UNTED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Original: FRENCH

Before: Judge Theodor Meron, presiding
Judge Fausto Pocar
Judge Claude Jorda
Judge Mohamed Shahabuddeen
Judge Mehmet Güney

Registrar: Adama Dieng

Judgement of: 26 May 2003

GEORGES ANDERSON NDERUBUMWE RUTAGANDA

v.

THE PROSECUTOR

Case No. ICTR-96-3-A

JUDGEMENT

Office of the Prosecutor:

Norman Farrell
Mathias Marcussen
Norul Rashid
Helen Brady

Counsel for the Appellant:

David Jacobs
David Paciocco

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 two appeals filed respectively by Georges Anderson Nderubumwe Rutaganda[1] on 5 January 2000 ("the Appeal" and "the Appellant" or "Rutaganda" respectively) and the Prosecutor[2] on 6 January 2000, against the Judgement and Sentence rendered by Trial Chamber I on 6 December 1999 in *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda* ("the Judgement" or "the Trial Judgement" and "the Trial Chamber").

2. Having considered the oral and written submissions of both parties, the Appeals Chamber

HEREBY RENDERS THE JUDGEMENT SET OUT BELOW.

[1] As amended pursuant to Decision (1. Motion for Inadmissibility of the Prosecutor's Notice of Appeal; 2. Motion to Amend Appellant's Notice of Appeal; 3. Motion to Extend the Time-limits for Filing the Prosecution's Notice of Appeal) of 15 March 2000. For details of the appeal proceedings, see Annex A to this Appeal Judgement.
[2] *Ibid*. The Pre-hearing Judge threw out the Motion for Inadmissibility of the Prosecutor's Notice of Appeal filed by the Appellant on 11 January 2000.

I. INTRODUCTION

A. Trial proceedings

1. The Indictment

3. The Appellant was tried by the Trial Chamber of the International Criminal Tribunal[3] on the strength of an indictment filed on 13 February 1996 and confirmed on 16 February 1996 ("the Indictment").[4] The Indictment charged the Appellant with participating in the crimes committed in April, May and June 1994 in the *préfectures* of Kigali and Gitarama, Republic of Rwanda, namely:

- Distributing guns and other weapons to members of the *Interahamwe* in Nyarungenge *commune*, Kigali *préfecture*;

- Stationing members of the *Interahamwe* at a roadblock near his office at the Amgar garage in Kigali. The said *Interahamwe* members subsequently killed eight Tutsis;

- Directing men under his control to detain, then kill ten Tutsis, who had been separated at the Amgar roadblock;

- Participating in the attack at the *École Technique Officielle* (the "ETO school") where thousands of unarmed Tutsis and some unarmed Hutus had sought refuge, which attack resulted in the deaths of a large number of Tutsis;

- Directing and participating in the massacres of the Nyanza gravel pit;

- Directing the *Interahamwe* to conduct a search for all Tutsis of Masango *commune* and to throw them into the river;

- Killing Emmanuel Kayitare;

- Ordering the bodies of victims to be buried in order to conceal his crimes from the international community.

4. The Indictment charged the Appellant, pursuant to Article 6(1) of the Statute of the International Tribunal ("the Statute"), with the following eight counts:

- Count 1—genocide—pursuant to Article 2(3)(a) of the Statute;

- Counts 2, 3, 5 and 7—extermination or murder, as the case may be—as crimes against humanity, pursuant to Article 3(a) and (b) of the Statute;

- Counts 4, 6 and 8—murder—as violations of Common Article 3 to the Geneva Conventions of 1949,[5] pursuant to Article 4(a) of the Statute.

[3] The Trial Chamber which heard this case was composed of Judge Kama (presiding), Judge Aspegren and Judge Pillay.
[4] The Indictment is set forth in paragraph 4 of the Trial Judgement.
[5] The Trial Chamber noted in the Judgement that the Prosecutor had chosen to restrict the counts to violation of Common Article 3 to the Geneva Conventions only (Trial Judgement, para 434). The Trial Chamber nevertheless held that, for it to make a finding of guilt for any one of counts 4, 6 and 8 of the Indictment, the Chamber must be satisfied that the material requirements of Common Article 3 *and Additional Protocol II* had been met (Trial Judgement, para. 435).

2. Judgement and Sentence

5. The Appellant entered an appearance on 30 May 1996, pursuant to Article 62 of the Rules of Procedure and Evidence ("the Rules") and pleaded not guilty to all counts in the Indictment. His trial opened before the Trial Chamber on 18 March 1997 and ended on 17 June 1999. The Judgement and Sentence were rendered on 6 December 1999. The Appellant was found guilty on three counts in the Indictment pursuant to Article 6(1) of the Statute, namely:

- Counts 1 and 2—genocide and extermination respectively—as crimes against humanity, on the strength of acts connected with the distribution of weapons, the events which took place at the Amgar roadblock and at the ETO, as well as the murder of Emmanuel Kayitare;

- Count 7—murder—as a crime against humanity, based on the killing of Emmanuel Kayitare.

6. The Appellant was found not guilty on Counts 3 and 5, namely murder as a crime against humanity, and on Counts 4, 6 and 8, namely murder as violations of Common Article 3 to the Geneva Conventions. The Trial Chamber sentenced him to a single term of life imprisonment for all the charges brought against him.

B. Appeal proceedings

7. Rutaganda initially appealed against all the convictions handed down against him, and against the single term of life imprisonment. He however withdrew his appeal against the sentence during the hearing of the appeal.[6]

8. The Prosecution, on its part, raised two grounds of appeal against acquittal pronounced in respect of Counts 4, 6 and 8 of the Indictment, namely murder as violations of Common Article 3 to the Geneva Conventions. The Prosecution, however, withdrew its second ground of appeal following the rendering of the Appeal Judgement in *Akayesu.*[7]

9. The Appeals Chamber heard both parties on their respective appeals in a public hearing held at the seat of the International Tribunal, Arusha, Tanzania on 4 and 5 July 2002.

10. Furthermore, although the Rules make no provision for these procedures, the Appellant filed several motions for disclosure and admission of additional evidence, pursuant to Rules 66, 68 and/or 115 of the Rules, after appeal hearings had begun.[8] The Appeals Chamber exceptionally

[6] T(A), 4 July 2002, p. 153.

[7] *Notice abandoning Ground two (2) of the Prosecution's notice of appeal dated 5 January 2000* (Notice of withdrawal), filed on 9 July 2001. The Prosecution indicated that: "Since the Appeals Chamber has decided [the] issue in *Akayesu* appeal, the Prosecution considers […] that it is no longer necessary for the Appeals Chamber to address the same issue as set out in the second ground of appeal in *Rutaganda* appeal" (Notice of withdrawal, para. 7).

[8] "*Defence motion for an order varying the grounds of appeal pursuant to Rule 107bis and Rules 114 and 116 of the Rules of Procedure and Evidence; for disclosure pursuant to Rules 66 B) and 68 of the Rules of Procedure and Evidence; for a rehearing of oral argument in the Appeal pursuant to Article 24 of the Statute of the International Tribunal for Rwanda, and for the admission of additional evidence pursuant to Rule 115 A and B of the Rules of Procedure and Evidence, as well as a Request for extension of the page limit applicable to motions, of the Statute of the International Tribunal for Rwanda, and for the admission of additional evidence pursuant to Rule 115 A and B of the Rules of Procedure and Evidence, as well as a Request for extension of the page limit applicable to motions"*, filed on 4 November 2002; "*Urgent Defence motion for disclosure pursuant to Rules 66 (B) and 68 of the Rules of Procedure and Evidence, and for a reconsideration of deadlines imposed in Judge Jorda's Order of December 12, 2002"*, filed on 18 December 2002; "*Consolidated Defence motion for an order varying the grounds of appeal pursuant to Rule 107bis and Rules 114 and 116 of the Rules of Procedure and Evidence ; for a rehearing of oral argument in the appeal pursuant to Article 24 of the Statute of the International Tribunal for Rwanda, and for the admission of additional*

granted one of such motions in part on 19 February 2003 by granting the Appellant leave, pursuant to Rule 115 of the Rules, to present additional evidence concerning the convictions for genocide and extermination as crimes against humanity.[9] The Appeals Chamber further held that, for the purposes of determining whether the evidence so adduced demonstrated that the impugned convictions had occasioned a miscarriage of justice, it was necessary to call a witness to appear. This was accordingly effected by decision of 24 February 2003, pursuant to Rules 98 and 107 of the Rules.[10]

11. The witness in question and the parties' new arguments on appeal were heard during proceedings[11] held at the seat of the International Criminal Tribunal for the former Yugoslavia (ICTY) on 28 February 2003.[12] This Appeal Judgement will rule on the appeals filed by Rutaganda and by the Prosecutor, as well as on the new arguments on appeal relating to the additional evidence.

C. Grounds of appeal

12. With regard first to Rutaganda's appeal, the Appeals Chamber recalls that the Notice of Appeal filed on 5 January 2000 comprised more than 170 points of appeal. Counsel for the Appellant subsequently filed exceptionally voluminous briefs, which, however, never embraced all the points referred to in the Notice of Appeal. Considering, especially, that the grounds of appeal brought before the Appeals Chamber did not clearly set forth the points raised in the Appellant's filings, and that, in general, these filings did not comply with the formal standards applicable to appellate review,[13] the Appeals Chamber rendered, on 26 April 2002, a decision ordering clarification and scheduling forthcoming hearings, wherein it ordered the Appellant to file a new document comprising a clear and concise enumeration of the grounds of appeal.[14] The Appellant filed the supplemental document on 3 June 2002 (the "Supplemental Defence Document")[15] and, on the one hand, withdrew some points of appeal and, on the other hand, reorganized his allegations into 21 distinct arguments on appeal. The Appeals Chamber grouped the said arguments under nine distinct grounds of appeal[16] that may be summarized as follows:

- Allegations relating to violation of the right to a fair trial, particularly in the alleged biased conduct of the examination and cross-examination of witnesses, and in the treatment given to Rutaganda's testimony. This ground of appeal is examined under Part III of this Appeal Judgement;

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evidence pursuant to Rules 115(A) and (B) of the Rules of Procedure and Evidence, as well as request for extension of the page limit applicable to motions", 3 January 2003.

[9] *Decision on the consolidated Defence motion for an order varying the grounds of appeal, for the rehearing of oral arguments in the appeal and for the admission of additional evidence, and scheduling order*, dated 19 February 2003 and filed in its public version on 14 May 2003.

[10] *Ibid.*; Summons to appear in court, dated 24 February 2003 and filed in its public version on 14 May 2003.

[11] Some of the proceedings were conducted behind closed doors during this hearing.

[12] For details of the motions filed after the appeal hearing, see Annex A of this Appeal Judgement.

[13] As defined in the case-law of the *ad hoc* tribunals.

[14] Decision Ordering Clarification, and Scheduling Forthcoming Hearings, 26 April 2002.

[15] *Grounds of Appeal, Supplemental Defence Document Pursuant to the Order of the Honorable Judge Claude Jorda, Pre-Hearing Judge dated 26 April 2002*, filed on 3 June 2002.

[16] The Appeals Chamber points out that the arguments referred to in the Notice of Appeal but not included in the Defence Appeal Brief and the Supplemental Defence Document have not been considered in this Appeal Judgement. The practice of the Appeals Chamber has in fact been to acknowledge that "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 the arguments and authorities." (see in particular Decision (Motion to have the Prosecution's Notice of Appeal Declared Inadmissible) *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, 26 October 2001, p. 4; *Kayishema/Ruzindana* Appeal Judgement, para. 46).

- Allegations of general errors of law relating to the assessment and treatment of evidence pertaining in particular to the right to cross-examination, the right to raise objections, hearsay evidence, expert evidence, burden of proof, prior witness statements, witness credibility, the impact of trauma and socio-cultural factors, and the proper conservation of the trial record. This ground of appeal is examined under Part IV of this Appeal Judgement;

- Allegations of specific errors of law and fact concerning alibi evidence, the admissibility of written statements of certain witnesses and the cross-examination of Rutaganda. This ground of appeal is examined under Part V of this Appeal Judgement;

- Allegations of errors of law and fact in the factual findings on the distribution of weapons. This ground of appeal is examined under Part VI of this Appeal Judgement;

- Allegations of errors of law and fact in the factual findings on the crimes committed at the Amgar garage. This ground of appeal is examined under Part VII of this Appeal Judgement;

- Allegations of errors of law and fact in the factual findings on the ETO school and Nyanza massacres, and an allegation of miscarriage of justice resulting from the presentation of additional evidence on appeal. This ground of appeal, as well as the new arguments relating to the additional evidence, is examined under Part VIII of this Appeal Judgement;

- Allegations of errors of law and fact in the factual findings on the murder of Emmanuel Kayitare. This ground of appeal is examined under Part IX of this Appeal Judgement;

- Allegations of errors of fact relating to the *Interahamwe* Movement and to Rutaganda's role in the *Interahamwe za MRND* Movement. This ground of appeal is examined under Part X of this Appeal Judgement;

- Allegations of errors of law and fact in the factual and legal findings on the crime of genocide. This ground of appeal is examined under Part XI of this Appeal Judgement.

13. Assuming the foregoing grounds of appeal were granted in part or in whole, Rutaganda requests the Appeals Chamber, as the case may be, to acquit him of the convictions entered against him, order a trial *de novo,* and/or reconsider whether the sentence pronounced is still appropriate in the circumstances.[17]

14. The Prosecution's appeal comprises a single ground of appeal[18] in which the Prosecution submits that the Trial Chamber committed an error of fact in holding that the nexus between the acts with which Rutaganda is charged and the armed conflict had not been established beyond reasonable doubt. The Prosecution's appeal is examined under Part XII of this Appeal Judgement.

[17] Defence Appeal Brief, Part XIV.
[18] *Notice Abandoning Ground Two (2) of the Prosecution's Notice of Appeal dated 5 January 2000*, filed on 9 July 2001

II. STANDARD FOR APPELLATE REVIEW

15. In the instant case, the parties do not take issue with the standards applicable to appellate review of allegations of errors of law and of fact. Nevertheless, the Appeals Chamber deems it necessary to recall those standards because the approach taken by Counsel for Rutaganda in the appeal has been, *inter alia*, to question the entire proceedings and to challenge most of the findings of the Trial Chamber that appeared to be unfavourable to him. The Appeals Chamber points out that, in general, this kind of approach is totally inadmissible. By contrast with the procedure in certain national legal systems, the appeals procedure laid down by Article 24 of the Statute—as well as by Article 25 of the ICTY Statute—is of a corrective nature, and is thus "not an opportunity for the parties to reargue their case."[19] This system of appeal necessarily affects the nature of arguments that a party may lawfully put forward on appeal and the general burden of proof that such party must discharge for the Appeals Chamber to step in. These standards have been recalled time and again by the Appeals Chambers of the International Tribunal and of the ICTY, and are reiterated under Sub-section A *infra*.

16. The Appeals Chamber further noted that Rutaganda put forward similar arguments in support of the different grounds of appeal referred to in distinct parts of his Defence Appeal Brief. To avoid repetition, the Appeals Chamber has thus grouped together some of his conclusions that apply to more than one ground of appeal in Sub-section B *infra*.

A. Standards for examination of allegations of errors of law and fact

17. Article 24 of the Statute sets forth the circumstances under which a convicted person and/or the Prosecutor may appeal against the judgement and/or sentence of a Trial Chamber. Under this provision, a party wishing to appeal must specify the error alleged[20] and show that such error falls under the jurisdiction of the Appeals Chamber, it being understood that Article 24 of the Statute limits the jurisdiction of the Appeals Chamber in the following manner:

> […] appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:
>
> (a) An error on a question of law invalidating the decision; or
>
> (b) An error of fact which has occasioned a miscarriage of justice. […]

18. Accordingly, where a party alleges that an error of law or of fact has been committed, that party must go on to show that the alleged error invalidates the decision or occasions a miscarriage of justice. Discharging this burden of proof is primordial for the appeal to succeed.[21] Indeed, the

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[19] *Bagilishema* Appeal Judgement (Reasons), para. 11. The ICTY Appeals Chamber in the *Kupreskic* case pointed out unequivocally that "[…] an appeal is not an opportunity for the parties to reargue their case. It does not involve a trial *de novo*" (*Kupreskic* Appeal Judgement, para. 22).

[20] See in particular *Kunarac* Appeal Judgement, para. 35.

[21] With regard in particular to allegations of errors of law, the Appeals Chamber in *Musema* concurred with the findings of the ICTY Appeals Chamber in *Furundzija*: "Where a party contends that a Trial Chamber made an error of law, the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether there was such a mistake. A party alleging that there was an error of law must be prepared to advance arguments in support of the contention; but, if the arguments do not support the contention, that party has not failed to discharge a burden in the sense that a person who fails to discharge a burden automatically loses his point. The Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law." (*Musema* Appeal Judgement, footnote 20 citing *Furundzija* Appeal Judgement, para. 35).
The Appeals Chamber in this case accepts this finding, but concurs with the distinction made by the Appeals Chamber of the ICTY in *Kupreskic*, namely that "a party who submits that the Trial Chamber erred in law must at least identify

Appeals Chamber is, in principle, not required to consider the arguments of a party if they do not allege an error of law invalidating the decision, or an error of fact occasioning a miscarriage of justice.[22] It is therefore quite useless for a party to repeat on appeal arguments that did not succeed at trial, unless that party can demonstrate that rejecting them occasioned such error as would warrant the intervention of the Appeals Chamber. Where a party is unable to explain in what way an alleged error invalidates a decision or occasions a miscarriage of justice, it should, as a general rule, refrain from appealing on grounds of such error.[23] Logically, therefore, where the arguments presented by a party do not have the potential to cause the impugned decision to be reversed or revised, the Appeals Chamber may immediately dismiss them as being misconceived, and would not have to consider them on the merits.[24]

19. With regard to requirements as to form, the ICTY Appeals Chamber in the *Kunarac* case stated that "[O]ne cannot expect the Appeals Chamber to give detailed consideration to submissions of the parties if they are obscure, contradictory, vague, or if they suffer from other formal and obvious insufficiencies."[25] An appellant must therefore clearly set out his grounds of appeal as well as the arguments in support of each ground; he must also refer the Appeals Chamber to the precise parts of the record on appeal invoked in support of his allegations.[26] From a procedural point of view, the Appeals Chamber has the inherent discretion, pursuant to Article 24 of the Statute, to determine which submissions of the parties merit a "reasoned opinion in writing".[27] The Appeals Chamber cannot be expected to provide comprehensively reasoned opinions in writing on evidently unfounded submissions. The Appeals Chamber should focus its attention on the essential issues of the appeal.[28] In principle, therefore, the Appeals Chamber will dismiss, without providing detailed reasons, those submissions made by appellants in their briefs or in their replies, or presented orally during the appeal hearing, which are evidently unfounded.[29]

20. With regard to the burden of proof specifically associated with allegations of errors of law, the Appeals Chamber recalls that in its capacity as the final arbiter of the law of the international Tribunal, it must, in principle, determine whether an error of procedural or substantive law was indeed made, where a party raises an allegation in this connection.[30] Indeed, case law recognizes

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the alleged error and advance some arguments in support of its contention. An appeal cannot be allowed to deteriorate into a guessing game for the Appeals Chamber. Without guidance from the appellant, the Appeals Chamber will only address legal errors where the Trial Chamber has made a glaring mistake." (*Kupreskic* Appeal Judgement, para. 27).

[22] *Kupreskic* Appeal Judgement, para. 22. The practice in the *ad hoc* tribunals admits that there are situations where the Appeals Chamber may raise issues *proprio motu* or accept to examine allegations of error where the findings would not have an impact on the verdict, but where the issues raised are of general importance for the jurisprudence or functioning of the Tribunal (see in particular: *Erdemovic* Appeal Judgement, para. 16; *Tadic* Appeal Judgement, paras. 238 to 326, and specifically paras. 247, 281 and 315; *Akayesu* Appeal Judgement, paras. 18 to 28; *Kupreskic* Appeal Judgement, para. 22). The parties in the instant case have not put forward any arguments that have the potential to fall into either of these categories.

[23] *Kupreskic* Appeal Judgement, para. 27. The The ICTY Appeals Chamber in *Kupreskic* arrived at this conclusion with reference to allegations of errors of law. The Appeals Chamber in this case deems that this standard *a fortiori* applies to allegations of errors of fact.

[24] *Ibid*, para. 23.

[25] *Kunarac* Appeal Judgement, para. 43.

[26] *Kunarac* Appeal Judgement, para. 44. The ICTY Appeals Chamber pointed out that the appellant must provide the Appeals Chamber with exact references to the parts of the records on appeal invoked in its support /…/ indicating precisely the date and exhibit page number or paragraph number of the text to which reference is made." (*Ibid.*).

[27] *Kunarac* Appeal Judgement, para. 47.

[28] *Ibid*.

[29] *Ibid*, para. 48.

[30] *Musema* Appeal Judgement, footnote 20 citing *Furundzija* Appeal Judgement, para. 35; *Kunarac* Appeal Judgement, para. 38.

that the burden of proof on appeal in respect of errors of law is not absolute.[31] In fact, the Appeals Chamber does not cross-check the findings of the Trial Chamber on matters of law merely to determine whether they are reasonable, but indeed to determine whether they are correct. Nevertheless, the party alleging an error of law must, at the very least, identify the alleged error, present arguments in support of his contention,[32] and explain in what way the error invalidates the decision. An alleged legal error that does not have the potential to cause the impugned decision to be reversed or revised is, in principle, not legal[33] and may thus be dismissed as such.

21. With regard to errors of fact, the party alleging this type of error in support of an appeal against conviction must show the error that was committed and the miscarriage of justice resulting therefrom.[34] It is an established principle that a high degree of deference must be shown to the factual findings of a Trial Chamber, and the Appeals Chamber has regularly recalled that it will not lightly disturb findings of fact by a Trial Chamber.[35] Such deference is based essentially on the fact that the Trial Chamber has the advantage of observing witnesses in person and hearing them when they are testifying,[36] and so are better placed to choose between divergent accounts of one and the same event. Trial Judges are better placed than the Appeals Chamber to assess witness reliability and credibility,[37] and to determine the probative value to ascribe to the evidence presented at trial.[38]

22. Therefore, with regard to errors of fact, the Appeals Chamber applies the standard of the "unreasonableness" of the impugned finding.[39] In other words, "[i]t is only when the evidence relied on by the Trial Chamber could not have been accepted by any reasonable person"[40] or where "the evaluation of the evidence is 'wholly erroneous'"[41] that the Appeals Chamber can substitute its own finding for that of the Trial Chamber.[42] Hence, the Appeals Chamber will not question factual findings where there was reliable evidence on which the Trial Chamber could reasonably base it findings.[43] It is further admitted that two judges, both acting reasonably, can come to different

[31] *Musema* Appeal Judgement, para. 16 citing *Furundzija* Appeal Judgement, para. 36. In fact, where the arguments of a party prove to be inadequate, the Appeals Chamber *may* admit the appeal for different reasons (*Musema* Appeal Judgement, footnote 20 citing *Furundzija* Appeal Judgement, para. 35).
[32] *Kupreskic* Appeal Judgement, para. 27.
[33] Unless it raises an issue of general interest for the jurisprudence or functioning of the Tribunal.
[34] See in particular: *Bagilishema* Appeal Judgement, para. 10.
[35] *Musema* Appeal Judgement, para. [18] cited in *Bagilishema* Appeal Judgement, para. 10. See also: *Kunarac* Appeal Judgement, para. 40 citing *Kupreskic* Appeal Judgement, para. 32; *Furundzija* Appeal Judgement, para. 37; *Tadic* Appeal Judgement, para. 64; *Aleksovski* Appeal Judgement, para. 63.
[36] The Appeals Chamber has access only to transcripts of live testimonies by witnesses.
[37] *Bagilishema* Appeal Judgement, para. 12 citing *Kupreskic* Appeal Judgement, para. 32. See also *Musema* Appeal Judgement, para. 18 and *Kunarac* Appeal Judgement, para. 40.
[38] *Bagilishema* Appeal Judgement, para. 11 citing *Akayesu* Appeal Judgement, para. 232 (citing *Tadic* Appeal Judgement, para. 64). See also *Musema* Appeal Judgement, para. 18; *Kunarac* Appeal Judgement, para. 39.
[39] *Bagilishema* Appeal Judgement, para. 10.
[40] *Bagilishema* Appeal Judgement, para. 11 citing *Akayesu* Appeal Judgement, para. 232 (citing *Tadic* Appeal Judgement, para. 64). See also *Kunarac* Appeal Judgement, paras. 39 and 40; *Kupreskic* Appeal Judgement, paras. 30 and 32; *Celebici* Appeal Judgement, para. 435.
[41] *Kunarac* Appeal Judgement, para. 39 citing *Kupreskic* Appeal Judgement, para. 30.
[42] *Bagilishema* Appeal Judgement, para. 11 citing *Akayesu* Appeal Judgement, para. 232 (citing *Tadic* Appeal Judgement, para. 64). See also *Musema* Appeal Judgement, para. 18; *Kunarac* Appeal Judgement, paras. 39 and 40;*Kupreskic* Appeal Judgement, paras. 30 and 32; *Celebici* Appeal Judgement, para. 435.
[43] The Appeals Chamber recalls that the Trial Chamber's discretion in weighing and assessing evidence is always limited by its duty to provide a "reasoned opinion in writing," (*Musema* Appeal Judgement, para. 18). The Trial Chamber is, however, not required to articulate every step of its reasoning for each particular finding it makes. (*Ibid.*). There is no guiding principle on the question as to the extent that a Trial Chamber is obliged to set out its reasons for accepting or rejecting a particular testimony, and therefore testimony must be considered on a case-by-case basis. (*Ibid.*). In situations where the Trial Chamber has not referred to some evidence, it may nevertheless be reasonable to assume that the Trial Chamber had taken it into account. (*Musema* Appeal Judgement, para. 19 citing *Celebici* Appeal Judgement, para. 481). Hence, when evidence is not mentioned in the judgement, it is the place of the appellant to show

conclusions, both of which are reasonable.[44] A party that limits itself to alternative conclusions that may have been open to the Trial Chamber has little chance of succeeding in its appeal,[45] unless it establishes that no reasonable tribunal of fact "*could have* reached the finding of guilt beyond reasonable doubt."[46]

23. Where a party succeeds in establishing that an error of fact has been committed in the light of the aforementioned standards, the Appeals Chamber must still be satisfied that such error occasioned a miscarriage of justice, in order to overturn or revise the impugned finding. The party alleging a miscarriage of justice must, *inter alia*, establish that the error was critical to the verdict reached by the Trial Chamber[47], and that a grossly unfair outcome has resulted from the error, as when an accused person is convicted despite lack of evidence on an essential element of the crime.[48]

24. The Appeals Chamber in *Bagilishema* held that the same standard of unreasonableness and the same deference to factual findings of the Trial Chamber apply when the Prosecution appeals against an acquittal.[49] The Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[50] Considering that it is the Prosecution that bears the burden at trial of proving the guilt of the accused beyond a reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different when the error is alleged by the Prosecution. The Prosecution faces a more difficult task. It must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated.[51]

B. Findings on the law applicable to certain issues raised on appeal

25. The Appeals Chamber notes that a good part of the issues raised in the appeals concern the manner in which the Trial Chamber assessed the evidence. Many arguments of the same nature have, moreover, been raised in support of the different grounds of appeal. To avoid repetition, the Appeals Chamber will set out some of its conclusions below as to the law applicable to more than one ground of appeal.

26. As a preliminary observation, the Appeals Chamber should also point out that under Rule 89 of the Rules, Trial Chambers are not bound by domestic rules of evidence. They apply rules of evidence which, in the spirit of the Statute and of general principles of law, permit a fair outcome of the case. The Appeals Chamber recalls that Rutaganda founded several of his contentions on authorities of national jurisdictions, mostly from judgements rendered by the Supreme Court of Canada. Interpretation of some of the Rules may indeed be guided by the domestic system it is patterned after, but under no circumstances can it be subordinated to it.[52] The Appeals Chamber

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that the Trial Chamber effectively misapprehended such evidence. (*Musema* Appeal Judgement, para. 19 citing *Celebici* Appeal Judgement, para. 483).

[44] *Kayishema/Ruzindana* Appeal Judgement, para. 143 citing *Tadic* Appeal Judgement, para. 64.

[45] *Kayishema/Ruzindana* Appeal Judgement, para. 143.

[46] *Bagilishema* Appeal Judgement, para. 10.

[47] *Kupreskic* Appeal Judgement, para. 29, cited in *Bagilishema* Appeal Judgement, para. 14

[48] *Furundzija* Appeal Judgement, para. 37 cited *inter alia* in *Musema* Appeal Judgement, footnote 24.

[49] *Bagilishema* Judgement, para. 13.

[50] *Ibid*., para. 14.

[51] *Ibid*.

[52] *Akayesu* Appeal Judgement, para. 323.

recalls that, once it has determined the law applicable to a particular issue, it should in principle follow its previous decisions, in the interests of certainty and predictability of the law.[53]

1. Corroboration

27. Rutaganda raised arguments concerning the corroboration of testimonies before the International Tribunal in his grounds of appeal relating to crimes committed at the Amgar garage, and to the murder of Emmanuel Kayitare.

28. The Appeals Chamber recalls that, as a general rule, a Trial Chamber is primarily responsible for assessing and weighing the evidence presented at trial, and that, in this regard, it is incumbent on the Trial Chamber to consider whether a witness is reliable and whether evidence presented is credible.[54] In this exercise, the Trial Chamber has the inherent discretion to decide what approach is most appropriate for the assessment of evidence in the circumstances of the case.[55]

29. Similarly, the issue as to whether it is necessary to rely on one or several witness testimonies to establish proof of a material fact depends on different factors that have to be assessed in the circumstances of each case.[56] It is possible for one Trial Chamber to prefer that a witness statement be corroborated, but neither the jurisprudence of the International Tribunal nor of the ICTY makes this an obligation.[57] Where testimonies are divergent, it is the duty of the Trial Chamber, which heard the witnesses, to decide which evidence it deems to be more probative,[58] and to choose which of the two divergent versions of the same event it may admit.

2. Right to cross-examination

30. Rutaganda raised arguments concerning the right to cross-examination in his grounds of appeal pertaining to general errors of law and to crimes committed at the Amgar garage.

31. Under Rule 85(B) of the Rules, each witness may, following his examination-in-chief, be subjected to cross-examination and re-examination. As to the procedure for cross-examination, Rule 90 (F) (*sic*) stipulates that cross-examination shall be limited to points raised in the examination-in-chief or to matters affecting the credibility of the witness. The Rules provide no other indication as to the scope of cross-examination or the form it should take, and only give general rules on examination and cross-examination of witnesses that are patterned after the *U.S Federal Rules of Evidence*.[59] With regard to leading questions in particular, the Rules do not contain any specific provision thereon, but, as the Appeals Chamber pointed out in the *Akayesu* case:[60]

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[53] Decision, *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, 31 May 2002, para. 92 and footnote 125 citing *Aleksovski* Appeal Judgement, paras. 107 to 109.
[54] *Akayesu* Appeal Judgement, para. 132 citing *Aleksovski* Appeal Judgement, para. 63, *Tadić* Appeal Judgement, para 64 and *Furundžija* Appeal Judgement, para. 37.
[55] *Kayishema*/*Ruzindana* Appeal Judgement, para. 119.
[56] *Musema* Appeal Judgement, para. 90; *Kayishema/Ruzindana* Appeal Judgement, para. 187; *Akayesu* Appeal Judgement, para. 132; *Aleksovski* Appeal Judgement, para. 63; *Tadic* Appeal Judgement, para. 65; *Celebici* Appeal Judgement, para. 506.
[57] *Musema* Appeal Judgement, para. 36 citing *Kayishema/Ruzindana* Appeal Judgement, paras. 154 and 229; *Aleksovski* Appeal Judgement, para. 62; *Tadic* Appeal Judgement, para. 65 and *Celebici* Appeal Judgement, paras. 492 and 506. See also *Kunarac* Appeal Judgement, para. 268.
[58] *Kayishema/Ruzindana* Appeal Judgement, para. 325.
[59] Article 611 of the *U.S. Federal Rules of Evidence* is worded as follows: "(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make interrogation and presentation effective for the ascertainment of the truth; (2) avoid needless consumption of time; and (3) protect witnesses from harassment or undue embarrassment; (b) Scope of the cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the

> […] leading questions are allowed and used during cross-examination whereas they are not permitted during examination-in-chief. Still, in the opinion of the Appeals Chamber, the Rules take on a life of their own upon adoption. Interpretation of the provisions thereof may be guided by the domestic system it is patterned after, but under no circumstance can it be subordinated to it.

3. Hearsay evidence

32. Rutaganda raised arguments concerning hearsay evidence in his grounds of appeal pertaining to general errors of law, distribution of weapons and crimes committed at the Amgar garage.

33. The Appeals Chamber emphasizes that the Rules of both this Tribunal and the ICTY generally reflect a preference for direct, live, in-court testimony. Nevertheless, the jurisprudence of both *ad hoc* Tribunals admits that Rule 89(C) of the Rules grants a Trial Chamber a broad discretion in assessing admissibility of evidence it deems relevant, including indirect evidence.[61] This discretion is not unlimited, considering that the test to be met before ruling evidence inadmissible is rigorous. It was thus ruled that "a piece of evidence may be so lacking in terms of the indicia of reliability that it is not 'probative' and is therefore inadmissible."[62] The Appeals Chamber is of the opinion that this principle should not be interpreted to mean that definite proof of reliability must necessarily be shown for evidence to be admissible. At the stage of admissibility, the beginning of proof that evidence is reliable, in other words, that sufficient indicia of reliability have been established, is quite admissible.[63]

34. With regard to hearsay evidence, it should be pointed out that this is not inadmissible. The Trial Chamber has the discretion to cautiously consider this kind of evidence and, depending on the circumstances of each case, in accordance with the provisions of Rule 89 of the Rules.[64]

35. The Appeals Chamber observes that in the instant case, as in *Akayesu*, some of Rutaganda's grounds of appeal concern the admission of hearsay evidence in the form of live testimony by witnesses on events which they had not witnessed personally. The Appeals Chamber concurs with the analysis made by the Appeals Chamber in the *Akayesu* Appeal Judgement[65] wherein it was held that when a witness testifies, their evidence is admitted in that, in the absence of timely objection, it

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witness. The court may in the exercise of discretion, permit inquiry into additional matters as if on direct examination; (c) Leading questions. Leading questions should not be used on the direct examination of a witness testimony. Ordinary leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions."

[60] *Akayesu* Appeal Judgement, para. 323. See also Rule 89(A) of the Rules: "The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers will not be bound by national rules of evidence."

[61] With regard to the interpretation of Rule 89(C) of the Rules by the Chambers of the International Tribunal, see *Akayesu* Appeal Judgement referred to above, para. 286. With regard to the ICTY, see *Prosecutor v. Dario Kordić and Mario Čerkez*, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and one Formal Statement, Case No. IT-95-14/2-AR73.5, ICTY Appeals Chamber, 18 September 2000 ("the second *Kordić* Decision"), para. 24, citing the *Aleksovski* Decision wherein it was stated that "it is well settled in the practice of the Tribunal that hearsay evidence is admissible" (para. 15). See also *Prosecutor v. Dario Kordić and Mario Čerkez*, Decision on Appeal Regarding Statement of a Deceased Witness, Case No. IT-95-14/2-AR73.5, ICTY Appeals Chamber, 21 July 2000 ("the first *Kordić* Decision"), para. 23.

[62] First *Kordić* Decision, para. 24.

[63] *Prosecutor v. Delalić, Decision on the Motion of the Prosecution for the Admissibility of Evidence*, Case No. IT-96-21-T, 19 January 1998, para. 31. It should be emphasized that a decision by the Trial Chamber to admit evidence does not in any way constitute a binding determination as to the authenticity or trustworthiness of the documents sought to be admitted. These are matters to be assessed by the Trial Chamber at a later stage in the course of determining the weight to be attached to the evidence in question.

[64] *Akayesu* Appeal Judgement, para. 288.

[65] *Ibid*, para. 287.

becomes part of the trial record, as reflected in the transcripts, and that the main safeguard applicable to the reliability of the evidence in this case is the preservation of the right to cross-examine the witness on the hearsay evidence which has been called into question.[66] The Appeals Chamber also holds that in these circumstances, although the decision will always depend on the facts of the case, it is unlikely, considering the stage of the proceedings and, in particular, in the absence of any objection, that a Trial Chamber would find that the live testimony of a witness it had just heard, was so lacking in terms of indicia of reliability as to be inadmissible.

[66] This right is recorded under Article 20(4)(e) of the Statute which provides that a person against whom a charge has been brought shall be entitled to "examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her" and under Rule 85(B) of the Rules which provides, *inter alia*, that: "examination-in-chief, cross-examination and re-examination shall be allowed in each case."

III. RIGHT TO A FAIR TRIAL

36. In this ground of appeal, the Appellant alleges that the Trial Chamber violated his right to a fair trial during the examination and cross-examination of witnesses, on the one hand, and, on the other hand, in the manner in which the Chamber treated him at his hearing when he took the witness stand.[67]

37. The Appeals Chamber points out that the Appellant's allegations relate mainly to the issue of bias on the part of the Trial Chamber, which allegedly assisted the Prosecution during its examination-in-chief and cross-examination of witnesses, including the Appellant himself, and treated Prosecution as well as Defence witnesses in a biased manner. For the Appellant, the Trial Judges were in breach of their duty to be impartial, which duty is provided for in Articles 12 and 20 of the Statute, Rule 85(B) of the Rules, as well as in the general principles of international law. The Appellant alleges that since the Trial Chamber was not seen to be impartial, as required by the above-mentioned provisions, his trial cannot be valid. According to him, the errors referred to *supra* invalidate all the convictions entered against him. The Appeals Chamber notes that the issue of a possible denial of the principle of equality of arms between the Appellant and the Prosecution is obliquely referred to in some of the allegations.

38. Before examining the allegations of violation of the Appellant's right to a fair hearing, the Appeals Chamber deems it necessary to review the attendant principles that are directly at issue in this ground of appeal.

39. The Appeals Chamber recalls that impartiality is one of the duties that judges pledge themselves to uphold at the time they take up their duties;[68] and this applies throughout the judge's term of office in the Tribunal.[69] This is a component of the right to a fair trial that is recognized in Articles 19 and 20 of the Statute.[70] The Appeals Chamber in the *Akayesu* Appeal Judgement endorsed the standards applicable to impartiality embodied in the Statute and the Rules,[71] as previously defined by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY),[72] which pointed out:

> "That there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:

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[67] Supplemental Defence Document, para. 20; Defence Appeal Brief, Parts XI and XII.

[68] Rule 14(A) of the Rules relating to solemn declaration provides as follows: "Before taking up his duties each Judge shall make the following solemn declaration: 'I solemnly declare that I will perform my duties and exercise my powers as a Judge of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for Genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, honourably, faithfully, impartially and conscientiously.'"

[69] *Čelebići* Appeal Judgement, para. 655.

[70] *Kayishema and Ruzindana* Appeal Judgement, para. 51. See also *Furundžija* Appeal Judgement, para. 177.

[71] Article 12 of the Statute provides that "The permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices…" Rule 15(A) of the Rules adds that: "A Judge may not sit at a trial or appeal in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality. He shall in any such circumstance withdraw from that case. Where the Judge withdraws from the Trial Chamber, the President shall assign another Trial Chamber Judge to sit in his place. Where a Judge withdraws from the Appeals Chamber, the Presiding Judge of that Chamber shall assign another Judge to sit in his place."

[72] *Furundžija* Appeal Judgement, para. 189. This definition was repeated in the *Čelebići* and *Akayesu* Appeal Judgements.

> A. A Judge is not impartial if it is shown that actual bias exists.
>
> B. There is an unacceptable appearance of bias if:
>
> (i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
>
> (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."

40. With regard to the test of the "reasonable observer", the ICTY Appeals Chamber held that:[73]

> "[...] the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold."

41. The very Appeals Chamber pointed out that the Judge should rule on cases according to what he deems to be the correct interpretation of the law, by ensuring that his behaviour does not give the impression to an unbiased and knowledgeable observer that he is not impartial.[74] Lastly, the ICTY Appeals Chamber held that:[75]

> "The relevant question to be determined by the Appeals Chamber is whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the circumstances to make a reasonable judgement) would be that [a] Judge […] might not bring an impartial and unprejudiced mind to the issues arising in the case."

42. The Appeals Chambers of ICTY and ICTR emphasized in *Akayesu* and *Furundžija* respectively that Judges of the International Tribunal must be presumed to be impartial, and, in the instant case, the Chamber endorses the test for admissibility of an allegation of partiality set forth in the *Akayesu* Appeal Judgement, wherein it was held that:

> "[...] There is a presumption of impartiality which attaches to a Judge. This presumption has been recognised in the jurisprudence of the International Tribunal, and has also been recognised in municipal law.
>
> In the absence of evidence to the contrary, it must be assumed that the judges of the International Tribunal "can disabuse their minds of any irrelevant personal beliefs or predispositions." It is for the Appellant to adduce sufficient evidence to satisfy the Appeals Chamber that the Judge in question was not impartial in his case. There is a high threshold to reach in order to rebut the presumption of impartiality."[76]
>
> "The Judges of this Tribunal and those of ICTY often try more than one case at the same time, which cases, given their very nature, concern issues which necessarily overlap. It is assumed, in the absence of evidence to the contrary, that by virtue of their training and experience, judges will

[73] *Furundžija* Appeal Judgement, para. 190. See also *Čelebići* Appeal Judgement, para. 683. On the oath: see also *Kayishema/Ruzindana* Appeal Judgement, para. 55.
[74] *Kayishema/Ruzindana* Appeal Judgement, para. 55. The same Chamber also affirmed that a Judge is bound only by his "conscience and the law", and that impartiality is a subjective test that relates to "the judge's personal qualities, his intellectual and moral integrity." (*Ibid*)
[75] *Čelebići* Appeal Judgement, para. 683 citing *Furundžija* Appeal Judgement, para. 189.
[76] *Akayesu* Appeal Judgement, para. 91 citing *Furundžija* Appeal Judgement, para. 197.

> rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case."[77]

43. The Appeals Chamber also recalls that the Appellant must set forth the arguments in support of his allegation of bias in a precise manner, and that the Appeals Chamber cannot entertain sweeping or abstract allegations that are neither substantiated nor detailed to rebut the presumption of impartiality.[78]

44. With regard to the principle of equality of arms between the Accused and the Prosecution, which is another component of the right to a fair trial in criminal law, it is stated, *inter alia*, in Article 20(4)(e) of the Statute that in the determination of any charge against the accused pursuant to the Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

> "To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her."

45. Lastly, the Appeals Chamber recalls that the Presiding Trial Judge is presumed to have been performing, on behalf of the Trial Chamber, his duty to exercise sufficient control over the process of examination and cross-examination of witnesses, and that in this respect, it is the duty of the Trial Chamber and of the Presiding Judge, in particular, to ensure that cross-examination is not impeded by useless and irrelevant questions.[79]

46. The Appeals Chamber will now consider the Appellant's ground of appeal arising from a violation of his right to a fair trial, and notes that the Appellant has not indicated whether in the instant case, his allegations of bias pertain to the first or the second component of the requirement of impartiality (i.e. whether there is actual or apparent bias). Although the Appellant reproaches Judges Kama, Pillay and Aspegren for having "prejudged" the case before the beginning of proceedings, his contention does not seem to be based on actual bias. In fact, his allegations are not based on financial interests or on interests that will lead to the promotion of the cause[80] (i.e. the first part of the second component of the requirement of impartiality). Consequently, after examining the Appellant's arguments, it appears that the allegations of bias made by the Appellant have to do with an appearance of bias and are relevant to the test of the "reasonable observer" (i.e. the second part of the second component of the requirement of impartiality).[81]

47. The Appeals Chamber emphasizes that although the arguments put forward by the Appellant to support his allegation of bias are more numerous in the instant case than in *Akayesu*, the two cases have many key similarities in this respect, considering the nature of the allegation and the fact that the composition of the Trial Chamber was the same in both cases. That being the case, it is proper to apply to the instant case the same approach adopted in *Akayesu*, namely, placing the cases of allegation of bias identified by the Appellant in their proper context as appears from the trial record, so that the intent of the persons who made the impugned remarks may be understood,[82] and examining them in the light of the test of a reasonable observer.

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[77] *Akayesu* Appeal Judgement, para. 269.
[78] *Ibid.*, paras. 92 and 100.
[79] *Akayesu* Appeal Judgement, para. 318.
[80] Although the Appellant reproaches the Trial Chamber for having "assisted the Prosecution".
[81] In fact, the Appellant speaks generally of "apprehension of bias" or of what a "reasonable observer" attending his trial would have thought.
[82] *Akayesu* Appeal Judgement, para. 316.

48. Three of the 42 allegations of bias raised in Part XI of the Defence Appeal Brief have, however, not been considered, in accordance with the standards for appellate review,[83] either because the Appellant has not specifically referred the Appeals Chamber to the parts of the trial record which, in his view, support his claim,[84] or because the Defence Appeal Brief[85] simply repeats the ground of appeal on this issue without stating reasons therefor.[86]

49. For the sake of clarity, the allegations of bias raised by the Appellant with regard to the examination-in-chief and cross-examination of witnesses other than the Appellant have been grouped together according to the witnesses to whom they refer, beginning with Prosecution witnesses, then Defence witnesses. Each allegation was considered separately.[87] A comparative analysis was made of the Judges' attitude during the examination of a Prosecution witness or a Defence witness, when the context so required.

A. Treatment of witnesses other than the Appellant

1. Prosecution witnesses

(a) Witness CC

50. The Appellant contends that one of the most disturbing interruptions by the Trial Chamber took place during the cross-examination of Witness CC. The Appellant points out that Witness CC, during his testimony before the Tribunal, radically departed from the account he gave in his prior statement to investigators, which account contained allegations of murder against Rutaganda. According to the Appellant, the witness, who was trying to reconcile his previous accounts, gave a third account of events to the Trial Chamber during cross-examination. The witness claimed that he had given the said third account to both investigators and the Prosecution, but this was categorically denied by the Prosecution. It was then, according to the Appellant, that Judge Kama, instead of commending the Prosecution's honesty regarding the witness's lack of credibility, admonished him for revealing his weapons to the opposing party, stressing that if that was the practice elsewhere, he, for his part, did not consider it appropriate, and hoped that the Prosecution had learned its lesson from the incident. The Appellant submits that Judge Kama also incomprehensibly attempted to find possible excuses for the witness by concluding:

> "He is asked to say the truth because he has made several statements. He made a statement to the prosecutor, he made another statement today. We would have liked that the two statements be in agreement. Unfortunately there are contradictions. Is this his error or an error of interpretation? In any case, we realize that there are contradictions."[88]

51. The Appeals Chamber recalls that it is necessary to situate Judge Kama's remarks in their proper context. The purpose of the incident at the hearing brought about by Prosecuting Counsel was to inform the Trial Chamber that the witness had maintained, in a discussion with Counsel, and contrary to his testimony before the Tribunal, his initial account of events. It is also necessary to

[83] See in particular: *Kunarac* Appeal Judgement, paras. 43 to 48.
[84] Defence Appeal Brief, paras. 506, 507, 519 and 520.
[85] Defence Appeal Brief, para. 587.
[86] Decision (Motion to have the Prosecution's Notice of Appeal declared inadmissible), *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, 26 October 2001, Appeals Chamber, p. 4; Judgement (Reasons); *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, 1 June 2001, Appeals Chamber, para. 46: "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." This principle was repeated to the Appellant in the Scheduling Order and clarification rendered in the instant case on 26 June 2002.
[87] With the exception of the three allegationsthat do not meet the standards for appellate review.
[88] Defence Appeal Brief, paras. 533 to 536. See also Prosecution's Response Brief, paras. 10.49 to 10.52.

look at the entire exchange between the Judge and Counsel for the parties, instead of the extracts alone referred to by the Appellant. This is the approach to be expected of a reasonable observer. In this regard, the following extracts of the transcripts preceding the statements highlighted by the Appellant shed light on the allegation of bias made by him:

> "[...] We're not going to get into the discussion about the truth or not. [...] The Tribunal will decide whether he lied, partially lied, or whatever."[89]
>
> "Please allow the Tribunal to determine whether or not there was probative value of this testimony."
>
> "The witness made a solemn declaration according to which he promised to say the truth and only the truth, nothing but the truth. This declaration was made yesterday. We understand that with time and some trauma one may make errors, but we don't understand why he should contradict himself or why he should not say the truth."
>
> "Counsel, once again, you are pleading now. I only want to discuss the incident."[90]
>
> "The witness has an obligation to tell the truth with the consequences that flow from false testimony. [There follows a quotation from Rule 91 of the Rules]. [...] Considering the complexity of the procedure, I think you may have to submit a motion for the Chamber to rule on that."[91]

52. Having thus been placed in their context, the Judge's remarks indeed reflect the Judge's wish to be enlightened by Counsel for the parties on the nature of the incident occasioned by the Prosecution. The Judge did not evade the issue of credibility of the witness, but rather pieced together the information necessary to address the issue at the appropriate time, deferring consideration of the merits of this issue to a later stage in the proceedings, either during the deliberations after closing arguments have been made, or in the event that the Defence filed a motion founded on Rule 91(B) of the Rules. This approach translates the Trial Chamber's concern to discover the truth, and it is obviously in this context that Judge Kama's previously mentioned comment could be placed:

> "Unfortunately, we realize that there are contradictions. Is that his error or the error of interpretation? In any case, we realize that there are contradictions."

53. The Appeals Chamber is convinced that a reasonable and informed observer would examine the impugned remarks by Judge Kama while bearing in mind the above remarks made some seconds earlier, which remarks explicitly raise the issue of Witness CC's credibility together with the attendant consequences of false testimony. With regard to the impugned remarks proper, the Appeals Chamber turned to the French version of the trial record, which is significantly different from the English version,[92] insofar as Judge Kama made the remarks in French. The remarks read as follows:

> En revanche, je ne suis pas sûr que ce soit de la loyauté que le Parquet puisse livrer à l'autre partie ses armes. Dans mon système juridique, cela ne se fait pas. Si cela se fait ailleurs, c'est possible. Je ne pense pas que ce soit de la loyauté. Que moi le Parquet, je divulgue à l'adversaire une partie de mes armes, de mes entretiens! Si c'est une pratique ailleurs, nous l'acceptons. Je le signalais au passage.

[89] T, 8 October 1997, p. 27.
[90] T, 8 October 1997, p. 28.
[91] T, 8 October 1997, pp. 30 and 31.
[92] Which shows that the Judge "*did not think that the Prosecution should reveal his weapons to the other party. That would not be part of my strategy. Maybe that is a practice elsewhere, but in passing I would like to mention that I do not consider it proper for the prosecution to reveal his (sic) weapons to the other party*".

54. The Judge's remarks clearly show that, although he is surprised by the Prosecution's attitude, he admits the validity of a practice that is different from that with which he is familiar. Of course, a well-informed observer could infer from the above remarks that Judge Kama misapprehended the content and scope of the Prosecution's duties under the Statute and the Rules. On the other hand, the Appeals Chamber considers that such an observer cannot reasonably conclude that the Judge's remarks reveal any bias whatsoever.

55. The same applies to the expression "*on aurait souhaité que les déclarations concordent*" (we would have liked that the two statements be in agreement), which, taken in isolation, would be confusing, but which, when placed in its context, shows further that the Judge was irritated at the witness's attitude, rather than that he sided with the Prosecution.

(b) Witness AA

56. The Appellant's allegations of bias with regard to Witness AA's testimony are mainly directed at Judge Kama. It seems proper to point out that AA testified in respect of the charges under paragraphs 17 to 19 of the Indictment, and that his testimony was deemed credible by the Trial Chamber.

57. On examination, some of the said allegations of bias are clearly based on an erroneous presentation by the Appellant of Judge Kama's attitude during the examination of the witness. This is the case with the allegations set out in paragraphs 524 to 530 of the Defence Appeal Brief.

58. The Appellant in the first place characterizes Judge Kama's attitude towards Witness AA as protective. He refers in particular to the fact that the Judge made sure that the trial record did not reflect the rude and uncooperative attitude of the witness, when he accused Counsel for the Appellant of lying. The Judge also apologized for the witness's attitude, blaming it on his lack of education.[93] The trial record shows[94] that the above allegation is clearly unfounded. In fact, not only did the Judge underscore the discourteous attitude of the witness, and did not excuse him, he also did not condone it. Rather, he presented the Tribunal's excuses to the Defence on behalf of the witness, and issued a warning to the witness. In so doing, Judge Kama did not give preferential treatment to the witness, nor did he in any way show bias.

59. The Appellant next submits that Judge Kama interrupted his Counsel as she was about to start her cross-examination of Witness AA on the discrepancies between his written statement to investigators and his oral testimony in relation to the circumstances surrounding the death of Emmanuel Kayitare, that is, to know whether the victim had been struck on the head or on the neck.[95] According to the Appellant, the Judge himself proceeded to examine the witness until he received an answer that appeared to restore the credibility of the witness, namely that his statement may have been wrongly interpreted. Hence, the Judge allegedly remarked as follows: "Okay, that's what I wanted to hear, that perhaps it is badly interpreted."

60. The Appeals Chamber notes that in light of the trial record,[96] Judge Kama intervened in the cross-examination, thus assisting Counsel for the Appellant who was trying unsuccessfully to elicit a response from the witness. In this connection, Judge Kama's question made it possible for a clear answer to come out. It also appears that the witness, of his own volition, alluded to the fact that his statements may have been poorly interpreted. Indeed, the Judge's remark, taken in isolation, could

[93] Defence Appeal Brief, para. 524. See also Prosecution's Response Brief, para. 10.39.
[94] T, 7 October 1997, pp. 9 to 12.
[95] Defence Appeal Brief, paras. 525 and 526. See also Prosecution's Response Brief, para. 10.40.
[96] T, 7 October 1997, pp. 43 to 47.

be confusing. However, insofar as the justification in question comes straight from the witness himself and was not suggested to him by the Judge, the Appeals Chamber considers that the Judge's remark, situated in its proper context, would not lead a reasonable observer to conclude that its author was biased. In any event, from the relevant passage of the trial judgement which reads: "[...] the Chamber is of the opinion that Witness AA's inability to indicate whether the blow unleashed by the Accused cut off the head or neck of the victim cannot call into question the reliability of his testimony since it is difficult for a lay person to ascertain the respective limits of the head and the neck,"[97] the Appeals Chamber notes that the inconsistency raised by Counsel for the Appellant was duly taken into consideration by the Trial Chamber, and that the issue as to whether the Trial Chamber committed an error in finding this witness credible is distinct from the issue of bias.

61. The Appeals Chamber considers, in the light of the trial record,[98] that the Appellant's assertion that the Judge subsequently attempted to lead Witness AA to state that he had mentioned to the investigators that Emmanuel Kayitare had been struck on the nape of the neck, and that the Trial Chamber was satisfied with a confused answer from the witness, namely that he was talking about the "head" rather than the "neck" or the "skull", was even more unfounded.[99] In fact, the Judge merely asked the witness once more, in a reasonable manner, what he had told the investigators about the part of the body on which Emmanuel Kayitare had been struck, without suggesting an answer to the witness. The fact that AA's answer in this regard was confused is irrelevant to the allegation of bias. The same applies to the allegation of bias raised in paragraph 528 of the Defence Appeal Brief, since Judge Kama in the instant case had reasonably sought to have clarification, without suggesting any answer whatsoever to the witness; or again in paragraph 529 of the Defence Appeal Brief, since the Judge clearly made a relevant interpretation of Witness AA's testimony describing the population protecting Cyahafi as "*splitting into two groups*" to mean "*antagonistic groups*". Indeed, it was necessary to come out of the impasse resulting from the fact that the witness was not answering the question from Counsel for the Appellant that was repeated four times, and aimed unsuccessfully at eliciting a clarification.[100] The Appellant's description of Judge Kama's attitude during the cross-examination of Witness AA as to the distance between his house and the persons he described as having been killed at Kimisagara[101] cannot stand up to scrutiny in light of the trial record.[102] In this instance, the Judge interrupted Counsel for Appellant's belaboured intervention intended to clarify the point at issue, with a view to testing the credibility of the witness, by linking the information given by the witness the previous day with that given a few moments before Counsel's intervention, and from which it is clear that the witness had observed the events from a distance of about 800 metres from his house situated on higher ground in Cyahafi, which gave him a better view of Kimisagara.

62. The Appellant also submits that Judge Kama intervened during the cross-examination of Witness AA, which intervention affected the strategy adopted by Counsel for the Appellant who was trying to point out a contradiction between AA's testimony and his written statement regarding the number of weapons in his possession at the time of the killing of Emmanuel Kayitare. The Appellant contends that the Judge intervened to ask the witness to state the number of weapons in question, and suggested to him that he had several weapons, including grenades, whereas these had not been mentioned previously by the witness.[103] The trial record [104] shows that Judge Kama

[97] Trial Judgement, para. 335.
[98] T, 7 October 1997, pp. 27 to 30.
[99] Defence Appeal Brief, para. 527. See also Prosecution's Response Brief, para. 10.42.
[100] T, 7 October 1997, p. 67.
[101] Defence Appeal Brief, para. 530. See also Prosecution's Response Brief, para. 10.46.
[102] T, 7 October 1997, pp. 69 and 70.
[103] Defence Appeal Brief, para.523. See also Prosecution's Response Brief, para. 10.38.
[104] T, 7 October 1997, pp. 34 to 36.

intervened in order to re-phrase a question that Witness AA did not seem to understand. It is true that the witness, who had not voluntarily mentioned that the Appellant had grenades hanging from his belt, only did so in response to Judge Kama's question. There is no provision in the Rules that prohibits Judges from asking questions in order to contribute to discovering the truth or to try to corroborate or contradict the facts in issue. In the instant case, the existence of grenades was specifically referred to in paragraph 14 of the Indictment, and had been mentioned by Witnesses BB, Q and T. A reasonable observer should have been informed of this aspect of the proceedings before the Tribunal.

63. The Appellant also contends that Judge Kama cast aside his role as Judge and donned the cap of the prosecution in order to have Witness AA make a statement about the status and role of the Appellant within the *Interahamwe* Movement in the course of his cross-examination. He also reproaches the Judge for informing the witness about the statements of other witnesses on this subject.[105] The trial record shows[106] that the witness had already mentioned that he knew the position occupied by Rutaganda in the hierarchy. On this point, Judge Kama merely repeated the witness's remarks. It is true that Judge Kama sought more than Counsel to determine precisely what the witness knew about the position occupied by Rutaganda. As has already been recalled, the Rules allow Judges to ask questions, and Judges have a wide discretion to contribute to the discovery of the truth, including the power to confront one witness with the testimony of another. In the case at bar, the position of Rutaganda on the ladder of authority was a fundamental aspect of the facts in issue. It seems normal that the Judges should give their full attention to this issue. Once situated in its context, Judge Kama's question appears legitimate to a reasonable observer.

64. Lastly, the Appellant submits that during the cross-examination of Witness AA, his Counsel was prevented from continuing with her attempt to explore the contradictions between several statements by the witness.[107] The trial record[108] shows that the witness had, on the one hand, testified that Emmanuel Kayitare had tried unsuccessfully to run away, and, on the other hand, that he had been caught at the end of a race of which he indicated the starting and finishing points. The Appeals Chamber notes that the witness actually contradicted himself at this point, whereupon Judge Kama's intervention may be said to have been excessive. Nevertheless, when it is situated in the right context, his attitude seems to result more from an imprecise recollection of the content of the testimony in question than from a deliberate attitude on the part of the Judge. The Appeals Chamber considers that an erroneous interruption is quite distinct from a biased attitude.[109] The Appeals Chamber notes in the instant case that the interruption, which is rather unfortunate, is not biased. Moreover, the Appellant has failed to show that Judge Kama's interruption would have led a reasonable observer to have serious doubt about the impartiality of its author.

(c) Witness H

65. The Appeals Chamber fails to see in what way Judge Kama's remarks that the scar, which the witness showed the Chamber at the request of Counsel for the Appellant, is situated in the heart area would be such as to show a biased attitude on the part of the Judge.[110] Furthermore, the Appellant does not show that he had been prevented, as he alleged, from pursuing his cross-

[105] Defence Appeal Brief, paras. 531 and 532. See also Prosecution's Response Brief, para. 10.47.
[106] T, 6 October 1997, pp. 115 to 117.
[107] Defence Appeal Brief, paras. 521 and 522.
[108] T, 6 October 1997, pp. 52, 124, 132 and 133.
[109] In this regard, see in particular the findings of the Appeals Chamber in the *Akayesu* Appeal Judgement, paras. 323 to 325: error invalidating a Judgement may not be shown by pointing to an anecdotal breach of the Rules by the Trial Chamber. It must be shown on an overall assessment of the trial that the Trial Chamber failed to render justice. The Appellant must show a prejudice such as would invalidate the Judgement.
[110] Defence Appeal Brief, para. 540. See also Prosecution's Response Brief, para. 10.56.

examination of Witness H on the issue of his wound. Nor is the Appellant's assertion [111] that Judge Kama interrupted the cross-examination of Witness H on the events that took place at ETO and Nyanza founded. In fact, the trial record establishes that the Judge waited for the witness to finish answering the question from Counsel for the Appellant before trying to clarify, without putting *pressure* on the witness, the issue as to whether the *Interahamwe* launched the attacks before or after the departure of UNAMIR soldiers.

(d) Witness A

66. The allegation that Judge Kama tried to link the Appellant via the *Interahamwe* Movement to the events at Nyanza, thus buttressing the Prosecution's argument during the examination of Witness A, does not seem to be founded.[112] Indeed, the trial record[113] shows that Counsel for the Appellant, of her own volition, used the term "*Interahamwe*". In this instance, a reasonable observer would not have concluded that Judge Kama's intervention was unwarranted or biased in favour of the Prosecution.

67. The Appeals Chamber considers as equally unfounded the Appellant's assertion that Judge Kama bolsters the Prosecution case by having Witness A state that his definition of the war corresponds with the crimes perpetrated by Hutu militia, whereas Counsel for the Appellant was referring to the war between RPF invaders and Rwanda.[114] The trial record shows [115] that the witness, of his own volition, in answering Counsel for the Appellant's questions, situates the start of the "war" at 6 April 1994. Furthermore, while it is correct to state that Witness A's definition was given by him in response to Judge Kama's questions, it does not appear, in any event, that the Judge's questions would have led a reasonable observer to conclude that his interruption was biased.

68. The Appellant also reproaches Judge Kama for intervening to prevent Counsel for the Appellant from challenging the credibility of Witness A as well as the inconsistency of his testimony. Thus, when Counsel for the Appellant was asking the witness whether UNAMIR soldiers were at the roadblock erected at the ETO school, she was interrupted by Judge Kama who took off on a different tangent, and suggested to the witness that something must have prevented him from leaving the school.[116] The trial record shows[117] that this question from Judge Kama, on the one hand, was not unwarranted and, on the other hand, appears to be legitimate and relevant when put in context. Equally unfounded is the reproach that the Judge interrupted the cross-examination to express surprise that Hutus and Tutsis were together on the Nyanza road, thus eliciting testimony that Hutus and Tutsis were in fact treated differently on that road. There is no evidence from the trial record that the Judge expressed "surprise". The Judge simply asked for clarification, and his intervention does not seem to be unwarranted or biased in the context of the proceedings.

69. The Appellant also reproaches Judge Kama for having interrupted his Counsel who was trying to establish that attempts had been made by intellectuals as well as by UNAMIR to ensure the protection of those who were at the ETO school.[118] An examination of the trial record[119] reveals

[111] Defence Appeal Brief, paras. 538 and 539.
[112] Defence Appeal Brief, para. 515. See also Prosecution's Response Brief, para. 10.28.
[113] T, 25 March 1997, pp. 22 and 23.
[114] Defence Appeal Brief, paras. 508 and 509.
[115] T, 20 March 1997, pp. 95 and 96; T, 24 March 1997, pp. 26 to 30
[116] Defence Appeal Brief, paras. 511 to 514. See also Prosecution's Response Brief, paras. 10.24 to 10.27.
[117] T, 24 March 1997, pp. 77 to 79; T, 24 March 1997, pp. 117 and 118 and T, (French), p. 132.
[118] Defence Appeal Brief, para. 516. See also Prosecution's Response Brief, para. 10.29.
[119] T, 25 March 1997, p. 6.

that the Judge, upon realizing that Witness A was obviously not in a position to answer a question of this nature, reasonably interrupted to control the proceedings. In so doing, his intervention is perfectly in line with the exercise of the Presiding Judge's duty to prevent needless cross-examination.

70. The same conclusion can be drawn with regard to the Appellant's allegation that his Counsel, who was examining the witness about the approximate number of *Interahamwe* he testified to being present at the ETO, was interrupted by Judge Kama who answered on behalf of the witness: "Must you have come what may a figure? He's already said there were many."[120] The trial record shows that the witness had already answered Counsel for the Appellant's question, apparently to the best of his knowledge.

71. Still with regard to the same witness, the Appellant this time reproaches Judge Pillay for having inappropriately expressed her sympathy towards Witness A and made comments to him suggesting that she believed in the veracity of his testimony.[121] The trial record shows[122] that Judge Pillay in fact expressed her sympathy towards this witness, who had just explained that he lost his family. When this comment is placed in context, it does not show, however, that the Judge, in this way, prejudged the veracity of the testimony.

72. Lastly, the Appellant reproaches Judge Pillay and Judge Aspegren for asking leading questions to Witness A intending to elicit testimony to the effect that Tutsi women had been raped and that the Appellant, as the highest leader of the *Interahamwe* Movement, should bear the responsibility for these acts.[123] The Appeals Chamber considers, in the light of the trial record,[124] that contrary to the Appellant's allegations, the Judges' questions were indeed aimed at clarifying the issue as to whether the victims in question belonged to the Tutsi ethnic group, and whether or not they had been killed; whether the Appellant had ordered these acts to be committed, and whether in the opinion of the witness he was a leader of the *Interahamwe* Movement. The Appeals Chamber considers that the questions put by the Trial Chamber were quite relevant in this case and do not show any bias on the part of their authors.

(e) Witness DD

73. It should first be noted that Witness DD's testimony relates to the events at the ETO and at Nyanza, and that the Trial Chamber relied particularly on the second named place to convict Rutaganda of the relevant counts.[125] The Appellant reproaches the Judges of the Trial Chamber for having interrupted and thus disrupted his defence strategy on an essential point, namely his identification by Witness DD. In this instance, an examination of the trial record shows that Counsel for the Appellant had just received confirmation from the witness that representatives of the witness support unit had, prior to his hearing before the Tribunal, showed him the courtroom as well as the place where the Accused would be seated. Counsel for the Appellant had just emphasized, albeit in the form of a question, that, consequently, the witness knew at what spot the Accused would be seated when the witness identified him at the hearing, at which point, after confirmation by the witness, the impugned interruption by Judge Kama took place. The Judge, after repeating Counsel for the Appellant's question, made the following remarks:

[120] T, 24 March 1997, p. 79.
[121] Defence Appeal Brief, para.517. See also Prosecution's Response Brief, para. 10.60.
[122] T, 25 March 1997, p. 69.
[123] Defence Appeal Brief, para. 518.
[124] T, 25 March 1997, pp. 69 to 74.
[125] Trial Judgement, paras. 280 to 282, 300, 361.

> "I am going to ask you the question again. You knew where Rutaganda would be seated here in the courtroom because we had told you so. We had told that, that is where the accused will be seated, is that not right?" and added, after the witness replied in the affirmative, "Counsel please continue with your question. You can add to this. You can ask whether or not that is the only reason he was able to recognise Mr. Rutaganda or whether he knew him. Please add to your question or complete your question."

Whereupon the witness actually confirmed that he knew the Accused before.

74. The Appeals Chamber is of the opinion that, when the impugned remarks are placed in their context, they do not denote any bias on the part of the Judge. At the very most, his intervention may seem to be premature inasmuch as it does not allow the witness to state spontaneously that he knew the Accused before the hearing. The question appears relevant, however, and had to be put to the witness, unless he of his own volition mentioned that he knew the Accused before.

75. The Appellant also reproaches the Judges for having interrupted the cross-examination of Witness DD about the location from where he sighted the Accused at the ETO, asking him to be more constructive.[126] The trial record shows that the Judges interrupted at a point when the cross-examination had been bogged down for some minutes. Their interruptions neither distorted nor hindered cross-examination by the Defence. Quite on the contrary, the Judges' interventions in this case helped to bring out the discrepancies detected by the Defence, and enabled the witness to provide an explanation therefor. In these circumstances, the Appeals Chamber considers that the comments were perfectly in line with the aforementioned duty of the Judge to stop any needless cross-examination, and with the Judges' discretion to contribute to discovering the truth.

(f) Witness W

76. It is necessary to point out that Witness W's testimony relates *inter alia* to the events at the ETO and Nyanza, and are part of the evidence relied upon by the Trial Chamber to find Rutaganda guilty of the counts under paragraphs 13 and 16 of the Indictment.[127] The Appellant submits that Witness W gave testimony to the effect that Rutaganda's vehicle brought reinforcements for the *Interahamwe* on the Nyanza road, and had difficulty in identifying the vehicle and in establishing the presence of Rutaganda in the said vehicle when Judge Aspegren asked the witness to confirm whether it was likely that Rutaganda was in the vehicle. The Appellant contends that by doing this, Judge Aspegren supported the Prosecution case. In a similar vein, the Appellant reproaches Judge Kama for leading the witness to say that the vehicle in question, which he had earlier described as white and again as green, was "green and white" or "white (with) green as dominant".[128] With regard to Judge Aspegren's remarks, the Appeals Chamber considers, from a reading of the trial record,[129] that they were misplaced, and agrees with the Appellant that they indeed lent support to the Prosecution case. However, this error cannot by itself overturn the presumption of impartiality. Nevertheless, with respect to Judge Kama's intervention, the above trial record shows that the witness, of his own motion, specified the colour of the vehicle following the intervention of Judge Kama, which intervention tended to highlight the discrepancies in the testimony on this issue. In this case, Judge Kama reasonably sought to obtain clarification, without suggesting any answer whatsoever to the witness. This last allegation of bias is therefore unfounded.

[126] Defence Appeal Brief, para. 2. See also Prosecution's Response Brief, para. 10.59.
[127] Trial Judgement, paras. 284 to 286 and 292.
[128] Defence Appeal Brief, para. 545. See also Prosecution's Response Brief, para. 10.63.
[129] T, 29 May 1997, p. 21.

(g) Witness BB

77. Witness BB's testimony relates to certain events which took place in Amgar. The Appellant recalls his argument that he, the Appellant, came to the aid of Witness BB, and that, considering that Witness BB is a Tutsi, this behaviour is such as would raise doubt as to the existence of a specific intent to commit genocide. The Appellant submits[130] that the Trial Chamber's conclusion that "in his (BB's) opinion, he was therefore a slave of the Accused's"[131] results from Judge Aspegren's interruption and from the leading questions he put to the witness. The relevant excerpt of the trial transcript reads as follows:

> "JUDGE ASPEGREN: Were you forced to work or were you paid?
>
> THE WITNESS: I was forced to work. I was not paid.
>
> JUDGE ASPEGREN: Who forced you?
>
> THE WITNESS: It was George Rutaganda. He kicked me and told me to help the others dig up the earth."[132]
>
> [...]
>
> "Q: Therefore, during this period were you considered to be the slave of Mr. Rutaganda?
>
> A: Yes, I was his slave because normally I did not work for him."[133]

There is no doubt that Judge Aspegren's questions in the instant case were leading questions. The Appeals Chamber recalls, however, that such questions are not prohibited before the Tribunal,[134] and points out that although the witness answered the question as to whether he was considered as the slave of the Accused in the affirmative, he stated what he meant by that, and did not significantly change what he had earlier described as his status at the time (i.e. orders of the Accused, forced and unpaid work). It should, moreover, be emphasized that Witness BB's testimony was not relied upon by the Trial Chamber for any of the convictions it entered against the Accused. Under these circumstances, the Appeals Chamber fails to see in what way Judge Aspegren's intervention could be viewed by a reasonable and knowledgeable observer as reflecting an appearance of bias.

(h) Witness Q

78. It should be pointed out that Witness Q's testimony was fully utilized by the Trial Chamber in support of its decision to convict the Appellant.[135] The Appellant submits in the main that Judge Kama chided the interpreter for translating the witness' statement to Counsel for the Appellant as follows: "*you are lying*", thus suggesting that it had been wrongly translated.[136] That trial record shows that Judge Kama indeed told the interpreter that he was right not to have translated Witness Q's statement in full, considering that it seemed unthinkable for the witness to accuse Counsel of lying. The Judge did not, however, object to the Defence's request that it be noted in the record that the interpreter had acknowledged that the witness had accused Counsel of lying. Although this

[130] Defence Appeal Brief, paras. 546 to 548. See also Prosecution's Response Brief, paras. 10.65 to 10.67.
[131] Trial Judgement, para. 231.
[132] T, 29 May 1998, p. 27.
[133] T, 29 May 1998, p. 29.
[134] See *infra* para. 31.
[135] Trial Judgement, paras. 194 to 195, 235 to 238, 243 to 248, 253, 256, 259 *et seq*.
[136] Defence Appeal Brief, para. 549.

apparently results from an erroneous assessment on the part of the Judge, his attitude does not denote bias. Even if the Judge had thought that the impugned remarks had been made by the witness, the witness would apparently have been admonished for his attitude, without such admonishment affecting the scope of his testimony. The Appeals Chamber accordingly considers that Judge Kama's attitude is not such as would lead a reasonable observer to conclude that he was not impartial.

79. The same conclusion holds in respect of Judge Kama's remarks on the discrepancies raised by Counsel for the Appellant in Witness Q's testimony regarding one of the bodies identified by the witness initially as that of his son, and subsequently as that of his nephew. When cross-examined on this by Counsel for the Appellant, Witness Q explained that he considered his nephew as his son, and, for this reason, had initially indicated that it was his son. In light of the trial record, it seems that Judge Kama once more apparently misapprehended the content of the statements made respectively by Counsel and by the witness. The fact remains that, although such misapprehension is unfortunate, it would not be interpreted by a reasonable observer as a sign of bias.

80. The Appeals Chamber considers further that the contention that the Trial Chamber took Witness Q to be credible, in spite of his unsatisfactory answers to Judge Kama's questions about the role the Appellant played in the distribution of weapons, is irrelevant to the issue of the Tribunal's impartiality.[137] The Judge's questions[138] in this regard seem to be fully warranted, with regard to an issue referred to in paragraph 10 of the Indictment which, moreover, is at the heart of the proceedings.

81. The Appellant also reproaches Judge Pillay for having put leading questions to Witness Q about alleged rapes committed and orders he is said to have given on this subject. The Appellant submits that, since the rapes were not mentioned in the Indictment, this line of questioning was prejudicial to him and denoted a prejudgement of culpability.[139] The trial record shows[140] that Judge Pillay's questions pertained to a passage of the testimony given in the morning. Once the questions are situated in their context, they concern not so much the acts of rape as the knowledge that the Appellant could have had thereof given his position on the ladder of authority. Judge Pillay's questions focus, above all, on the actual position occupied by the Appellant on the ladder of authority. In this instance, although the witness' answers show some confusion regarding the appellations of the various movements, they are, nonetheless, enlightening and relevant within the context of the trial. In those circumstances, the Appeals Chamber considers that the said allegation of bias is totally unfounded.

(i) Witness U

82. It should be recalled that Witness U's testimony pertains, in particular, to the murders that he observed from a location close to a garage. The Appellant reproaches Judge Kama and Judge Aspegren for having suggested the name of Amgar garage to the witness whereas the witness could not remember it.[141] The trial record indeed confirms that the name of the garage was suggested to the witness by Judge Aspegren during cross-examination, whereas he did not remember it during examination-in-chief. It should be pointed out, however, the witness had earlier clearly identified the places shown in the form of slides, and that the places in question indeed correspond to Amgar

[137] It should be noted that the credibility of Witness Q is amply dealt with under the ground of appeal pertaining to weapons distribution (Part VI of this Appeal Judgement).
[138] T, 9 October 1997, pp. 134 to 136.
[139] Defence Appeal Brief, para. 551. See also Prosecution's Response Brief, para. 10.69.
[140] T, 9 October 1997, pp. 132 to 134.
[141] Defence Appeal Brief, paras. 554 to 555. See also Prosecution's Response Brief, para. 10.72.

garage.[142] In Judge Kama's case, the name of the garage only appears in the English version of the trial record. For this reason, the Appeals Chamber holds, on the one hand, that the Judges' intervention does not affect the scope of Witness U's testimony and, on the other hand, that it cannot lead a reasonable observer to conclude that they are biased.

(j) Witness Hugues

83. The Appellant reproaches Judge Aspegren and Judge Kama for having put questions to Witness Hugues, a cameraman presented as being strongly supportive of RPF, that denoted a biased attitude, suggesting that the witness uses the term militia to characterize the *Interahamwe* Movement, that the mass killings had been planned, and were of an ethnic nature.[143] The trial record clearly shows that the witness's answers are not in any way influenced by the Judges' questions.[144] Judge Aspegren refers to other sources when he mentions the concept of "militia", and simply tries to get a useful description of the persons that the witness observed and that other witnesses before the Trial Chamber had identified as *Interahamwe*. Furthermore, Judge Aspegren's question relating to the possible planning of the killings and that of Judge Kama relating to the ethnic nature of the said killings are clearly appropriate in the context of the trial.

2. Comparison between the examination of Defence witnesses and that of Prosecution witnesses

84. First, the Appellant[145] contends that the admonishments to witnesses to tell the truth were sterner for Defence witnesses (DZZ, DDD, DNN, DPP and Mbonimpa) than for Prosecution witnesses. It should be noted, however, that this contention cannot stand up to scrutiny from the relevant parts of the trial record.[146]

85. Second, the Appellant contends that the biased attitude of the Judges is reflected in the manner in which the Trial Chamber treated Defence witnesses, showing scepticism or hostility towards them, which was in direct contrast with the sympathy expressed in respect of Prosecution Witnesses A, U, CC, Q, J and T, and the fact that the testimony of these witnesses was held to be truthful. The first part of this contention is not supported by the trial record relating to Defence Witnesses DZZ, DDD, DNN, DPP and Mponimpa.[147] Furthermore, an examination of the trial record [148] shows that as far as Witness A is concerned, the Judges briefly expressed their sympathy for the suffering experienced by this Prosecution witness before proceeding with his examination. The Appeals Chamber considers that the remarks in this instance appear to be normal for anyone preparing to examine a person on events that were undeniably painful, and do not show any sign of bias. The Appeals Chamber notes, incidentally, that Counsel for the Appellant herself commenced her examination with comments of the same nature. In the other cases, the remarks were made after the witnesses had been examined, before thanking them, and such remarks consisted mainly in commending the witnesses for the courage they showed in travelling right to Arusha to testify about the painful events. Here again, the remarks in question do not show any bias.

[142] See Exhibits 143, 168 and 169.
[143] Defence Appeal Brief, paras. 556 to 559. See also Prosecution's Response Brief, paras. 10.73 to 10.77.
[144] T, 25 May 1998, pp. 48, 77 and 82.
[145] Defence Appeal Brief, para. 562.
[146] T, 10 February 1999, p. 130 [DZZ]; 15 February 1999, p. 4 [DDD]; 16 February 1999, p. 58 [DNN]; 6 April 1999, pp. 21 and 22 [DPP]; 6 March [sic] 1999, p. 102 [Mbonimpa].
[147] *Ibid*.
[148] T, 25 March 1997,p. 69 [A]; 10 October 1997, p. 81 [U]; 8 October 1997, pp. 69 to 71 [CC]; 9 October 1997, p. 136 [Q]; 13 June 1997, p. 18 [J]; 11 March 1998, p. 118 [T].

3. Defence witnesses

(a) Witness DEE

86. With regard to the contention[149] that Defence Witness DEE, who had just testified that her husband was no longer alive, did not draw any sympathy from Judge Aspegren, contrary to what happened in the other situations referred to above, the Appeals Chamber notes that the comparison is not relevant in this case, and would not lead a reasonable observer to conclude that the Judge was not impartial. Indeed, Witness DEE was not in the process of describing the circumstances of the death of her husband, but was explaining, in reply to the Judge's question, that her husband would not have been in a position to receive any financial aid from the Accused since he was already dead at the time in question.[150]

(b) Witness Reichs

87. The trial record shows that the questions put by Judge Aspegren to Witness Reichs[151] are consonant with the normal approach taken by a Judge who is trying to test the credibility of a witness. Accordingly, the Appeals Chamber concludes that a reasonable and informed observer would not have had the impression that the questions denoted a biased attitude on the part of the Judge, as the Appellant submits.[152]

(c) Witness DDE

88. With regard to the contention that Judge Aspegren insisted during the cross-examination of DDE on the issue of the Appellant's alleged knowledge of the financial situation of the witness's husband, and of a financial deal between them, the Appeals Chamber holds that such insistence, which is indeed evident from the trial record, does not indicate bias.

(d) Witness DDD

89. The Appellant also reproaches Judge Kama [153] for intervening to remind Witness DDD of her duty to tell the truth and asking her not to change her answers. The trial record [154] shows that this was not a hostile warning to the witness. Inasmuch as the witness was modifying her version of events, the Judge's reminder of the duty to tell the truth was warranted. It should, moreover, be pointed out that the impugned intervention came after several hours of testimony without interruption by the Tribunal. The Appeals Chamber also considers as unfounded, in view of the trial record,[155] the allegation that Judge Kama harshly interrupted Witness DDD in order to force her to indicate whether the *Interahamwe* were seeking vengeance. The Judge's intervention does not appear, in this instance, to exceed the role of a Judge presiding a hearing.

90. The Appellant has provided only two examples of references to the relevant parts of the trial record [156] to support his overall contention that the cross-examination of Witness DDD by Judge Pillay and Judge Aspegren denotes a lack of impartiality.[157] The trial record reveals that if the

[149] Defence Appeal Brief, para. 584. See also Prosecution's Response Brief, paras. 10.97 to 10.99.
[150] T, 10 February 1999, pp. 512 and 513.
[151] T, 9 March 1999, p. 123.
[152] Defence Appeal Brief, para. 584. See also Prosecution's Response Brief, para. 10.109.
[153] Defence Appeal Brief, para. 563.
[154] T, 15 February 1999, p. 86.
[155] T, 15 February 1999, pp. 99 to 102.
[156] T, 16 February 1999, pp. 25 to 35.
[157] Defence Appeal Brief, paras. 570 to 571 and 572 to 576. See also Prosecution's Response Brief, paras. 10.94 and 10.95.

insistence of Judge Pillay and Judge Aspegren is put into context, namely, the uncooperative attitude of the witness, it would show neither hostility nor bias.

(e) Witness DZZ

91. The Appellant submits[158] that Judge Kama's attitude during the examination of Witness DZZ demonstrates that he did not believe the witness's statement relating to the purpose of the roadblocks and, in this way, denotes bias in favour of the Prosecution's argument on this point. From the trial record,[159] it does appear that the Judge is criticizing the account of the facts testified to by the witness, whereas the witness confirms that she did not notice that there were roadblocks used for separating Tutsis from Hutus. The Appeals Chamber admits that Judge Kama's attitude in this instance appears to be ill-timed. Nevertheless, once Judge Kama's remarks are situated in their context, they seem to reflect more the little credit that the Judge gives to the testimony at this point, taking into account his overall knowledge of the case and the other evidence presented at trial, than a biased attitude in favour of the Prosecution's argument. The Appeals Chamber recalls, on this point, the finding by the Appeals Chamber in *Akayesu* referring to paragraph 700 of the *Čelebići* Appeal Judgement, which reads as follows:[160]

> [...] This is particularly so in the case of judges who, as discussed above, are presumed to be impartial, and are professionally equipped, by virtue of their training and experience, for the task of fairly determining the issues before them by applying their minds to the evidence in the particular case.

A sufficiently informed observer should be duly aware of this aspect of the Tribunal's practice, and can therefore not reasonably conclude that the Judge is, in this instance, showing a biased attitude.

(f) Witness Shimamung called as expert witness by the Defence

92. The Appellant submits that the long cross-examination to which this expert was subjected by Judge Kama and Judge Aspegren denotes the little credit given by the Trial Chamber to the witness's status of expert and to his research methodology.[161] The trial record[162] shows that the Judges' interventions were relevant and warranted in this instance. First, they underscore the fact that the witness is a researcher, thus acknowledging his status as expert; and, secondly, as regards the Judges' questions relating to the expert's research methodology, these translate legitimate doubt, inasmuch as the expert admitted using, *a priori*, only the results which support the findings that he expects. In this context, the critical attitude of the Judges vis-à-vis the scientific method of the expert in no way denotes bias.

4. Application of Rule 73*ter* of the Rules

93. The Appellant takes issue with Judge Kama's remarks concerning the application of the new Rule 73*ter* of the Rules to the Defence:[163]

> [I]t it was perhaps unfortunate for her (*sic*) to be governed by the new rules particularly Rule 73*ter*, which is very limiting for the Defence. The Prosecutor happily, was able to escape the constraints of this Rule 73. (Transcript, 8 February 1999, pp. 5 and 6)

[158] Defence Appeal Brief, paras. 579 to 580. See also Prosecution's Response Brief, para. 10.102.
[159] T, 11 February 1999, pp. 48 to 50.
[160] *Akayesu* Appeal Judgement, para. 269 citing *Čelebići* Appeal Judgement, para. 700.
[161] Defence Appeal Brief, paras. 581 to 583. See also Prosecution's Response Brief, para. 10.107.
[162] T, 9 February 1999, pp. 101 to 106.
[163] Defence Appeal Brief, para. 586.

When these remarks are put in context, namely, the intervention by his Counsel denouncing as unfair the application of the new Rule 73*ter*[164] to the Defence alone, it is the Judge's remarks proper that the Appellant takes issue with in support of his contention that the Trial Chamber failed in its duty to be impartial. The Appeals Chamber considers that the impugned remark is not such as would lead a reasonable observer to conclude that the Judge was biased.

5. Findings

94. After thoroughly examining and placing the 39 allegations of bias in their context, the Appeals Chamber finds that a majority of them were clearly unfounded. The Appeals Chamber has, however, taken note of some unwarranted attitudes or erroneous assessments made by the Trial Chamber, but considers that a reasonable and informed observer would conclude that these were not such as would, or, at the very least, did not suffice, to overturn the presumption of impartiality of the Judges in that the circumstances would not have led a reasonable and duly informed observer to legitimately apprehend bias on the part of the Judges.

B. Treatment of the Appellant's testimony

95. For the sake of clarity, the Appeals Chamber has grouped the arguments put forward by the Appellant under this ground as follows: first, that the Presiding Judge apparently manifested his mistrust of the Appellant even before he took the stand as a witness; second, that the Trial Chamber imposed a time limit on the parties that was too strict, and that reminding them incessantly about this created a hostile atmosphere for the Appellant; third, that the Trial Chamber intervened during the examination-in-chief of the Appellant as well as during his cross-examination, thus giving the

[164] Rule 73*ter* of the Rules (Pre-Defence Conference) was adopted on 8 June 1998 and stipulated as at that date as follows:

> "(A) The Trial Chamber may hold a Conference prior to the commencement by the Defence of its case.
> (B) At that Conference, the Trial Chamber or a Judge, designated from among its members, may order that the Defence, before the commencement of its case but after the close of the case for the prosecution, file the following:
>
> (i) Admissions by the parties and a statement of other matters which are not in dispute;
>
> (ii) A statement of contested matters of fact and law;
>
> (iii) A list of witnesses the defence intends to call with:
>
> (a) The name or pseudonym of each witness;
>
> (b) A summary of the facts on which each witness will testify;
>
> (c) The points on the indictment as to which each witness will testify; and
>
> (d) The estimated length of time required for each witness;
>
> (iv) A list of exhibits the defence intends to offer in its case, stating where possible whether or not the Prosecutor has any objection as to authenticity.
>
> (C) The Trial Chamber or the designated Judge may order the defence to shorten the estimated length of the examination-in-chief for some witnesses.
>
> (D) The Trial Chamber or the designated Judge may order the Defence to reduce the number of witnesses, if it considers that an excessive number of witnesses are being called to prove the same facts.
> (E) After the commencement of the defence case, the Defence, if it considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called."

impression that it was "aligning itself with the Prosecution"; fourth, that the Trial Chamber intervened to cut off the Appellant's testimony.[165]

1. Warning by the Presiding Judge

96. The Appellant submits[166] that the Presiding Judge showed mistrust towards him even before he began his testimony, by making the following remarks about his duty to tell the truth:

> Je ne vous ferais pas les recommandations que d'usage (sic), que vous connaissez bien. Vous avez juré de dire la vérité, *essayez autant que faire se peut de dire la vérité*, puisque c'est le règlement du Tribunal qui veut qu'un accusé prête serment, ce n'est pas la même chose dans d'autres systèmes.[167] (Emphasis added). *("I am not going to make the usual recommendations that the Tribunal makes because you know them very well. You have stated that you will speak the truth and we expect that you are going to speak the truth. It is the requirement of the Tribunal for the witness to make the solemn declaration which you have made and this is our tradition and I do not know what it is in other places.")* (Transcript, 8 April 1999, p. 6)

The Appeals Chamber does not share the Prosecution's view [168] that the impugned remark is a standard warning given to all witnesses by the Trial Chamber prior to their testimony. Even then, the Appeals Chamber is convinced that this remark would not reasonably lead an informed observer to conclude that the Judge was not impartial. Indeed, the above sentence that follows Judge Kama's remark clearly shows that the remark is not made out of preconceived suspicion in respect of the Appellant, but because the Judge comes from a legal system where a witness is not required to make a solemn declaration to tell the truth before he is examined.[169]

2. Limits to the duration of testimony

97. The Appellant submits[170] first that the unacceptable limits imposed by the Trial Chamber on the duration of his testimony not only undermined his ability to make his defence effectively, but also revealed an appearance of bias on the part of the Judges. He points out that his testimony opened on the seventy-eighth day of the trial, whereas only a quarter of the hearing days were allotted to the presentation of the Defence case (fourteen days as against forty-three days for the presentation of the Prosecution case). Even then, the Trial Chamber is alleged to have immediately subjected his testimony to pressing and repeated time constraints,[171] which in the end limited it to a little over three days only [172] instead of the five days requested by the Defence, and created a tense and hostile atmosphere throughout the testimony.

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[165] Supplemental Defence Document, para. 20 (3). In so doing, according to the Appellant, the Trial Chamber breached the requirement of impartiality as well as the principle of equality of arms guaranteed under Articles 12 and 20 of the Statute, and Rules 85(B) and 89(B). In support of his argument, the Appellant cites several excerpts from Canadian jurisprudence relating to interruptions by the Judge that are considered to be contrary to the right to a fair trial, which the Prosecution believes are not binding on the Tribunal, and that they are not common to the majority of legal systems and practice in the "civil law" systems.

[166] Defence Appeal Brief, para. 595.

[167] T, 8 April 1999, p. 6.

[168] Prosecution Brief in Reply, para. 11.14.

[169] It should be noted that, following the criminal law applicable in Senegal, an examination of the accused on issues of fact and of personality comes right after the indictment is read, and it is not left to the choice of the accused to be heard as a witness, save where the person concerned exercises his right to keep silent.

[170] Defence Appeal Brief, paras. 596 to 618.

[171] Defence Appeal Brief, paras. 600, 601, 602, 605, 611, 613, and 614.

[172] Half days on 8, 9 and full days on 21, 22 and 23 April 1999. It should be noted that although the Appellant's filings show that he was also heard on 12 April 1999 (starting at 3.20 p.m.), the Transcript of 12 April 1999 shows that the hearing was adjourned because of the Appellant's state of health.

98. In this regard, the Appeals Chamber points out first of all, as does the Prosecution,[173] that the examination of the Appellant took place after additional time was granted him from 19 March to 5 April 1999 for the preparation of his defence, followed by an additional day on 7 April for him to consult with his Counsel. With regard to the examination proper, the Appeals Chamber recalls that the Appellant's examination-in-chief by his Counsel commenced on 8 April 1999[174] and continued on 9[175], 21[176] and 22 April 1999.[177] Cross-examination of the Appellant by the Prosecution opened on 22[178] and closed on 23 April 1999.[179]

99. From a reading of the trial record,[180] there is no denying that the Presiding Judge restricted the Appellant's testimony all too often to strict and repeated time limits, indicating that he expected Counsel for the parties to be brief and to the point when asking their questions, and that he expected similar stringency in the Appellant's answers. Nevertheless, the trial record also shows that the Presiding Trial Judge, in his successive remarks concerning the duration and method of examination, actually applied both stringency and flexibility, and the choice of Appellant's Counsel to conduct the examination as she thought fit was not affected in substance. The Appellant in fact had considerable latitude to say what he had to say.

100. An examination of one of the examples cited by the Appellant, which includes a reminder by the Presiding Judge about the Trial Chamber's wish regarding the duration of his testimony, and a request to his Counsel to ask questions connected with the Indictment,[181] perfectly illustrates the

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[173] Prosecution's Response Brief, para. 11.18.
[174] From 9.40 a.m. to 6.07 p.m.
[175] From 11 a.m. to 12.50 p.m.
[176] From 9.40 a.m. to 5.30 p.m. (the first 24 pp. of the Transcript being considered as introductory to the case.)
[177] From 10 a.m. to12.55 p.m. (first 118 pp. of the Transcript).
[178] From 3.30 p.m. to 5.30 p.m.
[179] Of the four hours of hearing, 155 pp. of the Transcript are taken up by the Appellant's cross-examination by the Prosecution, followed by additional questions from the Defence (pp. 155 to 159), Judge Pillay (pp. 160 to 170) and the Presiding Judge (pp. 171 to 176).
[180] T, 8 April 1999 p. 6; T, 9 April 1999 pp. 95 to 96; T, 21 April 1999, pp. 3 to 8 and 95; T, 22 April 1999 pp. 30 to 32 and 96.
[181] Defence Appeal Brief, paras. 601 to 605 *In extenso*, the dialogue in question reads as follows:

> *"MR. PRESIDENT: /…/ The Judges have just consulted and we would like to have the testimony of Mr. Rutaganda to come to an end tomorrow at 12:30, that will make four days and the prosecutor should start tomorrow afternoon and possibly Friday. That's the first statement. Secondly, we have received a lot of general information. I would like to have a greater precision and we would like to go directly into the indictment itself so that we can gain time. We have -- we are going to finish with the family and his business. Now, let us go into the indictment parse. I give you the floor.*
>
> *MS. DICKSON: Mr. President, we have gone too far into this matter for me to be quiet. There is no, there are no polemics whatsoever. We have lost a great deal of time in this trial this last week because Mr. Rutaganda was ill. This is already a prejudice that he has suffered to his health. The questions that I put to him were in our -- to our mind, relevant. We have listened to a lot of witnesses brought by the prosecutor to talk about the Interahamwe, to talk about the nature of their organisation, to talk about the role of Mr. Rutaganda in the organisation and this is a very important aspect. In so far as we had five days, the day, the day that we devoted to the beginning of the examination was supposed of (sic) have been provided for as a function of the remaining three days. Therefore, just -- if only for the record, I would like to point out this that we would have liked to and I consider -- we would have liked to have our complete five days for the examination in chief. This is what Mr. Rutaganda wishes. We submit this wish to you, Mr. President. This means that the days we lost were not our fault.*
>
> *MR. PRESIDENT: Ms. Dickson, as you've said you are loosing -- we are loosing time uselessly. You asked for five days, that is one thing. It is the Chamber that will decide how much time will be granted you or the prosecutor, that is another thing. You asked for five days and I told you in the beginning we are going see. In light of the circumstances, as you've said, we've lost a lost of time because of the illness of your client which we are sorry about but believe me we would like for you to finish tomorrow*

foregoing. The impugned remark by Judge Kama should first be placed in its context as appears from the trial record, namely, that it was made on the third day of the examination-in-chief of the Appellant by his Counsel. The Appellant's testimony opened on 8 April 1999 and focused on his family, his father's important role,[182] relations between the different ethnic groups in Rwanda,[183] the Appellant's educational background,[184] his professional life,[185] his marriage and details relating to his family life,[186] a description of his company head office and details on the Amgar *secteur*,[187] political parties in Rwanda,[188] the Appellant's material situation and his contacts with the entire Rwandan society,[189] his life in associations,[190] the RPF attack in October 1990 and its repercussions on Rwandan society,[191] political life, multiparty politics, the regional implantation of parties, the place of MRND and the Appellant's membership of this party,[192] the *Interahamwe za MRND* Movement.[193] The examination of the Appellant by his Counsel about the *Interahamwe za MRND* Movement continued on 9 April and 21 April, including the period after the intervention mentioned above.[194]

101. The Appeals Chamber recalls first of all that the Trial Chamber only intervened to seek further details in the Appellant's answers after the Appellant had spoken for long on issues of a general nature, without directly addressing the acts for which he was indicted. In that context, the request by the Presiding Judge of the Trial Chamber aimed at steering the examination closest to the acts for which he was indicted seems to be warranted. The Appeals Chamber also notes that the attitude of Appellant's Counsel, when the Presiding Judge expressed his opinion that the part of the examination relating to the *Interahamwe za MRND* Movement was closed and asked her to continue with the rest, reveals that she did not feel bound by that appraisal, given that she continued the examination of the Appellant on the same subject as she had planned, without attracting any hostile reaction from the Trial Chamber. Furthermore, it should be pointed out, as does the

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at 12:30, but if his state -- the condition of his health would not allow it we could go much further than that. In any case, this is just a wish expressed by the Chamber. It is also important the matters that have been raised with regard to the Interahamwe, the role that he played, we have finished with that aspect and I would like that now we delve in more directly into the indictment parse. Please you have the floor to do so and we are going to see -- to examine matters as we progress.

MS. DICKSON: I hope I have understood you well, Mr. President. Are you saying that we have finished with the Interahamwe because I did not think that I had finished?

MR. PRESIDENT: We thought we -- that we knew the structure, the role that he had played but if you want to continue with the Interahamwe –

MS. DICKSON: With your leave, Mr. President –

MR. PRESIDENT: There is no problem, continue but we hope that tomorrow at 12:30, we will finish." T, 21 April 1999, pp. 3 to 6.

[182] T, 8 April 1999, pp. 9 to 12.
[183] *Ibid.*, pp. 14 to 18.
[184] *Ibid.*, pp. 18 to 24.
[185] *Ibid.*, pp. 25 to 34.
[186] *Ibid.*, pp. 34 to 43.
[187] *Ibid.*, pp. 43 to 52.
[188] *Ibid.*, pp. 53 to 54.
[189] *Ibid.*, pp. 52 to 69.
[190] *Ibid.*, pp. 70 to 75.
[191] *Ibid.*, pp. 76 to 81.
[192] *Ibid.*, pp. 81 to 120.
[193] *Ibid.*, pp. 120 to 193.
[194] T, 21 April 1999, up to p. 72, after which the questions are directed at the Appellant's holdings in other commercial companies, as well as his relations with RTLM.

Prosecution,[195] that the interruption in no way prevented the Appellant from continuing his testimony for as long as he wanted on general issues before going to the details of his activities on the days referred to in the Indictment.

102. The second passage cited by the Appellant [196] also offers the opportunity to assess the true extent of the reminder by the Presiding Judge of the time allotted for his testimony.[197] The impugned remarks by the Presiding Judge clearly show that the wish expressed by the Trial Chamber concerning the limitation on the duration of the Appellant's testimony was not inflexible. With regard to the swift reaction by the Presiding Judge to the reminder by Counsel for the Appellant about her client's right to an effective defence, the Appeals Chamber considers that it is definitely excessive in this instance, but this alone would not lead a reasonable observer to doubt the impartiality of the Presiding Judge. Upon examination, the Appeals Chamber considers that the other arguments raised by the Appellant on this point, when placed within their context, are equally unfounded.[198] The Appeals Chamber is of the opinion that, despite the insistent nature of the calls to order by the Presiding Judge of the Trial Chamber regarding the duration of the Appellant's examination, the Appellant does not demonstrate that he was actually obstructed from presenting his defence, and he was able to speak as he wished.

103. Second, the Appellant submits that, in addition to the time constraints referred to above, there were repeated interventions by the Presiding Judge intended to shorten the testimony of the Appellant on points considered to be crucial to the Appellant's defence.

104. With regard to the conditions and formalities fulfilled by the Appellant for acquiring a firearm for his father, who, like him, was a victim of threats,[199] the trial record clearly shows [200] that the Appellant was able to express himself in detail on the various points. The first intervention by Judge Kama, which came after a considerable period of time (to wit, no less than four pages of transcript recording the Appellant's spontaneous testimony), clearly falls under the ambit of the Presiding Judge's duty to steer testimony that is getting lost in non-essential detail. The second intervention was aimed at interrupting repetitive questions from the Defence. In that context, the interventions in question cannot be considered as denoting a biased attitude on the part of Judge Kama, or as having thwarted the Defence on a crucial point.

105. With regard to Judge Kama's intervention aimed at focusing the Appellant's testimony concerning his schedule on 6 April 1994, the Appellant considers as biased the fact that the

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[195] Prosecution Brief in Reply, para. 11.25.

[196] Defence Appeal Brief, para. 614.

[197] *"Mr. President: The session is called to order. Ms. Dickson, it is 11:15, we are coming to end I believe and do you think you will be able to finish by 12:30 with the questions that you still have you ask?*
Ms. Dickson: Mr. President, as I said at the beginning, I'll do my best. We do not have—we have not had as much time as provided—as has been hoped for. This morning we started a little late and break has been a little longer than has been envisaged. I would do what I can. We have not yet finish. We would like Mr. Rutaganda to have a full, complete and effect (sic) defence.
Mr. President: We understand the interest. This is a lesson that the court cannot accept, we have been here for two years, we are doing it, we are trying to ensure that he has a full—a complete and effective defence. You should not, you should stop giving the Tribunal that lesson. All I asked you is this, we have gone through the various length of questioning, we have gone as far as his departure to Zaire, we've come back to the roadblocks and we are following. We are asking would you be able to finish by 12:30? If you can, well and good, if you cannot then we'll see." T, 22 April 1999, pp. 30 to 32.

[198] Defence Appeal Brief, paras. 600, 601, 602, 606, and 611 to 613.

[199] The Appellant wishes to show that he would not have used this method if he had access, as the Prosecution submitted, to truckloads of weapons. See the Prosecution's Response Brief, paras. 11.22 and 11.27 to 11.30 considering the contention unfounded.

[200] Nearly 9 pages of Transcript are taken up by this subject.

Presiding Judge reminds him that he had pledged to summarize his testimony.[201] Once more, it is necessary to put this intervention in context, namely, that the Appellant had just finished testifying at length and in detail about his schedule on 6[202], 7[203], 8[204] and 9[205] April 1994, and that he had just testified, without being interrupted by the Trial Chamber, about 10 April 1994[206] when the Presiding Judge asked him not to dwell on details and to summarize his remarks. The Appellant's testimony pertaining to 10 April actually went ahead without incident after this justified interruption by the Presiding Judge, which is proof that it was not perturbed by the said interruption.[207]

106. With regard to the contention that the Appellant had not proved that he did not participate in the meetings at Masango, whereas the Trial Chamber finally concluded that he had,[208] the Appeals Chamber points out that the Appellant's presentation is biased and cannot stand up to scrutiny. Indeed, the impugned remark by Judge Kama [209] was aimed at obtaining a precise answer from the Appellant to the question put to him by his Counsel to know whether he had heard anything about meetings when he was at Masango. This remark seems warranted in the sense that the Appellant began his answer to this specific question with an evasive statement, namely: "*First, normally for any meeting to take place, if it is a communal meeting, it is the communal official who should ask for authorization.*" It is then that the Presiding Judge intervened: "*The question is, did (sic) talk about meetings at Masango?*" to which the Appellant replied: "*No*", and the Presiding Judge added "*Let's go more quickly now and lose less time. So is no. Next question.*" The Appellant confirmed: "*no*" and the Presiding Judge added "*So is no.*" To which the Appellant replied "*no*" once more. It is only at this point that the Presiding Judge requested Appellant's Counsel to move on to the next question: "*Did you participate in any other meeting at Masango, Mr. Rutaganda?*" to which the Appellant replied "*Never.*" The next exchange between the Appellant and his Counsel remains within the context of Masango, namely, possible participation by the Appellant in the killings of Tutsis at Masango. Under these conditions, it appears clearly that the Presiding Judge's remarks did not prevent the Appellant from expressing himself as he thought fit and from putting forward his argument on the issue.

107. Concerning the allegation that the Presiding Judge considered the Trial Chamber as having sufficiently understood the material assistance the Appellant gave to Tutsis, and the fact that the assistance in question was given for nothing in return, and that he thus refused to hear the details of the assistance the Appellant gave to a Tutsi named Rutuku,[210] it should be pointed out that this remark was made after the Appellant had previously given a long explanation on the issue.[211] In that context, the Appeals Chamber is of the opinion that Judge Kama's remark, in which he considered

[201] The Appellant submits that he has suffered a particular prejudice because of this interruption, given that the judgement convicting him contains the assessment by the Trial Chamber in which the Appellant's activities on the days in question, including those acknowledged by him, could not have stopped him from participating in the acts with which he is charged. See also the Defence Reply Brief, paras. 11.32 to 11.34. stressing the ample explanations given by the Appellant without interruption on his schedule from 6 to 10 April.
[202] *Ibid*., pp. 104 to 113.
[203] *Ibid*., pp. 113 to 114.
[204] *Ibid*., pp. 115 to 143.
[205] *Ibid*., pp. 134 to 137.
[206] *Ibid*., pp. 137 to 139.
[207] *Ibid*., pp. 139 to 142.
[208] The Appellant indicates that he was prevented from demonstrating that, contrary to the allegations in para. 17 of the Indictment, neither he nor the other persons cited had the necessary authority to organize the holding of the said meetings during which they are alleged to have incited the population to throw Tutsis into the river (Defence Appeal Brief, para. 615).
[209] Defence Appeal Brief, para. 615 and T, 22 April 1999, p. 81.
[210] Defence Appeal Brief, para. 616.
[211] T, 22 April 1999, pp. 83 to 85.

that a sufficient number of examples had been given by the Appellant on this subject, does not seem to exceed his role as Presiding Judge.

108. On all these different points, the Appeals Chamber considers that the way in which the Appellant depicts the attitude of the Trial Chamber does not reflect the general attitude resulting from a complete reading of the relevant parts of the trial record, namely, that the Applicant was completely at liberty to express himself, and that the Trial Chamber intervened only to cut short long digressions in response to questions, or to ask for clarification.

3. Remarks which give the impression that the Trial Chamber sided with the Prosecution

109. The Appellant illustrates this allegation with examples of "*cross-examination*" by the Trial Chamber which occurred during his examination-in-chief by Counsel for the Appellant as well as during cross-examination by the Prosecution.

(a) Examination-in-chief

110. First, with regard to the structure of the *Interahamwe za MRND* Movement, the Appellant criticizes the questioning to which he was subjected by Judge Kama and Judge Aspegren. The questioning, comprising 50 questions, is alleged to have taken place after his Counsel had asked him only three questions on this central point in his defence. The Appellant contends that the Judges' questions denote scepticism on their part in relation to his answers on the following points: there was no budget, therefore there was no function for the treasurer; the fact that the *Interahamwe za MRND* Movement was incapable of growing into anything more than an embryo in a few years; his description of the nature of meetings held by the Movement; the fact of the Movement evolving into a youth wing without being orchestrated by the five members of the think-tank; questions aimed at having him admit that he had functions that empowered him to chair meetings in the absence of the president; that there must have been written documents defining the powers of each person; that the Movement was, *de facto*, able to act outside the party, and was engaged in Kuhahooza-type actions, which involved violence and/or threats aimed at forcing new members to join the Movement.[212]

111. In this instance, the Appeals Chamber notes that the Appellant's testimony about the *Interahamwe za MRND* Movement took up nearly thirty pages of the trial record, before the start of the series of questions and answers objected to by the Appellant. The Appeals Chamber recalls that it is up to the Judges to ask any questions that they deem necessary for the clarification of testimonies and for the discovery of the truth. A reading of the relevant section of the trial record would not warrant an assertion, as that made by the Appellant, that the Trial Chamber exceeded its role. Many as the questions put by Judge Kama and Judge Aspegren may be, they do not denote bias or any special scepticism, but are rather aimed at eliciting clarifications following the Appellant's lengthy testimony on the subject. The same applies to the alleged expression of scepticism by the Presiding Judge about the Appellant's participation in the activities of the Movement,[213] and to the questions that followed. Concerning the repetition of certain questions by Judge Aspegren, the Appeals Chamber is of the opinion that this would have been necessitated by the often evasive or irrelevant answers given by the Appellant. Lastly, the Appeals Chamber notes that Counsel for the Appellant herself admitted the legitimate nature of the said questions that she had intended to address.[214]

[212] Defence Appeal Brief, paras. 640 to 642.
[213] *Ibid.*, paras. 643 to 644.
[214] T, 8 April 1999, p. 163.

112. Second, with regard to Judge Kama's reaction to the question as to whether the Appellant was "okay",[215] which question was put to him by his Counsel after the series of questions referred to above, and interpreted by the Trial Chamber as a criticism on the part of Counsel, the Appeals Chamber considers that this reflects the irritation of the Presiding Trial Judge caused by the Defence question, but does not denote bias against the Appellant. Moreover, it finally proved to be without consequence.

113. Third, with regard to the Presiding Judge's remark to the Appellant, in which he allegedly mentioned the premises occupied by MRND in Kigali as one of the meeting places of the National Committee of the *Interahamwe za MRND* Movement, since he had just admitted that this was the case, the Appeals Chamber is of the opinion that this remark was not particularly judicious, but that it does not illustrate, contrary to the Appellant's assertions, a biased attitude on the part of Judge Kama.

114. Fourth, with regard to the Appellant's assertion that Judge Kama did his best to buttress the Prosecution's argument by having him admit that he had chosen to join MNRD because this was the ruling party, the Appeals Chamber considers that this contention is unfounded. Indeed, inasmuch as the long passage cited by the Appellant[216] follows the assertion by the Appellant himself that he was not ready to be a militant in the opposition, and that he joined the National Committee of the *Interahamwe za MRND* Movement in order to find protection against diverse pressures, the conclusion reached by Judge Kama as to the Appellant's motives seems logical and unbiased. In any event, the Appeals Chamber notes that the long exchange in question and the insistence by the Judge in this instance were favourable to the Appellant, and permitted him to qualify and clarify his testimony on the proposal of his Counsel, as shown by the part of the trial record not cited by the Appellant.[217]

115. Fifth, with regard to the request by the Presiding Judge aimed at obtaining from the Appellant an indication of the ethnic group to which the persons arrested in 1990 for their alleged complicity with RPF belonged, the Appeals Chamber considers the question relevant in the context of the trial. With regard to Judge Kama's comment, namely, "*That's the answer I was seeking*", which follows the Appellant's answer that there were both Tutsis and Hutus among those arrested, but that, according to him, the majority were Tutsis, the Appeals Chamber considers that, although the expression used is unfortunate in that it could lead to confusion, a reasonable observer who had followed the hearings and especially the Judge's efforts to obtain clear and concise answers would conclude that, in the instant case, this was the manner in which the Presiding Judge expressed his satisfaction in obtaining a precise answer to his question.

116. With regard to all the remarks of this nature, the Appellant has failed to demonstrate that there is an ulterior motive or bias in favour of the Prosecution's argument on the part of Judge

[215] Defence Appeal Brief, para. 641.
[216] *Ibid.*, paras. 647 to 648.
[217] T, 8 April 1999, pp. 96 to 97: "I said that the MRND, was (*sic*) power because the president of the republic was at the same time, in the years prior to 1993, also chairman of the party. To say that the MRND was in power whereas the prime minister was of the MDR, the person who was supposed to be the chief or head of government, I do not know. I do not know how to explain it but in my understanding, there were ministers of the MRND, there were ministers of the MDR, there were ministers from the PSD, and ministers from the PL and even from the PDC, a minister of the-- from the PDC. The ruling party, by this I understood, a party that won elections, that had won elections, a party that had organised and formed a government that was responsible for the activity for government, for the running of the government, a party that had set up a system that controlled the entire activity throughout the nation. That is what I understood by a ruling party but it was not the MRND."

Kama when he questions the Appellant on his material situation, and the Appeals Chamber notes that these are not borne out by the remarks in question.[218]

(b) Cross-examination by the Prosecution[219]

117. First, with regard to the examination of the Appellant on the issue as to whether the *Interahamwe za MRND* Movement was prepared to use force to protect MRND militants, it is clear from a reading of the relevant passage of the trial record that Judge Kama did no more than re-phrase the Prosecution's question, thus eliciting a more precise answer from the Appellant on the situation on the ground. The Appellant also criticizes the Judge's remarks, namely, "that is what we wanted to hear", commenting on the Appellant's answer which confirmed that members were able to react locally when they were attacked. On this point, the Appeals Chamber notes, as does the Prosecution, that it is typical of Judge Kama to make this type of remark which translates his satisfaction upon obtaining a precise answer to any question, whether from the Appellant or from any other witness, and considers that the interruption would not lead a reasonable observer who had followed the hearings to conclude that the Judge was biased.

118. Second, with regard to the examination of the Appellant on the subject of the letter in which the *Interahamwe za MRND Movement* denounced the partiality of UNAMIR, the Appellant reproaches Judge Kama and Judge Aspegren for asking a series of questions showing, according to him, their bias in favour of the Prosecution's argument. After considering the relevant passages of the trial record, the Appeals Chamber considers that the questions fall entirely within the ambit of the Judge's duty to contribute to the discovery of the truth, which implies, especially at the cross-examination phase, the possibility of testing witness credibility. The Appeals Chamber notes in passing that the said questions in no way unsettled the Appellant, as can be seen from his answers.

119. Third, with regard to the Prosecution's examination of the Appellant on MNRD, which the Prosecution presented as the Party of the President (Habyarimana), the Appeals Chamber points out that when placed in context,[220] Judge Kama's questions are once more aimed at obtaining greater clarification from the Appellant, who, at this point, gave the impression of playing with words. Concerning, in particular, the remark contested by the Appellant, the Appeals Chamber notes that in the French version, it is ascribed to the Prosecution and not to Judge Kama:

> "Me Stewart: Je pense que la question était claire, et Monsieur Rutaganda ne veut pas reconnaître que c'était son parti, il n'y a pas de problème. C'est pas là (sic) où je veux aller."
>
> ["Mr. Stewart: I think that the question was clear and Mr. Rutaganda does not want to take cognisance of his party. Mr. President: No problem. That is not where I am heading." (T, 22 April 1999, p. 113)]

120. Fourth, with regard to the examination of the Appellant on whether or not the *Interahamwe* had a uniform, part of the trial record cited[221] shows clearly that the persistent questions put by Judge Aspegren are aimed at obtaining a comment from the Appellant, not on his own assessment as to whether the *Interahamwe* had a uniform, taking into account the inside knowledge he has of the Movement, but on the impression created on each and everyone by the photographs presented as exhibits by the Prosecution in which members could be seen wearing similar uniforms. In the context of the trial, namely, the evidence of prosecution witnesses that made reference to the

[218] Defence Appeal Brief, paras. 651 and 652.
[219] These interventions, according to the Appellant, are such as would lead a reasonable observer to think that the Trial Chamber was on the side of the Prosecution. *Ibid* paras. 623 to 636.
[220] T, 22 April 1999, pp. 110 to 113.
[221] Defence Appeal Brief, para. 634.

existence of uniforms, the Appeals Chamber considers that the question does not seem to be unwarranted, especially after the Appellant has had the time to testify in detail on this issue.

121. Fifth, with regard to the closing questions put by the Presiding Judge to the Appellant, the Appellant does not demonstrate that they had no other purpose than to "lay a trap" for him to incriminate himself. With respect to an accusation of this nature, the Appeals Chamber cannot content itself with hasty allegations not supported by the passage cited by the Appellant.[222]

4. Interventions aimed at cutting off the Appellant's testimony

122. According to the Appellant, these interventions by the Trial Chamber were made during his examination-in-chief and cross-examination. The contention by the Appellant that, in this way, he was treated in a discriminatory manner does not stand up to scrutiny in light of the examples presented to the Appeals Chamber.[223]

123. First, the Appellant reproaches Judge Kama for his intervention asking him not to embark on interpretations about the origin of the "*réseau Zéro*" (the "Zero Network"). Although it is irrefutable that in the course of the trial certain questions put to other witnesses and to the Appellant himself may have led them to speculate or to hypothesize, the same is not true in this instance, given that the Appellant had just answered the Prosecution's question concerning his knowledge of the network, which he had read about in the newspapers. The Judge's intervention in this case seems justified and reveals no discriminatory character.

124. Second, the Appellant contests Judge Kama's intervention during his cross-examination on the issue of RTLM Radio. On the one hand, the Presiding Judge allegedly had doubts about the origin of the Appellant's knowledge that RPF gave an interview on this radio station, whereas the Trial Chamber did not subject Prosecution witnesses to this kind of credibility test.[224] The Appeals Chamber considers, upon reading the questions put by the Presiding Judge, that the questions were simply aimed at clarifying whether the Appellant had heard the interview in question, or whether it had been reported to him. The question was all the more warranted because the beginning of the Appellant's answer on the subject denoted uncertainty on his part. Furthermore, the Trial Chamber in no way prevented the Appellant from answering. On the other hand, the Appellant contends that the Presiding Judge interrupted him during his cross-examination by the Prosecution on the issue of Félicien Kabuga's holdings in the RTLM Project.[225] Upon scrutiny, Judge Kama's intervention seems to indicate his impatience vis-à-vis the cautious approach taken by the Appellant who had previously given details during the examination-in-chief on the subject in question. Obviously, the Judge's intervention does not seem to be judicious in the circumstances, given that the Appellant was apparently preparing to state that he had no personal knowledge of the point at issue and that the Judge had just enjoined him a few moments before not to go into conjectures. Much as such signs of impatience are regrettable, to which should be added another sign shown by Judge Kama during the Appellant's testimony on the impact of the war on MRND,[226] they do not denote hostility towards the Appellant, but rather irritation due to the length of the trial and the difficulty in bringing it to an end within a reasonable time. These signs cannot as such establish a biased or discriminatory attitude on the part of the Presiding Trial Judge.

[222] *Ibid.*, para. 636.
[223] *Ibid.*, paras 653 to 658.
[224] *Ibid.*, paras. 656 and 657.
[225] *Ibid.*, paras. 658 and 659.
[226] *Ibid.*, para. 660.

5. Conclusion

125. In view of the foregoing, the Appeals Chamber considers that the arguments put forward by the Appellant in support of his submission of biased and discriminatory treatment of his testimony by the Trial Chamber are unfounded. Concerning especially the allegations about the attitude of the Presiding Trial Judge, these should be interpreted within the context of the national legal system to which he belongs. Even if, after these reserves, some attitudes may be considered as regrettable, the Appellant has not established that they would lead a reasonable and informed observer to doubt the impartiality of the Presiding Judge of the Trial Chamber. This ground of appeal is accordingly dismissed.

IV. GENERAL ERRORS OF LAW

126. The Appellant puts forward ten main arguments in support of this ground of appeal. He contends that the Trial Chamber committed errors of law, each of which could invalidate the judgement or warrant the holding of a new trial.[227] The Appeals Chamber understands that he also submits, in the alternative, that the accumulation of the said errors is at the very least, such as would invalidate the convictions as a whole.[228] The alleged errors relate to the manner in which the Trial Chamber conducted the trial and assessed the evidence. The Prosecution's response is that the alleged errors do not exist or do not constitute errors of law that would invalidate the judgement.[229]

A. Error affecting the right to cross-examine[230]

127. The Appellant alleges that the Trial Chamber committed an error of law affecting the Defence's right to cross-examination provided for in Rule 85(B) of the Rules,[231] on the one hand, by preventing him from asking leading questions, and on the other hand, by directing his counsel not to challenge answers given by witnesses. He submits that the general attitude of the Trial Chamber suggests that the Chamber's conception of the notion of cross-examination is so narrow that it amounts to a negation of the principle itself and, in this instance, made it impossible for his Counsel to cross-examine the witnesses properly and to effectively rebut the evidence proffered against him. According to the Appellant, this error of law is such as would invalidate all the convictions entered against him in the Judgement.[232]

128. The Appeals Chamber recalls that the Rules do not contain any specific provision on leading questions, but instead lay down general rules on examination and cross-examination which, appear to be patterned on the *U.S Federal Rules of Evidence*,[233] and, as it stated in *Akayesu*:[234]

> "True, under this system, leading questions are allowed and used during cross-examination whereas they are not permitted during examination-in-chief. Still, in the opinion of the Appeals Chamber, the Rules take on a life of their own upon adoption. Interpretation of the provisions

[227] The characterisation "error of law" in Section IV of the Defence Appeal Brief is confirmed by the Supplemental Defence Document.
[228] Defence Appeal Brief, para. 705, which focuses not on invalidation of the Trial Judgement but on miscarriage of justice, and should be interpreted in light of the Supplemental Defence Document.
[229] Prosecution's Response Brief, para. 3.2.
[230] Supplemental Defence Document, para. 1.
[231] According to Rule 85(B) of the Rules: "Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine him in chief, but a Judge may at any stage put any question to the witness."
[232] Amended Notice of Appeal, para. 134; Defence Appeal Brief, pp. 29 to 32; Defence Reply Brief, paras. 3.02 to 3.09.
[233] Article 611 of the *U.S.Federal Rules of Evidence* is worded as follows: "(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make interrogation and presentation effective for the ascertainment of the truth; (2) avoid needless consumption of time; and (3) protect witnesses from harassment or undue embarrassment; (b) Scope of the cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may in the exercise of discretion, permit inquiry into additional matters as if on direct examination; (c) Leading questions. Leading questions should not be used on the direct examination of a witness testimony. Ordinary leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions."
[234] *Akayesu* Appeal Judgement, para. 323. See also Rule 89(A) of the Rules: "The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence."

> thereof may be guided by the domestic system it is patterned after, but under no circumstance can it be subordinated to it."

129. The Appellant offers four examples in support of his contention. The first example concerns the intervention by the Presiding Judge in response to an objection by the Prosecution chiding one of the Appellant's Counsel for making "speeches" instead of asking questions[235] during the cross-examination of Witness E:[236]

> "Mr. PRESIDENT: Yes, now we have always said to both the Prosecution and the Defence that they have to ask direct questions. They have to avoid making comments and that they have to avoid asking leading questions. We have had the situation where we have said this is not acceptable. We have noticed that sometimes there are expressions that can perhaps be attributed to the way the French language is formulated; -Am I to understand -am I right in saying-- Fine, I can understand that and I did not intervene. But in fact that is not a question. A question is simply to ask the question,' What do you mean by this?' But not to say, 'Am I to understand this is what you mean by this?" It is not the same thing. We will bear this in mind because you have raised it. But this applies to both parties. Fine, counsel you have the floor".[237]

130. The Prosecution submits that this remark by the Presiding Trial Judge within the context of the clarification he wanted cannot be taken to mean a general ban on leading questions, as the Appellant claims.[238]

131. The Appeals Chamber points out that, in any event, the reminder by the Trial Chamber that the parties should avoid asking leading questions and making comments, which was given when a witness was being cross-examined, clearly goes beyond the framework of cross-examination and, in the instant case, was not followed to the letter. Indeed, a reading of the trial record shows that, quite apart from the three examples of intervention cited in relation to Witnesses B, M and Nsanzuwera, numerous leading questions were put to the witnesses in question and to other witnesses throughout the trial, during their cross-examination, particularly by Counsel for the Appellant, and this happened without the Trial Chamber interrupting. Under these conditions, it cannot be deduced from the foregoing general remark that the Appellant was, as he claims, systematically denied the right to test the credibility of witnesses and to cross-examine them effectively by asking them leading questions.

132. The second example cited by the Appellant relates to the cross-examination of Witness B and to the Presiding Judge's intervention emphasizing that a question put by Appellant's Counsel in relation to Witness B's prior statement about RTLM Radio is a leading question, and requesting her to re-phrase it.[239]

133. The Judge's intervention should be placed in its context:

> MS. DICKSON: Thank you, Mr. President, your honours. Good afternoon Witness 'b'. Witness 'b' you told us yesterday that R.T.L.M., was the radio station of the *Interahamwe*, why did you say that?
>
> A. Did I say that it was the radio of the *Interahamwe*?
>
> Q. After a question by the Prosecutor yesterday concerning the Interahamwe, you spoke of R.T.L.M., 'their radio'. When you said 'their' were you talking about the *Interahamwe*?

[235] T, 10 June 1997, p. 56.
[236] Defence Appeal Brief, para. 30.
[237] T, 10 June 1997, pp. 57 to 58.
[238] Prosecution's Response Brief, paras. 3.10 and 3.11.
[239] Defence Appeal Brief, para. 31.

> MR. PRESIDENT: Was that not a leading question.
>
> MS. DICKSON: Well, Mr. President if you allow me, during the cross examination, I will again submit to you that the Defence should have a certain leeway in which to ask her questions. Insofar as the witness is not being favourable to us in this case. [...]
>
> MR. PRESIDENT: […] if a judge noted this, we did not note that he said anything about the R.T.L.M., and the *Interahamwe*. I didn't say you couldn't ask a question concerning that. I just simply said that this question as it was formulated, was leading. I am not trying to hinder your cross-examination. Of course if you know there is one issue that I hold particularly at heart that is that of the rights of the accused. But from time to time you must accept that sometimes you are not formulating the questions per se but rather making comments or providing commentary.[240]

134. The Appeals Chamber notes that Judge Kama's intervention came after the witness had, by his question to the Appellant's Counsel, shown that he was not sure of having made the statement ascribed to him by Counsel. The Appeals Chamber also notes that Appellant's Counsel herself acknowledged that the witness did not make the statement in question:

> MS. DICKSON: Well, in fact Mr. President, I was trying to establish the context for the witness's response because in fact during one of his answers he did not actually say R.T.L.M was *Interahamwe's* radio but in progression he presented it that way. So I wanted to in all fairness present, clarify his answer.[…][241]

135. The Appeals Chamber further points out that, contrary to the Appellant's assertion, the Defence indeed asked a leading question, insofar as the question contained some information that the wording of the question did not permit the witness to confirm or comment on. The Appeals Chamber points out that the Appellant himself considers this type of leading question unacceptable, whether during examination-in-chief or during cross-examination.[242] In such a context, the Appeals Chamber considers that the Judge's intervention is fully justified.

136. Lastly, as also appears from a reading of the trial record, the Appeals Chamber points out that the Judge finally asked the witness a question that elicited the clarification apparently sought by Counsel for the Appellant:

> MR. PRESIDENT: I am simply saying this because it seems like it is best to have the most direct and the clearest questions and that is going to be best for every one concerned.
>
> […]
>
> MR. PRESIDENT: So let me now ask the witness. Did you say yesterday when the Prosecutor asked you a question that R.T.L.M., was the *Interahamwe* radio? What did you say yesterday? Please answer Counsel Dickson's question?
>
> A: What I meant was, on this radio station there were programmes, messages that contained ethnic divisionist messages all of which tended to incite the population to kill each other.
>
> MS. DICKSON: Thank you for your clarification.[243]

[240] T, 11 June 1997, pp. 16 to 19.
[241] *Ibid*., p. 19.
[242] Defence Appeal Brief, page 28.
[243] T, 11 June 1997, pp. 20 to 21.

137. The third example given by the Appellant concerns the cross-examination of Witness M. The Appellant cites Judge Kama reproaching Counsel for the Appellant for making open suggestions, then reminding her not to ask leading questions.[244]

138. The Appeals Chamber points out that the Judge's intervention came after the following question by Appellant's Counsel upon the witness recalling the Appellant's statements enjoining the *Interahamwe* to kill Tutsis, after he had distributed weapons in Cyahafi *secteur*:

> [...] if you stayed ten meters away from a man who distributed weapons to *Interahamwe*, a person who had asked that Tutsis be exterminated, otherwise, he would come with an armored tank, wouldn't it be true to say that you are not really taking him very seriously if you stayed?[245]

The Chamber notes that the question put by Appellant's Counsel is preceded by a remark in the same tone of voice, to which the witness replied, indicating that the Appellant's statement scared him and prompted him to go back home.[246] It is in that context that the Judge intervened, pointing out to Appellant's Counsel that she was suggesting answers to the witness on the basis of her own deductions, and requesting her to re-phrase her question. In the circumstances, there is no denying that the Judge's remark seems fully justified and falls within the scope of the Judge's duty to avoid needless examination. Furthermore, it should be noted that the Judge in no way stopped Appellant's Counsel from seeking to clarify the reason behind the witness's staying on the scene during the period in question, but asked her to put clearly the question to the witness this time, without suggesting to him again that, in fact, he never took the Appellant's statement seriously.

139. The fourth example given by the Appellant in support of his contention concerns Witness Nsanzuwera and the intervention by the Trial Chamber, which, according to him, prevented his Counsel from challenging the answers.[247] The Prosecution responds that the Judge's intervention in this instance is cited out of context and that the allegation is unfounded. The Appeals Chamber points out that Judge Kama's remarks are cited only in part by the Appellant, and that they were made after his Counsel had been questioning Witness Nsanzuwera repeatedly, and for a long time, on the fact that he omitted to mention in a book he wrote, and during his previous testimony in the *Kayishema/Ruzindana* case, the year spent at the *École Normale de Shyogwe* (Teacher Training College, Shyogwe) during which he might have known the Appellant:

> You are not going to accuse him because he has been a state prosecutor. No, obviously the witness doesn't have the right to ask questions. He must answer questions but at the same time the witness cannot be compelled to answer in a specific manner and that is why I am always against questions that are repeated. Once you have asked a question you go to another question. If the answer is not suitable then you can draw the consequences. I have always said that here.[248]

The Appeals Chamber considers that the trial record [249] shows that Judge Kama intervened to put an end to a tense and sterile exchange between the witness and Appellant's Counsel, after the witness had already answered Counsel's repetitive questions. Under these conditions, the Appeals Chamber holds that the Judge's intervention lies perfectly within the framework of his role to prevent needless cross-examination.

140. To conclude on the first allegation pertaining to the violation of the Appellant's right to cross-examine witnesses, the Appeals Chamber considers that the Trial Chamber did not, as the

[244] Defence Appeal Brief, para. 31.
[245] T, 13 June 1997, pp. 16 to 17.
[246] *Ibid*., p. 16.
[247] Defence Appeal Brief, paras. 32 to 33.
[248] T, 24 March 1998, pp. 141 to 142.
[249] *Ibid.*, pp. 136 to 142.

Appellant contends, systematically prohibit leading questions during cross-examination; neither did it prevent his Counsel from challenging witnesses' answers. The Appeals Chamber holds that the interventions of the Trial Chamber mentioned by the Appellant fall within the ambit of the Presiding Judge's role to prevent the proceedings from stagnating through repetitive or confused questions, or to ensure that the Defence does not, through its questions to the witness, put words into the witness's mouth. The argument based on the alleged error of law must therefore be dismissed as unfounded.

B. Error affecting the right to raise objections

141. The Appellant alleges that the Trial Chamber committed an error of law in ruling that neither the Defence nor the Prosecution had the right to raise objections to the presentation of evidence, and thus deprived them of the opportunity ensure the proper application of the rules of evidence pursuant to the provisions of Rule 89 of the Rules.[250] He submits that to deprive the parties of the right to raise objections during the presentation of evidence amounts to depriving the Tribunal of the assistance of the parties on the essential factors for the assessment of evidence, not only with regard to its admissibility, but also as regards the weight to be attached to it. He specifies that in the instant case, the parties seriously took into account the Trial Chamber's warning and refrained from raising objections. He illustrates this contention with the remarks made by his Counsel during the cross-examination of Witness B: "The Defence is (*sic*) understood that in the case of these proceedings the Chamber will not accept for us to object."[251] He further contends that it is actually during the presentation of evidence that objections are most relevant, as obtains in accusatorial systems, and that it would be pointless to expect the parties to present in their closing arguments each item of problematic evidence. In support of this argument, the Appellant invokes the jurisprudence of the ICTY Trial Chamber in *Tadić*[252] and of the ICTR Trial Chamber in *Semanza*.[253] He submits that even if the Appeals Chamber were to hold that the error committed by the Trial Chamber did not invalidate the conviction, the principle of renunciation, namely, that he did not raise any objection during the trial, cannot be invoked against him on appeal.[254]

142. The Prosecution submits in response that, by limiting objections, the Trial Chamber's sole aim was to forestall constant and needless interruptions of the proceedings. The Prosecution further submits that the parties had, and effectively used, various means to make their objections known to the Trial Chamber.[255] According to the Prosecution, this approach conforms to the jurisprudence of the ICTY Appeals Chamber, which requires that any contentions raised on appeal must have been raised at trial, but does not require that they should have been raised in a specific manner.[256] The Prosecution emphasizes in the end that the Appellant's allegation is unfounded.[257]

143. The Appeals Chamber recalls that the Rules of the Tribunal do not contain any specific provision on the right to raise objections during the presentation of evidence. Nonetheless, Rule 89 of the Rules, which contains general rules of evidence, provides as follows:

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[250] Defence Appeal Brief paras. 35 to 37.
[251] T, 11 June 1997, p. 18.
[252] As referred to by the Appellant: *Prosecutor v. Tadić*, "Decision on Defence Motion on Hearsay", Case No. IT-94-1-T (5 August 1996), para. 19.
[253] As referred to by the Appellant: *Prosecutor v. Semanza*, "Decision on the Defence Motion for Exclusion of Evidence on the Basis of Violations of the Rules of Evidence, *Res Gestae*, Hearsay and Violations of the Statute and Rules of the Tribunal, Case No. ICTR-97-20-I (23 August 2000).
[254] Defence Appeal Brief, paras. 38 to 40; Defence Reply Brief, paras. 3.10 to 3.16.
[255] Prosecution's Response Brief, paras. 3.30 to 3.31.
[256] *Ibid*., paras. 3.32 to 3.33.
[257] *Ibid*., paras. 3.35 to 3.37.

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

144. After examining excerpts of the trial record cited by the Appellant,[258] the Appeals Chamber notes that the interruptions made by the Trial Chamber do not result from a decision to prohibit any party from presenting evidence as such. The interruptions by the Chamber were aimed at avoiding the ill-timed interruption of one party by another for the purpose of raising an objection during the examination of a witness. This position adopted by the Trial Chamber with regard to the procedure for raising an objection neither seems to be at variance with the Rules, nor with the spirit of the Statute, nor with the general principles of law, although it is not the only approach that is compatible therewith.

145. The Appeals Chamber notes that, incidentally, contrary to the Appellant's assertion, the trial record shows that the parties, notably the Defence, were able, where appropriate during the hearings, including periods outside the cross-examination of witnesses, to voice their objections before the Tribunal relating to the presentation of evidence by the other party. Furthermore, the Appellant raised by way of motion a number of objections during the trial relating to the presentation of evidence by the Prosecution. The Appeals Chamber points out that in *Tadić* and in *Semanza*, cited by the Appellant in support of his argument, the Defence also made objections by way of written motion. Accordingly, the position adopted by the Trial Chamber preserved, in a fair manner, the right of the parties to bring to the notice of the Tribunal any objections they might have had to the presentation of evidence by the other party.

146. To conclude on the second allegation pertaining to the prohibition of objections, the Appeals Chamber considers that the approach taken by the Trial Chamber does not constitute an error of law.

C. Error relating to hearsay evidence[259]

147. While not challenging the admissibility of hearsay evidence, depending on the circumstances in which the evidence is adduced, the Appellant reproaches the Trial Chamber for having admitted such evidence on a number of occasions without any caution.[260] He submits that this is an error of law such as would invalidate the Judgement. The Appellant puts forward, in support of this argument, 12 examples drawn from the testimonies of Witnesses A, H, DD, BB, AA and Expert Witness Nsanzuwera.

148. First, the Appeals Chamber notes that the Trial Chamber indeed stated in paragraph 18 of the Trial Judgement as follows:

> Pursuant to Rule 89 of the Rules, the Chamber may assess all relevant evidence which it deems to have probative value. The Rules do not exclude hearsay evidence, and the Chamber has the

[258] As referred to by the Appellant: T, 24 March 1998, p. 215, l. 1.7 to 17 and T, RU7960E, pp. 14 to 15. Defence Appeal Brief, para. 35.
[259] Supplemental Defence Document, para. 3.
[260] Defence Appeal Brief, paras. 44 to 48.

> discretion to consider such evidence. Where the Chamber decides to consider such evidence, it is inclined to do so with caution.

Before examining in detail the allegations made by the Appellant, the Appeals Chamber concurs with the legal principles recalled in the *Akayesu* Appeal Judgement that govern the two distinct issues, namely, the admissibility and assessment of hearsay evidence before the Tribunal.[261]

149. The Rules of both this Tribunal and the ICTY generally reflect a preference for direct, live, in-court testimony. Nonetheless, the jurisprudence of both Tribunals admits that Rule 89(C) of the Rules confers on the Trial Chamber a broad discretion to admit any relevant evidence which it deems to have probative value, including indirect evidence.[262] This discretion is not unlimited. However, the standard to be met before ruling any evidence inadmissible is rigorous. It was thus held that "[A] piece of evidence may be so lacking in terms of the indicia of reliability that (it) is not 'probative' and is therefore inadmissible."[263]

150. The Appeals Chamber notes that in this case, as in *Akayesu*, the Appellant challenges the admission of hearsay evidence that takes the form of direct, live, in-court testimony by witnesses in relation to events that they had not witnessed personally. The Appeals Chamber endorses the Appeals Chamber's assessment in the *Akayesu* Appeal Judgement,[264] where it was held that when a witness gives evidence, such evidence is admitted in that, in the absence of timely objection, it becomes part of the trial record, as reflected in the transcripts, and that the main safeguard regarding the assessment of reliability of evidence in this case consists in preserving the right to cross-examine the witness on the hearsay evidence that is being challenged.[265] The Appeals Chamber also considers that in such circumstances, even if the decision hinges on the facts of the case, it is unlikely at that stage in the trial, and particularly in the absence of an objection, that a Trial Chamber would decide that the indicia of reliability of a witness testimony that the Chamber has heard live would be so lacking as to negate its probative value and render it inadmissible.

151. The Appeals Chamber considers that the examples cited by the Appellant in support of this allegation may be classified into three categories.

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[261] *Akayesu* Appeal Judgement, para. 285. In footnote 499 of this Judgement, the Appeals Chamber notes that the subject has been considered in some detail by the Trial Chambers and the Appeals Chamber of the ICTY. See for example: *Prosecutor v. Duško Tadić*, Decision on Defence Motion on Hearsay, Case No. IT-94-1-T, Trial Chamber, 5 August 1996; *The Prosecutor v. Tihomir Blaškić*, Decision on the Standing Objection of the Defence to the Admission of Hearsay With no Inquiry as to its Reliability, Case No. IT-95-14-T, Trial Chamber, 21 January 1998; *Blaškić* Trial Judgement; *Prosecutor v. Zlatko Aleksovski*, Decision on Prosecutor's Appeal on Admissibility of Evidence, Case No. IT-95-14/1-AR73, ICTY Appeals Chamber, 16 February 1999 ("the *Aleksovski* Decision"); *Prosecutor v. Dario Kordić and Mario Čerkez*, Decision on Appeal Regarding Statement of a Deceased Witness, Case No. IT-95-14/2-AR73.5, ICTY Appeals Chamber, 21 July 2000 ("the first *Kordić* Decision") and *Prosecutor v. Dario Kordić and Mario Čerkez*, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and one Formal Statement, Case No. IT-95-14/2-AR73.5, ICTY Appeals Chamber, 18 September 2000 ("the second *Kordić* Decision"). The *Akayesu* Appeal Judgement notes, however, that in these cases, the Appeals Chamber and Trial Chambers were confronted with hearsay evidence in the form of either documents or formal statements which were sought to be admitted and in relation to which an opposing party had not been afforded an opportunity to cross-examine.

[262] For an interpretation of Rule 89(C) of the Rules by the ICTR, see *Akayesu* Appeal Judgement, para. 286 referred to above, and by the ICTY, see the second *Kordić* Decision, para. 24, referring to the *Aleksovski* Decision wherein it was stated that "it is well settled in the practice of the Tribunal that hearsay evidence is admissible." (para. 15). See also first *Kordić* Decision, para. 23.

[263] First *Kordić* Decision, para. 24.

[264] *Akayesu* Appeal Judgement, para. 287.

[265] This right is provided for under Article 20 (4) (e) of the Statute, which provides that in the determination of any charge against an accused, the accused shall be entitled to "examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her," and in Rule 85(B) of the Rules, which provides in particular that "examination-in-chief, cross-examination and re-examination shall be allowed in each case."

152. The first category concerns the items of hearsay recounted by the witnesses, which items have been entered into the trial record, but which the Appellant does not invoke as having been cited in the Judgement for whatever reason. The following testimonies fall into this category: Witness A's statement in reply to a question from Judge Pillay, according to which the perpetration of acts of sexual violence on women and girls was ordered instead by the leaders of the *Interahamwe*;[266] the statement by Witness DD to the effect that some Tutsi women who survived told him after the war that they had been "raped", given that the *Interahamwe* had "made them their wives and that they had been made pregnant by these men";[267] the statement by Witness BB reporting a statement at second hand that "Mr. Rutaganda had gone to the battlefield with a man named Ramazani and other *Interahamwe* and that Ramazani had been killed and that Rutaganda became afraid";[268] the statement by Witness AA that "people talked about a certain Rutaganda who was going to attack";[269] and lastly, the statement by Witness Nsanzuwera that first, there were unverified rumours to the effect that the Appellant obtained bank loans from the leader of MRND; second, that he had information from the Director of Hôtel des Milles Collines (confirmed by *Interahamwe* detainees overheard by the witness in prison), that the Appellant reportedly sold beer in the hotel in question obtained from plunder committed by the *Interahamwe*; third, that the Appellant was engaged in smuggling currency, according to *Interahamwe* detainees,[270] and fourth, and lastly, that the first defence of the *Interahamwe* arrested after the genocide was to say that they had killed on the orders of their leaders.[271]

153. The Appeals Chamber recalls that the inclusion of witness statements containing hearsay evidence in the trial record does not *ipso facto* entail one conclusion or another as to their reliability or probative value. The first example cited is clearly not in the category of hearsay, but constitutes the witness's expression of an opinion in response to a question from Judge Pillay to know whether the witness was aware of any *Interahamwe* leader who had tried to prevent the commission of the acts of sexual violence he had described. With regard to the statement that "Rutaganda" was going to attack and the statements relating to the bank loans, the proceedings clearly established that these were mere rumours. In the other cases, the trial record shows that during the examination-in-chief or cross-examination, clarifications were given on the circumstances in which the statements in question had been obtained. Upon examination, the contention that the testimonies in question had been admitted by the Chamber without caution is thus unfounded. The acts to which these testimonies refer are in fact irrelevant to the Indictment issued against the Appellant. Since the Appellant has failed to show that there was an error, this argument is accordingly dismissed.

154. The second category of examples cited by the Appellant in support of this argument relates to witness statements containing hearsay evidence, which statements have been included in the Trial Judgement as summaries of witness statements on the alleged events or as factual findings by the Trial Chamber. This category would include first of all, Witness A's statement that the Hutus who were with him at the ETO, Murundi and Molondi told him that Colonel Léonidas Rusatira had asked the Hutus to split away from the group of refugees.[272] The Appeals Chamber understands from the latest filings by the Appellant that, on this point, he is raising an issue of error of law and of fact committed by the Trial Chamber. Paragraph 299 of the Trial Judgement indicates the following:

[266] Defence Appeal Brief, p. 38 and Defence Reply Brief, para. 3.26.
[267] Defence Appeal Brief, p. 39 and Defence Reply Brief, para. 3.28.
[268] Defence Appeal Brief, p. 40 and Defence Reply Brief, para. 3.29.
[269] Defence Appeal Brief, p. 40 and Defence Reply Brief, paras. 3.29 to 3.30.
[270] Defence Appeal Brief, pp. 40 to 41 and Defence Reply Brief, paras. 3.31 to 3.32.
[271] Defence Appeal Brief, pp. 41 to 43 and Defence Reply Brief, paras. 3.32 to 3.37.
[272] Defence Appeal Brief, pp. 37 to 38 and Defence Reply Brief, paras. 3.22 to 3-25

> Colonel Léonides Rusatila (sic) separated Hutus from Tutsis at the ETO, prior to the attack, and several hundred Hutus left the ETO compound.

As concerns the admission of this hearsay evidence and the assessment of its probative value, the Appeals Chamber points out that the examination and cross-examination of Witness A afforded the Trial Chamber an appreciable number of indicia for the assessment of the circumstances in which the remarks in question, which were first hand, were heard by the witness, who was present at the scene and was a direct witness to the actual departure of the Hutus. In such circumstances, the Appeals Chamber considers that it has not been established that the Trial Chamber acted without caution, or that it exceeded its discretion by considering the said hearsay evidence as being admissible and ascribing probative value to it. The Appellant has not demonstrated further that this assessment by the Trial Chamber is unreasonable.

155. The Appeals Chamber also points out that this hearsay evidence is not directly relevant in respect of the Appellant himself, and that, with regard to the separation of Hutus from Tutsis at the ETO, the critical issue as to the Appellant's responsibility is not to know who ordered the said separation, but the fact that the separation took place. However, with regard to this last point, it is Witness A's direct evidence, not any hearsay evidence, that was taken into consideration by the Trial Chamber. Lastly, there was other evidence to the effect that Hutus and Tutsis had been separated in other places before the massacres. The Appellant has thus not established, in any event, that the alleged error, viewed from the angle of an error of law, is one that would invalidate the Trial Judgement under this count, or, viewed from the angle of an error of fact, is one occasioning a miscarriage of justice.

156. Second in this category would be the statement by Witness H, a Tutsi from Kicukiro, who was present during an attack on his house by the *Interahamwe*, after the CDR Chairman had been killed in 1994. The witness indicated that on that occasion he personally noticed the arrival of a vehicle and, upon inquiring from other persons present on the scene about the identity of those on board, learnt that it was one Gérard Karangwa and the Appellant. Paragraph 275 of the Trial Judgement summarizes the witness' statement as follows:

> Witness H, a Tutsi man from Kicukiro, testified that his house was attacked and searched in February 1994 by *Interahamwe*, armed with clubs, who had arrived shortly before a vehicle. Witness H was told that General Karangwa and the Accused /…/ were inside it.

The Appeals Chamber points out that the wording used by the Trial Chamber clearly indicates that the Chamber was not unaware of the fact that the information about the Appellant's presence in the vehicle was hearsay. The Appeals Chamber notes that the Trial Chamber seems not to have sought clarification as to the identity of the authors of the statement in question, and that the Appellant made no attempt to have it during the cross-examination of the witness. However, it is clear that at the end of the examination of the witness who was close to the original source of the reported statements (given that he was in fact present when the vehicle arrived), the Trial Chamber possessed several facts relating to the circumstances in which the statements were heard, and could thus assess the reliability of the information in question at the time it was admitted. In the circumstances, it does not appear that the Trial Chamber acted without caution, or that it exceeded its discretion in assessing the evidence by admitting the hearsay evidence. The Appeals Chamber considers that, in any event, even if the alleged error were to be proved, it would not be such as would invalidate the Judgement, inasmuch as the statements in question pertain to events not referred to in the Indictment.

157. Moreover, although there is no denying that in the Trial Judgement's reference to "General" instead of "Gérard" Karangwa, in reporting Witness H's statement, indeed constitutes an error of fact, the Appellant does not demonstrate that this occasioned a miscarriage of justice. The Appeals

Chamber notes that the events in question did not form part of the Indictment and that the Trial Chamber did not rely on them to convict the Appellant.

158. Third in the second category is the statement by Witness Nsanzuwera alleging that he heard from some members of the *Interahamwe* imprisoned after the genocide in Kigali Prison that *Interahamwe* leaders (including the former Secretary-General of MRND and the Appellant himself), were reportedly seen at the roadblocks giving orders. The said statement is summarized as follows in paragraph 363 of the Trial Judgement concerning the general allegations under paragraphs 5, 6, 7 and 8 of the Indictment:

> An expert witness for the Prosecutor, Mr Nsanzuwera, [...] also testified that the Accused was often present at roadblocks and barriers, issuing orders.

159. The Trial record reveals that, contrary to the Appellant's assertions, the Trial Chamber did not act without caution, insofar as it actually inquired about the conditions under which the said statements had been heard, and envisaged the possibility that the detainees in question made those accusations for the sole purpose of defending themselves. Once more, the Appeals Chamber holds that the admission of this hearsay evidence does not exceed the limits of the Trial Chamber's discretion in assessing evidence, as stated *supra*. In any event, the Appeals Chamber notes that the Trial Chamber does not seem to have based the conviction of the Appellant under the various charges involving the roadblocks on this hearsay evidence, but indeed on direct evidence. Hence, even if an error had been committed, it is not such as would invalidate the Trial Judgement.

160. Contrary to the foregoing two categories of statements, the third category pertaining to Witness AA's statement that Amgar Garage was "a venue for the *Interahamwe* and an *Interahamwe* headquarters" does not constitute hearsay, inasmuch as cross-examination of the witness reveals that he challenged the suggestion that he was in this case reporting rumours, and affirmed that he had personal knowledge of the matter.

161. To conclude, the Appeals Chamber holds that the argument is baseless, considering that the Appellant fails to demonstrate that the Trial Chamber misapprehended the standards set forth in Rule 89 of the Rules and, in this instance, failed to carry out its intention to assess "with caution" the hearsay evidence contained in the statements by Witnesses A, H, DD, BB, AA and Expert Witness Nsanzuwera as to their admissibility or probative value.

D. Error relating to expert evidence [273]

162. The Appellant alleges that the Trial Chamber committed errors of law relating to expert evidence, contrary to Article 24 of the Statute and Rules 89(B) and (C) and 94*bis* of the Rules, thereby invalidating the Judgement. In particular, he reproaches the Trial Chamber for refusing to conduct an inquiry into the expertise of Witnesses Heuts, Reyntjens and Nsanzuwera before hearing their evidence, or at the very least, for not satisfying itself of their expert qualifications; denying Defence Counsel the full opportunity to challenge the expertise of the last named witness, and declaring this witness to be an expert based on his status as a Rwandan and former Rwandan prosecutor; lastly, for permitting the three witnesses to offer opinions on matters clearly beyond their expertise, and for relying strongly on such evidence in the case of Witnesses Reyntjens and Nsanzuwera. The Appellant points out that the evidence of Witness Reyntjens is central to the nature and status of the *Interahamwe za MRND*, which forms the core of the charges against him, and that the admission of Witness Nsanzuwera as expert could only serve "to taint him" in the eyes

[273] Supplemental Defence Document, para. 4.

of the Trial Chamber and to unduly admit evidence that was so prejudicial to him that it must invalidate the Judgement.[274]

163. The Prosecution, basing its argument on ICTY practice and procedure, as well as on a comparative study of the case-law of both Common law and Civil law jurisdictions, replies that the admission of a person as an expert and the probative value to be attributed to his testimony is dependent on two factors. First, the Tribunal must be convinced that the expert evidence could assist it in understanding all the evidence presented or in determining a fact in issue. Second, the witness called as an expert must have sufficient skill, knowledge or experience in or related to the pertinent field so that his or her opinion or evidence will probably aid the Tribunal in the search for truth.[275] The Prosecution concludes that the Appellant's argument is unsubstantiated.[276]

164. The Appeals Chamber points out that, whereas the Rules lay down a specific procedure for admitting an expert witness's report without hearing the witness, subject to its acceptance by the opposing party,[277] they do not require a "*voir dire*" examination of the person called as an expert. The Appeals Chamber recalls that, pursuant to Rule 89(A) of the Rules, the Chambers are not bound by national rules of evidence. In the instant case, the Trial Chamber clearly chose an approach that consists in having the qualifications of the persons called as experts by the Prosecution clarified during their examination-in-chief by the Prosecution and cross-examination by Counsel for the Appellant. This amounts to admitting the witness statement before having ruled on the admission of the witness as an expert. The Appeals Chamber considers that, where the Rules are silent as to the procedure for taking expert evidence at the hearing, and in accordance with the provisions of Rule 89(B) of the Rules, this approach does not appear to be contrary to the spirit of the Statute and the general principles of law, and was such as would permit a fair determination of the case.

165. In practice, the trial record shows that the Appellant's assertion that the Trial Chamber did not allow an inquiry into the respective qualifications of the three experts called by the Prosecution is unfounded. Indeed, the said experts were heard on this point during their examination by the Prosecution, and Counsel for the Appellant had the opportunity to challenge their qualifications during their cross-examination. This is what Counsel did in the cross-examination of Expert Witnesses Reyntjens and Nsanzuwera.

166. Furthermore, with regard to Nsanzuwera, the Appeals Chamber will now examine the Appellant's assertion that the following intervention of the Presiding Trial Judge prevented him from challenging the qualifications of this witness as expert:

> We agree. It is your right to ask the questions. Those questions you are asking, well, appear normal. The witness has said that he is an expert, first of all, because he is Rwandan. He knows—he says that he knows he can give background, the history of the Interahamwe, what happened, and also he said that he has been a state prosecutor. So that is enough background for him to be considered an expert.[278]

A reading of the part of the trial record that follows this passage reveals that the cross-examination of the witness by Counsel for the Appellant on this particular point continues for long without the Presiding Judge interrupting. Although the language used by Judge Kama seems to imply that, in

[274] Defence Appeal Brief, paras. 53 to 68; Defence Reply Brief, paras. 3.38 to 3.58. See also Supplemental Defence Document, pp. 6 to 7.
[275] Prosecution's Response Brief, para. 3.82.
[276] *Ibid*., para. 3.18.
[277] Rule 94 *bis* of the Rules.
[278] T, 24 March 1998, p. 126.

his opinion, the fact that the witness served as a State prosecutor in Rwanda constitutes a sufficient basis for considering that Nsanzuwera's status as expert in this case has been established, there is no denying that the rest of the hearing enabled Counsel for the Appellant to raise a number of questions relating not only to the inadequacy of the qualification alleged, but also to the issue of neutrality. The Appellant fails to demonstrate that the Trial Chamber did not take into consideration all the issues raised at the hearing when admitting Nsanzuwera as an expert. Furthermore, in view of his previous duties as prosecutor in Rwanda, given that Nsanzuwera had information on the progress of the work of the commission set up at the Prosecutor's Office in Kigali and charged with investigating the criminal activities of the *Interahamwe* in order to identify their leaders and members with a military past, and to list the various incidents during which the different youth movements confronted one another, the Appeals Chamber holds that the Appellant has not shown that the Trial Chamber abused its discretion by admitting the witness as an expert in the instant case.

167. An examination of the examples—placed in their context—on which the Appellant relies to submit that the Trial Chamber committed an error of law in allowing the three witnesses to give opinions outside their area of expertise – in fact to speculate – shows that this allegation is unfounded. The most that the examples in question establish is that Expert Witness Heuts underscores the fact that a forensic investigator has to be more careful about his conclusions if research on explosives is conducted two years after the events, and that Professor Reyntjens takes precautions to state the limits of his research, with regard to some questions put to him. Moreover, the different questions put to Nsanzuwera about his sources of information enabled the Trial Chamber to evaluate in an informed manner the credibility of the testimony in question and the weight attached to it. The Appeals Chamber recalls in this regard that the assessment of the credibility of expert evidence is the primordial responsibility of the trier of fact, and that it has not been demonstrated in this instance that the trial judges in this case exceeded their discretion.[279]

168. To conclude, the Appeals Chamber holds that the Appellant's argument pertaining to errors of law relating to expert evidence is unfounded.

E. Errors relating to the burden of proof[280]

169. The Appellant contends that the Trial Chamber misapprehended the principles governing the burden of proof. He submits that the Trial Chamber committed six errors of law invalidating the Trial Judgement, contrary to Article 20(3) of the Statute and Rule 87(A) of the Rules, by violating the principle of presumption of innocence and by misapprehending the burden of proof that requires the Prosecution to prove the accused's guilt beyond a reasonable doubt.

170. The Appellant reproaches the Trial Chamber mainly for misapprehending the rule that all the Defence needs to do when it offers an alibi is to raise a reasonable doubt and thus shift the burden of proof. In support of his contention, he cites excerpts from the Trial Judgement on the factual findings relating to the distribution of weapons:[281]

> [...] Further the Defence did not produce any witnesses to confirm an alibi testifying that the Accused was elsewhere when the events described by the Prosecution witnesses took place, [...].[282]

[279] See *Kayishema* and *Ruzindana* Appeal Judgement, para. 210.
[280] Supplemental Defence Document, para. 5.
[281] Defence Appeal Brief, paras. 72 to 73; Defence Reply Brief, paras. 3.61 to 3.67; and Supplemental Defence Document, p. 8.
[282] Trial Judgement, para. 196.

> [...] The Defence has not provided evidence which effectively refutes the evidence presented by the Prosecutor in support of the allegations set forth in paragraph 10 of the Indictment.[283]

171. The Prosecution points out that the aforementioned passages of the Trial Judgement cited by the Appellant are quoted out of context, and that the argument reveals a misapprehension of the language used by the Trial Chamber. According to the Prosecution, the language used simply illustrates that the Trial Chamber did what it was required to do, namely, consider all the evidence presented at trial before ruling on the guilt or innocence of the Accused, without misapprehending the principle that the burden of proving guilt beyond reasonable doubt lies on the Prosecution. The Prosecution further submits that, in so doing, the Trial Chamber correctly held that the Appellant's defence was more of a bare denial than an alibi.[284]

172. The Appeals Chamber recalls that the standard of proof to be applied is that of proof beyond a reasonable doubt, and that the burden of proof lies on the Prosecution, insofar as the Accused enjoys the benefit of the presumption of innocence.[285] The Appeals Chamber also endorses the Appeals Chamber's considerations in *Kayishema and Ruzindana* whereby:

> 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.[286]

173. In response to the question as to whether the Trial Chamber did, as the second passage cited by the Appellant seems to suggest, make an erroneous application of the burden of proof and shifted it, the Appeals Chamber considers that it is first of all necessary to find out what standard was applied in respect of the burden of proof by the Trial Chamber in the Judgement beyond the impugned paragraph. In this respect, the Appeals Chamber points out that Section 1.4 of the Trial Judgement dealing with evidentiary matters does not set out the standard applicable to the burden of proof.

174. An analysis of parts of the Trial Judgement dealing with the Chamber's factual findings relating to paragraphs 11 to 18 of the Indictment helps to show that the Trial Chamber actually indicated that the onus was on the Prosecution to prove the charges brought against the Appellant beyond a reasonable doubt, and then went on to apply this standard by acquitting the Appellant of the charge against him when it deemed that the Prosecution had not discharged this burden.

> However, the Chamber notes that the Prosecutor has not led evidence to the effect that the *Interahamwe* manning the roadblock had been stationed there by the Accused. Hence, the Chamber finds that it has not been proven beyond reasonable doubt that the Accused stationed *Interahamwe* members at the said roadblock.[287]

> The Chamber notes however that only Prosecution Witness V had testified that the Accused had chaired the meeting and had taken the floor. The Chamber notes that V's testimony on this point is not corroborated by those of Witnesses C and EE, both of whom had declared that the Accused was indeed present at the meeting and had taken a seat at the table of speakers but had himself not taken the floor. Accordingly, the Chamber holds that, on the basis of uncorroborated testimonies

[283] *Ibid*.
[284] Prosecution's Response Brief, paras. 3.137 to 3.140.
[285] See in particular *Kayishema* and *Ruzindana* Appeal Judgement, para. 107.
[286] *Ibid*., para. 113.
[287] Trial Judgement, para. 226 (cp. also paras. 260, 261, 299, 304, 314, 336, 337).

> presented to it, it has not been proven beyond a reasonable doubt that the Accused ordered that all Tutsis be tracked and thrown into the river.[288]

175. The Appeals Chamber further underscores the fact that, incidentally, the Trial Chamber explicitly recalled the standard of the burden of proof in most of its legal findings.[289] It is therefore not correct to claim, as the Appellant does, that the Trial Chamber in general misapprehended the principle of presumption of innocence and of burden of proof.

176. The Appeals Chamber considers next that it would be proper to place the passages cited by the Appellant in their context. Paragraph 196 of the Trial Judgement falls within the purview of the factual findings of the Trial Chamber in relation to the charges under paragraph 10 of the Indictment dealing with the distribution of weapons. After finding in paragraph 195 of the Trial Judgement that Prosecution Witnesses J, U, T and Q were credible, and deciding to rely on their testimonies, the Trial Chamber examined in paragraph 196 of the Judgement the Appellant's rebuttal of the evidence brought against him in respect of this charge. The paragraph in question reads as follows:

> The Chamber notes that the testimony of the Accused and Witness DDD indicates that the Accused did leave his house on 8 April, and that he was in Kigali at the Amgar office on 15 April and on 24 April. His defence to the allegations set forth in paragraph 10 of the Indictment is a bare denial. The Chamber notes that under cross-examination, the Defence did not suggest to the Prosecution witnesses that the Accused had not participated in the distribution of weapons, or that he was not present at Nyarugenge *commune* on 8, 15 and 24 April 1994. Further *the Defence did not produce any witnesses to confirm an alibi* by testifying that the Accused was elsewhere when the events described by the Prosecution witnesses took place, as he does in respect of other allegations in the Indictment. A number of Defence witnesses testified that the Accused was very busy selling beer after his return to Kigali on 14 April, but the Chamber considers that selling beer would not have precluded the Accused from also engaging in the distribution of guns as alleged by the Prosecutor. *For these reasons, the Chamber considers that the Defence has not provided evidence which effectively refutes the evidence presented by the Prosecutor in support of the allegations set forth in paragraph 10 of the Indictment.* (Emphasis added)

177. The Appeals Chamber considers that the language used by the Trial Chamber in the last sentence of the paragraph in question is ambiguous with respect to the standard of proof applied, particularly as the said standard has not been previously enunciated in the Judgement. The Appeals Chamber nonetheless concurs with the findings of the Appeals Chamber in *Musema*, which did not consider that the fact that the Trial Chamber assessed "the relative weight and probative value to be accorded to each piece of evidence in the context of all other evidence presented to it in the course of the trial," did not allow for the conclusion that it had shifted the burden of proof, but, on the contrary, was proof of the correct application of the relevant rules of procedure and evidence. In the instant case, it appears that the Trial Chamber first considered that the testimonies of four of the witnesses called by the Prosecution in support of this charge were credible and reliable; and next it considered whether the Appellant's rebuttals were sufficiently supported. The Appeals Chamber understands that this approach is in line with the first passage cited by the Appellant. The Appeals Chamber understands the expression "the Defence has not provided evidence which effectively refutes the evidence presented by the Prosecutor" to mean that, according to the Trial Chamber, the evidence adduced by the Appellant in support of his denial of the charges was not sufficient to cast reasonable doubt on the issue as to whether the Prosecution had discharged the burden of proof beyond a reasonable doubt. The last sentence of the paragraph illustrates this position:

[288] *Ibid*., para. 315.
[289] Cp. for example, Trial Judgement paras. 385, 388, 390, 391, 393, 394 and 397.

> A number of Defence witnesses testified that the Accused was very busy selling beer after his return to Kigali on 14 April, but the Chamber considers that selling beer would not have precluded the Accused from also engaging in the distribution of guns as alleged by the Prosecutor.

178. Accordingly, an analysis of the Trial Chamber's approach in assessing the evidence presented before it by the parties shows that in this instance, it did not depart from the approach used in the rest of the Judgement, and did not apply a different standard of proof nor, as a result, commit an error of law in this respect.

179. The Appellant also raises, in support of his argument, the alleged violation by the Trial Chamber of the rule that the Accused should be given the benefit of the doubt because: first, it considered in paragraph 195 of the Trial Judgement (distribution of weapons) that Witness J was credible on the grounds that, during cross-examination, he had given reasonable answers to the questions put to him regarding the discrepancies between his testimony and his statement prior to the trial;[290] second, it considered in paragraph 253 of the Judgement (attack at the Amgar garage), with regard to Witness Q, "that the said contradictions can probably be attributed to the trauma he may have suffered from having to recount the painful events he witnessed and of which he was a victim";[291] third, it considered as negligible the contradiction between the testimonies of Professor Haglund and of Witness Q and dismissed, in paragraph 259 of the Judgement, the findings by the former on the ground that the Trial Chamber was "not satisfied that the grave site referred to by Witness Q and the one exhumed by Professor Haglund are one and the same."

180. In response, the Prosecution submits that the Trial Chamber, in general, ascribes probative value to the evidence before it based on its relevance and credibility, and that at the end of the proceedings the Prosecution should discharge its burden of proving that all the elements of the crime have been established beyond a reasonable doubt.

181. The Appeals Chamber considers that the aforementioned passages of the Judgement relating to the Trial Chamber's assessment of the probative value of the testimonies of J and Q clearly show that the Chamber actually considered the testimonies to be credible and reliable after having measured the scope of the discrepancies referred to above. There is nothing to show that following this assessment the Trial Chamber entertained any doubts on the matter, as the Appellant's allegation seems to suggest. The Appeals Chamber notes that the examples cited *supra* have also been used by the Appellant as allegations of factual errors in support of his ground of appeal pertaining to the distribution of weapons and to crimes committed at Amgar garage. The Appeals Chamber will thus re-endorse the relevant findings it made with reference to those grounds of appeal under Parts VI and VII of this Judgement. The Appeals Chamber holds that the argument that the examples in question also reflect a violation of the rule that the Accused should be given the benefit of the doubt is clearly unfounded.

182. The Appellant also submits that the approach taken by the Trial Chamber with regard to the non-corroboration of evidence denotes a violation of the principle that it is the Prosecution's duty to prove the charges beyond a reasonable doubt. The Appellant refers in particular to a passage in paragraph 18 of the Trial Judgement:

> *The Chamber's approach is that it will rely on the evidence of a single witness, provided such evidence is relevant, admissible and credible.*

[290] Defence Appeal Brief, paras. 74 to 75. Defence Reply Brief, paras. 3.68 to 3.72.
[291] *Ibid*.

The Appellant submits that, where corroboration of some evidence is not effectively requested, it is not sufficient for the said evidence to be "relevant, admissible and credible" for it to serve validly as the only basis for conviction; it must also be sufficiently strong to be believed beyond all reasonable doubt.[292] The Prosecution does not respond specifically to this contention.

183. With reference to paragraph 18 of the Trial Judgement, the Appeals Chamber notes that the French version of the passage cited above differs significantly from the English, without such difference affecting the assessment of the contention raised by the Appellant. The French version reads as follows:

> La Chambre note qu'aux termes de l'Article 96i), la corroboration du témoignage de la victime n'est pas requise en cas de viol et de violences sexuelles. La Chambre s'associe aux *Jugement Akayesu* et au *Jugement* « *Le Procureur contre Dusko Tadic* » (le « *Jugement Tadic* ») selon lesquels le fait que le Règlement stipule que la corroboration du témoignage de la victime de violences sexuelles n'est pas requise n'autorise pas à déduire que la corroboration de témoignages est nécessaire dans les cas de crimes autres que les violences sexuelles. Toutefois, la Chambre examinera avec prudence tout témoignage unique. *Elle pourrait s'en contenter pour autant qu'elle le juge pertinent, recevable et crédible*. Conformément à l'Article 89 du Règlement, la Chambre peut recevoir tout élément de preuve pertinent dont elle estime qu'il a valeur probante. Le Règlement n'exclut pas la preuve par ouï-dire et la Chambre est libre d'examiner des preuves de cette nature. Cependant, lorsqu'elle décide de le faire, la Chambre procède en toute précaution[293]

184. The Appeals Chamber considers that paragraph 18 of the Judgement contains a relevant and accurate statement on the application of the rules of evidence, drawn on the Rules and case-law of the Tribunal with respect to the evidence of a single witness, hearsay evidence, and the principle of caution related thereto. The indication by the Trial Chamber that it would rely on the evidence of a single witness, so long as it considered such evidence relevant, admissible and credible, should not be interpreted to mean a misapprehension of the general rule of evidence, which requires the Prosecution to prove its case beyond a reasonable doubt. As indicated earlier, although Section 1.4 of the Judgement devoted to evidentiary matters does not contain a reminder of the principle relating to the burden of proof, the Trial Chamber well and truly applied it throughout the Judgement. The Appeals Chamber finds no reason to think that the passage cited, which is perfectly compatible with this principle, would signify that the Trial Chamber implicitly decided not to apply the principle in respect of uncorroborated evidence. The argument must therefore be dismissed.

F. Error relating to prior witness statements [294]

185. The Appellant submits that the Trial Chamber committed an error of law by adopting erroneous and general criteria in its assessment of the contradictions between witnesses' prior statements and their in-court testimony, with a view to minimizing their importance.[295] According to him, this error has occasioned an incorrect assessment of the evidence presented by the Prosecution, and this calls for a retrial.[296] In support of his allegations, the Appellant invokes in particular the Judgement rendered in *Kayishema and Ruzindana*.[297]

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[292] Defence Appeal Brief, paras. 78 to 79.
[293] Emphasis added and references omitted.
[294] Supplemental Defence Document, para. 6.
[295] Defence Appeal Brief, paras. 82 to 93; Defence Reply Brief, paras. 3.73 to 3.80; Supplemental Defence Document, p. 9.
[296] Supplemental Defence Document, p. 11 and Defence Appeal Brief, para. 93.
[297] Defence Appeal Brief, paras. 83, 84, 87, 88 and 93. According to the Prosecution, the Trial Chamber which heard the *Kayishema and Ruzindana* case was merely stating the standard applicable in all cases, namely that "it is not for the Trial Chamber to search for reasons to excuse inadequacies in the Prosecution's investigative process." (*Kayishema and Ruzindana* Judgement, para. 78 cited in Prosecution's Response Brief, para. 3.148).

186. The Appellant specifically refers to paragraph 19 of the Trial Judgement, which reads as follows:

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

187. The Appellant advances the following main arguments:

- The Appeals Chamber should attach little weight to the references in which the Trial Chamber was concurring with the reasoning in the *Akayesu* Trial Judgement.[298] The Prosecution submits in rebuttal that this argument has no legal basis. According to the Prosecution, there is no provision in the Rules to stop the Trial Chamber from relying on its earlier decisions, unless an error of law can be demonstrated;[299]

- The Trial Chamber was speculating when it considered that the discrepancies could have resulted from errors in the transcripts of prior statements or from errors in translation thereof, without allowing Counsel for the Appellant to establish whether this was indeed the case.[300] The Appellant emphasizes that his motions seeking disclosure by the Prosecution of tapes or cassettes or notes of witness interviews, which would have helped him to determine whether or not there was such an error, were only considered belatedly by the Trial Chamber, which dismissed them;[301]

- The Trial Chamber erroneously relied on the time lapse between the events and the appearance of the witness in order not to take the discrepancies into account.[302] The Appellant submits that this argument enabled the Trial Chamber to shield the credibility of Prosecution witnesses from challenges based on the discrepancies, and to neutralize any negative impact that failing memories could have on the testimony of witnesses. The Prosecution, on the contrary, considers that it was proper for the Trial Chamber to take these factors into consideration;[303]

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[298] Defence Appeal Brief, para. 83.
[299] Prosecution's Response Brief, para. 3.147.
[300] Defence Appeal Brief, paras. 85 to 86.
[301] The Appellant stated that he filed a motion before the Trial Chamber on 23 June 1997, then a second "formal" motion on 31 October 1997 seeking disclosure of any tapes or cassettes or notes of witness interviews by investigators, and that the "*Decision on the Defense motion for disclosure of evidence*" was rendered on 4 September 1998 (Defence Appeal Brief, para. 85).
[302] Defence Appeal Brief, para. 87.
[303] Prosecution's Response Brief, paras. 3.149 to 3.151.

- According to the Appellant, the Trial Chamber committed an error of law in holding that the discrepancies between prior statements and in-court testimony should be discounted because the statements were not taken by judicial officers.[304] In his opinion, discrepancies of this nature affect the credibility of a witness, unless the witness can convincingly explain them away. The Appellant submits that the Trial Chamber erred by confusing the use of the said statements as hearsay with their use in determining the extent of the contradictions and their effect on the credibility of witnesses. He submits that it does not matter whether those statements were taken under oath, as prior statements are not presented as hearsay evidence in order to prove the truth of their content, but simply to impeach the credibility of the witness in view of apparent contradictions;

- The Trial Chamber committed an error by adopting a general policy that gives precedence to in-court testimonies.[305] The Prosecution submits that this argument is unfounded, because the Chamber, in its opinion, made a rational assessment of the contradictions that arose from prior statements.[306]

188. Before any other consideration, the Appeals Chamber recalls that the Trial Chamber is primarily responsible for assessing and weighing the evidence presented at trial and, in this regard, it is for the Trial Chamber to consider whether a witness is reliable and whether the evidence presented is credible.[307] In so doing, it is incumbent on the Trial Chamber to take an approach it considers most appropriate for the assessment of evidence.[308] Hence, when the Appellant relies on the *Kayishema* and *Ruzindana* Judgement[309] to contend that the approach taken by the Trial Chamber to assess the evidence in the instant case is inappropriate, he is raising an argument that the Appeals Chamber considers irrelevant. Furthermore, the Appeals Chamber considers as baseless the assertion that it should attach little weight to references by the Trial Chamber to the decision in *Akayesu*, on the ground, *inter alia*, that the composition of the Chambers was the same. In fact, Trial Chambers, which are courts with coordinate jurisdiction, are not mutually bound by their decisions, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive. The fact that a bench of the Trial Chamber comprises the same Judges in any two cases does not alter the validity of this principle.[310]

189. With regard to the argument alleging the adoption of a general policy which gives priority to in-court testimony, the Appeals Chamber recalls the view expressed in *Akayesu* that "such a general finding is, in the circumstances of a particular case, properly open to a Trial Chamber, but it is not, as suggested, reflective of a 'policy'."[311] After recalling the context in which Trial Chambers can consider prior statements,[312] the Appeals Chamber concluded in this case that it was incumbent on the Trial Chamber to assess and weigh the evidence before it, in the circumstances of each

[304] Defence Appeal Brief, paras. 88 to 89. He recalls that in common law jurisdictions, prior inconsistent statements may be admitted to show that they contradict statements made on the witness stand, even though they are not admissible as hearsay to prove the truth of their content.
[305] Defence Appeal Brief, para. 92.
[306] Prosecution's Response Brief, para. 3.152.
[307] *Akayesu* Appeal Judgement, para. 132 referring to the *Aleksovski* Appeal Judgement, para. 63, *Tadić* Appeal Judgement, para. 64 and *Furundžija* Appeal Judgement, para. 37.
[308] *Kayishema* and *Ruzindana* Appeal Judgement, para. 119.
[309] The Appellant refers to paragraphs 77 and 78 of the *Kayishema/Ruzindana* Trial Judgement.
[310] *Aleksovski* Appeal Judgement, para. 114.
[311] *Akayesu,* Appeal Jugement, para. 133 *in fine.*
[312] *Ibid.*, paras. 134 and 135.

individual case, to determine whether or not the evidence of the witness as a whole was relevant and credible.[313]

190. The Appeals Chamber in the instant case reiterates its findings in *Akayesu* and, upon analysing the Judgement, dismisses the Appellant's arguments. Indeed, contrary to Appellant's contentions, it seems that the Trial Chamber did not adopt a general policy that gives precedence to direct testimony. The Chamber instead assessed the credibility of witnesses and the reliability of their testimonies in light of the contradictions in their prior statements, and took into consideration the fact that the witnesses gave reasonable answers to the questions put to them about the contradictions.[314] In so doing, it did not hesitate to hold that material contradictions could not stand up to the scrutiny of cross-examination [315] and to dismiss the testimony it considered to be unreliable [316] when the contradictions between the pre-trial statement of a witness and his testimony before the Chamber were such as to cast doubts on the probative value of the evidence, or on the overall testimony where the contradictions were of a material nature.

191. The Appeals Chamber will now consider the Appellant's argument that the Trial Chamber belatedly considered, and subsequently denied, his request for disclosure of investigators' tapes, cassettes or notes on witness interviews. He submits that access to the said tapes and notes would have enabled him to ascertain the reliability of the translations. It would be proper to recall the context in which the said request for disclosure was made. The Trial Chamber's decision of 4 September 1998 referred to above addresses the Defence Motion dated 30 October 1997.[317] The relevant excerpts from this motion read thus:

> 32. The specific request in the applicant's request for disclosure of 23 June, was as follows, as seen in document RD-2:
>
> "Any tape, cassette, or notes from an interview written during the collection of statements from witnesses you have presented or intend to present."
>
> 33. This request was made by the applicant because the witnesses in the present case have already stated that their written statements do not faithfully reflect the contents of their interviews with the investigators of the Tribunal.
>
> 34. In paragraph 3, the Trial Prosecutor indicates that he is not aware of having any tape, cassette or notes on interviews with witnesses he has called or intends to call before the Tribunal.
>
> 35. It is possible for the Prosecutor to ask the investigators within her own office, whether such cassettes or notes of interviews with witnesses exist.
>
> 36. If these tapes do exist, they are vital for the cross-examination of prosecution witnesses.

[313] *Ibid.*, para. 135.
[314] Cp., for example, Trial Judgement, para. 195.
[315] The Appeals Chamber emphasizes that, in this case, the Trial Chamber made several references in the Trial Judgement to the cross-examination of Prosecution witness during which the issue of contradictions between their in-court testimony and their prior statements was raised. Cp., for example, Trial Judgement, para. 195 (Witness M), para. 227 (Witness HH), paras. 245 to 247 (Witness Q), para. 272 (Witness A), para. 282 (Witness DD), para. 327 (Witness AA).
[316] Trial Judgement, paras. 195 and 227 concerning Witnesses M and HH respectively. Concerning Witness HH, the Trial Chamber followed the same reasoning and held that the witness had not given a convincing explanation for the substantial differences, as emphasized by the Defence, between the testimony before the Tribunal and the statement made to the investigators.
[317] The decision referred to earlier states that the Defence motion is based on Rules 66, 67, 68 and 70 of the Rules.

> 37. The Prosecutor has no justifiable grounds for not verifying whether or not these tapes exist and transmitting the results of her inquiry to the Defence.[318]

192. The Appeals Chamber notes that the Prosecution's filings in response to the Motion of 30 October 1997 show that the Prosecution discharged its duty under Rule 66(B) of the Rules on this point by disclosing the documents, reports and video cassettes in its custody.[319] A reading of the Decision of 4 September 1998 also shows that after distinguishing the obligation to disclose under Rule 66(A)(i) and (ii), the right to inspect books, documents and other materials which are material to the preparation of the defence under Rule 66(B), and the obligation to disclose under Rule 68 of the Rules, the Trial Chamber correctly held, on the basis of the aforementioned filings by the Prosecution, that the Prosecution had fulfilled all of its obligations, with the exception of those pertaining to four witnesses.[320] If this were not the case, as the Appellant seems to suggest, with regard to access to recordings of witness statements, it was his duty to bring this issue to the attention of the Trial Chamber.

193. Lastly, the Appellant cannot validly raise the issue that the Trial Chamber considered his motion belatedly, whereas, during cross-examination of one witness in particular, he never raised the issue that he was still denied access to recordings of the witness statement that was made before the Office of the Prosecutor.

194. With regard to the argument that the Trial Chamber minimized the contradictions between prior statements and in-court testimony by advancing various reasons, such as errors in transcription, time lapse, and the fact that the statements were not taken by judicial officers, the Appeals Chamber reiterates the findings in the *Akayesu* Appeal Judgement in relation to arguments that are similar in many respects.[321] The Appeals Chamber in that instance found no error in this reasoning, and held "that it is within the Trial Chamber's discretion, after seeing a witness, hearing their testimony (and that of other witnesses) and observing them under cross-examination, to accept or reject such testimony."[322] The Appeals Chamber considers, in the case at bar, that the Appellant has not put forward any convincing arguments that would call into question the findings of the Appeals Chamber in *Akayesu*, whereby the above-mentioned factors, which are often taken into account by any Trial Chamber of an International Tribunal, and were considered in the *Čelebići* case,[323] are valid and reasonable.

195. The Appeals Chamber holds the view that the Trial Chamber took into consideration the factors referred to above as part of its assessment of the impact of contradictions on witness credibility, but did not use them for the purpose of ignoring the contradictions between prior statements and testimony before the Chamber, as demonstrated above.

196. For these reasons, the Appeals Chamber holds that the Trial Chamber did not commit any error of law and, accordingly, dismisses the argument relating to prior witness statements.

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[318] Request of the Defence for and Order for Disclosure, dated 10 October 1997 and registered on 31 October 1997.
[319] Response of the Office of the Prosecutor to the Request of the Defence for an Order for Disclosure, filed on 5 February 1998.
[320] The Chamber ordered disclosure with respect to three of these witnesses, and stated that the issue of the protective measures requested by the Prosecution for Witness JJ was still pending.
[321] Cf., for example, *Akayesu* Appeal Judgement, paras. 143 and 146.
[322] *Akayesu* Appeal Judgement, para. 147.
[323] *Čelebići* Appeal Judgement, paras. 496 to 498.

G. Errors relating to the assessment of witness credibility[324]

197. The Appellant submits that the Trial Chamber committed errors of law in its assessment of the credibility of witnesses. In the Appellant's view, the Trial Chamber misunderstood, on the one hand, the relation between false testimony (Rule 91 of the Rules) and its function as a Trial Chamber in evaluating evidence,[325] and, on the other hand, the significance of the Defence submission on "witness tainting".[326]

198. Consequently, the Appellant contends that Prosecution evidence was never properly assessed and that he was not given the benefit of the presumption of innocence. The Appellant submits that this calls for a retrial, where a proper assessment of the evidence can be undertaken.[327]

1. Application of Rule 91 of the Rules

199. The Appellant focuses on the following passage in paragraph 20 of the Trial Judgement, which reads as follows:

> […] This Chamber reaffirms its position that false testimony is a deliberate offence which requires wilful intent on the part of the perpetrator to mislead the Judge and thus to cause harm. The onus is on the party pleading a case of false testimony to prove the falsehood of the witness's statements and to establish that they were made with harmful intent, or, at least, that they were made by a witness who was fully aware that they were false. To only raise doubt as to the credibility of the statements made by the witness is not sufficient to reasonably demonstrate that the witness may have knowingly and wilfully given false testimony. In the Chamber's view, false testimony cannot be based solely on inaccurate statements made by the witness, but rather requires wilful intent to give false testimony […].[328]

200. The Appellant submits that, in view of the fact that this passage falls under the part of the Judgement dealing with evidentiary matters, it does not represent a mere summary of his unsuccessful motions to establish that there were false testimonies during the proceedings. According to him, this paragraph reflects the fact that the Judges took the view, during their deliberations, that they were not bound to consider the allegation that a witness may have lied in his testimony, unless the party making the allegation established the falsehood of the testimony and the witness's intent. The Appellant contends that by so doing, with respect to Prosecution witnesses, the Trial Chamber shifted the burden of proof, and, thus, committed an error of law.[329]

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[324] Supplemental Defence Document, para. 7.

[325] Supplemental Defence Document, para. 7 (3). Defence Appeal Brief, para. 94. The Appellant submits, *inter alia*, that the Trial Chamber committed an error of law by relying on Rule 91 of the Rules in order not to take into account the possibility that Prosecution witnesses had given false testimony. Under this Rule, "If a Chamber has strong grounds for believing that a witness may have knowingly and wilfully given false testimony, the Chamber may direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony."

[326] Supplemental Defence Document, para. 7(4). Defence Appeal Brief, para. 94. For the Appellant, the fact that the Trial Chamber treated Defence allegations of witness "tainting" as objections to hearsay, shows that the Judges misapprehended the significance of the question of "tainting" and, in so doing, committed an error of law. Defence Appeal Brief, paras. 94 to 102; Defence Reply Brief, paras. 3.81 to 3.83; cf. also T(A), 4 July 2002, pp. 50 to 52.

[327] Cf. Supplemental Defence Document, p. 12. The Prosecution, for its part, considers that, in general, the Appellant gives an erroneous interpretation of the scope and purpose of the Trial Chamber's application of Rule 91 of the Rules. For the Prosecution, what the Appellant proposes to the Appeals Chamber is purely speculative and the Appellant does not show, with the aid of specific references, that an error exists, but merely suggests the possibility of an error. The Prosecution submits that paragraph 20 of the Trial Judgement shows that all the Trial Chamber did was to draw a distinction between Rule 91 and the general criteria for the evaluation of witnesses. (Cf. Prosecution's Response Brief, paras. 3.154 to 3.162).

[328] Footnotes omitted.

[329] Defence Appeal Brief, para. 97.

201. The Appeals Chamber first of all emphasizes that the Appellant cites only part of paragraph 20 of the Trial Judgement. He omits the passages immediately preceding and following the passage he cites in support of his contention, which passages are indeed indispensable in understanding the reasoning followed by the Trial Chamber.

202. Indeed, paragraph 20 starts with the Trial Chamber recalling that the Defence filed motions in the course of the trial requesting investigations of alleged false testimony against two Prosecution witnesses, and that the said motions were dismissed by the Trial Chamber and that this decision was upheld on appeal.[330] It is directly within the context of these motions that the Trial Chamber recalls the interpretation of the requirements of Rule 91 of the Rules cited by the Appellant.

203. The passage which follows is even more crucial. In that passage, the Trial Chamber recalls the distinction made by the Appeals Chamber in the instant case in 1998[331] between the credibility of witness testimony and the false testimony of a witness, in that the testimony of a witness may lack credibility without such testimony amounting to false testimony within the meaning of Rule 91 of the Rules.[332] The Trial Chamber clearly followed this distinction, and there is nothing to support the view advanced by the Appellant that it applied a different reasoning during its deliberations. Moreover, it has not been demonstrated that the Chamber refused to consider the Defence arguments calling into question the credibility of a Prosecution witness on the pretext that the Defence did not prove the falsehood of the witness' testimony and/or the wilful intent of the witness to mislead the Trial Chamber. The Appeals Chamber is satisfied that, apart from the Defence motions requesting an investigation of possible false testimonies by Witnesses U and CC, which, logically, were considered by the Trial Chamber under Rule 91 of the Rules, the very Trial Chamber went on, in accordance with Rule 89(C) of the Rules, to assess the credibility of all the witnesses and the probative value of their testimonies after the hearings.[333] The Appeals Chamber accordingly holds that the Trial Chamber did not commit the error of law alleged.

2. Question of "witness tainting"

204. The Appellant, in this contention, focuses specifically on the situation of some Prosecution witnesses who admitted that, following the events referred to in the Indictment, they had cooperated with the new government or had been conveyed to the mass grave sites at Amgar.[334] Further, the Defence asserts, on the basis of the testimony of Professor Reyntjens, that some witnesses cooperated, had links with or were influenced by the *Ibuka* Organization, which, according to Professor Reyntjens, allegedly paid people to give false testimony.[335] The Appellant reproaches the

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[330] These motions were addressed in two decisions of the Trial Chamber dated 30 and 31 March 1998 respectively. (Cf. "*Decision on the defence motion to direct the Prosecution to investigate the matter of false testimony by Witness 'CC'*" and "*Decision on the Defence motion to direct the Prosecutor to investigate the matter of false testimony by witness 'E'*"). The Appeals Chamber dismissed the appeal lodged by the Defence on 8 June 1998 (Cf. "*Decision on appeals against the Decisions by Trial Chamber I rejecting the Defence motions to direct the Prosecutor to investigate the matter of false testimony by witnesses 'E' and 'CC'*").

[331] "*Decision on appeals against the Decisions by Trial Chamber I rejecting the Defence motions to direct the Prosecutor to investigate the matter of false testimony by witnesses 'E' and 'CC'*", *The Prosecutor v. Georges Rutaganda*, Case No. ICTR-96-3-T, 8 June 1998.

[332] Apart from the passage referred to by the Appellant, the Trial Chamber points out in paragraph 20 that "During the trial proceedings, the Defence filed motions requesting investigations of the alleged false testimony against two of the Prosecutor's witnesses. The Appeals Chamber dismissed these appeals. […] The Appeals Chamber pointed out that there is a clear distinction between the credibility of witness testimony and false testimony of a witness. The testimony of a witness may lack credibility, but this does not necessarily mean that it amounts to false testimony falling within the ambit of Rule 91." (Footnotes omitted).

[333] Cf., for example, Trial Judgement para. 195 (concerning Prosecution Witness M) and para. 227 (Witness H).

[334] Defence Appeal Brief, paras.100 to 102.

[335] Defence Appeal Brief, para.100. The Appellant refers to the T, 17 June 1999, pp. 21, 22 and 38.

Trial Chamber for not taking these facts into consideration in the Judgement, and considers that this constitutes a serious omission in as much as there were serious reasons to apprehend the phenomenon of "witness tainting". To support his allegations, the Appellant refers specifically to paragraph 21 of the Trial Judgement[336] which, in his view, reveals that the Trial Chamber misunderstood his submissions with regard to the impact that possible collaboration between witnesses and government officials could have had on the evidence. He alleges that by finding that this was neither a matter of "contamination" nor of "illegal means of collecting information", but rather of hearsay,[337] the Trial Chamber committed an error of law.

205. Before considering any other issue, the Appeals Chamber points out that the statement by Professor Reyntiens that the *Ibuka* Organization paid people to give false evidence cannot, *per se*, constitute a sufficient ground for excluding, in a general manner, the testimony of Prosecution witnesses, or the testimony of persons who collaborated with the new government in any manner whatsoever.

206. The first issue the Appeals Chamber must address is whether the Trial Chamber committed an error in finding that it was dealing with hearsay, and not "contamination". The Appellant refers particularly[338] to Witnesses Heuts,[339] J[340] and M.[341]

207. The Appeals Chamber recalls that the task of weighing and assessing evidence lies, first, with the Trial Chamber, and that it is therefore for the Trial Chamber to determine whether or not a witness is credible.[342] Furthermore, it falls to the Trial Chamber to take the approach it considers most appropriate for the assessment of evidence.[343] As concerns hearsay, it should be pointed out that it is not, *per se*, inadmissible, and that it is up to the Trial Chamber to assess with caution and on a case-by-case basis each evidentiary material of this nature, in accordance with the provisions of Rule 89 of the Rules.[344]

208. With regard to Witness Heuts, the Appeals Chamber emphasizes that during the cross-examination of this witness on the issues raised by Counsel for the Appellant, the said Counsel never raised any objection relating to the question of "tainting". Furthermore, the Trial Chamber made no reference to this witness's testimony in the Judgement. The witness himself characterized his evidence as hearsay.[345] Moreover, the Appellant in no way demonstrated that this witness had been "tainted".

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[336] Paragraph 21 of the Judgement reads thus: "The Chamber notes the Defence submission that some of the Prosecution witnesses are unreliable because they testified to events that they previously heard other people talk about, and that therefore the Prosecution's case is marred by "contamination". The Defence also submitted that some of the evidence was obtained by illegal means, which rendered it inadmissible. The Chamber finds that this is neither a matter of "contamination", nor of "illegal means of collecting information", but of hearsay." (Footnotes omitted).

[337] Notice of Appeal, para. 94, and Defence Reply Brief, para. 3.83.

[338] Defence Appeal Brief, para. 101 (a) to (c). The Appellant also refers to a witness who, for security reasons, is unidentified. The Appeals Chamber is therefore not in a position to assess the Defence allegations relating to this witness.

[339] The Appellant refers to T, 20 March 1997, p. 15 and T, 19 March 1997, pp. 35 and 36. The Appellant wonders why the *conseillers* refused to let the witness enter a house situated near the Nyanza road junction, where the victims' bodies were kept. According to him, there may have been no bodies kept in that house, but the authorities claimed the opposite so as to exaggerate the number. (Defence Appeal Brief, para. 101 (b)).

[340] The Appellant refers to T, 13 June 1997, p. 97.

[341] The Appellant refers to T, 13 June 1997, pp. 30 and 43.

[342] *Musema* Appeal Judgement, para. 18.

[343] *Kayishema* and *Ruzindana* Appeal Judgement, para. 119.

[344] *Akayesu* Appeal Judgement, para. 288. Cf. Section C of this Title.

[345] Witness Heuts did state the following "The *conseillers*, both of them, they told me that the victims who came out of the graves were temporarily stored in that house." (T, 19 March 1997, p. 35).

209. Next, the Appellant makes reference to Witnesses J and M [346] whose evidence the Trial Chamber took into consideration in respect of the charges related to the distribution of weapons.[347] The Chamber, *inter alia*, considered that Witness J was credible. In this instance, the Appeals Chamber is of the view that the Defence has not demonstrated in what way the fact that Witness J was a civil servant was sufficient to call into question his credibility.[348] Concerning Witness M, the mere fact that he had held a position of authority, or wielded the necessary influence to obtain a *laissez-passer*, cannot, *per se*, establish that the witness was, as alleged by the Appellant, "tainted".[349] The Appeals Chamber also notes that the Trial Chamber found Witness M's testimony to be unreliable.[350]

210. The Appeals Chamber will next determine whether the Trial Chamber committed an error by deliberately not taking into consideration the fact that some witnesses were "tainted" after having been exposed to prejudicial information by taking part in the exhumations at Amgar garage. According to the Appellant, since this exposure took place before their testimony, the Trial Chamber should not have determined the credibility of these witnesses on the basis of their ability to describe the sites in question.[351] The Appellant refers specifically to the testimonies of Witnesses J, AA, U and Q.[352]

211. First, with respect to Witness J, the Appeals Chamber emphasizes that this witness's testimony was not taken into consideration by the Trial Chamber in its assessment of the events that took place at Amgar. As concerns Witness Q, who testified about the alleged killing of ten Tutsis at Amgar garage (paragraph 12 of the Indictment),[353] the Appeals Chamber observes that, in order to sustain its factual findings pertaining to paragraph 12 of the Indictment, the Trial Chamber heard the evidence of three Prosecution witnesses, namely, BB, T and Q, that it considered credible.[354] Of course, as the Appellant points out,[355] it seems that Witness Q actually testified that he had been to the Amgar garage three times with the investigators and that he was summoned to appear at the *gendarmerie* office.[356] Nonetheless, the Appeals Chamber remarks that the Trial Chamber examined Q's evidence with caution and noted a number of contradictions. The Trial Judgement does not show that the Trial Chamber based the credibility of Witness Q entirely on his description of the site. The Chamber equally took into consideration Witness Q's account,[357] which was corroborated by the evidence of Witnesses BB and T. In the Appeals Chamber's opinion, the Trial Chamber did not attach a lot of weight to the witness's ability to identify Amgar garage and the location of the grave from which the bodies were exhumed in assessing the credibility of his evidence.

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[346] Defence Appeal Brief, para. 101 (c).
[347] Trial Judgement, pp. 71 to 82 (factual findings) and pp. 144 to 145, 152 (legal findings).
[348] The Appellant merely refers to T, 13 June 1997, wherein the witness stated "I work at the sector and I had been sent to the prefecture." (T, 13 June 1997, p. 97).
[349] The Appellant makes reference to the English Transcript of 13 June 1997, pp. 30 and 43.
[350] Trial Judgement, para. 195. The Trial Chamber also relied on the testimonies of Witnesses U, T and Q, which it considered to be credible, to find beyond reasonable doubt that the Accused took part in the events alleged against him under paragraph 10 of the Indictment.
[351] Defence Appeal Brief, para. 102.
[352] *Ibid.*, para. 101 (d).
[353] Trial Judgement, paras. 228 to 261.
[354] *Ibid.*, para. 252.
[355] Defence Appeal Brief, para. 101 (d) (iv). The Appellant refers to the T, 9 October 1997 (English version), pp. 126 and 128.
[356] Contrary to what the Defence alleges, the witness actually testified that he was summoned to appear at the gendarmerie brigade; but, as to whether this was in relation to his testimony in court, the witness stated that the *gendarmerie* brigade was not aware that he was testifying in this case. (T, 9 October 1997, p. 128)
[357] Trial Judgement, see in particular paras. 235 to 238, paras. 243 to 248 and 256.

212. Similarly, with regard to the testimonies of AA and U,[358] and the Trial Chamber's findings on the murder of Emmanuel Kayitare (paragraph 18 of the Indictment), an analysis of paragraphs 317 to 344 of the Trial Judgement does not support a finding that the ability of Witnesses AA and U to describe the site played a crucial role in the assessment of their credibility. In any event, the Appeals Chamber in the instant case refers to its findings on the ground of appeal pertaining to the murder of Emmanuel Kayitare (Part IX of this Judgement).

213. Accordingly, the Appeals Chamber holds that the Appellant has not put forward any convincing argument to demonstrate the alleged errors of law relating to the assessment of witness credibility.

H. Error relating to the impact of trauma

214. The Appellant submits, with reference to paragraph 22 of the Trial Judgement, that the Trial Chamber committed an error of law by "discounting" contradictions and weaknesses in witness testimony before the Chamber on grounds that some witnesses had suffered the trauma of victimization.[359] The Appellant puts forward three main arguments in support of his allegations.[360] First, the Appellant contends that the Trial Chamber should not have considered the witnesses as victims before assessing their credibility. Second, he reproaches the Trial Judges for not having explained the impact they ascribed to these factors and, further, for considering the fact that the witnesses were victims in discounting the contradictions in some of the evidence (on this point, the Appellant refers specifically to the testimonies of Witnesses AA and Q with respect to the killings at Amgar garage[361]). Third and last, the Appellant argues that the Trial Chamber, by referring to the notion of trauma to admit certain testimonies, never as much as considered that this factor could be one that probably "tainted" the evidence.

215. It would be proper to first of all cite paragraph 22 of the Trial Judgement that the Appellant challenges:

> "Many of the witnesses who testified before the Chamber in this case have seen atrocities committed against members of their families and close friends and/or have themselves been the victims of such atrocities. Some of these witnesses became very emotional and cried in the witness box, when they were questioned about certain events. A few witnesses displayed physical signs of fear and pain when they were asked about certain atrocities of which they were victims. The Chamber has taken into consideration these factors in assessing the evidence of such witnesses."

216. In response to the Appellant's first argument, the Appeals Chamber points out that the above-mentioned paragraph does not show in any way that the fact that the Judges characterized some witnesses as victims led them to refrain from questioning the credibility of their evidence. The Trial Chamber only noted a point which came up as the witness hearings went on, and which it rightly decided to take into consideration in assessing the credibility of the witnesses. Paragraph 22 of the Judgement clearly shows that the Chamber simply took "into consideration these factors in *assessing* the evidence of such witnesses"; in other words, it assessed the credibility of witnesses

[358] For Witness AA, see T, 7 October 1997, p. 79; for Witness U, see T, 10 October 1997, pp. 47 and 79 to 80.
[359] Defence Appeal Brief, paras. 103 to 107; Defence Reply Brief, paras. 3.84 to 3.87; Supplemental Defence Document, pp. 12 to 13. Cf. also, T(A), 4 July 2002, p. 51 *et seq*. In his arguments at the appeal hearing, the Appellant referred to the Chamber's approach to Prosecution Witness DEE, regarding the traumas she allegedly suffered. According to the Appellant, the Trial Chamber may have considered that "the same approach to trauma that signalled the excuse -- and apologia for Prosecution witnesses is not extended to Defence witnesses." (T(A), 4 July 2002, p. 56).The Appeals Chamber emphasizes that this argument was dealt with under Part III of this Appeal Judgement relating to allegations of bias and refers the Appellant to the findings thereon.
[360] Defence Appeal Brief, paras. 104 to 107. Defence Reply Brief, paras. 3.84. to 3.87.
[361] Defence Appeal Brief, para. 106.

and the reliability of their evidence in light of the trauma they experienced. The Appeals Chamber emphasizes that the Trial Chamber never stated that it considered the trauma suffered by some witnesses as a guarantee that their statements were true.

217. In his second contention, the Appellant submits that the Trial Chamber failed to explain the impact of trauma, and relied on the status of some witnesses as victims to "discount" the contradictions in their evidence. Before any further consideration, the Appeals Chamber recalls the finding in the *Musema* Appeal Judgement: "Trial Chambers normally take the impact of trauma into account in their assessment of evidence given by a witness."[362] The Appeals Chamber also emphasizes that, in accordance with the general principles of evidence, it is incumbent on the Trial Chamber to adopt an approach it considers most appropriate for the assessment of evidence.[363] Furthermore, although the Trial Chamber must always provide a "reasoned opinion in writing," it is not required to articulate every step of its reasoning for each particular finding it makes.[364] The Appeals Chamber notes that in the instant case, the Trial Chamber not only indicated in the introduction to the Judgement that it had taken into consideration the impact of trauma on witness statements, but also stated the scope of the trauma factor on some of the testimonies, and this is precisely the thrust of Appellant's third contention.

218. The Appellant indeed reproaches the Trial Chamber for "discounting" the discrepancies in some testimonies by invoking the impact of trauma. He challenges paragraphs 253 and 334 of the Trial Judgement cited below:

> With respect to Witness Q in particular, the Chamber holds that the said contradictions can probably be attributed to the trauma he may have suffered from having to recount the painful events he witnessed and of which he was a victim. The Chamber stresses further that the time lapse between the events and the testimony of the witness must be taken into account in assessing the recollection of details.
>
> The Chamber is of the opinion that Witness AA is credible and, consequently, accepts his testimony. Although contradictions emerged under cross-examination in his testimony with regards to details, such contradictions are not material and do not impugn the substance of his testimony on the circumstances of the death of Emmanuel Kayitare. The Chamber finds that such contradictions may be attributed to the possible trauma caused to Witness AA as a result of recounting the painful events he had witnessed and the period of time between the said events and AA's appearance before the Chamber. Additionally, the Chamber recalls that the inconsistencies between the witness testimony and statements made before the trial must be analysed in the light of difficulties linked, particularly, to the interpretation of the questions asked and the fact that those were not solemn statements made before a commissioner of oaths.

219. On this point, the Appeals Chamber refers to the opinion of the ICTY Appeals Chamber, which considers that in matters of evidence, there is no established rule that traumatic circumstances endured by a witness necessarily render his or her evidence unreliable.[365] In the instant case, it has not been demonstrated how the "trauma" would have rendered Witnesses AA and Q incapable of giving an accurate account of the events they experienced. Consequently, the Appeals Chamber considers that the Trial Chamber correctly held that the fact that a witness may

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[362] *Musema* Appeal Judgement, para. 63.
[363] *Kayishema and Ruzindana* Appeal Judgement, para. 119.
[364] *Čelebići* Appeal Judgement, para. 481 cited in *Musema* Appeal Judgement, para.18.
[365] *Kunarac* Appeal Judgement, para. 324. "[I]n principle, there could be cases in which the trauma experienced by a witness may make her unreliable as a witness and […] a Trial Chamber must be especially rigorous in assessing identification evidence. However, *there is no recognised rule of evidence that traumatic circumstances necessarily render a witness's evidence unreliable.* It must be demonstrated *in concreto* why "the traumatic context" renders a given witness unreliable. It is the duty of the Trial Chamber to provide a reasoned opinion adequately balancing all the relevant factors. […]"[365] (Emphasis added).

forget or mix up small details is often as a result of trauma suffered and does not necessarily impugn his evidence in relation to the central facts of the crime.[366] Hence, the Appellant, by merely citing two paragraphs of the Judgement and raising general considerations, has in no way demonstrated the basis for his contention that the Trial Chamber in general discounted many contradictions in the evidence on grounds of trauma.

220. Lastly, the Appeals Chamber cannot entertain the argument that the Trial Chamber failed to acknowledge the possibility that trauma could "taint" the evidence of a witness who suffered it. Such a conclusion cannot be drawn from the fact that the Judgement does not mention the possibility that persons who were victims of atrocities may seek vengeance when giving evidence, or in any event show a lack of objectivity in their evidence. If this hypothesis could be validly contemplated, as the Appellant emphasizes,[367] in cases of war crimes or crimes against humanity, it would still be necessary to show concrete facts in support of the hypothesis with respect to a specific witness for the Trial Chamber to find his evidence not to be reliable or credible. However, the Appeals Chamber notes that on this point, the Appellant makes only general allegations.

221. Consequently, it has not been established that the Trial Chamber committed an error of law by taking into consideration the fact that some witnesses experienced traumatic events and by assessing their evidence in this light. The Appellant's argument relating to the impact of trauma must therefore be dismissed.

I. Error relating to the impact of social and cultural factors [368]

222. The ninth argument put forward by the Appellant focuses on a passage in paragraph 23 of the Trial Judgement relating to the assessment of testimonial evidence. The paragraph in question is cited here *in extenso*:

> *The Chamber has also taken into consideration various social and cultural factors in assessing the testimony of some of the witnesses. Some of these witnesses were farmers and people who did not have a high standard of education, and they had difficulty in identifying and testifying to some of the exhibits, such as photographs of various locations, maps etc.* [...] *These witnesses also experienced difficulty in testifying as to dates, times, distances, colours and motor vehicles.* In this regard, the Chamber also notes that many of the witnesses testified in Kinyarwanda and as such their testimonies were simultaneously translated into French and English. As a result, the essence of the witnesses' testimonies was at times lost. Counsel questioned witnesses in either English or French, and these questions were simultaneously translated to the witnesses in Kinyarwanda. In some instances it was evident, after translation, that the witnesses had not understood the questions. (Emphasis added)

223. The Appellant alleges in essence that the Trial Chamber committed an error of law by improperly taking judicial notice of social and cultural factors. For the Appellant, social and cultural factors are not "matters of common knowledge" in respect of which judicial notice should be taken under Rule 94(A) of the Rules of Procedure and Evidence.[369] He considers in fact that the Trial Chamber resorted to this approach even though it did not specifically state so. Yet, according to the Appellant, the Judges in so doing made generalizations that were not corroborated by evidence or, especially, by expert opinion. Thus, facts that were noted as being matters of common knowledge were in reality only matters of personal knowledge and stereotypes that the various members of the Chamber may have had on the Rwandan people. In support of his argument, the

[366] *Čelebići* Appeal Judgement, para. 497.
[367] Defence Appeal Brief, para. 107.
[368] Supplemental Defence Document, para. 9.
[369] Rule 94(A) of the Rules indeed provides that: "A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof."

Appellant cites a Canadian case decided by the Ontario Court of Appeal,[370] where it was held that a judge had erred by considering as common knowledge his own personal experiences about the cultural tendencies of a native witness. The Appellant also reproaches the Trial Chamber for having applied the factors in question in a general manner, without indicating to which witnesses they applied, and in this way, disregarded some discrepancies in the evidence presented by the Prosecution. Therefore, since the evidence presented by the Prosecution was, according to the Appellant, never assessed properly, the Appellant requests a trial *de novo* where proper evaluation of the evidence can be undertaken.[371]

224. The Prosecution's response is that the Appellant has misapprehended the scope and purpose of judicial notice. Rule 94(A) is not applicable in this instance and was not invoked by the Trial Chamber. In paragraph 23, the Trial Chamber simply summed up its general observations about witnesses. There was therefore no need for an expert opinion to validate such observations. Given that the judges had already heard many witnesses having the same socio-cultural background, they were perfectly entitled to draw certain general conclusions from their experience, without such amounting to common knowledge within the meaning of Rule 94(A). According to the Prosecution, the Trial Chamber did no more than assess the abilities of the various witnesses. The Prosecution submits that the Appellant has not shown that the Trial Chamber's evaluation of the evidence has been unreasonable. It concludes that this argument should be dismissed, since no error of law has been committed.[372]

225. The Appeals Chamber considers that the Appellant has incorrectly characterized as judicial notice the approach taken by the Trial Chamber . The Appeals Chamber notes, first of all, that the Trial Judgement does not at all refer to judicial notice, the underlying purpose of which is to dispense with future proof of officially recorded facts that are indisputable.

226. The Appeals Chamber also notes that paragraph 23 of the Trial Judgement only states an observation that obviously dawned on the Trial Chamber as it heard the evidence given before it, namely, the fact that some of the persons heard were farmers and people who were not sufficiently literate, and that this situation had repercussions on the quality of their evidence, insofar as these witnesses experienced difficulties in answering certain questions under the conditions described by the Trial Chamber. The observation made by the Trial Chamber concerns the proceedings proper and not facts of common knowledge in respect of which proof would not be required. This is not the same thing as taking judicial notice and, consequently, the case cited by the Appellant in support of his contention is irrelevant.

227. The Appeals Chamber considers that in the passage referred to by the Appellant, placed in its context, the Trial Chamber seeks to clarify the approach it took in assessing testimonial evidence when faced with the difficulty mentioned earlier. In so doing, it was complying with the general principles of evidence referred to above, and did not commit an error of law.[373] The Appeals Chamber notes that the Appellant has not demonstrated further that this approach was unreasonable in the instant case.

228. The Appeals Chamber will now consider the Appellant's contention that the Trial Chamber took a general approach, without indicating in which cases and to what extent, in its assessment, it applied the test based on the impact of social or cultural factors. The Appeals Chamber notes that

[370] *R. v. W.(S), Ontario Court of Appeal*, Appellant's Book of Authorities, tab.18.
[371] Amended Notice of Appeal, para. 129; Defence Appeal Brief, paras. 108 to 114; Defence Reply Brief, paras. 3.88 to 3.91.
[372] Prosecution's Response Brief, paras. 3.170 to 3.177.
[373] Cf. Part IV, Section E of this Appeal Judgement.

the fact that the Trial Chamber made the introductory observation referred to above, and stated its approach before considering the testimonies on a case-by-case basis, cannot lead to the conclusion that it did not make a proper assessment of the reliability and credibility of each testimony. Furthermore, the Appeals Chamber recalls that, although the Trial Chamber is primarily responsible for assessing the credibility of a testimony and must always provide a "reasoned opinion in writing", it is not required to articulate every step of its reasoning for each particular finding it makes.[374] In particular, nothing stops the Chamber from stating, at the outset of the Judgement, the approach it has taken and which it subsequently follows, on a case-by-case basis, with regard to the impact of the difficulties linked to the social or cultural background of a witness, in order to assess the contradictions noted and to determine whether the witness was reliable and his evidence credible.

229. The Appeals Chamber notes that in the instant case, paragraph 23 of the Trial Judgement shows that the Trial Chamber made clarifications about the witnesses to whom its observation applied: "farmers and people who did not have a high standard of education," who had difficulty in giving their testimonies before the tribunal, and "had difficulty in identifying and testifying to some of the exhibits, such as photographs of various locations, maps, etc. [...]" and also experienced "difficulty in testifying as to dates, times, distances, colours and motor vehicles." A reading of the trial transcript strengthens the Trial Chamber's observation. The examination of Witness A testifying about the attack on the ETO may be cited as an example. Witness A was born in a rural *préfecture* and lived in Rwanda all his life, spoke only Kinyarwanda, and was a mason by profession. At the hearings, in answer to a question that he should estimate the distance in kilometres between the Kicukiro *commune* and the Kigali Airport, the witness said:

> I lived on the hill and the airport was located on a different hill. You can see the hill from us, as the crow flies, from our home.[375]

A few days later, during cross-examination of this same witness, the following exchange took place:

> *M^e DICKSON : Si vous me permettez. Lorsque vous avez quitté l'ÉTO, avez-vous quitté vers le nord*? [Mr. Dickson : If you would allow me, when you left the ETO, did you go north?]
>
> *TEMOIN A : Nous sommes allés vers Rebero, comme si on allait vers Rebero*. […] [Witness A: We went towards Rebero as if we were going to Rebero.]
>
> *M. LE PRÉSIDENT : Oui, oui,. Mais vous voulez exactement quoi, qu'il vous montre quel trajet, d'où à où ? C'est plus simple je crois.* [Mr. President : Yes, yes. But what exactly do you want, that he show you the way he took, from where to where? It's more simple I think.]
>
> *M^e DICKSON : De l'ÉTO …* [Mr. Dickson : From the ETO …]
>
> *M. LE PRÉSIDENT : Parce que le nord, le sud, en général ils ne comprennent pas ce que c'est*.[376] [Mr. President : Because the north, the south, in general they don't understand what that means.]

230. It is clear that the difficulties faced by a witness in estimating distances or giving a geographical direction must be taken into account in assessing the scope and reliability of certain aspects of his testimony; but these do not affect the testimony as a whole or its credibility. Accordingly, the Appeals Chamber holds that the part of the Appellant's contention about the

[374] *Musema* Appeal Judgement, para. 18.
[375] T, 20 March 1997, p. 87.
[376] CRA, 25 March 1997, pp. 8 and 9.

general nature of the reasoning in the Judgement regarding the impact of social and cultural factors on certain testimonies is unfounded.

231. The same holds for the allegation that the Trial Chamber referred to these factors to disregard certain discrepancies in the testimonies of Prosecution witnesses. Indeed, the Appeals Chamber considers that by taking these factors into account, the Trial Chamber showed that it was concerned about making a proper assessment of testimonial evidence. These factors, amongst others, such as translation-related difficulties, or the impact of trauma, must have led the Trial Chamber to put into perspective the discrepancies in certain statements. The Appeals Chamber notes that, in general, the Trial Chamber seems to have been satisfied that the testimonies considered were corroborated by other evidence, and that the discrepancies noted were minimal. A reading of the Judgement thus shows that the Trial Chamber discounted various parts of the Prosecution evidence that were considered to be too contradictory. The Appeals Chamber cannot find any error of law in this instance.

232. To conclude, the Appeals Chamber is of the opinion that the Trial Chamber did not commit the alleged errors of law.

J. Errors relating to the editing of transcripts

233. The Appellant alleges that the Trial Chamber twice committed an error of law, namely, by not making sure that an accurate record of all the proceedings was kept, and by directing interpreters not to interpret what the witnesses actually said. Thus, according to the Appellant, the Trial Chamber violated Rule 81(A) of the Rules.[377] These errors are alleged to have been committed at the hearing of Witnesses AA and Q, who respectively testified about the allegations of weapons distribution, crimes committed at the Amgar garage and the murder of Emmanuel Kayitare. The demeanour of the said Prosecution witnesses, in the Appellant's view, revealed a hostile attitude towards the Appellant, and should have been taken into account in assessing their credibility. Consequently, the Appellant asserts that the Trial Chamber's attitude contributed to a trial in which Prosecution evidence was not evaluated in accordance with the law, and to casting doubts on the interpretation of all the testimonies. The Appellant submits that this error of law invalidates the Trial Chamber's decision and warrants a retrial.[378] The Prosecution's response is that the Appellant has grossly exaggerated the import of these incidents, which do not establish that an error of law has been committed or that the Appellant has suffered any prejudice.[379]

234. The two examples put forward by the Appellant in support of his contention concern the remarks of the Presiding Judge with respect to incidents that occurred during the cross-examination of Witnesses AA and Q, which incidents took place within a few days of each other. These witnesses seem to have taken turns in accusing Counsel for the Appellant of lying. It would be proper to place the remarks in their context:

With regard to the cross-examination of Witness AA:

> THE DEFENDANT: Thank you, Mr. President. Earlier when the question was asked by Ms. Dickson, she asked, *Yesterday, did you not say that you had only called upon the soldier once?* And, in fact, he said, No, you're lying. [...].

[377] Rule 81(A) of the Rules provides: "The Registrar shall cause to be made and preserve a full and accurate record of all proceedings, including audio recordings, transcripts and, when deemed necessary by the Trial Chamber, video recordings."
[378] Defence Appeal Brief, paras. 115 to 117; Supplemental Defence Document, pp. 14 to 15; Defence Reply Brief, paras. 3.92 to 3.94.
[379] Prosecution's Response Brief, paras. 3.178 to 3.182.

> MR. PRESIDENT: Interpreter, is that correct? Did he say, No, you're lying?
>
> THE INTERPRETER: Yes, in fact, he did say that, and I said, no, that's not what I said.
>
> MR. PRESIDENT: *You were right to translate it that way, to soften the blow a bit*, so to speak. It is not admissible for you to use such language. This is the first time we have heard a witness use such terms in such an impolite manner. I warned you yesterday that you should answer the questions, if you can. If you cannot, then you shouldn't. But you shouldn't make any comments or give us any assessment. Counsel, the Tribunal presents its excuses on behalf of the witness. We can perhaps understand perhaps he's not educated enough to know better.[380]

With regard to the cross-examination of Witness Q:

> MS. DICKSON: What did the witness just say? Was there a remark that he just said that was not interpreted? I'm asking a question of the interpreter. Was something just said? It seems as though the witness just made a remark that was not interpreted, the very last thing he said.
>
> THE INTERPRETER: The witness said that it wasn't true. That's what I said. In fact he said you are lying but I interpreted that as saying that's not true.
>
> MR. PRESIDENT: *You were correct in not translating verbatim exactly what he said* [...].
>
> THE WITNESS: I said it was not true because I did not finish burying those people because I didn't even bury them.
>
> MR. PRESIDENT: In other words, the statement that you read which seems to say that he had been given the order to bury, that they did the work, he is now saying that this statement is not correct because he never participated in burying anybody so there you are. Ask your question.
>
> MS DICKSON: In fact I was going to ask him a question but he immediately said that this was a lie so I could ask him the question but -- [...]
>
> MR PRESIDENT: No, I believe it was badly interpreted. The witness said that the statement that you read is false. I think that's more exact. I don't think he was talking about you. It is not logical. You are not the one who made the statement. You are just reading the statement. So I think it was badly interpreted. We consider that it was badly interpreted. It is not possible, Counsel. You are not the one who made the statement. You are reading a statement written by somebody else. You are not the one who is lying. It is the statement that's false. Interpreter, please explain that, that it is the statement that's false.[381]

235. The Appeals Chamber recalls that apart from the provisions of Rule 81(A) of the Rules, which require that a full and accurate record be kept of all the proceedings, Rule 76 of the Rules provides that "Before performing any duties, an interpreter or a translator shall solemnly declare to do so faithfully, independently, impartially and with full respect for the duty of confidentiality." The Appeals Chamber notes that in the two examples provided by the Appellant, the statement "You were correct in not translating verbatim exactly what he said" is highly confusing. Although interpretation does not require word for word translation, it must be as accurate as possible, while taking into account, among others, the language level and cultural context of the person being interpreted. The expressions "you are lying" (plural) and "you are lying" (singular) obviously impute an intention to the person to whom they are addressed, which intention is not present in the more objective expression "I did not say that" or "that is not true."

[380] T, 7 October 1997, pp. 10 to 12. (Emphasis added)
[381] T, 9 October 1997, pp. 90 to 94. (Emphasis added)

236. Assuming that the witnesses actually used the first expression, as seems to have been established in the case of Witness Q, but does not clearly seem to be so in the case of Witness AA, the two remarks by the Presiding Judge approving what the interpreter said, which amounts to cushioning the offensive remarks by the witnesses, hardly seem to be consistent with the requirement of accuracy of the trial record. However, when they are placed in context, it seems evident that they had no effect, insofar as in the two cases the remarks actually made by the witnesses appear in the trial transcripts, and the Presiding Judge did not have the intention to alter or modify the transcript. Thus, with regard to Witness AA, the Appeals Chamber notes that the Presiding Judge himself reinstated the expression "you are lying", supposedly used by the witness. He did not in any way seek to hush up the impropriety committed against Appellant's Counsel, since he even pointed out to the witness that his attitude was intolerable. He also presented the Tribunal's excuses to Appellant's Counsel on behalf of the witness, and reprimanded the witness. Similarly, with respect to Witness Q, the witness's remarks were restored by the interpreter, and once again, the Trial Chamber did not attempt to cover up the issue. When the Presiding Judge indicated that the offensive words were the result of a poor translation, he simply wanted to clarify the situation by explaining that the first translation given by the interpreter was, in his opinion, more in line with what the witness wanted to say. The Appeals Chamber considers, nevertheless, that it would have been more judicious to question the witness directly in order to afford him the opportunity to clarify what he had in mind. The Appeals Chamber is of opinion that, although Judge Kama's remarks are indeed unfortunate, they had no effect on the respect for the rule relating to the accuracy of trial transcripts, which rule is alleged to have been violated.

237. In conclusion, the Appeals Chamber holds that the argument based on the alleged errors relating to the editing of transcripts is unfounded. Considering that the errors alleged under this ground of appeal have not been established, there is no need to examine the alternative ground advanced by the Appellant relating to the cumulative effect of the errors.

V. SPECIFIC ERRORS OF LAW AND FACT

A. Errors relating to the alibi

238. The Appellant raises a number of issues on the treatment of the alibi by the Trial Chamber, and submits that the Chamber erred in fact and in law.[382] The Appellant contends that the ultimate erroneous finding of the Trial Chamber that the alibi was concocted and an afterthought undermines not only his credibility and the convictions for the offences for which the alibi was presented, but also the integrity of the entire trial.[383] According to the Appellant, only a new trial can correct the prejudice he has suffered.[384] Many of these issues are thus also relevant to the grounds of appeal regarding the Trial Chamber's findings on the distribution of weapons, the killings at Amgar garage, the massacres at the ETO and Nyanza, and the killing of Emmanuel Kayitare. Given the overlapping of the Appellant's arguments and the need for clarity, the present section will be mainly devoted to determining whether the Trial Chamber erred in dismissing the Appellant's alibi. If it is determined that there was an error on the part of the Trial Chamber, the Appeals Chamber will then consider the argument that this error *generally* undermined the Trial Chamber's findings in the other relevant sections of the Judgement. Furthermore, the Appeals Chamber points out that it did not deem it necessary to address *seriatim*, on a case-by-case basis, all the issues raised by the Appellant regarding the alibi for the reasons advanced under paragraph 257 below.

239. The Appeals Chamber will now turn to one of the main arguments raised by the Appellant, namely, the finding by the Trial Chamber that no notice of an alibi had been given before or during trial.[385] The Appellant contends that the Trial Chamber erred in fact by ruling that "no record of a notice was filed at anytime, and that there is no record of such a notice in the judicial archives or within the judicial record."[386] According to the Appellant, a notice of alibi had been given to the Prosecution, and specific reference had been made by Counsel for the Appellant of her intention to present an alibi for the charges relating to the massacres at the ETO and Nyanza. Moreover, the Appellant contends that, since Rule 67 of the Rules requires that the Defence notify only the Prosecution of its intent to enter a defence of alibi, the Trial Chamber erred in finding that there was no notice of alibi within the judicial record.[387] He makes specific reference to paragraphs 139, 297 and 298 of the Trial Judgement, which read as follows:

> 139. In her closing argument, Defence Counsel stated that a notice of alibi [had been filed]. *The Chamber notes that no record of a notice of alibi was filed at any time, and that there is no record of such a notice in the judicial archives or within the judicial record.* Notwithstanding this, the Trial Chamber finds it appropriate and necessary to examine the defence of alibi, pursuant to Rule 67 B) of the Rules which states that 'Failure of the defence to provide such notice under this Rule shall not limit the right of the Accused to rely on the above defences.' (Emphasis added)
>
> 297. The Chamber has considered the testimony of the Accused and Witness DDD, jointly, as their testimony is consistent and puts forward a defence of alibi, claiming that the Accused was en route to Masango on 11 April and was not present at the ETO, at Nyanza, or at any of the locations on the way to the ETO from Nyanza where Witness A, Witness H, Witness DD and Witness W testified that they saw him on that day. *The Chamber notes that the alibi defence was not introduced until near the end of the trial, after the Prosecution rested its case. Neither the Accused nor Witness DDD mentioned the alibi at the time of the arrest of the Accused or during any of the pre-trial proceedings.* (Emphasis added)

[382] Supplemental Defence Document, para. 11 (a) to (g).
[383] T(A), 4 July 2002, pp. 60 to 61 and Supplemental Defence Document, *ibid*.
[384] Supplemental Defence Document, para. 11 (a) to (d) and (g).
[385] Supplemental Defence Document, para. 11 (b) 3.
[386] Trial Judgement, para. 139.
[387] T(A), 4 July 2002, pp. 67 to 68.

> 298. *The Chamber particularly notes that Defence counsel did not mention the alibi of the Accused in her opening statement or in her cross-examination of any of the Prosecution witnesses who testified over a period of 18 months.* Consequently, Witness A, Witness H, Witness DD and Witness W were never confronted with and given an opportunity to respond to the assertion that the Accused was not present on 11 April at the ETO or at Nyanza and that their testimony must therefore be false. The Chamber has found these Prosecution witnesses to be credible, and finds the extremely delayed revelation of an alibi defence to be suspect. The inference to be drawn is that this defence was an afterthought and that the account of dates was tailored by the Accused and Defence Witness DDD, following the conclusion of the Prosecution's case. The only witness to support the alibi of the Accused is Witness DDD, and the Chamber is mindful that she has a personal interest in his protection. For these reasons, the Chamber does not accept the testimony of the Accused and Witness DDD that they were on the way to Masango on 11 April. (Emphasis added)

240. The procedure to be followed where an accused intends to enter an alibi in his defence is covered by Rule 67(A)(ii) and (B) of the Rules which provide *inter alia* that:

> Subject to the provisions of Rules 53 and 69:
>
> (A) 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 intent 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;
>
> [...]
>
> (B) Failure of the defence to provide such notice under this Rule shall not limit the right of the accused to rely on the above defences.

241. Rule 67(A)(ii) relates to the reciprocal disclosure of evidence at the pre-trial stage of the case and places upon the Defence the obligation to notify the Prosecution of its intent to enter a defence of alibi and to specify the evidence upon which it intends to rely to establish the alibi.[388] This allows the Prosecution to organise its evidence and to prepare its case prior to the commencement of the trial on the merits. As the Appeals Chamber explained in *Kayishema and Ruzindana:*

> [...] 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.[389]

242. Rule 67(A)(ii) does not require the Defence to produce the probative evidence to be used to establish the accused's whereabouts at the time of the commission of the offence. The extent and nature of the evidence that the Defence uses to cast doubt on the prosecution case is a matter of strategy which is for the Defence to decide.[390] The Appeals Chamber recalls that the strategy

[388] *Kayishema and Ruzindana* Appeal Judgement, para. 109.
[389] *Ibid.*, para. 111.
[390] *Ibid.*, para. 110.

adopted by the person who raises an alibi may have an impact on a Trial Judge in reaching his or her conclusion.[391] Nevertheless, the requirements of Rule 67(A)(ii) are satisfied when the Defence has notified the Prosecution of the required particulars of the alibi, without necessarily producing the evidence.

243. To ensure a good administration of justice and efficient judicial proceedings, any notice of alibi should be tendered in a timely manner, ideally before the commencement of the trial. However, were the Defence to fail in this regard, Rule 67(B) provides that the Defence may still rely on evidence in support of an alibi at trial. Consequently, the obligations laid down by Rule 67 (A)(ii) must be read in conjunction with the caveat provided for by Rule 67(B).[392]

244. There is no requirement under Rule 67(A)(ii) for the Defence to notify the Chamber, in addition to the Prosecutor, of its intent to enter an alibi. *A fortiori*, the Defence is not required to provide the Chamber with details of the alibi witnesses and of the locations at which the accused is said to have been at the time the alleged crimes were committed. Prior to the commencement of the trial, the Defence is obliged to disclose alibi evidence only to the Prosecution and not to the Trial Chamber.

245. Considering the foregoing, unless one of the parties chooses to make the notice available to the Chamber or to file it with the Registry, there will be no written record of the notice within the case file at the pre-trial stage of the proceedings. It is only prior to the commencement of the Defence case that the Rules, specifically Rule 73*ter* (Pre-Defence Conference), require the Defence to provide details of its evidence to the Chamber.[393]

246. It is at this stage of the proceedings that the Trial Chamber will receive information relevant to the alibi. Although the Rules do not specify that a notice of alibi be provided, the materials filed in conformity with Rule 73*ter* should enable the Trial Chamber to avail itself of the Defence's intention to enter an alibi. Furthermore, read together, the list of witnesses, the summary of their testimonies and the points in the indictment as to which they will testify, should provide the Chamber with particulars sufficient to determine the extent of the alibi.

247. The Appeals Chamber has reviewed the materials presented by the Appellant in support of his submission that a notice of alibi had been provided. Clearly, the existence of the notice of alibi

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[391] *Musema* Appeal Judgement, para. 201.

[392] Despite the provisions of Rule 67(B) and depending on the circumstances, failure to raise an alibi in a timely manner can impact on Trial Chambers findings.

[393] Rule 73*ter* was applicable at the time of trial. Rule 73*ter* provides:

> (A) The Trial Chamber may hold a Conference prior to the commencement by the defence of its case.
> (B) At that Conference, the Trial Chamber or a Judge, designated from among its members, may order that the defence, before the commencement of its case but after the close of the case for the prosecution, file the following:
>
> (i) Admissions by the parties and a statement of other matters which are not in dispute;
> (ii) A statement of contested matters of fact and law;
> (iii) A list of witnesses the defence intends to call with:
>
> (a) The name or pseudonym of each witness;
> (b) A summary of the facts on which each witness will testify;
> (c) The points in the indictment as to which each witness will testify; and
> (d) The estimated length of time required for each witness;
>
> (iv) A list of exhibits the defence intends to offer in its case, stating where possible whether or not the Prosecutor has any objection as to authenticity.
>
> The Trial Chamber or the Judge may order the Defence to provide the Trial Chamber with copies of the written statements of each witness whom the Defence intends to call to testify.

was at issue during the Trial proceedings. The "*Avis en vertu de l'article 67 a) (ii) du règlement de preuve et procédure – Défense d'alibi*" [Notice pursuant to Rule 67(A)(ii) of the Rules of Procedure and Evidence – Defence of Alibi (the "Notice")], said to have been filed by the then Co-Counsel for the Appellant on 15 February 1997, was produced by the Appellant for the purposes of this appeal. This would seem to suggest that the Appellant met the requirements of Rule 67(A)(ii) of the Rules.[394] In this document, the Appellant notified the Prosecutor of his intent to enter an alibi in relation to the crimes charged in paragraphs 10 and 16 of the Indictment, specifically with regard to the dates of 6 and 12 April 1994. Particulars of five witnesses the Appellant wanted to call, of whom three were said to be in the Tingi-Tingi refugee camp in Zaïre (now Democratic Republic of Congo), and details of the location of the Appellant for those two days, were provided.

248. The trial record shows that the Prosecution was unsure whether it had received the Notice. However, in a written declaration, dated 12 April 2000, a then member of the Prosecution, Mr. Pierre Richard Prosper, stated that he had been made aware in late February or early March 1997 of Counsel for the Appellant's intention to enter a defence of alibi on behalf of the Appellant. The written declaration shows that the Notice provided sufficient details to cause the Prosecution to review relevant evidence and to disclose further materials to the Appellant, at least as pertained to 6 April 1994.

249. The question of an alibi was also raised during the Rule 73*ter* Pre-Defence Conference of 16 September 1998 held after the close of the Prosecution case. At this conference, Counsel for the Appellant filed her list of witnesses, with pseudonyms and a summary of their intended testimony.[395] The Prosecution asked whether three particular witnesses were to testify to an alibi, as the list indicated that the three witnesses, namely, DT, DU and DDD, were expected to testify about the activities of the Appellant on 11 and 12 April 1994.[396]

250. In response, Counsel for the Appellant noted that she had already provided a written answer to the query, and recalled that, in conformity with the Rules, she had communicated a notice of alibi to the Prosecution in February or March 1997.[397] Thereafter, the Prosecution indicated that it would try to find the notice, but took the matter no further.[398]

251. Moreover, the Appeals Chamber notes that the Appellant also referred on a number of occasions to alibi witnesses he intended to call during the proceedings. Thus on 4 March 1997, during the hearing of the Defence's *Extremely Urgent Request for a Teleconference Deposition*,[399] Counsel for the Appellant stated that she had identified three witnesses "specifically because they were alibi witnesses".[400] In her opening arguments on 18 March 1997, Counsel for the Appellant suggested that it might be impossible, in view of the prevailing situation in then Zaïre and despite her best efforts and those of the Tribunal, to call, amongst others, three alibi witnesses.[401] Likewise, on both 13 June 1997 and during closing arguments, the Appellant indicated that a notice of alibi had been given for 6 April 1994.[402]

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[394] Annexed to the Defence Appeal Brief.
[395] List of witnesses prepared in pursuance of Rule 73 *ter* (3) (I) of the Rules.
[396] Although Witnesses DU and DT appear on the list of witnesses presented during the pre-Defence conference on 16 September 1998, they did not testify at trial.
[397] T, 16 September 1998, pp. 38 to 39.
[398] T, 16 September 1998, p.38.
[399] Extremely Urgent Request for a Teleconference Deposition (Rule 71 of the ICTR Rules of Procedure and Evidence), filed on 15 February 1997.
[400] T, 4 March 1997, p. 8.
[401] T, 18 March 1997, pp. 81 to 82.
[402] T, 17 June 1999, p.28.

252. Moreover, on 6 March 1997, the Trial Chamber itself referred to the alibi in granting the above-cited Defence's Urgent Request:

> WHEREAS the Defence submitted that the delay in examining its request constitutes, in its mind, a violation of the rights of the accused to a fair trial particularly rights allowing him to call defence and alibi witnesses.[403]

253. Lastly, the Trial Chamber also acknowledged that time was needed to find alibi witnesses, which factor necessitated adjourning proceedings.[404] The Trial Chamber similarly granted a Prosecution adjournment request to prepare the cross-examination of a potential alibi witness.[405]

254. For the foregoing reasons, it can therefore be concluded that prior to the commencement of the trial, the Appellant had in fact given a Notice of alibi to the Prosecution for the 6 and 12 April 1994. The Trial Chamber therefore erred in finding that there was no notice of alibi for this period. This error, however, did not occasion a miscarriage of justice, as it did not prevent the Appellant from relying on the alibi at trial.

255. However, as regards the alibi for 11 April 1994, the Appeals Chamber finds that the Trial Chamber did not err in finding that no notice was given to the Prosecution. Although in the Appellant's opening arguments he made known his intention to call witnesses in support of his alibi of 11 April 1994, the Appeals Chamber holds that, placed in context, it cannot be said that such an act constitutes a clear notice of alibi.[406] The Trial Chamber did not therefore err in finding in paragraph 298 of the Judgement that Counsel for the Appellant had not mentioned the alibi in her opening arguments.[407] In the Notice of alibi dated 15 February 1997, the Appellant identifies three potential alibi witnesses, whose testimonies relate to the whereabouts of the Appellant on 12 April 1994. Neither Witness DDD nor the date of 11 April 1994 is mentioned, although this did not prevent the Appellant from relying on her evidence relating to this date. The Trial Chamber duly considered the evidence and rejected it.[408]

256. Although Rule 67 does not require that the Chamber be notified of the defence of alibi, the Appeals Chamber does not find that it was unreasonable for the Trial Chamber to have concluded, as pertains to 11 April, that there was no record of the alibi. Moreover, given that the alibi was not disclosed to prosecution witnesses, it was not unreasonable for the Trial Chamber to note that the alibi was not introduced at any stage during the pre-trial proceedings but kept until the end of the trial.[409]

257. The Appellant puts forward a certain number of other arguments in support of his main allegation that the Trial Chamber erred in rejecting his alibi and in finding that it was concocted.[410]

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[403] Decision on the Extremely Urgent Request made by the Defence for the taking of a Teleconference Deposition, 6 March 1997.
[404] T, 27 March 1997, p. 80.
[405] T, 15 February 1999, pp. 115 to 117.
[406] The hearing of 18 March 1997 was devoted to the opening arguments of the parties. The above passage appears near the end of the Appellant's opening statement, where he is explaining to the Court the problems encountered in the search for eye-witnesses, including potential alibi witnesses. Specific reference is made to the difficulty in implementing the Trial Chamber's Decision on the extremely urgent request made by the Appellant for the taking of a teleconference deposition, of 6 March 1997. No other details as to the nature or particulars of the alibi are found elsewhere in the opening arguments, although in the French transcripts, reference is made to 11 and 12 April 1994.
[407] Supplemental Defence Document, para.11(c)2.
[408] Trial Judgement, paras. 293 to 298.
[409] Trial Judgement, para. 297.
[410] The Appellant contends that the Chamber committed an error of law and fact in finding that the alibi had been concocted. See Supplemental Defence Document, para. 11(g) 1 to 4.

He contends that in disbelieving the evidence relating to 11 April, the Trial Chamber was influenced by its view that no alibi notice had been served on the Prosecution.[411] Furthermore, he alleges that the Trial Chamber committed an error of law by holding against him the fact that, at the time of his arrest, neither the Appellant nor Witness DDD mentioned an alibi for 11 and 12 April 1994.[412] Lastly, the Trial Chamber allegedly committed an error of law in doubting the Appellant's credibility because of the tactical decisions or omissions of Counsel for the Appellant.[413] The Appeals Chamber holds that it is not necessary to address these other allegations *seriatim.* Indeed, the findings by the Trial Chamber recalled *supra* did not prevent the Appellant from raising the alibi and presenting evidence in support thereof during the proceedings. Paragraph 139 of the Trial Judgement clearly expresses the position adopted by the Trial Chamber:

> 139. In her closing argument, Defence Counsel stated that a notice of alibi [had been filed]. The Chamber notes that no record of a notice of alibi was filed at any time, and that there is no record of such a notice in the judicial archives or within the judicial record. *Notwithstanding this, the Trial Chamber finds it appropriate and necessary to examine the defence of alibi, pursuant to Rule 67(B) of the Rules which states that*:
>
> > "Failure of the defence to provide such notice under this Rule shall not limit the right of the Accused to rely on the above defences." (Emphasis added)

258. The Trial Chamber then summarised the alibi evidence in Section 3.2 of the Judgement.[414] Lastly, in paragraph 174 of the Judgement, the Chamber indicates that it "considers the defence of alibi, after having reviewed the Prosecutor's case in the factual findings on the relevant paragraphs of the Indictment."

259. The Judgement shows clearly that the Trial Chamber duly considered the entire alibi evidence relied on by the Appellant, notwithstanding the findings in paragraphs 139, 297 and 298 of the Judgement. The Judgement also shows clearly that the finding that the Accused was present and participated in the events of 11 April 1994 was amply sustained by the evidence. Several eye-witnesses saw the Appellant participating on the relevant occasions in the activities in question. The Trial Chamber found the witnesses to be credible and to have presented consistent evidence. Unless the Appellant establishes in his ground of appeal relating to the killings at the ETO and at Nyanza that the Trial Chamber erred in its assessment of the witnesses' testimony and credibility, the Appeals Chamber must find their testimony reliable. In any event, the Appeals Chamber considers that, with regard to this ground of appeal, the Trial Chamber never acted unreasonably by not attaching probative value to the evidence called by the Appellant to show that, at the relevant times on 11 April 1994, he was not at the scene of the crimes charged. Even supposing that the errors of law and fact relied on by the Appellant as summarized in paragraph 257 were founded, they would not be such as to invalidate the findings of the Trial Chamber or to occasion a miscarriage of justice. Indeed, the Appeals Chamber is of the opinion that the assessment of alibi evidence by the Trial Chamber was clearly of paramount importance. The assessment was not tainted by error and the evidence presented formed a good basis for the Trial Chamber's decision.

260. Lastly, the Appeals Chamber notes that, although the Appellant contends that because the Trial Chamber found "Mr Rutaganda was a liar", all of the convictions are tainted,[415] the Appellant does not adduce further specific arguments or examples in support of this general contention.

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[411] Supplemental Defence Document, para. 11(b)2 and 4.
[412] Supplemental Defence Document, para. 11(a) 1 to 7.
[413] Supplemental Defence Document, para. 11(c) 1 and 3; para. 11 (d) 1 to 3.
[414] Trial Judgement, paras. 138 to 174.
[415] Defence Appeal Brief, paras. 182 to 184.

261. Placed in context, it is clear that the findings of the Trial Chamber that the alibi was concocted and an afterthought related specifically to the alibi for 11 April 1994, in respect of which there was no notice of alibi. The Appeals Chamber reiterates its finding that the Trial Chamber never erred by not admitting the Appellant's alibi for that date. Furthermore, there are no grounds for believing that these findings had any effect on the Trial Chamber's considerations of defence evidence elsewhere in the Judgement. For the above reasons, the Chamber dismisses the ground of appeal relating to the general treatment of the alibi.

B. Errors relating to the admissibility of the Tingi-Tingi witness statements

262. The Appellant contends that the Trial Chamber erred in law in its Decision on the Defence's Motion for Leave to have 14 Written Witness Statements Admitted as Evidence (the "Decision Refusing Admission of Statements"),[416] wherein the Chamber refused to admit statements from witnesses in the Tingi-Tingi refugee camp in Zaïre (the "Statements" and the "Tingi-Tingi camp" respectively). He also submits that the Trial Chamber applied the wrong test for the admission of hearsay evidence by requiring the Defence to establish reliability and authenticity of the statements. He further argues that the Trial Chamber also erred by preventing the Defence from establishing a foundation for the reliability of statements through the testimony of witness DD. Lastly, the Appellant submits that the Trial Chamber failed to apply the rules of admissibility of evidence according to the fairness and justice of the circumstances of the case.[417]

263. The Appellant questions the decision not to admit 14 witness statements that he sought to have admitted into evidence during the trial. In his submissions before the Trial Chamber, the Appellant explained that the 14 statements had been made by potential defence witnesses, all of whom had disappeared on 2 March 1997, following an attack on the Tingi-Tingi camp. Counsel for the Appellant indicated to the Trial Chamber that, despite the investigations, surviving witnesses could not practicably be found, and that, to her knowledge, two witnesses were dead. She sought therefore to have the statements admitted as indirect hearsay evidence. She concluded that her request for the admission of the statements depended on the need to repair the prejudice suffered due to the loss of the witnesses.[418]

264. The first argument of the Appellant before the Appeals Chamber is that the Trial Chamber erred by requiring him at trial *to establish* the reliability of the statements. According to the Appellant, Rule 89 of the Rules only requires that *sufficient* indicia of reliability be present so as to determine admissibility.[419] In response to this argument, the Prosecution submits that the Trial Chamber proceeded correctly in evaluating the admissibility of the statements and that, in the circumstances of the case, the Chamber had the discretion not to admit them.[420]

265. Although the Rules of both the ICTR and the ICTY reflect a preference for direct, live and in-court testimony, Rule 89(C) of the Rules allows a Chamber "to admit any relevant evidence which it deems to have probative value."[421] As has previously been noted, this provision grants a

[416] Decision on the Defence's Motion for Leave to have 14 Written Witness Statements Admitted as Evidence, 23 April 1999.
[417] Defence Appeal Brief, paras. 185 to 219; Defence Reply Brief, paras. 4.26 to 4.30; Supplemental Defence Document, para.12 (1) to (6).
[418] T, 9 April 1999, pp. 6 to 13 and 35 to 39.
[419] Defence Appeal Brief, paras. 187 to 189.
[420] Prosecution's Response Brief, paras. 4.36 to 4.56.
[421] *Akayesu* Appeal Judgement, para. 286.

Trial Chamber a broad discretion in assessing admissibility of evidence and, in particular, to admit relevant out-of-court statements which a Trial Chamber considers probative.[422]

266. It is well established case-law that the reliability of a statement is relevant to its admissibility, and that where a piece of evidence is lacking in terms of indicia of reliability it may be deemed inadmissible.[423] As the Appeals Chamber has previously indicated, the threshold to be met before ruling that evidence is inadmissible is high. It must be shown that the evidence is so lacking in terms of the indicia of reliability as to be devoid of any probative value.[424] In the opinion of the Appeals Chamber, this should not be interpreted to mean that definite proof of reliability is necessary for the evidence to be admitted. According to the Appeals Chamber, provisional proof of reliability on the basis of sufficient indicia is enough at the admissibility stage.[425]

267. Contrary to the allegations of the Appellant, the Trial Chamber did not apply an improper standard for admissibility of hearsay evidence. Indeed, the Trial Chamber was quite forthright in paragraph 17 of the Decision refusing leave to admit witness statements when it affirmed: "In the opinion of the Tribunal, the Defence has provided little or no information which provides *indicia* as to reliability, voluntariness, truthfulness and trustworthiness of the statements. The limited information which has been presented by Defence Counsel is insufficient to establish the reliability and authenticity of the written statement."[426]

268. Furthermore, a review of the record reveals that the Trial Chamber inquired as to how the statements were obtained and considered fully the little information provided by the Appellant's Counsel, who informed the Chamber that the statements, some hand written, others typed, had been taken in 1996 by the then Lead Counsel, although the precise circumstances under which they were taken were unclear.[427] Counsel for the Appellant was unable to provide any further details and explained that she was not present in 1996 at the time the statements were taken.[428]

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[422] *Prosecutor v. Zlatko Aleksovski*, Decision on Prosecutor's Appeal on Admissibility of Evidence, Case No. IT-95-14/I-AR73, 16 February 1999, para. 15; *Prosecutor v. Dario Kordić et al*, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and one Formal Statement, Case No. IT-95-14/2-AR73.6, 18 September 2000, para. 24.

[423] *Ibid.*, *Kordić*, para. 24, citing *Aleksovski*, para. 15.

[424] *Akayesu* Appeal Judgement, para. 286. See also Part IV of this Appeal Judgement.

[425] The Appeals Chamber notes that the Trial Chamber had adopted a similar approach in *Prosecutor v. Delalic*, Decision on the Motion of the Prosecution for the Admissibility of Evidence, Case No. IT-96-21-T, 19 January 1998, para. 31. The Appeals Chamber further notes that a decision by a Trial Chamber to admit the evidence does not constitute a conclusive determination as to the authenticity or trustworthiness of the admitted materials. This exercise rests with the Trial Chamber at a later stage of the proceedings in the course of determining the weight to be attached to this evidence.

[426] Decision on the Defence's Motion for Leave to have 14 Written Witness Statements Admitted as Evidence, 23 April 1999 para. 17 (Emphasis added). In English – the authoritative version of the Decision – paragraph 17 reads thus: "*In the opinion of the Tribunal, the Defence has provided little or no information which provides indicia as to reliability, voluntariness, truthfulness and trustworthiness of the statements. The limited information which has been presented by Defence Counsel is insufficient to establish the reliability and authenticity of the written statements." (*Emphasis added).

[427] Counsel for the Appellant gave the following explanation: "These statements were taken, were drafted by the witnesses themselves and in the photocopies of the original statements you will see that generally, it would be the person's handwriting some of them typed but following the request of the Counsel De Timmerman who had taken measures to ensure that witnesses who had sent messages in camps that people be able to testify for Mr. Rutaganda be able to do so and this is, he saw several people in the camp and 16 people gave testimonies. Some persons had not, weren't of use to Mr. Rutaganda but there were some which were transmitted. I have found some in the file when I took up the case of Mr. Rutaganda and the first thing Defence did was to present the motion for teleconferencing." T, 9 April 1999, page 16.

[428] T, 9 April 1999, p. 18.

269. In view of the foregoing, it is apparent that the information made available to the Trial Chamber as to the circumstances in which the statements were taken was very limited. In the opinion of the Appeals Chamber, the Trial Chamber did not err in deciding that the information did not present sufficient indicia of reliability. Few details, if any, were available to the Trial Chamber in relation to the circumstances in which the statements were taken, the identity of the interviewers, the nature of the questioning, and whether the witnesses had spoken under oath or solemn declaration.[429] Without further details, the Trial Chamber had the inherent discretion not to admit the statements. Considering that the Trial Chamber did not commit the alleged error of law in its decision refusing to admit the statements, the Appeals Chamber dismisses the Appellant's allegations that the Trial Chamber committed an error of law that had the potential to invalidate the Judgement.

270. In relation to the second argument, the Appellant contends that the Trial Chamber also erred by cutting off the inquiries of his Counsel about the authenticity of the statements during the testimony of Witness DD. The Appellant contends that the Presiding Judge prevented Counsel from pursuing the examination despite the fact that she had stated that she had five more questions in relation to the statement. The Appellant submits that he thereby prevented the Defence from establishing a foundation for the reliability of the statements. The Appellant submits that the Decision refusing to admit the statements was unfair, given that it was the Trial Chamber that prevented him from meeting the requirement of reliability.[430]

271. The trial record shows that the Presiding Judge indeed allowed Counsel for the Appellant to pursue her line of inquiry regarding the reliability of the statements.[431] On being interrupted by the Presiding Judge on the issue of the relevance of the questions, Counsel for the Appellant explained that she was establishing a foundation for potential hearsay evidence, namely, witness statements, to be introduced at a later date. Counsel for the Appellant was permitted to continue with her questions until the Presiding Judge enquired about the number of questions remaining. Counsel indicated that she had possibly five more questions, but confirmed that she had finished with the subject. Further questioning concerned matters linked to the witness's return to Rwanda.[432] Thus, although the Presiding Judge sought to accelerate the examination of Witness DD, the Appellant was not prevented from fully pursuing his line of inquiry in relation to the Tingi-Tingi camp witness statements.

272. Consequently, the Appeals Chamber considers as baseless the Appellant's argument that the Presiding Judge prevented him from establishing a foundation for the statements. Since the allegation of error of law cannot stand, the second argument is accordingly dismissed.

273. As a third argument, the Appellant submits that the Trial Chamber failed to apply the rules of admissibility required by the fairness and justice of the given circumstances, thus committing an error of law.[433] The Appellant argues that the statements were crucial defence evidence and that the necessity for presenting them in hearsay form was partly caused by the delay in hearing the Defence's "Extremely Urgent Request for a Teleconference Deposition."[434] The Appellant also suggests that much less exacting standards for the admission of hearsay were imposed on the Prosecution than on the Appellant. In its response, the Prosecution argues that the Appellant has

[429] Paragraph 18 of the Decision refusing to admit the statements.
[430] Defence Appeal Brief, paras. 195 to 196, Supplemental Defence Document, para.12 (5).
[431] T, 17 March 1999, pp. 22 to 23.
[432] *Ibid*.
[433] Supplemental Defence Document, para.12 (6).
[434] Extremely Urgent Request for a Teleconference Deposition (Rule 71 of the ICTR Rules of Procedure and Evidence), filed on 15 February 1997.

failed to identify any relevant or material procedural inequality and that the issue of the teleconference motion is immaterial to the admissibility of the statements.[435]

274. Although the Appellant's filings are not clear, the Appeals Chamber is of the opinion that they raise two distinct questions here. The first is whether, given the exceptional nature of the Tingi-Tingi statements, the Trial Chamber acted with due fairness and in the interests of justice by not admitting them. The second question is whether, during the trial, the Trial Chamber was more lenient with the Prosecutor when determining the admissibility of hearsay evidence.

275. Regarding the first question, the Appellant contends that, following the loss of the witnesses, the Trial Chamber should have been more receptive to the hearsay evidence, given that the admission of the statements would be the only way their evidence could be brought to light. As aforesaid, Rule 89(C) grants a Trial Chamber a wide discretion to admit relevant evidence that it deems to have probative value. Thus, in considering whether to admit potential evidence, in particular evidence which could in any way be exculpatory or mitigating, a Trial Chamber should remain alive to the given circumstances and realities of the case in the exercise of its discretion.[436]

276. The Appeals Chamber notes that the ICTY Appeals Chamber in *Kordić* considered that Rule 89(C) of the Rules of that Tribunal must also be interpreted so that safeguards are provided to ensure that the Trial Chamber can be satisfied that the evidence is reliable.[437] The Appeals Chamber concurs with that interpretation and is consequently of the opinion that the discretion granted the Trial Chamber under Rule 89(C) should be counterbalanced with the caution required in admitting hearsay evidence.

277. It seems that the Appellant attributes much of the responsibility for the loss of the witnesses to the delay by the Tribunal in hearing the Defence's *Extremely Urgent Request for a Teleconference Deposition (Rule 71 of the ICTR Rules of Procedure and Evidence)*, filed on 17 February 1997.[438] The Appeals Chamber notes that the Appellant raised similar arguments before the Chamber during the hearing of his motion for the admission of the statements. Specifically, the Appellant submitted that he was seeking admission of the statements as reparation for the "irreparable prejudice" caused by the loss of the witnesses.[439] During the hearing, the Trial Chamber was made aware of all the steps taken by the Appellant and the difficulties he encountered following the taking of the statements and in tracing the witnesses. Moreover, the Appellant gave reasons for filing his motion mid-way through the Defence case.

278. In the opinion of the Appeals Chamber, the Appellant has not shown that, by not admitting the statements, the Trial Chamber failed to take into consideration these exceptional circumstances or that the Chamber did not accord the appropriate leniency. Moreover, as the Appeals Chamber noted above, the statements were found to possess little or no *indicia* of reliability, and, hence, at the admissibility stage, were devoid of probative value. Consequently, despite the exceptional

[435] Prosecution's Response Brief, paras. 4.50 to 4.56.
[436] Rule 89(C) should be read subject to Rule 89(B), whereby the Trial Chamber is required to apply the Rules of Evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and with the general principles of law.
[437] *Prosecutor v. Dario Kordić*, Decision on Appeal regarding Statement of a Deceased Witness, Case No. IT-95-14/2-AR73.6, 21 July 2000, para. 22. The Appeals Chamber notes that Rule 89(C) of the ICTY Rules corresponds to Rule 89(C) of the Rules of the Tribunal.
[438] Annexed to the Motion was a list of the names of the 16 potential witnesses. The Motion was heard on 6 March 1997, by which time the Tingi-Tingi refugee camp had been destroyed. As a remedy, the Appellant suggested that measures be taken to locate and protect the witnesses. These were ordered by the Trial Chamber in its Decision on the Extremely Urgent Request made by the Defence for the taking of a Teleconference Deposition, dated 6 March 1997.
[439] T, 9 April 1999, p. 36.

circumstances, the Trial Chamber did not err in rejecting the Defence's request to admit the Tingi-Tingi camp witness statements.

279. Concerning the second question, the Appellant contends that the Trial Chamber erred in imposing more rigid requirements for the admissibility of hearsay evidence on the Appellant than on the Prosecution. In particular, the Appellant states that at no time did the Trial Chamber exact the same standard for the admissibility of hearsay evidence on the Prosecution as it did in respect of the Tingi-Tingi camp witness statements.[440] The Appeals Chamber notes that this argument is general and unsupported by specific examples. That being the case, the argument cannot stand. Given also that it has not been shown that the Trial Chamber erred by imposing an erroneous standard for the admissibility of the statements, the Appeals Chamber finds that this argument, as a whole, should be dismissed accordingly.

C. Cross-examination of Rutaganda using collateral documents

280. The Appellant submits that the Trial Chamber erred in law by allowing the Prosecution to use three non-disclosed documents during his cross-examination. The documents at issue are pictures taken from a book in the ICTR library, an Agence France Press (AFP) newspaper clipping, and the Articles of Association of *Radio Télévision Libre Mille Collines* (RTLM) showing the initial shareholders.[441] The Appellant argues that as these documents were not disclosed during the Prosecution case, the Prosecution was effectively permitted to split its case. In addition, according to the Appellant, the documents were admitted as hearsay evidence without an inquiry being made as to their reliability. Lastly, the Appellant argues that the Trial Chamber failed to apply the principle of equality of arms. In support of this submission, the Appellant cites a specific example to show that a different standard was imposed on him. The Appellant concludes that the prejudice suffered calls for a re-trial.[442]

281. The Prosecution submits that the arguments of the Appellant are baseless. It contends that the documents, deemed relevant to the cross-examination by the Trial Chamber, were not subject to disclosure and that no prejudice was suffered by the Appellant through the use of the documents.[443]

282. The record shows that at the start of the cross-examination of the Appellant, the Prosecution presented the Chamber with a file containing documents that it intended to use during cross-examination. The three documents cited by the Appellant were also within the file, and had not been previously disclosed to the Defence. The Trial Chamber permitted the Prosecution to tender them, but, in order to allow the Appellant time to familiarise himself with the materials, postponed questioning on them until the next day.

283. The issue the Appeals Chamber must first settle is whether, given that the materials had not been previously disclosed in conformity with Rule 66 or 68[444] of the Rules, the Trial Chamber erred

[440] Defence Appeal Brief, paras. 217 to 219, Supplemental Defence Document, para.12 (6), Defence Reply Brief, para. 4.30.
[441] Filed as Prosecution Exhibits 473, 474 and 475 respectively.
[442] Defence Appeal Brief, paras. 220 to 235, Supplemental Defence Document, paras.13 (1) to (6).
[443] Prosecution's Response Brief, paras. 4.57 to 4.73.
[444] Rule 66 of the Rules (Disclosure of materials by the Prosecutor) reads thus:

> Subject to the provisions of Rules 53 and 69:
> (A) The Prosecutor shall disclose to the Defence:
> (i) 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; and

by allowing the Prosecution to use the materials during the cross-examination and, if so, whether this error is such as to invalidate the Judgement.

284. Considering that the photographs, the press clipping and the Articles of Association of RTLM bordered on issues that had been raised by the Appellant during examination-in-chief, the Appeals Chamber considers that the Trial Chamber had the discretion to admit them during the cross-examination of the Appellant. Moreover, the documents in question were not documents the Prosecution was required to disclose under Rule 66(A) or permit the inspection thereof under Rule 66(B) of the Rules. Lastly, since the documents did not seem to be of an exculpatory nature for the Appellant, the Prosecution was under no obligation to disclose them to the Appellant under Rule 68 of the Rules. The allegation by the Appellant that the Prosecution did not discharge its burden of disclosure[445] is thus unsubstantiated.

285. The Appellant contests the use and admission of photographs taken from a publication entitled *Rwanda, les médias du génocide*. The 9 photographs show the *Interahamwe* at an allegedly peaceful demonstration in support of the Nzanzimana government, various Rwandan personalities including the then President Juvénal Habyarimana, "moto taxis", the Appellant wearing an MRND cap and the Appellant and the *Interahamwe* at the MRND extraordinary congress held in July 1993.[446] The record shows that the Prosecution indicated during the trial that it obtained the publication from the ICTR library for use in the cross-examination of the Appellant.[447]

286. The trial record shows that during the examination-in-chief, the Appellant also spoke of the "moto taxis", referred to as the "*Interahamwe* taxi",[448] and of his attempt to initiate with others the holding of a possible *Interahamwe za MRND* congress, which was subsequently relegated behind the MRND party congress.[449] In addition, the Appellant indicated during his examination that he wore an MRND hat when he attended meetings and that he had participated in MRND rallies;[450] and, throughout his examination, the Appellant spoke generally about the structure, activities and purpose of the *Interahamwe za MRND*.

287. Therefore, in the opinion of the Appeals Chamber, the Appellant has not demonstrated that the Trial Chamber erred by admitting the photographs contained in the publication entitled *Rwanda, les médias du génocide*, which would afford the Prosecution the opportunity to rebut the allegations made by the Appellant during his cross-examination. In any event, were it established that the

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(ii) No later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; upon good cause shown a Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the Defence within a prescribed time.

(B) At the request of the defence, the Prosecutor shall, subject to Sub-Rule (C), permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused. […]

Rule 68 (Disclosure of exculpatory evidence) reads thus:
"The Prosecutor shall, as soon as practicable, disclose to the Defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence."

[445] Supplemental Defence Document, para. 13 (4).
[446] T, 23 April 1999, pp. 6 to 26.
[447] T, 22 April 1999, p. 104.
[448] T, 8 April 1999, p. 149.
[449] T, 8 April 1999, pp. 151 to 152, 166 to 167, 171 to 172.
[450] T, 9 April 1999, pp. 75 to 76, and T, 21 April 1999 pp. 10 to 11.

photographs should not have been admitted, the Appeals Chamber would still be of the opinion that the Appellant has not demonstrated that he suffered any prejudice by their admission or that they had an impact on the Judgement.

288. As regards the AFP clipping dated 14 May 1994 and relating to statements ascribed to Robert Kajuga, Chairman of the *Interahamwe za MRND*, [451] and the Articles of Association of RTLM with the list of initial shareholders,[452] the Appeals Chamber finds that the Trial Chamber had the inherent discretion to admit them.

289. In seeking to have the documents admitted prior to cross-examination, the Prosecution contended that it intended to use them in response to matters raised during the Appellant's examination-in-chief. The record supports this argument. The Appellant testified about Robert Kajuga in the course of his examination, and stated that he had never heard anything discriminatory from Kajuga.[453] Likewise, concerning RTLM, during his examination-in-chief, the Appellant testified about his investment in the station, and gave details and names of other shareholders.[454]

290. The Appeals Chamber finds, therefore, that it has not been established that the Trial Chamber erred in admitting the press clipping and the Articles of Association of RTLM.

291. It should be recalled that the Trial Chamber accorded the Appellant sufficient time to familiarise himself with the photographs, the press clipping and the Articles of Association. However, Counsel for the Appellant did not avail herself of the opportunity to re-examine the Appellant on the photographs or on the Articles of Association. Notwithstanding, during cross-examination by the Prosecution on the photographs, the Presiding Judge indicated that the author's comments should be treated with caution.[455] As regards the press clipping, the Appeals Chamber notes that the Appellant called into question the authorship of the article and underscored that the statements contained therein were attributable solely to the Chairman of the *Interahamwe*.[456] The Appellant has not shown that the Trial Chamber failed to consider these factors when admitting the materials and when assessing their impact on his testimony.

292. Lastly, the Appeals Chamber notes that the Appellant has not put forward any convincing argument to show that the documents were unreliable or that the Trial Chamber violated the doctrine of equality of arms. Consequently, the Appeals Chamber dismisses the arguments of the Appellant that the Trial Chamber erred in law by admitting the said documents at that stage in the trial, and by violating the doctrine of equality of arms.

293. Having rejected, for the foregoing reasons, the arguments pertaining to the alibi, the errors relating to the Tingi-Tingi witness statements and the collateral documents used in the cross-examination of Rutaganda, the Appeals Chamber dismisses the Appellant's ground of appeal relating to specific errors of law and fact.

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[451] T, 22 April 1999, pp. 105 to 106. The statements ascribed to Kajuga in the article relate to the *Interahamwe*'s support of the civil defence in the fight against RPF, the killing of *Inkotanyi* (RPF infiltrators) as well as innocent civilians at roadblocks, and incidents with the Red Cross and its ambulances, T, 23 April 1999, pp. 26 to 36, 45 to 49, 56 to 58.
[452] T, 22 April 1999, pp.104 to 105.
[453] T, 9 April 1999, pp. 50 to 51, 81 to 87.
[454] T, 21 April 1999, pp.74 to 79, 87 to 94.
[455] T, 23 April 1999, p. 19 (French version).
[456] T, 23 April 1999, pp. 35 to 41 (French version).

VI. DISTRIBUTION OF WEAPONS

294. Under this ground of appeal,[457] the Appellant challenges his conviction for genocide and extermination as crime against humanity, entered under Counts 1 and 2 of the Indictment and in respect of which he was held responsible for having aided and abetted in the preparation for and perpetration of killings of members of the Tutsi group.[458] It transpires from its Judgement that the Trial Chamber accepted the evidence of Witnesses J, U, T and Q in finding, beyond a reasonable doubt, that the Appellant aided and abetted in the killings of members of the said group by distributing weapons to the *Interahamwe* on 8 and 15 April 1994, and on or about 24 April 1994.[459] In his written submissions, the Appellant contends that the Trial Chamber committed errors of law [460] and fact[461] in its interpretation of the Indictment,[462] assessment of the alibi,[463] and evaluation of the evidence presented at trial.[464] He is therefore requesting that the Appeals Chamber set aside the Trial Chamber's finding on paragraph 10 of the Indictment.[465]

295. The Appeals Chamber will examine *seriatim* the Appellant's arguments on appeal. The Appeals Chamber notes, nonetheless, that unless other grounds of appeal are accepted, the errors alleged under this ground of appeal are not such as to lead to the setting aside of the convictions for genocide and extermination as a crime against humanity. Indeed, even assuming that the Trial Chamber's factual findings in respect of paragraph 10 of the Indictment are reconsidered or invalidated, the other findings under paragraphs 383 through 402 and 403 through 418 of the Trial Judgement suffice to establish beyond a reasonable doubt the culpability of the Appellant.

A. Interpretation of the Indictment and assessment of the alibi

296. In this section, the Appeals Chamber will examine the Appellant's arguments concerning the interpretation of the Indictment and assessment of the alibi, with respect to the facts alleged in paragraph 10 of the Indictment, which reads as follows:

> On or about 6 April 1994, Georges RUTAGANDA distributed guns and other weapons to *Interahamwe* members in Nyarugenge commune, Kigali.

297. With respect to the interpretation of the Indictment,[466] the Appellant contends that the Trial Chamber committed an error of law in finding that he distributed weapons on 8 and 15 April 1994, and on or around 24 April 1994,[467] whereas paragraph 10 of the Indictment averred a single act of weapons distribution on or about 6 April 1994. [468] The Appellant maintains that these dates are outside the time

[457] Supplemental Document, para. 14.
[458] Trial Judgement, paras. 386 and 416.
[459] *Ibid.*, paras. 195 to 201 and 416.
[460] Supplemental Document, paras. 14(4) to (7) and 15(1) to 18(8). The Appeals Chamber notes that the allegation at paragraph 15(1) is entirely unfounded, and therefore rejects it.
[461] *Ibid*., paras. 15(9) to (14).
[462] *Ibid*, paras. 14(1) to (7).
[463] *Ibid*, paras. 11(e) and (f).
[464] *Ibid*, paras. 15(1) and (14).
[465] The paragraph reads as follows: "[O]n or about 6 April 1994, Georges RUTAGANDA distributed guns and other weapons to *Interahamwe* members in Nyarugenge *commune*, Kigali."

[466] In his written submissions, the Appellant put forward four main arguments in support of this allegation (Supplemental Document, paras. 14(4) to (7); Rutaganda's Brief, para. 236 to 276). The Appeals Chamber finds that these arguments relate to one sub-ground of appeal.
[467] Supplemental Document, para. 14(4); *Ibid*., paras. 252 to 265.
[468] *Ibid*., para. 14(4).

frame referred to in the Indictment,[469] and that the Trial Chamber erred, on the one hand, in misconstruing the expression "on or about"[470] and, on the other hand, in considering time not to be of the essence in paragraph 10 of the Indictment.[471]

298. Moreover, the Appellant argues that he was prejudiced by the error, as he had relied on the date set out in the indictment – namely 6 April 1994 – in preparing his defence. He submits that he submitted an alibi notice for 6 and 7 April 1994, but the Trial Chamber found against him for his failure to present alibi evidence for 8, 15 and 24 April 1994.[472] The Appellant also alleges that the Trial Chamber erred in rejecting, for no apparent reason, the Prosecution motion to amend the Indictment pursuant to Rule 50 of the Rules, in order to substitute 6 April with 15 or 16 April 1994.[473] He argues that such a decision is incompatible with the finding that he distributed weapons on three different dates alleged in the Indictment.[474]

299. In its Response, the Prosecution maintains, *inter alia*, that paragraph 10 of the Indictment is framed in such a manner as to include weapons distribution on several occasions within the general time frame of April 1994.[475] The Prosecution also contends that the Appellant did not suffer prejudice in relation to the submission of his alibi,[476] as he put forward evidence to establish his alibi for the whole material period of April 1994.[477]

300. Having considered the totality of the Appellant's arguments, the Appeals Chamber is of the opinion that the relevant paragraphs of the Trial Judgement, which the Appellant appears to contest,[478] read as follows:

> 196. The Chamber notes that the testimony of the Accused and Witness DDD indicates that the Accused did leave his house on 8 April, and that he was in Kigali at the Amgar office on 15 April and on 24 April. His defence to the allegations set forth in paragraph 10 of the Indictment is a bare denial. The Chamber notes that under cross-examination, the Defence did not suggest to the Prosecution witnesses that the Accused had not participated in the distribution of weapons, or that he was not present at Nyarugenge Commune on 8, 15 and 24 April 1994. Further the Defence did not produce any witnesses to confirm an alibi by testifying that the Accused was elsewhere when the events described by the Prosecution witnesses took place, as he does in respect of other allegations in the Indictment. A number of Defence witnesses testified that the Accused was very busy selling beer after his return to Kigali on 14 April, but the Chamber considers that selling beer would not have precluded the Accused from also engaging in the distribution of guns as alleged by the Prosecutor. For these reasons, the Chamber considers that the Defence has not provided evidence which effectively refutes the evidence presented by the Prosecutor in support of the allegations set forth in paragraph 10 of the Indictment.[479] (Emphasis added)
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> 201. The Chamber notes that the dates of the three incidents - 8 April, 15 April, and 24 April - vary from the date on or about 6 April, which is set forth in paragraph 10 of the Indictment (1). The phrase "on or about" indicates an approximate time frame, and the testimonies of the witnesses date the events within the month of April. The

[469] *Idem.*
[470] In its Trial Judgement, the Trial Chamber explained that the phrase "on or about" indicates an approximate time frame within the month of April. See Trial Judgement, paras. 201 and 255.
[471] Supplemental Document, paras. 14 (6) and (7); Rutaganda's Brief, para. 269.
[472] Supplemental Document, para. 11(e)(1) and (2), and (3) to (5). The Appeals Chamber hereby dismisses the allegation made in para. 11(e)(6) on the ground that it is entirely unfounded. In his arguments, the Appellant also contends that the Trial Chamber shifted the burden of proof by holding that he had failed to adduce sufficient evidence to refute the evidence presented by the Prosecution. (Supplemental Document, para. 15(8). The Appeals Chamber recalls that it dismissed this argument in Part IV of this Judgement.
[473] Rutaganda's Brief, para. 268 (citing Trial Judgement, para. 14).
[474] *Ibid.*
[475] Prosecution's Response, para. 5.9.
[476] *Ibid.*, para. 5.19.
[477] *Ibid.*, paras. 5.26 and 5. 28.
[478] The Appeals Chamber notes that the Appellant's written submissions do no specify which passages of the Trial Judgement he challenges under this ground of appeal.
[479] Trial Judgement, para. 196.

> Chamber does not consider these variances to be material or to have prejudiced the Accused. The Accused had ample opportunity to cross-examine the witnesses. In reviewing the allegation set forth in this paragraph of the Indictment, the Chamber finds that the date is not of the essence. The essence of the allegation is that the Accused distributed weapons in this general time period.[480] (Emphasis added)

301. An Indictment is aimed at providing the accused with "a description of the charges against him with sufficient particularity to enable him to mount his defence."[481] Accordingly, the indictment must be sufficiently specific, meaning that it must reasonably inform the accused of the material charges, and their criminal characterisation. The materiality of an alleged fact depends, above all, on the nature of the alleged criminal conduct charged to the accused.[482] Before the ICTY, these principles derive from Articles 17(4), 20(2), 20(4)(a) and (b) of the Statute, and Rule 47(C) of the Rules.

302. Although, *a priori*, the Prosecution is required to prove the facts alleged in the Indictment, the Appeals Chamber holds the view that the Indictment cannot have the degree of specificity of the evidence underpinning it. The Appeals Chamber therefore considers that, in general, minor differences between the indictment and the evidence presented at trial are not such as to prevent the Trial Chamber from considering the indictment in the light of the evidence presented at trial. Moreover, the Appeals Chamber notes that in *Kunarac*, the ICTY Appeals Chamber held that "minor discrepancies between the dates in the Trial Judgement and those in the Indictment […] go to prove […] that the events charged in the Indictment did not occur."[483]

303. Such doctrines must, however, be assessed in the light of paragraphs 20(2), (4)(a) and (b) of the Statute, and take into account the specific circumstances of each case. Indeed, the Appeals Chamber is of the opinion that the right of the accused to be informed of the nature of the charge against him and the right to have adequate time for the preparation of his defence imply that an accused must be able to identify the criminal acts and conduct alleged in the indictment in all circumstances. Before holding that an event charged is immaterial[484] or that there are minor discrepancies between the indictment and the evidence presented at trial, a Chamber must normally satisfy itself that no prejudice shall, as a result, be caused to the accused. An example of such prejudice is the existence of inaccuracies likely to mislead the accused as to the nature of the charges against him. Depending on the specific circumstances of each case, the question to be to determined is whether an accused was reasonably able to identify the crime and criminal conduct alleged in each of the paragraphs of the Indictment.[485]

304. In the present case, the Appeals Chamber finds that paragraph 10 of the Indictment is a sufficiently concise description of the criminal conduct with which the accused was charged, pursuant to Article 17(4) of the Statute and Rule 47(C) of the Rules. Though paragraph 10 of the Indictment alleged that the Appellant had distributed weapons "on or about 6 April 1994", the Appeals Chamber notes that this paragraph cannot be read in isolation from the rest of the document. Indeed, this paragraph must be read in the context of the other paragraphs of the Indictment relating to genocide and extermination as crime against humanity. Moreover, the Appeals Chamber notes that the description of the events charged in paragraph 10 of the Indictment does not show that the Prosecution necessarily envisaged only a single act of weapons distribution. On the contrary, the Prosecution evidence presented at trial shows that the

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[480] Trial Judgement, para. 201 (Footnotes omitted).
[481] *Kupreskic* Appeal Judgement, para. 95; see also para. 88, and the *Furundzija* Appeal Judgement, para. 61.
[482] *Kupreskic* Appeal Judgement, para. 89.
[483] *Kunarac* Appeal Judgement, para. 217.
[484] Non-material facts are, by nature, superfluous; in other words, it is not, in principle, necessary to prove them in order to establish the culpability of an accused for a given crime.
[485] Moreover, it goes without saying that where an accused considers that the evidence at trial falls outside the scope of the indictment, he may raise an objection as to lack of fair notice and/or seek appropriate remedy from the Trial Chamber, either by way of an adjournment of the proceedings or by excluding the challenged evidence. (*Furundzija* Appeal Judgement, para. 61).

Prosecution had envisaged more than a single act of weapons distribution. In any event, the trial record does not show that the Appellant indicated to the Trial Chamber that the evidence at trial fell outside the scope of the Indictment. Nor does it show that the Appellant requested additional time to prepare his defence. The Appeals Chamber therefore finds that the Trial Chamber did not commit an error of law in considering the evidence presented at trial, which evidence tended to show that the Appellant had distributed weapons on three occasions in April 1994.

305. As to whether the Appellant suffered prejudice as a result of the Trial Chamber's finding that the specific date was not material, the Appeals Chamber observes that, according to the trial record, the Appellant submitted an alibi notice for 6 and 12 April 1994.[486] The Appeals Chamber notes, nonetheless, that paragraph 196 of the Trial Judgement clearly shows that the Appellant presented evidence – including his own testimony, and that of Witness DDD – in support of an alibi for 8, 15 and 24 April 1994. The Appellant's contention that he suffered prejudice as to the presentation of his alibi therefore appears clearly unfounded in this instance.

306. It is the opinion of the Appeals Chamber that the alleged variance between the evidence presented at trial and the Indictment in relation to the date of the commission of the offence cannot lead to invalidation of the Trial Chamber's findings unless the said date is actually an essential part of the Appellant's alleged offence.[487] However, such is not the case in this instance. The Appeals Chamber notes, moreover, that according to the evidence presented at trial, the weapons distributions occurred during a period that was reasonably close to the date referred to in the Indictment and that, therefore, the Appellant was not misled as to the charges brought against him. For these reasons, the Appeals Chamber dismisses this sub-ground of appeal and finds that the Trial Chamber did not commit the alleged error of law in this instance.

B. Assessment of the evidence presented at trial

307. In this section, the Appeals Chamber will examine the Appellant's arguments in respect of the Trial Chamber's assessment of the evidence of Witnesses Q, T, U and J.

1. Witness Q

308. The Trial Judgement reveals that the Trial Chamber found Witness Q to be a credible witness.[488] In the summary of Witness Q's testimony, the Trial Chamber noted that he testified that the Appellant had distributed firearms, and that he was a "leader of the *Interahamwe*" and that "everyone said that the Appellant was distributing weapons at the *commune* level".[489] The Trial Chamber also noted that Witness Q was not cross-examined on this statement. Under this ground of appeal, the Appellant challenges the Trial Chamber's conclusion that Witness Q was reliable, and, more specifically, that the Trial Chamber committed the following errors of law and fact:[490]

- error of law in drawing inferences from the Appellant's failure to cross-examine Witness Q on the weapons distribution at the *commune* level, whereas the Trial Chamber elicited this statement after cross-examination had ended;[491]

- error of law in admitting and relying on hearsay evidence;[492]

[486] See *Avis en vertu de l'article 67(A)ii) du Règlement de procédure et de preuve – Défense d'alibi*, that Counsel for Appellant appears to have filed on 15 February 1997. See Appeals Chamber's findings under Part V of this Judgement.
[487] See *Dossi* (1918) 13 Cr App R 158.
[488] Trial Judgement, para. 195.
[489] *Ibid.*, para. 194.
[490] Rutaganda's Brief, paras. 282 to 287.
[491] Supplemental Document, paras. 15(1) and 15 (2).

- error of law in discounting inconsistencies in the testimony of Witness Q based on his trauma, as well as errors of transcription and/or interpretation in the said testimony;[493]

- errors of law and fact in relying on the testimony of Witness Q despite its being confused and contradictory;[494] and

- Error of fact in crediting the witness's testimony whereas the answers were elicited from questions that invited the witness to speculate. [495]

309. The Prosecution argues, *inter alia*, that the Appellant has failed to show that the Trial Chamber drew improper inferences from the Appellant's failure to cross-examine the witness.[496] The Prosecution submits that to the extent the Trial Chamber summarised Witness Q's testimony, it did not indicate whether the testimony was material to the weapons distribution findings. Nor did the Trial Chamber state that it relied upon the alleged hearsay evidence given by Witness Q. Moreover, the Prosecution contends that Witness Q did not provide inconsistent evidence as to who ordered the weapons distribution. The Prosecution explains that Witness Q testified that weapons were distributed on two separate occasions, namely the day the President's plane was shot down, on 6 April 1994, and the day the Appellant gave orders for distribution of weapons in the Witness's presence. Lastly, the Prosecution challenges the Appellant's suggestion that the Bench improperly extracted evidence from the witness.[497]

310. The Appeals Chamber considers that a party who fails to cross-examine a witness upon a particular statement tacitly accepts the truth of the witness's evidence on the matter. Therefore the Trial Chamber did not commit an error of law in the case at bar, in inferring that the Appellant's failure to cross-examine Witness Q on the weapons distribution meant that he did not challenge the truth of the witness's evidence on the matter. That being said, it is unclear from the Trial Judgement whether the Trial Chamber drew inferences from this failure. Rather, it appears that it only noted that the Appellant failed to cross-examine Witness Q regarding the specific statement, without making any inferences in its factual conclusions.[498] It is the opinion of the Appeals Chamber that this argument is without foundation.

311. With respect to the Appellant's contention that the Trial Chamber erred in admitting and relying on Witness Q's hearsay evidence, the Appeals Chamber notes that *a priori,* the Trial Judgement reveals that the Trial Chamber did not rely on this evidence in finding that the Appellant had distributed weapons. Moreover, the Appellant did not present any arguments to show that the Trial Chamber actually relied on the hearsay evidence in its factual conclusions. In any event, the Appeals Chamber recalls that hearsay evidence, *per se*, is not inadmissible before the International Tribunal. The Appeals Chamber therefore considers that this argument must also fail.

312. With respect to the Appellant's contention that the Trial Chamber erred in law in considering the impact of trauma, as well as the transcription and/or interpretation errors in discounting Witness Q inconsistencies, the Appeals Chamber once again notes that the Appellant made this claim in support of his ground of appeal regarding the crimes committed at the Amgar garage. The Appeals Chamber notes that the same applies to the allegation of error in respect of the contradictions between the account of Witness Q and that of Witness Haglund. The Appeals Chamber therefore refers the Appellant to its

[492] *Ibid*., para. 15(3).
[493] *Ibid*., para. 15(4).
[494] *Ibid*., paras. 15(5) and 15(10).
[495] *Ibid*., para. 15(10).
[496] Prosecution's Response, para. 5.46.
[497] Rutaganda's Brief, paras. 282 to 287.
[498] Trial Judgement, para. 194.

findings on these arguments, under the grounds of appeal on the crimes committed at the Amgar garage, *infra*.[499]

313. With regard to the allegations of errors of law and fact regarding inconsistencies in the testimony of Witness Q, the Appeals Chamber holds that the alleged inconsistencies in the evidence of the said witness – in regard to which the Appellant refers to his allegations relating to the crimes committed at Amgar garage[500] – are immaterial as to whether the Appellant had distributed weapons to members of the *Interahamwe* in April 1994. When the alleged inconsistencies are placed in the context of this issue, the Trial record reveals that Witness Q did not contradict himself as to who distributed weapons.[501] This witness testified that weapons were distributed on two separate occasions, and that the Appellant was present on one of the occasions. As such, the fact that Witness Q did not identify the Appellant on the first occasion does not render his entire testimony unreliable. In any case, it is apparent from the Trial Chamber's factual findings that more weight was placed upon the testimony of other witnesses who provided specific dates on which the Appellant had distributed weapons (namely, Witness J in relation to 15 April 1994, Witness T in relation to 24 April 1994, and Witness U in relation to 8 April 1994). Even if the Appellant's arguments were founded in this instance – which, indeed, is not the case – the allegation of error of fact and law neither invalidates the Judgement nor occasions a miscarriage of justice.

314. Lastly, contrary to the Appellant's assertion that the Trial Judges improperly extracted evidence from the witness, the trial record shows that the Trial Chamber acted within its discretion when examining the witness on certain aspects of his testimony.

315. For these reasons, the Appeals Chamber dismisses all of the Appellant's arguments in relation to the Trial Chamber's assessment of the evidence of Witness Q.

2. Witness T

316. Under this ground of appeal, the Appellant contends that the Trial Chamber erred in law in relying on the evidence of Witness T, and puts forward several arguments relating to possible bias on the part of the witness, Witness T's insufficient knowledge of the Appellant, and his inability to identify the Appellant satisfactorily in court, as well as the existence of several inherent contradictions in his testimony.[502]

317. The Appeals Chamber notes, first of all, that contrary to the Appellant's assertions,[503] the Trial Chamber relied on Witness T's evidence in establishing the Appellant's involvement in weapons distribution on 24 and not on 8 April 1994. Indeed, Witness T's evidence, summarised in paragraph 193 of the Trial Judgement, relates to the Appellant's presence during the attack by the *Interahamwe* on the *Abakombozi*[504] and the fact that when he arrived at the wheel of a red pick-up truck in which he brought *Uzzi* guns, he distributed some of the weapons (while the rest remained in the pick-up) with the assistance of the *Interahamwe* leader for the area and of one François, president of the *Interahamwe* for Cyahafi. According to Witness T, the Appellant gave the weapons to François who, in turn, distributed them. Thus, the *Interahamwe* distributed weapons to those in the neighbourhood who did not have any. The witness further testified that the Tutsis were separated from the Hutus while the Appellant was standing in the back of the vehicle in which he had brought the weapons, and that when the massacres started, the

[499] See Part VII of this Judgement.
[500] For example, the time lapse between the presidential plane crash and the start of the killings in Kigali, the witness's escapes, the events at a roadblock outside Amgar garage and the events at Amgar garage.
[501] T, 9 October 1997, pp. 10 and 19 to 25.
[502] Supplemental Document, para. 15(11); Rutaganda's Brief, paras. 288 to 290.
[503] Supplemental Document, para. 15(11).
[504] That is, youths of the *Parti Social Démocrate*, who were defending Cyahafi *secteur* against *Interahamwe* from nearby *secteurs*.

Appellant was seated in the vehicle. The Appeals Chamber affirms that the Trial Chamber's factual findings on this matter are found in paragraph 199 of the Trial Judgement, which reads as follows:

> The Chamber finds that on or about 24 April in Cyahafi sector, the Accused distributed *Uzzi* guns to the president of the *Interahamwe* of Cyahafi during an attack by the *Interahamwe* on the *Abakombozi*.

318. The Appeals Chamber will now examine in detail the Appellant's arguments which, he contends, should have led the Trial Chamber to disqualify Witness T's evidence. First of all, the Appellant alleges that the Trial Chamber failed to take account of a possible cause of bias, namely the fact that Witness T was an RPF soldier until shortly prior to his testimony.[505] On this point, the Prosecution responds that the courts are not obliged to give a detailed answer to every argument.[506] The Appeals Chamber notes that the Appellant is not unaware that this argument *per se* cannot invalidate Witness T's testimony, and that he has not put forward any arguments to show any bias on the part of this witness. The Appeals Chamber also notes that the Trial Chamber had two serious indicia of the absence of any animus on the part of the witness against the Appellant. Indeed, as regards the murder of his brother, Witness T explicitly stated that the Appellant was not present.[507] Furthermore, as regards the meeting, which, the Appellant states, took place in the Appellant's compound and during which the massacres were planned (according to what the witness was told by a third party who had since passed away), the witness testified that the person in question never indicated whether the Appellant was present at the meeting.[508]

319. The Appellant also contends that when asked to identify him in the courtroom, Witness T initially pointed to someone in the interpretation booth, before identifying him.[509] The Prosecution stresses that this point should not be exaggerated, insofar as Witness T did provide a satisfactory explanation as to his mistake and finally identified the Appellant unequivocally.[510] The Appeals Chamber has taken into account the two relevant passages of the trial transcript regarding the witness's identification of the Appellant.[511] The Appeals Chamber notes that although the transcripts of the early part of the proceedings do not specifically mention the incident referred to by the Appellant, the said incident is not disputed by the parties. It further notes that immediately after his initial mistake, the witness was asked by President Kama to look around the room and try to identify the Appellant, whereupon the witness identified the Appellant without difficulty. The Appeals Chamber notes that the witness clearly explained the reasons for the initial confusion, which, he testified, was due to the change in the appearance of the Appellant, who had lost weight and aged since the time when they were neighbours. Accordingly, the Appeals Chamber considers that it was not unreasonable not to disqualify the witness's evidence as unreliable due to his initial confusion. The Appellant also indicates that the witness did not know him well and gives several examples to support the assertion.[512] The Prosecution responds that the examples in question are irrelevant in as much, as not knowing certain details about the professional or social status of a neighbour does not in any way impair one's ability to give truthful evidence as to what one witnessed. [513] The Appeals Chamber concurs with this analysis.

320. Lastly, the Appellant alleges that there are a number of inherent contradictions in Witness T's account relating to the following points: (1) the issue as to whether Rutaganda brought one or more vehicles containing weapons to the place of the attack;[514] (2) the presence of the Appellant during the

[505] Rutaganda's Brief, para. 289(1).
[506] Prosecution's Response, paras. 5.62 and 5.63.
[507] T, 11 March 1998, p. 114 to 115.
[508] *Ibid.*, p. 23.
[509] Rutaganda's Brief, para. 289(2).
[510] Prosecution's Response, para. 5.65.
[511] T, 11 March 1998, pp. 6, 112 and 113.
[512] Rutaganda's Brief, para. 289(3).
[513] Prosecution's Response, para. 5.67.
[514] Rutaganda's Brief, para. 289(4).

attack;[515] (3) the time when the *Interahamwe* from the area actually attacked;[516] (4) whether the person the witness was hiding with was of Hutu or Tutsi origin;[517] (5) the witness being compelled to bury his brother and his friend;[518] and (6) the witness witnessing the killing of his brother.[519] The Prosecution challenges the existence of several of the alleged inconsistencies and submits that the other discrepancies are immaterial to the credibility of Witness T's evidence regarding the weapons distribution by the Appellant.[520] Having examined the relevant trial transcripts, the Appeals Chamber considers that the discrepancies alleged in points (1), (2), (3), 4) and (5) have not been established.[521]

321. However, the Appeals Chamber notes that Witness T's account of the circumstances surrounding the killing of his brother conflicts with the forensic evidence presented at trial.[522] The Trial Chamber notes that the forensic evidence shows that the body of the witness's brother bore three gunshot wounds to the head from back to front. However, the witness initially testified that:

> My elder brother was compelled to lie on the ground and a bullet was shot at him. He was asked to sleep on his stomach, he was shot at with a pistol, a shotgun and the bullet went through his heart.[523]

When asked, in cross-examination, to point to the place where his brother was shot, Witness T pointed to the area between the two shoulder blades. He testified that the bullet exited through the heart and that entry of the bullet was visible on the undershirt his brother was wearing.[524] The Appellant contends, without any showing, that Witness T did not witness the killing of his brother and that his testimony is not sufficiently credible to support a finding that he actually saw the Appellant distributing weapons. The Appeals Chamber considers that the contradictions in question can be explained otherwise than by holding that he was not present when his brother was killed. It notes in this regard that he was not asked to specify how far he was from his brother when the killing occurred or his angle of vision. The Appeals Chamber further notes that it has no information on the condition of the undershirt the victim wore. If the issue was to establish the circumstances surrounding the killing of Witness T's brother, the aforesaid discrepancies would certainly call into question the probative value of the witness' evidence on this point. However, considering the overall available evidence used by the Trial Chamber to assess the credibility of Witness T, the Appeals Chamber finds that the Appellant has failed to show that a reasonable tribunal could have, owing to the discrepancies alone, set aside the testimony of Witness T in respect of the alleged distribution of weapons by the Appellant on 24 April 1994.

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[515] *Ibid*., para. 289(5).
[516] *Ibid*, para. 289(6).
[517] *Ibid.*, para. 289(7).
[518] *Ibid*, para. 289(8).
[519] *Ibid*, para. 289(9).
[520] Prosecution's Response, paras. 5.68 to 5.78.
[521] As regards point (1), see French Transcript, 11 March 1998, p. 118; unlike the English transcript (T, 11 March 1998 p. 114), it refers to only one vehicle; regarding point (2), see *id*. (French) pp. 115 to 116; regarding point (3), see T, 11 March 1998, pp. 14 to 15. It should be noted that T's testimony mentions three separate events: a first attack that coincided with the weapons distribution, and led by the *Interahamwe* from Kimisagara and Gasyata on Cyahafi *secteur*, then defended by the *Abakombozi* around 24 April (pp. 13 to 14); a second attack the next day with the participation of the *Interahamwe* from the area joined by Hutu *Abakombozi* after they were told that the Tutsis were the people to be killed and that they were to forget about party differences (pp. 17 to 18); lastly, the killing of his elder brother, his friend and the driver, which, according to him, occurred at the end of May (p. 31); regarding point (4), see *id.*, pp. 19 and 23 to 25; regarding point (5), see *id.*, pp. 34 to 35 and 112**.**
[522] Annex D, Prosecution Exhibit 254.
[523] T, 11 March 1998, p. 31.
[524] *Ibid*, p. 108.

3. Witness U

322. Under this ground of appeal, the Appellant contends that the Trial Chamber erred in law in disregarding what he qualifies as fundamental inconsistencies between Witness U's previous statement and his in-court testimony, because the statement had not been signed.[525] He further submits that the Trial Chamber erred in fact in crediting the testimony of Witness U notwithstanding the inherent implausibility and contradictions identified by the Appellant.[526]

323. On the other hand, the Prosecution submits that the Trial Chamber's decision to disallow the tendering of the unsigned statement was appropriate. [527] As regards the alleged error of fact, the Prosecution argues that it appears from the record that Witness U's testimony contains no inconsistency and that it was therefore reasonable for the Trial Chamber to find the witness credible.[528]

324. The Appeals Chamber will begin by examining the ground of appeal according to which the Trial Chamber committed an error of law by disregarding the inconsistencies between the earlier statement of Witness U and his in-court testimony, because the said statement had not been signed.

325. The Appeals Chamber recalls that it falls to the Trial Chamber to determine if an inconsistency and/or discrepancy between two testimonies of the same witness substantially casts doubt on the witness's overall credibility.[529] In this instance, the Appeals Chamber reiterates the principle articulated in the *Akayesu* Trial Judgement that:

> The Chamber has considered inconsistencies and contradictions between these statements and testimony at trial with caution […], and in the light of the time lapse between the statements and the presentation of evidence at trial, the difficulties of recollecting precise details several years after the occurrence of the events, the difficulties of translation, and the fact that several witnesses were illiterate and stated that they had not read their written statements.[530]

The Appeals Chamber therefore recognises that the Trial Chamber had the discretion to determine whether the alleged inconsistencies directly concerned the crucial issue as to whether the Appellant distributed weapons to the *Interahamwe*.

326. The Appellant contends that the Trial Chamber erred in limiting use of the statement of Witness U. In support of his contention, the Appellant suggests that the Presiding Judge's statement (that "according to a general principle of law, such an unsigned statement by a witness cannot be used against the witness, unless he recognises having made the statement"[531]) testified to an overly restrictive procedure which led the Trial Chamber's failure to carefully assess the credibility and reliability of Witness U. [532]

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[525] Supplemental Document, para. 15(6).
[526] Supplemental Document, para. 15(12).
[527] Prosecutions's Response, paras. 5.79 to 5.81.
[528] *Ibid.*, paras. 5.82 to 5.102.
[529] *Musema* Appeal Judgement, para. 89; *Čelebići* Appeal Judgement, para. 497; *Kupreškić* Appeal Judgement, para. 156.
[530] Trial Judgement, para. 19.
[531] T, 10 October 1997 p. 76.* [English translation differs from French version.]
[532] The record shows that at the beginning of his cross-examination, Witness U confirmed having previously given a statement to the Prosecution. The witness also confirmed having signed the statement, but did not know exactly when he signed it. At that moment, the Appellant stated that the statement he had in his possession was not signed, and requested the Tribunal's indulgence to allow him to obtain a signed copy from the Prosecution. The Prosecution confirmed that the statement, recorded as Exhibit 189, was not signed in either English or French. After being questioned further by the Appellant, the witness confirmed having signed the statement below a text in Kinyarwanda

327. However, the Appeals Chamber notes that despite the aforementioned statement by the Presiding Judge, the Trial Chamber, in its Judgement, mentioned and considered the said pre-trial statement of Witness U.[533] The Appeals Chamber further notes that during the cross-examination of this witness, the Presiding Judge himself intervened with regard to a contradiction pointed out by the Appellant between the pre-trial statement and the testimony of Witness U.[534] In this regard, although the Judge implied that the unsigned statement could not be used in examining the witness, the Appeals Chamber considers that, as revealed by the trial record, the Trial Chamber did not do so during its examination of Witness U.

328. Accordingly, the Appeals Chamber accords no weight to the Appellant's contention that the Trial Chamber erred in law by disregarding the pre-trial statement of Witness U on account of the fact that it was not signed.

329. With respect to the allegation of an error of fact, the Appellant points to a number of inconsistencies and contradictions identified by him, which, he contends, vitiate Witness U's testimony, in order to highlight the apparent implausibility of the witness's evidence. The said inconsistencies and contradictions relate to the signing of this witness's pre-trial statement, the Appellant's political status, the role the Appellant played in the weapons distribution and his account thereof, the account regarding the *Interahamwe*, the fact that he hid in a bush near a garage and his subsequent flight, and the exact place he claimed that the victims were buried.

330. The Appeals Chamber recalls that, in examining an allegation of an error of fact, it must defer to the factual findings of the Trial Chamber, as the Trial Chamber is primarily responsible for evaluating the evidence presented at trial, assessing it and deciding what weight to accord it. Therefore, having examined Witness U's evidence, the Appeals Chamber finds that the Appellant's arguments are unfounded. Indeed, the Trial Chamber thoroughly examined the questions raised in the examination-in-chief and cross-examination.[535] Moreover, having examined Witness U's testimony, the Appeals Chamber notes that the Trial Chamber intervened many times during the examination-in-chief and cross-examination of the witness on the inconsistencies invoked by the Appellant in support of his contention that the witness was not reliable. [536] Likewise, the Appeals Chamber finds that the contention that Witness U was ready to draw incriminating conclusions is unfounded.[537]

331. It is the opinion of the Appeals Chamber that the Appellant has failed to demonstrate that no reasonable tribunal could have accepted the evidence upon which the Trial Chamber relied. Consequently, the Appeals Chamber holds that the Appellant has not established the alleged error of fact.

4. Witness J

332. The Appellant contends that the Trial Chamber erred in fact by finding, in reliance upon Witness J's testimony, that the Appellant had distributed weapons on 15 April 1994. Indeed, the witness testified at trial that the distribution occurred on 15 or 16 April 1994, whereas in his pre-trial statements to the Investigators from the Office of the Prosecutor he had stated that the distribution occurred on 6 or 7 April 1994.[538] Moreover, the Appellant submits that the Trial Chamber erred in finding Witness J to be a

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acknowledging that he had read the statement or had it read to him. Thereafter, during his cross-examination, the Appelant submitted an attestation in Kinyarwanda bearing his thumbprint. The witness reaffirmed having signed the statement with a pen. (T, 10 October 1997 pp. 29 to 34**,** and 50 to 53).

[533] Trial Judgement, para. 191.

[534] T, 10 October 1997 pp. 69 and 70.

[535] Trial Judgement, paras. 188 to 192.

[536] See, *inter alia*, T, 10 October 1997 pp. 13 to 18**,** 20 to 28, 36 to 38**,** 60 to 67**,** 72 to 75.

[537] *Ibid.* See, *inter alia*, pp. 10 and 35 to 40.

[538] Rutaganda's Brief, para. 303(1), Supplemental Document para. 15(13) and Rutaganda's Reply, para. 5.54.

credible witness[539] and in discounting contradictions between the witness's testimony and his pre-trial statements.[540] According to the Appellant, the contradictions concern the following points: (1) the question as to whether the *conseiller* of Cyahafi was killed before or after the weapons distribution;[541] (2) the issue as to who distributed weapons on that date (the Appellant himself or the two passengers in his vehicle);[542] (3) Witness J's reaction when the shooting started (whether he fled immediately or only after having seen Rusagara shot dead).[543] The Appellant challenges the Trial Chamber's factual findings[544] that Witness J "provided reasonable answers to the questions raised on cross-examination with regard to inconsistencies between his testimony and his pre-trial statements".[545]

333. In response, the Prosecution argues first of all that the alleged contradictions have not all been established and that, in any event, the Trial Chamber did not err in finding Witness J to be a credible witness, as such minor discrepancies cannot undermine the entirety of his evidence.[546] The Prosecution contends that the reasons put forward by Witness J to explain some of the discrepancies were more than reasonable in the circumstances, and that the Appellant's arguments are, therefore, without merit.[547]

334. The Appeals Chamber reaffirms that the Trial Chamber is primarily responsible for assessing and weighing the evidence presented at trial.[548] Prior statements of witnesses who appear in court are relevant only insofar as they are necessary to a Trial Chamber in its assessment of the credibility of a witness,[549] and the Trial Chamber generally accepts live testimony as being the most persuasive evidence before a court.[550] As the Appeals Chamber has recalled in the present Judgement, it is incumbent upon a Trial Chamber to assess whether any contradictions and/or inconsistencies raised in a witness's testimony substantially cast doubt on the overall credibility of the witness.

335. With respect to the Appellant's first contention that the Trial Chamber committed an error of fact by relying on Witness's J evidence in concluding that the Appellant distributed weapons on 15 April 1994, whereas his pre-trial statements mentioned 6 or 7 April 1994, the Appeals Chamber notes, first of all, that the Trial Chamber took due notice of the contradictions both during Witness J's cross-examination[551] and very clearly in the Trial Judgement *per se*.[552] Having examined the trial transcripts, the Appeals Chamber finds that the explanation given by Witness J regarding the contradictions during his cross-examination [553] were persuasive; the Appellant has failed to show how it was unreasonable for the Trial Chamber to accept those explanations. The Trial Chamber duly assessed and weighed the evidence before it, and the Appellant has failed to demonstrate that no reasonable trier of fact would have reached such a conclusion. The Appeals Chamber therefore dismisses the Appellant's allegation of an error of fact.

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[539] Trial Judgement, para.195.
[540] Rutaganda's Brief, paras. 303 to 308, Supplemental Document para.15 (14) et Rutaganda's Reply, paras. 5.56 to 5.61.
[541] Rutaganda's Brief, para. 303(2); Rutaganda's Reply, para. 5.56.
[542] Rutaganda's Brief, para. 303(3); Rutaganda's Reply, para. 5.57.
[543] Rutaganda's Brief, para. 303(4); Rutaganda's Reply, para. 5.58.
[544] Supplemental Document para. 15(14), Rutaganda's Brief, paras. 305 to 307.
[545] Trial Judgement, para.195.
[546] Prosecution's Response, paras. 5.103 to 5.115.
[547] Prosecution's Response, para. 5.113.
[548] *Akayesu* Appeal Judgement, para.132.
[549] *Ibid*, para.134.
[550] *Ibid.*
[551] The President stated: "So obviously his statement today is different from the one he gave earlier". T, 13 June 1997, p. 105. See also T, 13 June 1997 pp.88 to 93 and 102 to 105.
[552] Trial Judgement, para.178.
[553] T, 13 June 1997, pp. 90 to 91 and 101 to 106.

336. The Appellant submits in his second sub-ground that Witness J's testimony suffers from such material discrepancies as would prevent a reasonable trier of fact from affirming that Witness J provided pertinent answers to explain these discrepancies and, therefore, from finding that Witness J's testimony is credible. Having examined the trial record, the Appeals Chamber finds the discrepancy alleged by the Appellant in paragraph 332, point 3, has not been demonstrated.[554] The Appeals Chamber considers that the clarifications provided by Witness J regarding the circumstances surrounding his flight[555] do not show any contradictions with his initial statement that "as soon as I heard the shooting, I did not look up. I just immediately fled."[556] Even assuming that the Appellant's allegation is founded, such a minor discrepancy cannot undermine Witness J's credibility.

337. As to the contradictions alleged by the Appellant in paragraph 332, points 1 and 2, the Appeals Chamber notes that the Trial Chamber took note of those contradictions during Witness J's cross-examination[557] and explained them in its Judgement.[558] Having examined the trial record, the Appeals Chamber holds that it was entirely reasonable for the Trial Chamber, which is primarily responsible for evaluating and weighing evidence, to find that Witness J had sufficiently articulated his initial statements and provided "reasonable responses to the questions raised on cross-examination with regard to inconsistencies between his testimony and his pre-trial statement".[559] The Appeals Chamber considers that the Trial Chamber duly weighed the evidence before it and assessed Witness J's credibility in the light of the alleged inconsistencies. The Appellant has failed to show that no reasonable trier of facts would have, based solely on the contradictions, discredited Witness J's evidence and found the Appellant not guilty of the weapons distribution on 15 April 1994.

338. For these reasons, the Appeals Chamber finds that the Trial Chamber did not commit an error of fact that occasioned a miscarriage of justice by finding the Appellant responsible for the weapons distribution which occurred on 15 April 1994.

5. Contradictions between the testimonies of Witnesses J, T and U

339. Under this ground of appeal, the Appellant contends that Witnesses J, T and U contradicted one another,[560] and that the Trial Chamber committed an error of fact in not finding that there was reasonable doubt regarding the facts alleged in paragraph 10 of the Indictment.[561] The Appellant's main argument is that no reasonable [562] trier of fact could have found that the evidence of Witnesses J, T and U established beyond a reasonable doubt that he was responsible for a single act of weapons distribution.[563]

340. The Appeals Chamber recalls that it dismissed, *supra*, the Appellant's arguments on the interpretation of the Indictment and held that the Trial Chamber did not err in finding that the Appellant

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[554] *Ibid*., pp. 76, 92 and 107 to 111.
[555] *Ibid*., pp. 92, 107 to 111.
[556] *Ibid*., p. 76.
[557] As to who distributed the weapons, see T, 13 June 1997, pp. 55-56, 61 and 100.
As to whether the *conseiller* of the *commune* was killed before or after the weapons distribution, see T, 13 June 1997, pp. 95 to 99.
[558] Trial Judgement paras.177,179 and 180.
[559] *Ibid*., para.195.
[560] Supplemental Document, para. 15(9); Rutaganda's Brief, paras. 276 to 279; Rutaganda's Reply, paras. 5.16 and 5.17.
[561] Rutaganda's Brief, paras. 278 and 279.
[562] Rutaganda's Brief, para. 276.
[563] Rutaganda's Brief, para. 279. The Appellant submits tht the testimonies of Witnesses J, T and U were contradictory as regards the following: what day the weapons distribution occurred; the time the distribution occurred; in what context the distribution occurred; where the Appellant was in the vehicle; the kind of vehicle; the type of weapons disributed; who received the weapons; what role each person played in the distribution; whether persons from Cyahafi were involved in killings at the distribution site (Rutaganda's Brief, paras. 278(i) to 278(ix)).

had participated in three acts of weapons distribution during the month of April 1994. The Appeals Chamber also dismissed the Appellant's allegation that the Trial Chamber erred in finding Witnesses J, T and U to be credible witnesses. It therefore appears unnecessary to examine the discrepancies alleged by the Appellant under this sub-ground, as the arguments are clearly unfounded. Indeed, to the extent that the Appellant distributed weapons on different dates in April 1994, it does not seem abnormal for the testimonies of Witnesses J, T and U not to be mutually corroborative on all the points.

341. For all these reasons, the Appeals Chamber dismisses the ground of appeal on the weapons distribution.

VII. CRIMES COMMITTED AT THE AMGAR GARAGE

342. Under this ground of appeal, the Appellant challenges his conviction for genocide and crime against humanity (extermination), charged under Counts 1 and 2 of the Indictment, for having ordered, committed, aided and abetted in the preparation and execution of killings of members of the Tutsi group, and caused serious bodily or mental harm to members of said group.[564]

343. Based on the testimonies of Witnesses Q, BB and T, the Trial Chamber found beyond a reasonable doubt that in April 1994, members of the Tutsi group were singled out at a roadblock near the Amgar garage, and then taken to the Appellant's office, where he ordered their detention.[565] It further found that the Appellant subsequently directed men under his control to take fourteen detainees to a hole near the Amgar garage. Lastly, it found that, on the orders of the Appellant and in his presence, these men killed ten of the detainees with machetes, and then threw the bodies into a hole near the Amgar garage.[566]

344. On appeal, the Appellant submits that the Trial Chamber committed errors of law and fact in its assessment of the evidence, and is therefore requesting that the Appeals Chamber set aside the Trial Chamber's finding in respect of paragraph 12 of the Indictment.[567] The Appeals Chamber understands that the Appellant submits mainly that the Trial Chamber (1) committed errors of law and fact in its assessment and treatment of the testimony of Witness Q, (2) committed errors of fact and law in its assessment of the testimony of Witness BB, (3) committed an error of law in relying on the testimony of Witness T, (4) committed an error of law and fact by incorrectly applying the concept of corroboration and (5) committed an error of fact in its assessment of the Prosecution evidence.

A. Assessment and treatment of Witness Q's testimony

345. In general, the Appellant submits that the Trial Chamber committed errors of fact and law in its assessment of Witness Q's testimony by:

- considering many and significant contradictions in the evidence of Witness Q not to be of a material nature ;[568]

- discounting these contradictions on the supposition that Witness Q was unable to testify consistently because of the trauma he had experienced as a victim ;[569]

- discounting "the contradictions in light of difficulties in interpretation in taking the statements, even though there was no proof of transcription or interpretation errors and the nature of the contradiction belie these excuses";[570]

- failing to note discrepancies between Witness Q's pre-trial statements and his in-court testimony, by relying on the fact that these statements were not made under oath and thereby confusing the law of

[564] Trial Judgement, paras. 388, 389 and 406.
[565] *Ibid.*, paras. 228 to 261.
[566] *Ibid.*, para. 388.
[567] Supplemental Document, p. 32 and Rutaganda's Brief, para. 354.
[568] *Ibid*., point (9), p. 31 and, paras. 313 to 328.
[569] *Ibid*., point (1), p. 30 and, paras. 324 to 326.
[570] *Ibid*., point (2) and para. 327.

hearsay with the use of prior statements for determining inconsistencies and their effect on the witness's credibility;[571]

- undermining the burden on the Prosecution by rejecting Rutaganda's defence in this charge, partly due to the fact that the evidence did not "exclude the Accused's participation", and disregarding the contradiction between the testimony of Witness Q and the physical condition of the grave site identified by him on Exhibit 168 and speculating that the grave site he referred to and the one that had been exhumed were not one and the same. The Appellant also submits that the Trial Chamber erred by failing to rely on the eyewitness testimony of Witness Haglund and by disregarding his expert opinion.[572]

1. Inconsistencies and contradictions in Witness Q's testimony

346. As Witness Q was the only witness to testify as to the alleged killings at the Amgar garage, the Appellant argues that the Trial Chamber should have examined his testimony with caution, considering that he was unreliable.[573] In Response, the Prosecution explains that the Appellant advanced similar arguments concerning the alleged inconsistencies at trial.[574] Having examined the Appellant's submissions, the Prosecution's Response thereto and Witness Q's entire testimony, the Appeals Chamber finds that some of the alleged contradictions and inconsistencies do not relate to paragraph 12 of the Indictment and, as such, are immaterial to this ground of appeal.[575] Accordingly, the Appeals Chamber will only address those alleged contradictions and inconsistencies that relate to the killings at the Amgar garage in April 1994.

347. The Appellant submits that the Trial Chamber committed a number of errors of fact by disregarding (1) the many contradictions between the witness's testimony and his prior statements, (2) internal inconsistencies in the witness's testimony, and 3) lack of corroboration with Witness BB's testimony.

348. In this regard, the Appellant first sets out the inconsistencies and contradictions between Witness Q's pre-trial statements and his testimony at trial, namely:

- whether the witness buried the bodies in the hole;[576]

- how deep was the hole;[577]

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[571] *Ibid*., point (3). The Appellant cites page 1296 of Rutaganda's Brief, which contains no argument regarding this alleged error.
[572] Supplemental Document, points (5) and 6), and Rutaganda's Brief, para. 318.
[573] Rutaganda's Brief, para. 315.
[574] Prosecution's Response, para. 6.4 (citing Rutaganda's Brief, paras. 315 to 332).
[575] The following alleged contradictions and inconsistencies set forth below all relate to the following points mentioned in para. 316 of Rutaganda's Brief:
- When he learned that the Presidential plane had been shot down;
- Whether Rutaganda distributed weapons;
- How he hid at the house of Rucogoza and his subsequent detention;
- Whether the person who arrested him knew his father;
- How long he stayed at the home of a disabled person by the name of Thomas;
- Whether the witness had heard the Appellant say that killings at the ETM school should be carried out at night;
- Whether he was asked to rape a girl or had learnt that a girl had been raped;
- Whether he could move around freely at Cyuma's home; and
- Whether he saw a white man who was with Rutaganda.

[576] Rutaganda's Brief, para. 316, point (10). The Appellant refers to T, 9 October 1997, pp. 24, 28 and 90.
[577] *Ibid.* point (12). Reference to T, 9 October 1997, pp. 85 to 86.

- the account of the events which occurred in the hole;[578] and

- the killing of a young girl.[579]

349. The Appellant then alleges that the Trial Chamber erred by disregarding some internal contradictions he pointed out in Witness Q's testimony concerning the following points:

- how long the witness stayed at the temple;[580]

- the existence of a registration process;[581]

- the number of persons the Appellant took to the hole; [582]

- whether the Appellant had spared the witness's life;[583] and

- who were the people in charge of "security" in the area around Amgar garage .[584]

350. Lastly, the Appellant alleges that the Trial Chamber erred by disregarding the contradictions between the testimonies of Witnesses Q and BB regarding, on the one hand, whether ordinary construction work was taking place at the time of the commission of the crimes[585] and, on the other hand, the use of the Hindi Mandal temple.[586]

351. In response, the Prosecution argues that the Trial Chamber was aware of those contradictions and the lack of precision in Witness Q's testimony. It explains that the Trial Chamber considered the said contradictions in its evaluation of Witness Q's credibility, in light of the trauma that the witness may have suffered from having to recount the events he witnessed and of which he was a victim.[587]

352. Having reviewed the relevant portions of the transcripts referred to by the Appellant, the Appeals Chamber has identified some contradictions concerning the following: (1) how long the witness stayed at the temple; (2) the existence of a registration process and (3) the use of the Hindi Mandal temple. Having reviewed the relevant portions of the transcripts, the Appeals Chamber agrees with the Prosecution's contention that Witness Q's testimony concerning the matters above is consistent. Moreover, the transcripts reveal that Witness Q, in cross-examination, clarified his answers in response to the Defense's concerns regarding any discrepancies in the testimony at trial.

353. Before proceeding to analyse the discrepancies and their possible effect on the reliability of Witness Q" entire testimony, the Appeals Chamber will briefly recall the standards to be applied on appeal, as set out in the Introduction to this Judgement. Indeed, to the extent that the Trial Chamber was best placed to observe the witnesses first hand, the Appeals Chamber will only intervene in cases where the Appellant has demonstrated that evidence relied upon could not have been accepted by any reasonable tribunal or where the evaluation of the evidence is wholly erroneous. It should also be stressed that with

[578] *Ibid*., point (9). The Appellant cites T, 9 October 1997, pp. 24 and 88.
[579] *Ibid*., point (17). The Appellant refers to T, 9 October 1997, pp. 46 to 47.
[580] Rutaganda's Brief, para. 316, point (6). The Appellant refers to T, 9 October 1997, p. 21 and to paragraph 238 of the Trial Judgement.
[581] *Ibid*., point (7). The Appellant refers to T, 9 October 1997, pp. 81 to 82 and 85.
[582] *Ibid*., point (8). Reference to T, 9 October 1997, pp. 21 to22 and para. 93 of the Trial Judgement
[583] *Ibid*., point (11). The Appellant refers to T, 9 October 1997, pp. 24 to 25 and 48 to 49.
[584] *Ibid*., point (20). Reference to T, 9 October 1997, pp. 46 and 117.
[585] *Ibid*., point 13. The Appellant refers to T, 29 May 1998, pp. 52 to 53 (Witness BB).
[586] *Ibid*., point (5). The Appellant is referring to T, 9 October 1997, p. 21 (Witness Q), and to T, 29 May 1998, p. 62 (Witness BB).
[587] Prosecution's Response, para. 6.8

regard to the assessment of the credibility of a witness and the reliability of testimony, the Trial Chamber may accept a witness's testimony despite the existence of contradictory statements.[588] It therefore falls to the Trial Chamber to assess the contradictions pointed out and determine whether the witness — in the light of his entire testimony — was reliable, and his testimony credible.

354. The question before the Appeals Chamber is whether the Trial Chamber committed the alleged error by finding that some contradictions were not material and did not fundamentally affect the consistency of Witness Q's testimony.

355. First, with regard to the allegations concerning discrepancies as to how long Witness Q stayed at the "Hindi Mandal" temple,[589] the record shows that the reference cited by the Appellant does not accurately reflect the testimony of the witness, and appears to be a transcription error found in the English version.[590] Indeed, the record shows that during his testimony, the witness was questioned several times about his stay at the temple, and that he was consistent in his answers as to the approximate length of time he remained at the temple.[591.] In the view of the Appeals Chamber, the Trial Chamber's finding that the witness had stayed there for three hours is substantiated by the evidence. The Appellant's argument is therefore unfounded.

356. Secondly, as regards the allegation that Witness Q's account of the "registration process" at the Amgar garage was contradictory,[592] the Appeals Chamber notes, after examining the relevant portions of the transcript,[593] that the testimony of witness Q in relation to the "registration process" of the victims in the Appellant's office indeed appears at times inconsistent, despite the Trial Chamber seeking further clarification from the witness on this aspect of his testimony. However, in the view of the Appeals Chamber, the inconsistencies are minor and immaterial to the substance of the allegations set out in paragraph 12 of the Indictment, namely that Tutsis were detained and killed at the Amgar garage.

357. Finally, as regards the alleged contradictions between the testimony of Witness Q and that of Witness BB as to what the building called "Hindi Mandal" (allegedly used as a prison and occupied by approximately two hundred people during April 1994[594]) was used for, the Appeals Chamber affirms that the record shows that during the events the witness was prevented from leaving the garage and that he did not personally go to the "Hindi Mandal" building. There is no evidence to suggest that the witness was in a position to have been aware of anything which may have been occurring within the building. Also, it appears that the witness was not aware of the initial use of the building, the state of its interior and that nothing was stored within it during the events.[595] Considering, therefore, Witness BB's limited knowledge of the "Hindi Mandal", and his predicament at the material time, the Appeals Chamber does not find that his testimony substantially contradicts that of Witness Q.

358. The Appeals Chamber therefore finds that the discrepancies identified by the Appellant are minor and, by themselves, insufficient to put into question the reliability of Witness Q in view of the charges that led to the Appellant's conviction, and therefore rejects the Appellant's arguments.

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[588] See *Musema* Appeal Judgement, para. 89, *Čelebići* Appeal Judgement, para. 497, and *Kupreškić* Appeal Judgement, para. 156.

[589] Rutaganda's Brief, para. 316, point (6). The Appellant submits that the Trial Chamber "misapprehended this evidence", by finding that Witness Q stayed at the "Hindi Mandal" temple for a number of hours. In support of this argument, he invokes the English transcript where the Appelant testified that he was there for three days.

[590] The Appeals Chamber observes that the witness testified in Kinyarwanda, and was interpreted directly into English.

[591] T, 9 October 1997, pp. 21, 22 and 78 and 79 or T, 9 October 1997, pp. 23, 24 and 93.

[592] Rutaganda's Brief, para. 316, point (7).

[593] T, 9 October 1997 pp. 81, 82 and 85.

[594] Rutaganda's Brief, para. 316, point (5). The Appellant contends that Witness BB was aware that people were detained in the "Hindi Mandal" building, given the proximity of his house to the garage.

[595] T, 29 May 1998, pp. 20 to 25, and 62 and 69.

359. The Appeals Chamber further holds that the Appellant has failed to demonstrate any error of fact that could have led to a miscarriage of justice, through his general allegations that Witness Q showed a readiness to implicate Rutaganda or that he was a dangerous witness. [596] Accordingly, the Appeals Chamber dismisses the allegations, as they are unsubstantiated.

2. Other allegations of errors in the assessment of Witness Q's testimony

360. As recalled *supra*, the Appellant points to, *inter alia*, four errors of law, which the Appeals Chamber will consider *seriatim* in this section.

361. Firstly, regarding the Trial Chamber's taking into account of the trauma suffered by the victims and of the Appellant's contention that by so doing, the Trial Chamber committed an error of law in justifying and, thereby, discounting the inconsistencies in the evidence of Witness Q, the Appeals Chamber recalls that it has already examined this allegation under the ground of appeal on general allegations of errors of law, and therefore refers to its findings in that regard that the Trial Chamber did not commit an error of law in taking account of the trauma suffered by certain witnesses and in assessing their evidence in that light.[597] The same also applies to the alleged errors of law in the transcriptions which the Appeals Chamber dismissed on the ground that the Appellant failed to raise any convincing arguments warranting a review of the jurisprudence of the Appeals Chambers of both the ICTY and ICTR according to which it is both right and reasonable to take this factor into account.[598]

362. The Appellant further alleges that the Trial Chamber committed an error of law in discounting contradictions between the pre-trial statements of Witness Q and his in-court testimony, based on the fact that the said statements were not made under oath.[599] The Appeals Chamber notes, on the one hand, that the Appellant does not present any allegation in support of this argument in his submissions on appeal in relation to this ground. Of course, with regard to an error of law, the burden of proof on the Appellant is not absolute. Nonetheless, the appealing party must, at the minimum, identify the alleged error, present arguments in support of his allegation and explain how the error invalidates the decision, which is clearly not the case in this instance. On the other hand, the Appeals Chamber notes that the Appellant has already raised such arguments in his first ground of appeal and, once again, refers him to its conclusions on the said ground.[600]

363. Lastly, the Appellant submits that the Trial Chamber committed an error of law by reducing the burden of proof on the Prosecution by rejecting Rutaganda's defence in this charge, in part because his evidence did not "exclude the Accused's participation", and by the contradiction between the testimony of Witness Q and condition of the grave site identified by him on Exhibit 168, by speculating that the grave site he referred to and the one that had been exhumed were not one and the same. The Appeals Chamber straightaway states that these arguments have already been dealt with under the first ground of appeal and thus refers to its findings on that matter.[601] The Appellant also submits that the Trial Chamber erred by failing to rely on the direct evidence of Witness Haglund and by disregarding his expert opinion.[602]

364. The Appellant explains that Witness Q identified the hole where 10 persons were killed and buried behind the Amgar garage on Exhibit 168, tendered by Prosecution expert witness Professor William

[596] Rutaganda's Brief, paras. 319 to 323.
[597] See Part IV of this Judgement.
[598] *Ibid*.
[599] Supplemental Document, para.16(3). The Appellant is referring to page 1296 of Rutaganda's Brief, which contains no argument concerning the allegation of error.
[600] See Part IV of this Judgement.
[601] *Idem*.
[602] Supplemental Document, paras. 15(5) and 15(6) and Rutaganda's Brief, para. 318.

Haglund and labelled by him as RUG-1.[603] The Appellant submits that no site was found containing ten or more bodies, and that the hole identified by Witness Q contained three bodies, not ten. He challenges the Trial Chamber's findings on this matter and argues that the Trial Chamber unfairly excluded this evidence on the basis that it disagreed with Professor Haglund's scientific method.[604] For its part, the Prosecution submits that the Trial Chamber had the discretion either to accept or reject the evidence of an expert witness, if that evidence was not helpful in determining the facts of the case.[605]

365. Considering the lack of clarity of the Appellant's written submissions, and although he submitted these allegations in a section devoted to errors of law, the Appeals Chamber understands that they tend to show the existence of both an error of law (as he challenges the Trial Chamber's exclusion of Professor Haglund's evidence) and an error of fact (namely, if the evidence had been admitted, the Trial Chamber should have considered the discrepancies between the testimonies of Professor Haglund and Witness Q).

366. The Appeals Chamber recalls that with respect to expert witness testimony, the approach adopted by the Trial Chamber, consisting in hearing such a witness before deciding whether to admit him as an expert witness, was considered to be consonant with the spirit of the Statute and the general principles of law, and equally allows for a fair determination of the matter.[606] A combined reading of paragraphs 256 through 259 of the Trial Judgement setting out the reasoning which provides the basis for the Trial Chamber's findings contested by the Appellant shows that the Trial Chamber duly considered both the evidence of the Prosecution expert witness and the evidence of the expert witness called by the Defence. It must be emphasised that it was in the light of the testimony of the latter witness that the Trial Chamber held that it was not satisfied with the scientific method used by Professor Haglund. The Appeals Chamber therefore considers as unfounded the allegation that the Trial Chamber erred in law in discounting Professor Haglund's expert evidence.

367. With respect to the alleged error of fact, the Appeals Chamber finds the Appellant's argument unfounded. In assessing the reliability of the expert evidence, the Trial Chamber may, pursuant to Rule 89 of the Rules, admit any relevant evidence which it deems to have probative value. In the absence of any showing by the Appellant that no reasonable trier of fact could have discounted Professor Haglund's evidence, the Appeals Chamber must *a priori* give a margin of deference to the Trial Chamber's assessment of the evidence presented at trial and to its factual findings, as the Trial Chamber is best placed to hear the witnesses and assess the probative value of their evidence. [607] The Appeals Chamber holds that the Appellant has not shown that the Trial Chamber erred in discounting Professor Haglund's evidence, which it found to be of little relevance in determining the facts of the case, as the Trial Chamber explained at paragraph 258 of its Judgement: "the Prosecutor failed to show a direct link between the findings of Professor Haglund […] and the specific allegations in the Indictment". What was germane to the issue before the Trial Chamber, and rightly so, was whether the bodies of the victims were thrown in a hole, and not the question as to the exact location of the hole. The Trial Chamber's interest was justifiable under the circumstances.

368. The Appeals Chamber therefore finds that the Trial Chamber did not commit the alleged errors of law and fact in its assessment and evaluation of the testimony of Witness Q. The Appeals Chamber therefore dismisses this first argument on appeal.

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[603] Rutaganda's Brief, para. 318.
[604] Rutaganda's Brief, para. 318. The Appellant is referring to paragraph 259 of the Trial Jugement, which reads as follows: "Accordingly, the Chamber holds that the findings of the said expert witnesses do not help the Chamber determine the facts of the case. Moreover, the Chamber is not satisfied that the grave site referred to by Witness Q and the one exhumed by Professor Haglund are one and the same".
[605] Prosecution's Response, para. 6.41.
[606] See Part IV of this Judgement.
[607] *Aleksovski* Appeal Judgement, para. 63.

B. Allegations of errors in relation to the assessment of Witness BB's testimony

369. While the Trial Chamber also noted that the Defence had indicated some contradictions in Witness BB's testimony under cross-examination, it, however, held that such contradictions were immaterial to Witness BB's credibility.[608] According to the Trial Judgement, Witness BB testified that he was arrested at a roadblock near the Appellant's residence because he was a Tutsi.[609] He further testified that, upon discovering that he was a Tutsi, the *Interahamwe* told him that they had received orders that very day to take anyone apprehended at the roadblock to the Appellant's office at Amgar garage.[610] At trial, Witness BB identified Amgar garage on the slide tendered by Prosecution as exhibit 145. It must be noted, therefore, that Witness BB did not proffer evidence regarding the killings at Amgar garage. Based on Witness BB's testimony, the Trial Chamber was satisfied beyond a reasonable doubt that in April 1994, Tutsis who had been separated at the roadblock in front of Amgar garage were taken to the Appellant's office.[611]

370. On Appeal, the Appellant challenges Witness BB's credibility on two grounds,[612] namely:

- there were problems in the way the evidence was sought;
- there were credibility and reliability problems.

371. The Appeals Chamber will examine the Appellant's arguments *seriatim*.

1. The way the evidence was sought

372. The Appellant submits that the Trial Chamber improperly asked leading questions during Witness BB's testimony.[613] The Appellant refers to the portion of the transcript where Judge Aspegren asked: "[…] were you considered to be the slave of Mr. Rutaganda?" and the witness answered: "Yes, I was his slave because normally I did not work for him."[614] The Appellant therefore contends that the Trial Chamber improperly stated in its Judgement that Witness BB considered himself to be a slave of the Appellant's.[615]

373. In response, the Prosecution argues that the Appellant must demonstrate that this line of questioning amounts to an error of law under Article 24 of the Statute of the Tribunal.[616] It further argues that the Appellant's only problem with Judge Aspegren's question was the fact that the Trial Chamber had noted in its summary of Witness BB's testimony that the witness considered himself to be a slave of the Appellant's.

374. The Appeals Chamber considers that in this instance, the Appellant alleges two separate errors, namely: an error of law as to whether it was appropriate for the Judge to ask a leading question and, an error of fact for misrepresenting the witness's testimony regarding his having been Rutaganda's slave.

375. As to whether Judge Aspegren was entitled to ask the question in issue, the Appeals Chamber recalls that the Rules contain no provisions on leading questions. As the Appeals Chamber held when

[608] Trial Judgement, para. 252.
[609] *Ibid.*, paras. 230 and 231.
[610] *Idem.*
[611] *Ibid.*, para. 260.
[612] Supplemental Document, para.16(10). The Appellant seems to be referring to Rutaganda's Brief, paras. 329 to 334.
[613] Supplemental Document, para. 16(10) and Rutaganda's Brief, paras. 330 to 332.
[614] *Ibid.*, para. 330 (citing T, 29 May 1998, p. 29).
[615] Trial Judgement, para. 231.
[616] Prosecution's Response, paras. 6.51. to 6.52.

considering the ground of appeal on allegations of bias (where the Appellant makes a similar allegation), Judge Aspegren's question was, to be sure, a leading question, but it came after a lengthy discussion with the witness regarding his activities at the Amgar garage, and was aimed at clarifying the witness's testimony. Moreover, the Appeals Chamber reaffirms that leading questions *per se* are not proscribed before the Tribunal.[617] Accordingly, the Appeals Chamber takes the view that the Appellant's allegation of an error of law is unfounded.

376. As regards the allegation of an error of fact, the Appeals Chamber recalls that although the Appellant's answer to the question whether he was the Appellant's slave was in the affirmative, he stated what he meant by that (that is, on the orders of the Accused; forced, unpaid labour). The Appeals Chamber again reaffirms that the impugned statements, cited in the summary of Witness BB's testimony, were not used by the Trial Chamber as a basis for any of the guilty verdicts entered against the Appellant. The Appeals Chamber therefore finds the Appellant's arguments unfounded.

2. Credibility and reliability

377. The Appellant submits that Witness BB's testimony was not credible.[618] Given that Witness BB's testimony was "palpably unreliable", the Appellant can see no reason why a reasonable tribunal would consider such evidence credible. Hence, the Appellant challenges the Trial Chamber's finding that "although […] the Defence pointed out some contradictions in the testimonies of Witnesses BB and Q, such contradictions are not of a material nature and do not vitiate the consistency of the substance of their testimonies, as to their account of the facts at issue in the instant case".[619] In particular, the Appellant argues that the Trial Chamber failed to consider the following inconsistencies:

- witness BB's inability to give as accurate description of the people at the roadblock dressed as *Interahamwe*;[620]
- whether the witness was beaten and mistreated by the Appellant; [621]
- whether the witness worked on a cellar, which was allegedly under construction; [622]
- whether the witness overheard the discussion between the *Interahamwe* and the Appellant concerning the collection of ammunition at the garage; [623]
- whether the witness was free to leave the Amgar garage at any time;[624]
- whether the Appellant was the head of a group of killers;[625] and
- whether the witness saw anyone when the Appellant left the garage. [626]

378. The Prosecution argues in response that these alleged inconsistencies are "either non-existent or highly peripheral".[627] It also argues that the alleged inconsistencies are immaterial to the primary issue of

[617] See Part III of this Judgement.
[618] Rutaganda's Brief, para. 333.
[619] Trial Judgement, para. 252.
[620] Rutaganda's Brief, para. 333, point (1). Reference to T, 29 May 1998, pp. 70-72.
[621] *Ibid*., point (2). The Appellant refers to T, 29 May 1998, pp. 17 and 42.
[622] *Ibid*., point (3). The Appellant refers to T, 29 May 1998, pp. 17, 28 and 29 and to the Trial Judgement, para. 232.
[623] *Ibid*., point (4). The Appellant refers to T, 29 May 1998, p. 18.
[624] *Ibid*., point (5). Reference to T, 29 May 1998, pp. 19 to 20.
[625] *Ibid*., point (6). The Appellant cites T, 29 May 1998, p. 59.
[626] *Ibid*., point (7). The Appellant cites T, 29 May 1998, pp. 73 and 75.
[627] Prosecution's Response, para. 6.70.

Witness BB's credibility.[628] The Prosecution therefore submits that there is nothing incredible or incongruous about Witness BB's account of the events at the Amgar garage.[629]

379. The Appeals Chamber recalls that the Trial Chamber did not rely upon Witness BB's testimony in order to determine whether the Appellant ordered, committed, aided and abetted in the killings at the Amgar garage. Rather, the Trial Chamber relied upon Witness BB's testimony as corroborating evidence in order to determine whether Tutsis were separated at the roadblock and then taken to the Appellant's office at the Amgar garage. Having examined the transcripts, the Appeals Chamber is not convinced that the alleged inconsistencies called Witness BB's credibility into question.[630] Moreover, the alleged inconsistencies do not directly relate to the separation or detention of Tutsis at the roadblock near the Amgar garage. More importantly, it is an undisputed fact that there was a roadblock at the Amgar garage and that Witness BB, a member of the Tutsi group, was detained at the said garage. The Appeals Chamber therefore finds that the Appellant has failed to demonstrate that the Trial Chamber erred in considering Witness BB as a credible witness, and therefore dismisses the Appellant's arguments on this matter.

C. Admissibility of hearsay evidence concerning Witness T's testimony

380. The Appellant submits that the Trial Chamber erred in law by relying on the hearsay evidence of Witness T, even though the evidence was presented without any indicia of reliability.[631] The Appellant raises the question whether the hearsay was even reliable enough to be probative evidence for the purpose of admission, as, according to him, no evidence was provided as to any indicia of reliability that might attach to this hearsay.[632] The Appeals Chamber notes that the Appellant advances two general arguments in support of this allegation.[633]

381. In response, the Prosecution submits that Witness T's evidence was not the only evidence upon which the Trial Chamber relied to convict the Appellant for his role in the killings of Tutsis at Amgar garage.[634] It further explains that the Trial Chamber only used Witness T's evidence concerning his neighbour's experience at Amgar garage, in determining whether Tutsis were brought and detained there.[635] The Prosecution therefore submits that the Trial Chamber did not err in its limited reliance upon this alleged hearsay evidence.

382. The Appeals Chamber understands that, in this instance, the Appellant challenges the admissibility of the hearsay evidence contained in Witness T's testimony. The Appeals Chamber, indeed, notes that the Appellant challenges the admission of hearsay evidence consisting of statements that Witness T himself made during his testimony, regarding events of which he was not an eyewitness. The Appeals Chamber recalls, in this Judgement, the principles governing the admissibility and assessment of hearsay evidence and, therefore, refers to the relevant sections on this matter.[636] The Appeals Chamber further recalls that it endorsed the jurisprudence articulated in the *Akayesu* Appeal Judgement: "[…] the

[628] *Ibid.*, para. 6.59.
[629] *Ibid.*, para. 6.65.
[630] T, 29 May 1998.
[631] Supplemental Document, point (4), p. 30. The Appellant refers to paragraphs 338 through 350. The Appeals Chamber states, however, that only paragraphs 346 through 348 appear to specifically support the allegation of an error of law.
[632] Rutaganda's Brief, para. 346
[633] Rutaganda's Brief, paras. 347 to 348.
[634] Prosecution's Response, para. 6.81.
[635] *Ibid.*, para. 6.82.
[636] See Part IV, section C of the present Judgement.

test to be met before ruling evidence admissible is accordingly high. It must firstly *be shown that the evidence is so lacking in terms of the indicia of reliability* as to be devoid of any probative value."[637]

383. The Appeals Chamber notes that the Trial Chamber not only considered Witness T's testimony reliable enough for the purpose of admission as hearsay evidence, but it also found the witness to be credible.[638] The Appellant, in support of his allegation, advances only two general arguments, which cannot be considered as showing that the evidence is so lacking in terms of the indicia of reliability as to be devoid of any probative value. [639] Moreover, the Appeals Chamber has held in this Judgement that it is unlikely, in the absence of an objection, for a Trial Chamber to find that the indicia of reliability of the evidence of a witness it has heard in person is so lacking as to render his evidence devoid of any probative value and inadmissible. In the instant case, it must be stated that after Witness T gave his testimony, it was put on the record, as transcribed, and no objection was raised.[640] In any event, the Trial Chamber stated that it has the discretion to consider hearsay evidence, and that where the Chamber decides to consider such evidence, it is inclined to do so with caution.[641] As a precaution, the Trial Chamber did not rely solely on Witness T's evidence to hold the Appellant guilty of the crimes committed at Amgar garage. Rather, as the Prosecution correctly explained, the Trial Chamber only relied on Witness T's evidence in determining whether Tutsis were detained at the Amgar garage.

384. Accordingly, the Appeals Chamber finds that the Appellant has not shown that the evidence of Witness T is so lacking in terms of the indicia of reliability as to be devoid of any probative value, and that the Trial Chamber thereby erred in law by admitting the hearsay.

D. Use of the principle of corroboration

385. The Appeals Chamber understands that the Appellant points out two errors in support of this general allegation, which errors he qualifies, on the one hand, as error of law (the Trial Chamber allegedly erred in law by misapplying the concept of corroboration as regards Witnesses Q, BB and T[642]) and, on the other, as error of fact (the Trial Chamber allegedly erred by adjudicating that the testimony of Witness Q was corroborated by the evidence of Witnesses BB and T whereas, on balance, the testimony of Witnesses BB and T contradicted Q's account[643]).

386. Having examined the written submissions referred to by the Appellant (which are identical for both alleged errors), the Appeals Chamber notes that the Appellant has presented no argument in support of his allegation of error of law. As the Appeals Chamber has stated *supra*, the appealing party must, at the minimum, identify the error, present arguments and explain how the error invalidates the decision, which, once again, is not the case in this instance. The Appeals Chamber therefore dismisses straightaway the Appellant's allegation of an error of law, and will examine only the alleged error of fact.

387. The Appeals Chamber notes that the Appellant challenges the Trial Chamber's conclusions in paragraph 260 of the Judgement, which reads as follows:

> Thus, on the basis of the corroborating testimonies of Witnesses Q and BB, the Chamber is satisfied beyond any reasonable doubt that, in April 1994, Tutsis who had been separated at a roadblock in front of Amgar garage were taken to the office of the Accused inside Amgar garage. Based on the corroborating testimonies of Witnesses Q and T, the Chamber is satisfied beyond reasonable doubt that the Accused ordered that the Tutsis thus brought to him be detained within the premises of the Amgar garage.

[637] *Akayesu* Appeal Judgement, para. 286 *in fine.* (Emphasis added)
[638] Trial Judgement, para. 252.
[639] Rutaganda's Brief, paras. 347 and 348.
[640] T, 11 March 1998, pp.24 to 29.
[641] Trial Judgement, para. 18.
[642] Supplemental Document, p. 30, point (7), referring to Rutaganda's Brief, paras. 335 to 350.
[643] *Ibid*., point (8), p. 31, referring to Rutaganda's Brief, paras. 335 to 350.

The Appellant submits, on the one hand, that the testimonies of Witnesses Q and BB, as well as those of Witnesses Q and T, are not corroborative, and, on the other, that the testimonies of Witnesses BB and T did more to contradict Witness Q's account more than confirm it.

388. With respect to the allegations relating to Witnesses BB and Q,[644] the Appeals Chamber does not share the view of the Appellant that the testimony of Witness BB proves that Q's account is implausible and that the Trial Chamber unfairly picked the similarities between Witness BB and Witness Q's testimonies, while ignoring the bigger problems in Witness BB's testimony.[645] Indeed, although the Appellant alleges a number of contradictions or implausible details,[646] the Appeals Chamber notes, nonetheless, that both testimonies are analogous as they relate to material facts of the case, namely: (1) whether there was a roadblock near the Amgar garage; (2) whether there were Tutsis at the Amgar garage; (3) whether Tutsis were separated and detained at the Amgar garage; and (4) whether Tutsis were taken to the Appellant's office at the Amgar garage.[647] Moreover, the Appeals Chamber finds that the Trial Chamber did not find that the evidence of Witness BB corroborated that of Q's in all respects. The Appeals Chamber considers that the Appellant has failed to show that no reasonable tribunal would have reached the impugned decision of the Trial Chamber. Accordingly, in the opinion of the Appeals Chamber, the Appellant has not demonstrated the alleged error of fact.

389. With respect to the allegations relating to Witnesses T and Q,[648] the Appellant submits, on the one hand, that Witness T's testimony does not corroborate Q's account, as Witness T provided little evidence about the events at the Amgar garage[649] and, on the other, that there are significant contradictions between Witness T's hearsay evidence and the testimony of Witness Q.[650]

390. First, with regard to the Appellant's allegations in respect of the tenor of the testimony of Witness T,[651] the Appeals Chamber recalls that it is not enough to pick and choose from a witness's evidence or to submit different factual conclusions the Trial Chamber could have made. The Appellant must show that no reasonable tribunal could have found beyond a reasonable doubt that the testimonies of Witnesses Q and T corroborated each other as to whether the Appellant ordered the Tutsis that were brought to him to be detained at Amgar. The Appeals Chamber finds that the Appellant's arguments in this regard are not persuasive.

391. Secondly, the Appellant submits that the Trial Chamber ignored significant contradictions between the testimonies of Witnesses T and Q. According to him, the Trial Chamber should have used Witness Q's hearsay evidence to cast doubt on Witness Q's testimony. The Appeals Chamber notes that the Appellant identifies three contradictions, namely: (1) according to Witness T's testimony, there were no ethnic divisions or killings until 24 April 1994; (2) as of 24 April, the Presidential Guard came and

[644] Rutaganda's Brief, paras. 335 to 337.
[645] *Ibid.*, para. 337.
[646] Rutaganda's Brief, paras. 335 to 337. The Appellant argues that: 1) Witness BB did not testify that the Hindi Mandal temple was used as a prison (Appellant referring to T, 29 May 1998, pp. 52 to 53); 2) Tutsis were systematically eliminated while he was spared and fed (Reference to T, 29 May 1998, p. (22) and (3) Rutaganda hired construction workers nothwithstanding that there were detained Tutsis whom he could have forced to carry out this work (the Appellant cites T, 29 May 1998, p. 52).
[647] See T, 9 October 1997 and 29 May 1998, Witnesses Q and BB, respectively.
[648] Rutaganda's Brief, paras. 338 to 345 and 349 to 350.
[649] *Ibid*., paras. 340 to 345.
[650] *Ibid*, paras. 349 to 350.
[651] *Ibid*, paras. 343 to 344.

calmed the situation (whereas Witness Q testified that it was responsible for killings) and (3) Witness T did not describe the Hindi Mandal temple as a prison, even though he lived in the neighbourhood.[652]

392. The Appeals Chamber recalls that it falls to the Trial Chamber to assess and weigh the evidence presented at trial. The Appeals Chamber will substitute its findings to those of the Trial Chamber only when it has been established that the assessment of the evidence is wholly erroneous. The Appeals Chamber notes that the Trial Chamber found Witnesses T and Q to be credible witnesses. Based on the totality of the evidence presented by the parties, the Trial Chamber found beyond a reasonable doubt that Rutaganda ordered the detention of Tutsis at Amgar. Having examined the transcripts referred to by the Appellant, the Appeals Chamber finds that the Appellant's arguments are unfounded and do not show the alleged error of fact.

E. Witnesses DD, DF, DS, DEE and DDD

393. The Appellant submits that the Trial Chamber misapprehended the evidence given by Witnesses DD, DF, DS, DEE and DDD, when it concluded that their testimonies did not exclude the Appellant's participation in the events alleged in paragraph 12 of the Indictment.[653] According to the Trial Chamber, "such testimonies were offered to prove that the Accused was transacting business at Amgar during that period."[654] However, the Prosecution argues that none of these witnesses was in a position to know what was happening at the Amgar garage during the times relevant to the Indictment.[655]

394. The Appeals Chamber finds that a review of the record confirms that these witnesses were unable to refute keys facts established at trial. Facts such as a roadblock being erected near the Amgar garage; the separation of Tutsis at this roadblock; and the killings at the hole, were never refuted by the testimonies of these witnesses. In this regard, it was reasonable for the Trial Chamber to conclude that these witnesses did not refute the material facts established at trial, such as the Appellant's being in his office at the Amgar garage from 15 to 24 April 1994. As such, the Appellant's submissions on this sub-ground of appeal are without merit.

395. For the foregoing reasons, the Appeals Chamber finds that the Appellant has failed to demonstrate that the Trial Chamber erred in evaluating the evidence proffered by Witnesses Q, BB, T, DD, DF, DS, DEE and DDD.

396. The Appeals Chamber therefore rejects the ground of appeal concerning the crimes committed at the Amgar garage.

[652] *Ibid*, para. 349(a), (b) and (c). The Appellant refers to T, 11 March 1998, pp. 9, 6, 15, 56 and 68, respectively.
[653] Supplemental Document, para. 16(11). Rutaganda's Brief, para. 351.
[654] Trial Judgement, para. 255.
[655] Prosecution's Response, para. 6.99.

VIII. ETO SCHOOL AND NYANZA MASSACRES

397. Under this ground of appeal,[656] the Appellant challenges his convictions for genocide and extermination as crimes against humanity, charged under Counts 1 and 2 of the Indictment. The Trial Chamber found the Appellant guilty of the said crimes, *inter alia*, for participation in the attacks against the Tutsis at ETO and Nyanza, and for the forced diversion of refugees to Nyanza, Kicukiro *commune*, on 11 April 1994.[657] The Trial Chamber based its relevant factual conclusions on the testimonies of Witnesses A, H, W and DD,[658] whom it found to be credible witnesses.[659] Moreover, the Trial Chamber dismissed the alibi according to which the Appellant was on his way to Masango on 11 April 1994.[660]

398. In his Appeal, the Appellant contends that the Trial Chamber committed errors of law and fact by finding Witnesses A, H, W and DD to be credible. The arguments in relation to this ground of appeal are examined in Sub-sections A and C, *infra*. Moreover, the Appellant was exceptionally allowed to add another ground of appeal pursuant to Rule 115 of the Rules, after judgment was reserved on the Appeal. The Appeals Chamber ordered the production of two incidental forms of additional evidence pursuant to Rules 98 and 107 of the Rules. The said evidence relates to the Appellant's presence at the ETO school and Nyanza on 11 April 1994. The parties made their oral arguments on the said evidence at the hearing held on 28 February 2003 ("28 February 2003 Hearing") at The Hague, the Netherlands. The additional evidence and the new arguments on appeal are examined in Sub-section D, *infra*.

A. General Allegations

399. The Appellant contends that the Trial Chamber committed errors of law and fact. He alleges that the Trial Chamber erred by failing to note the discrepancies between the Prosecution case at trial and the Indictment confirmed against the Appellant[661] (first ground). He alleges that the Trial Chamber committed errors that he terms errors "in principle" (that is, relating to the taking of evidence),[662] as such errors have been presented both as errors of law[663] and of fact[664] (second ground).

400. As regards the Appellant's allegations of the discrepancies between the Prosecution case and the evidence adduced at trial,[665] the Appeals Chamber understands that the Appellant raises three main issues, namely (1) the lack of evidence to support some of the allegations made in the Indictment;[666] (2) the fact that only one single witness attested to some of the allegations[667] and (3) the divergence between the evidence tendered by the Prosecution and the facts alleged in the Indictment.[668] For its part, the Prosecution submits that it is not uncommon for the evidence presented at trial to differ somewhat from the rather shorthand summary of facts in an indictment.[669] For the Prosecution, there is no material difference between the facts alleged and the ones established by the evidence. The Prosecution further contends that the alleged discrepancies isolated by the Appellant, do not call the Trial Chamber's findings into question, as they are supported by the evidence.

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[656] Supplemental Document, para. 17.
[657] Trial Judgement, paras. 390 to 392, 407 and 408.
[658] The testimonies of Witnesses H and DD were relied upon in relation to the ETO events; the testimonies of Witnesses A, H and W were relied upon in relation to the events at Nyanza and on the road to Nyanza.
[659] Trial Judgement, paras. 292 and 298.
[660] *Ibid*., paras. 297 and 298.
[661] Supplemental Document, paras. 17 (2) and (6).
[662] Rutaganda's Brief, paras. 356 *et seq.*
[663] Supplemental Document, para 17(1).
[664] *Ibid*., paras. 17(3), (4) and (9).
[665] Rutaganda's Brief, paras. 369 - 371. See also Rutaganda's Reply Brief, p. 79, para. 7.05.
[666] *Ibid*., para. 370.
[667] *Idem.*
[668] *Idem.*
[669] Prosecutor's Response, paras. 7.13 to 7.18.

401. The Appeals Chamber notes that the Appellant merely calls into question the reasonableness of the Trial Chamber's findings by means of general allegations enumerating the problems which, he submits, cast doubt on the facts alleged in the Indictment. It is the view of the Appeals Chamber that by that approach, the Appellant has not demonstrated that an error was committed. As he is not acquainted with the jurisprudence of the ICTR and ICTY concerning the standard of review of errors of fact in an appeal, the Appellant offers no explanation to demonstrate the alleged errors of fact that led to a miscarriage of justice. Moreover, where the Appellant makes serious allegations regarding the integrity of the judicial process, as he has done in this instance, he must, *inter alia*, demonstrate the prejudice caused by the divergences between the facts alleged in the Indictment and the evidence adduced at trial in accordance with the relevant jurisprudence, as recalled in the preceding section.[670] The Appeals Chamber finds that the Appellant has failed to demonstrate the alleged error or that it caused him any prejudice, and therefore dismisses this ground of appeal for lack of merit.

402. The Appellant also submits that the Trial Chamber committed the following general errors:

- misapprehending evidence about whether an ETO teacher who was allegedly seen in the presence of Mr. Rutaganda was *Interahamwe*;

- failing to note discrepancies as material;

- its readiness to discount contradictions or inconsistencies by speculating that "inconsistencies could for the most part be attributed to external factors relating to pre-trial statements and other language and translation issues";

- securing speculative evidence implicating Mr. Rutaganda, through leading questions from the bench.[671]

403. The Appeals Chamber notes first of all that the first and third errors alleged by the Appellant relate to some of the arguments presented earlier by the Appellant with regard to allegations concerning Witness H's credibility.[672] Accordingly, the Appeals Chamber refers the parties to the relevant sections under this Part.

404. Concerning the alleged failure by the Appeals Chamber to note discrepancies in witness testimonies, deeming them minor, whereas, according to the Appellant, they were material,[673] the Appeals Chamber reiterates the standard of review in an appeal as recalled at the beginning of this Judgement, and cannot conclude that such an error was made, considering the general nature of the Appellant's allegations and the complete lack of proof of the alleged error.

405. Lastly, the Appellant submits that the Trial Judges secured from Witness W speculative evidence incriminating Rutaganda through leading questions.[674] He submits that it would be unfair and unreasonable to infer, based on this testimony, that Rutaganda was in the vehicle.[675] The Appeals

[670] See Part VI: Distribution of Weapons.
[671] Rutaganda's Brief, paras. 356 to 366.
[672] *Ibid*., paras. 357 to 359 [See also Supplemental Document, para. 17(4)] and Rutaganda's Brief, para. 386 (under "Evidence of Witness H implicating Mr. Rutaganda – summarized").
[673] Supplemental Document, para. 17 (9). See also Rutaganda's Brief, paras. 360 to 361.
[674] Rutaganda's Brief, para. 364. The Appellant refers to the following dialogue between Judge Aspegren and Witness W (T, 29 May 1997, pp. 19):
Q. Was Rutaganda himself there?
A. No, he wasn't there. Except that I saw his vehicle but I didn't see the driver.
Q. Is it possible that Mr. Rutaganda was in his car without you having seen him?
A. It is possible because I saw the vehicle from far.
[675] Rutaganda's Brief, para. 365.

Chamber notes, as does the Appellant, that the Trial Chamber stated in paragraph 285 of the Judgement, that:

> Witness W recognised some of the *Interahamwe* on the road to Nyanza, and he observed the vehicle of the Accused bringing in *Interahamwe* as reinforcements. He testified that the Accused *could have been* in this vehicle, which he only saw from afar, *but he did not actually see the Accused.* (Emphasis added)

406. However, it is the view of the Trial Chamber that, contrary to the Appellant's contention, the above quotation does not demonstrate that the Trial Chamber accorded particular significance to the said testimony. Indeed, apart from the fact that this testimony is rightly included in the summary of the said witness's testimony, the Appeals Chamber affirms that the Trial Chamber did not rely solely on this testimony in its factual findings concerning the Appellant's guilt.[676] Admittedly, the Trial Chamber refers to Witness W's testimony in paragraph 304 of the Judgement. However, it should be emphasised that it was in reliance on the testimonies of A and H,[677] eyewitnesses who respectively "saw the Accused in a vehicle coming in from the direction of Nyanza" and, "saw the Accused on the way to Nyanza", that the Trial Chamber found beyond a reasonable doubt that "the Accused was present and participated in the forced diversion of refugees to Nyanza".[678] Read together, paragraphs 303 and 304 of the Trial Judgement clearly show that the Appellant's allegations regarding Rutaganda's presence during the forcible diversion of refugees to Nyanza are without merit.

407. The Appeals Chamber will now consider the allegations of error relating to testimonies of Prosecution witnesses regarding each of the sites referred to in the Indictment.

B. ETO School Massacres

408. Under this ground of appeal, the Appellant alleges that the Trial Chamber committed an error in its evaluation of the evidence of Witnesses H and DD. Based on the evidence, the Trial Chamber found beyond reasonable doubt that the Accused was present and participated in the attack on Tutsi refugees at the Eto school.[679] The Appellant challenges this finding, submitting that he played no role in the attack and that the evidence relied on by the Trial Chamber is not reliable.[680]

1. Witness H

409. Concerning this Witness's evidence, the Trial Chamber stated that Witness H, a Tutsi man from Kicukiro, testified that on 6 April 1994, he took his family to the ETO school, where UNAMIR troops told them to come inside the compound for their protection. He stated that 3,500 to 4,000 took refuge at the ETO school. He testified that on the day of the attack on the ETO school, once the UNAMIR troops left the ETO compound, the *Interahamwe* immediately entered and proceeded to attack, firing guns and hurling grenades. That is when the witness saw the Appellant talking with Gérard Karangwa, President of the *Interahamwe* at the *commune* level.[681]

410. In its factual findings, the Trial Chamber found Witness H to be a credible witness.[682] The Trial Chamber recalled that Witness H saw the Appellant at the time of the attack on the ETO, in a group which began throwing grenades and firing at the refugees.[683]

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[676] See Trial Judgement, paras. 292 to 304, in particular, para. 304, where the Chamber states this: "Witness W saw a *vehicle belonging to the Accused* bringing in *Interahamwe* as reinforcements." (Emphasis added)
[677] Trial Judgement, para. 303.
[678] *Ibid*., para. 304.
[679] Trial Judgement., para. 300.
[680] Rutaganda's Brief, para. 372.
[681] Trial Judgement, paras. 275 to 279.
[682] *Ibid.*, para. 292.

411. The Appellant contends that the Trial Chamber erred by holding that Witness H was a credible and reliable witness to support its finding of guilt against the Appellant for the crimes at the ETO school.[684] In support of this contention, the Appellant advances three main arguments which allegedly show that Witness H is unreliable:[685]

- that the witness had a particular animus towards him;

- that witness H was ready to make suppositions during his testimony; and

- that Witness H made inconsistent and contradictory statements at trial.

412. The Appeals Chamber will address the arguments *seriatim*, as submitted by the Appellant.

(a) Animus towards the Appellant

413. The Appellant submits that Witness H's testimony shows that he had a particular animus towards him, which should have led to a careful scrutiny of his evidence.[686] The animus, he explains, existed before the events of April 1994, as Witness H believed that the Appellant "was complicit in the attack on his residence following the assassination of the leader of the CDR party".[687] The Appellant surmises that the witness offered this testimony with the clear intent of reminding the Trial Chamber of Rutaganda's status in order to "ensure that his presence at ETO was interpreted nefariously"[688] and, as such, should have been considered unreliable by the Trial Chamber.[689]

414. The Prosecution submits that the Appellant's contention that Witness H held an animus towards him was completely speculative.[690] It explains that Witness H simply clarified the identities of those who were at the ETO school at the relevant times.[691]

415. The Appeals Chamber notes that having observed and accepted Witness H's testimony at trial, the Trial Chamber made a point of mentioning that the witness learned that the Appellant was in a vehicle, shortly after the arrival of the *Interahamwe* who had attacked his residence in February 1994.[692] Thus, it had the opportunity to determine whether the veracity of Witness H's evidence was affected by any alleged animus. Having reviewed the transcripts of Witness H's testimony, the Appeals Chamber finds nothing suggesting that such distorting animus was at work.[693]

(b) Readiness to make suppositions

416. The Appellant contends that Witness H showed a "readiness to make suppositions without any professed or demonstrated competence to do so."[694] In support of this contention, the Appellant cites, *inter alia*, the dialogue between the Presiding Judge, Laïty Kama, and Witness H regarding an attack by

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[683] *Ibid*., para. 300.
[684] Rutaganda's Brief, para. 387.
[685] *Ibid.*, para. 388 to 397.
[686] *Ibid*., para. 391.
[687] *Ibid.*, para. 388. The Appellant cites T, 25 March 1997, p. 111.
[688] *Ibid*., para. 390.
[689] *Ibid*., para. 391.
[690] Prosecution's Response Brief, para. 7.118.
[691] *Ibid.*, para. 7.119.
[692] Trial Judgement, para. 275
[693] T, 25 March 1997, pp. 102 to 116
[694] Rutaganda's Brief, paras. 392 to 395.

the *Interahamwe*,[695] and between the Prosecution and the witness regarding the relative functions of the *Interahamwe* leadership structure.[696]

417. However, the Prosecution submits that the Appellant's contention regarding Witness H's testimony is incorrect.[697] It also argues that the witness's admission of readiness to make suppositions reinforces his credibility.[698]

418. Indeed, the Appeals Chamber notes that the Appellant did not submit an accurate description of the dialogue between Judge Laïty Kama and the witness concerning the attacks by the *Interahamwe* before the UNAMIR departed the ETO school. Instead, the Appellant selectively replaced pertinent information with ellipses when quoting portions of the witness's responses.[699] The Appeals Chamber takes the view that such a practice is misleading. Although the Presiding Judge initially stated that Witness H's responses were "illogical",[700] this statement should be considered in the context of the Judge's questions which were aimed at clarifying why the refugees were not attacked by the *Interahamwe* on the road to the ETO school, whereas they had been attacked by those same *Interahamwe* at the ETO after the UNAMIR soldiers departed. It is precisely in this context that the Judge stated: "It is illogical", and asked the witness to explain. Witness H clarified his responses by again answering the question put to him[701], to the Judge's satisfaction. The Appeals Chamber therefore finds this argument to be without merit.

419. The Appeals Chamber is also of the view that, contrary to the Appellant's contentions, the probative value of Witness H's evidence was not undermined by the alleged suppositions made at trial. When asked by the Defence whether he was making suppositions, the witness clearly replied that he was and admitted that he did not know what the orders given to the *Interahamwe* were.[702] Moreover, the Appeals Chamber considers that the Appellant failed to show how the suppositions affected Witness H's credibility, and in what way the Trial Chamber committed an error by relying, *inter alia*, on the said evidence in finding that the Appellant was present at the time of attack at the ETO. Consequently, the Appeals Chamber can see no reason for believing that it was unreasonable for the Trial Chamber to rely upon Witness H's evidence, and therefore dismisses the Appellant's allegations.

420. The Appellant also submits that Witness H testified based on "pure supposition" about the relative functions of the *Interahamwe* leadership structure, without any professed or demonstrated competence to do so.[703] That Witness H testified that the Appellant was more high-ranking than Gérard Karangwa within the *Interahamwe* does not, in the Appeals Chamber's opinion, render his entire testimony incredible or unreliable. In any event, Witness H was not called, or asked, to give expert testimony on the hierarchy of the *Interahamwe*. Instead, he only provided this testimony upon being asked by the Prosecution whether the Appellant was superior to Gérard Karangwa.[704] Moreover, the Defence opted not to question the witness on this point at trial. In this regard, the Appellant cannot now argue on appeal that the witness was incompetent to testify on the leadership structure of the *Interahamwe*.

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[695] *Ibid*., paras. 392 and 393. The Appellant cites T, 26 March 1997, pp. 69 and 70.
[696] Rutaganda's Brief, paras. 394 and 395. The Appellant cites T, 26 March 1997, pp. 11 and 12, and T, 25 March 1997, p. 122.
[697] Prosecution's Response Brief, para. 7.121.
[698] *Ibid.*, para. 7.123.
[699] Rutaganda's Brief, para. 392.
[700] See T, 26 March 1997, pp. 77-79.
[701] T, 26 March 1997, p. 69 (Witness H).
[702] T, 26 March 1997, p. 69.
[703] Rutaganda's Brief, para. 394.
[704] T, 26 March 1997, pp.12 to 13 (Witness H).

421. Lastly, the Appellant maintains that the Trial Chamber prejudicially misapprehended the evidence of Witness H in finding that Witness H knew that Mr. Kagina, an ETO teacher, was a member of the *Interahamwe*, although the witness stated that he did not know whether Kagina was a member of the *Interahamwe*.[705] In its Judgement, the Trial Chamber stated that Witness H knew Mr. Kagina to be a member of the *Interahamwe*.[706] While the Appeals Chamber emphasises that Witness H actually testified that he did not know whether Mr. Kagina was a member of the *Interahamwe*, but that he participated in the crimes,[707] it finds that this point was not material to the main issue of the Appellant's presence at the ETO school and his participation in the crimes committed there. The Trial Chamber simply stated the facts in the summary of the witness' testimony, but, on the basis of the testimonies of Witnesses H and DD, it established Rutaganda's presence at the ETO school and his participation in the crimes committed there. The Appeals Chamber finds that the Appellant has not sufficiently demonstrated that the alleged error of fact led to a miscarriage of justice. Accordingly, the Appeals Chamber finds that this sub-ground of appeal must fail.

(c) Inconsistencies and Other Problems with Witness H's Testimony

422. The Appellant points out that Witness H was defensive when responding to questions concerning his signed prior statement.[708] However, the Prosecution argues that the witness was not defensive, as he was simply trying to explain why discrepancies might exist between his January 1996 statement and the evidence of March 1997.[709] Having reviewed the trial transcripts regarding the witness's response, the Appeals Chamber disagrees with the Appellant's assertion that the witness came across as defensive.[710] Accordingly, the argument on this point must fail.

423. The Appellant also submits that Witness H provided inconsistent colour descriptions of the uniforms worn by members of the *Interahamwe*.[711] However, the Prosecution explains that the transcript shows that the witness's description was either given or interpreted in error. It further explains that the witness later clarified his answer, thereby reducing the significance of any earlier inconsistency.[712] Having reviewed the trial transcript of Witness H's testimony of 25 March 1997,[713] the Appeals Chamber notes the following dialogue between the Presiding Judge and Witness H concerning the colour of the *Interahamwe* uniform:

> Q. Did they wear any special colours?
>
> A. I remember that their uniform was blue, blue green and black.
>
> […]
>
> Q. Could you again try to remember what the colours of the *Interahamwe*?
>
> A. For the *Interahamwe*, it was red, black and green.

[705] Rutaganda's Brief, para. 357, and paras. 394 and 395 (quoting the Trial Jugement, para. 277).
[706] Trial Judgement, para. 277.
[707] T, 26 March 1997, p. 14**.**
[708] Rutaganda's Brief, para. 396(1).
[709] Prosecution's Response Brief, para. 7.129.
[710] T, 26 March 1997, Witness H, p. 80.
[711] Rutaganda's Brief, para. 396(2).
[712] Prosecution's Response Brief, para. 7.131.
[713] T, 25 March 1997, pp. 93 *et seq*. The Appeals Chamber notes that the French and English transcripts differ somewhat regarding who the Judge asked the question *"[v]ous vous souvenez que vous avez dit bleu, vous ?"*. In the English transcript, it is the witness who answers the question, whereas in the French transcript, it is the interpreter, not the witness, who answers *"Je me m'en souviens pas, Monsieur le Président, mais c'est possible, mais je ne m'en souviens pas"*.

Mr. President:	You have to be clear, just now you said that the Interahamwe wore caps with tembo and their clothing with red, blue and green [...]
The Witness:	No. I said it was red, black and green.
Mr. President:	Do you recall you said blue just now?
The Witness:	I am sorry, I don't remember. It is possible but I don't remember.
Mr. Interpreter:	It is blue?
Mr. President:	So what is it now? What colour was this uniform?
The Witness:	It was black, red and green..
Mr. President:	That is for the *Interahamwe* now?
The Witness:	That's correct.

424. The Appeals Chamber recognises that there is some confusion in the trial transcript regarding the colour of the uniforms. It notes, however, that the dialogue between the Presiding Judge and Witness H set the record straight on this question, as Witness H answered it clearly. As the trier of fact, the Trial Chamber accepted the clarification as sufficient and credible and, as such, the Appeals Chamber cannot see why it was unreasonable to do so.

425. In further challenging Witness H's testimony, the Appellant raises the following issues which allegedly show that his evidence is unreliable: [714]

- whether, on 6 April 1994, the witness saw a roadblock around the road at Gikongo/Kicukiro, preventing him from reaching his house;[715]
- whether the witness encountered armed members of the *Interahamwe* on his way to the ETO school;[716]
- the timing of the attack after the UNAMIR departure from the ETO school;[717]
- when Witness H first saw the Appellant for the first time at the ETO school;[718]
- whether Gérard Karigarawa was with the Appellant at the ETO school;[719] and
- Witness H's ability to speak French.[720]

[714] Rutaganda's Brief, para. 396(3)-(10).
[715] *Ibid.*, para. 396(3). The Appellant cites T, 25 March 1997, p. 105**,** and T, 26 March 1997, p. 54. In its Response, the Prosecution argues that this is not a contradiction, and that it is a relatively insignificant discrepancy in the light of Witness H's entire testimony (See Prosecution Response, para. 7.133).
[716] *Ibid.*, para. 396(4). The Appellant cites T, 26 March 1997, pp. 55 and 56. The Prosecution explains that the witness clarified the alleged inconsistency in his subsequent testimony. *Ibid.*, para. 7.135.
[717] *Ibid.*, para. 396(5). Reference to Witness H's testimony (T, 25 March 1997, pp. 110 and 111) and to Captain Luc Lemaire's testimony (T, 1 October 1997, pp. 210 to 211).
[718] Rutaganda's Brief, para. 396(6). The Appellant cites T, 25 March 1997, pp. 111 and 121. The Prosecution responds that this cannot be considered a contradiction. Prosecution's Response, para. 7.140.
[719] *Ibid.*, para. 396(7). The Appellant illustrates the alleged inconsistencies between the testimonies of Witness H (T, 25 March 1997, p. 111) and Witness W (T, 29 May 1997, pp. 10 and 11).

426. In discussing the nature of the evidence before it, the Trial Chamber noted that such inconsistencies, as identified by the Appellant, "were not material […] and could for the most part be attributed to external factors relating to pre-trial statements and other language and translation problems."[721] This, the Appellant argues, is an error of law invalidating the decision with respect to paragraphs 13 to 16 of the Indictment.[722] The Appellant submits that the "readiness [of the Trial Chamber] to disregard and excuse problems with the witnesses for the Prosecution [...] represents a significant error of principle undermining the integrity of the findings made in the case generally, and with respect to this allegation particularly."[723]

427. As regards an alleged error of fact, the Appeals Chamber reiterates that the Trial Chamber was best placed to determine whether the alleged inconsistencies were so material as to cast doubt on the evidence. As the said evidence was given in court, it was within the Trial Chamber's discretion to determine its probative value, and the Appellant must demonstrate that the alleged error occasioned a miscarriage of justice. The Appeals Chamber also finds that such minor inconsistencies, as those identified by the Appellant, certainly cannot suffice to render Witness H's entire testimony unreliable.[724] More importantly, the Appellant has failed to show that the alleged inconsistencies were material and substantial to the main issue of his presence at the Eto and of his participation in the attacks at the ETO school, and that the Trial Chamber failed to take them into consideration. Having reviewed the trial transcript relating to the testimony of this witness and of other witnesses cited by the Appellant,[725] the Appeals Chamber finds that the Appellant has failed to demonstrate the Trial Chamber's alleged error in considering the inconsistencies to be minor in its evaluation of Witness H's credibility in its findings on the ETO massacres, and that such an error led to a miscarriage of justice. Accordingly, the Appeals Chamber rejects the arguments challenging Witness H's credibility.

428. Moreover, with regard to an alleged error of law, the Appeals Chamber recalls that "[W]here a party contends that a Trial Chamber made an error of law, the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether there was such a mistake. […] The Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law."[726] As regards the allegation that the Trial Chamber erred in law by invoking external factors relating to pre-trial statements and other language and translation issues in order to explain the inconsistencies in Witness H's testimony, the Appellant appears to be making reference in part to paragraph 292 of the Trial Judgement. The Appeals Chamber affirms that, in this instance, the Trial Chamber simply took into consideration certain factors in order to make a fair evaluation of the evidence. Having noted minor inconsistencies, the Trial Chamber gave reasons that could explain such inconsistencies; however, the Appeals Chamber holds that the Trial Chamber did not justify or excuse the inconsistencies. Indeed, the Trial Judges made a point of stating that such inconsistencies "*could* for the most part be attributed to external factors" (emphasis added), and the Appeals Chamber does not find that this amounts to an error of law that would invalidate the trial Judgement. Moreover, the Appeals Chamber reaffirms its findings regarding a contention made as part of the ground of appeal under General Errors of Law,[727] whereby the Appellant challenges the Trial Chamber's treatment of social and cultural factors**.**

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[720] *Ibid*, para. 396(9). The Appellant refers to the Transcript of 26 March 1997, pp. 66 and 86.
[721] Trial Judgement, para. 292.
[722] See Supplemental Document, para. 17, and Rutaganda's Brief, paras. 362 and 363.
[723] Rutaganda's Brief, para. 363.
[724] *Čelebići* Appeal Judgement, para. 498.
[725] For Witness H, see Transcript of 25 March 1997, pp. 105, 110, 111, 121; T, 26 March 1997, pp. 54 to 56, 66 and 86. For Captain Luc Lemaire's testimony, see T, 1 October 1997, pp. 210 to 211; for Witness W, see T, 29 May 1997, pp. 10 to 11.
[726] See *Furundžija* Appeal Judgement, para. 35.
[727] See Part IV of this Judgement.

429. Consequently, the Appeals Chamber fails to see any reason for a finding that the Trial Chamber made an error of law that could invalidate the decision or an error of fact that occasioned a miscarriage of justice, as contended by the Appellant. Accordingly, the Appeals Chamber dismisses the Appellant's arguments in relation to Witness H, as they lack merit.

2. Witness DD

430. The Trial Chamber also found Witness DD to be a reliable identification witness.[728] In relation to his evidence,[729] the Trial Chamber stated that Witness DD, a Tutsi man who was a high school student in 1994, testified that he was a neighbour of the Appellant and that he knew that the latter was vice-president of the *Interahamwe.* [730] When he learned of the death of the Rwandan President, he fled with his entire family to the ETO for refuge, because the UNAMIR troops were there and they thought their safety would be ensured. On 11 April, when the UNAMIR troops left, Witness DD saw the *Interahamwe* attack. He testified that the *Interahamwe* leaders were present and named the Appellant as well as the *conseiller* of Kicukiro, who was also his neighbour, as having been among the leaders. He also saw the Appellant at about fifty (50) metres from the ETO entrance, together with the *conseiller* and many others he was unable to identify. According to the witness, all of them were armed, and the Appellant had a gun.

431. In its factual findings, the Trial Chamber relied on Witness DD's testimony that he saw the Appellant armed with a gun at the time of the attack. Based on this evidence, the Trial Chamber found, beyond a reasonable doubt, that the Appellant was present and participated in the attack on Tutsi refugees at the ETO school.[731]

432. In addition to questioning the overall credibility of the witness,[732] the Appellant submits that Witness DD's testimony is not reliable, as it contains numerous contradictions and inconsistencies compared to, *inter alia*, his previous statements made before the investigators of the Office of the Prosecutor.[733] In support of this contention, the Appellant submits that the Trial Chamber failed to consider the following inconsistencies:

- Witness DD's position while at the ETO school;[734]
- the number of people at the ETO school;[735]
- the people who entered the ETO school with the *Interahamwe*;[736]
- Witness DD's distance from the Appellant when he saw him at the ETO school;[737]
- Witness DD's testimony regarding the clothing worn by the Appellant;[738]

[728] Trial Judgement, para. 292.
[729] Trial Judgement, paras. 280 to 282.
[730] Trial Judgement, para. 280.
[731] Trial Judgement, para. 300.
[732] Rutaganda's Brief, paras. 401(12) to 407.
[733] In its Response, the Prosecution argues that these minor inconsistencies do not discredit or render Witness DD's testimony unreliable. It maintains that the few inconsistencies identified by the Appellant are trivial, and do not jeopardise the Trial Chamber's findings that Witness DD was a reliable and credible witness. See Prosecution's Response, paras. 7.155 and 7.158.
[734] Rutaganda's Brief, para. 401(1). The Appellant cites T, 27 May 1997, pp. 40 and 106.
[735] *Ibid*., para. 401 (2). Reference to T, 27 May 1997, pp. 45 and 106.
[736] *Ibid*., para. 401 (3). The Appellant cites T, 27 May 1997, pp. 50 and 51.
[737] *Ibid*., para. 401 (4). The Appellant cites T, 27 May 1997, p. 46, and T, 28 May 1997, p. 29.

- the location of the Appellant at the time Witness DD first saw him;[739]

- when Witness DD saw the Appellant;[740]

- when the attack began;[741]

- whether the Appellant was armed;[742] and

- how long the attack lasted.[743]

433. As already stated, the Appeals Chamber must give a margin of deference to the Trial Chamber's assessment of Witness DD's testimony, as it is best placed to determine whether these alleged inconsistencies were so material as to cast doubt on the evidence. Although the Trial Chamber made no reference in its findings to the alleged inconsistencies, as pointed out by the Appellant, it can nevertheless be assumed that it regarded them as immaterial in determining the primary issue of the Appellant's presence at the ETO school,[744] and that on this point, there can be no doubt.

434. In all events, having reviewed the relevant portions of Witness DD's testimony, the Appeals Chamber does not consider the alleged inconsistencies material to the issue of the Appellant's presence at the ETO school.[745] Notwithstanding, the Appeals Chamber holds that, in the light of the arguments put forward by the Appellant, the Appellant has failed to demonstrate that the Trial Chamber committed an error in its findings on Witness DD's identification of the Appellant. Accordingly, the Appellant's arguments challenging Witness DD's credibility are rejected.

C. Forcible Transfer and Massacres at Nyanza

435. Under this sub-ground of appeal, the Appellant challenges his conviction for the crimes which occurred at Nyanza on 11 April 1994.[746] The Trial Chamber accepted the evidence of Witnesses A, H and W, and found beyond a reasonable doubt that the Appellant was present and participated in the forced diversion of refugees to Nyanza and that he directed and participated in the attack at Nyanza.[747] On appeal, the Appellant contends that he played no role in those events, and that the evidence relied on by the Trial Chamber was unsafe.[748]

1. Witness A

436. The Appeals Chamber affirms that the Trial Chamber found Witness A to be a credible witness.[749] In respect of his evidence, the Trial Chamber stated that Witness A, a Tutsi man who had worked for the

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[738] *Ibid*., para. 401 (5). The Appellant cites Witness DD's testimony (T, 28 May 1997, p. 29) and Captain Lemaire's testimony (T, 30 September 1997, pp. 170-171 and T, 1 October 1997, p. 87).
[739] *Ibid*., para. 401 (6) (The Appellant cites T, 27 May 1997, pp. 46 and 114 and T, 28 May 1997, pp. 29 and 35). See also point 8) (T, 27 May 1997, pp. 33 and 56 and T, 28 May 1997, p. 32).
[740] *Ibid*., para. 401 (7) (Reference to T, 27 May 1997, p. 113 and T, 28 May 1997, pp. 29 and 30).
[741] *Ibid*., para. 401 (9). The Appellant cites T, 27 May 1997, p. 113 (Witness DD) and T, 1 October 1997, pp. 210 to 211 (Capitaine Lemaire).
[742] *Ibid*., point 10. Reference to T, 27 May 1997, pp. 47 to 48.
[743] *Ibid*., point 11. (T, 27 May 1997, pp. 48 and109).
[744] In the *Čelebići* Judgement, para. 497, the Appeals Chamber found that "[A]lthough the Trial Chamber made no reference in its findings to the alleged inconsistencies [...], it can nevertheless be assumed that it regarded them as immaterial to determining the primary question [....]".
[745] T, 27 and 28 March 1997, Witness DD.
[746] Trial Judgement, paras. 402 and 408.
[747] *Ibid.*, paras. 302, 303 and 304.
[748] Rutaganda Brief, para. 372.
[749] Trial Judgement., para. 292.

Appellant as a mason, testified that on 7 April 1994 he went with his wife and five children to the ETO, a kilometre away from his house, to seek refuge and protection because the UNAMIR troops were stationed there. Witness A testified that the departure of the UNAMIR troops created panic among the refugees and caused many of them to leave the ETO entrance; as a result, Witness A was able to re-enter the compound where he was reunited with his family. According to him, that is when the *Interahamwe* came in and mixed in with the crowd of refugees inside the building. According to the witness, the refugees then decided to proceed together to the Amahoro stadium. The witness further testified that a soldier with a megaphone then came to them and told them it was not a good idea to go to the stadium and suggested instead that they go to Nyanza, where, he said, they would be safe. Along the way to Nyanza, he saw the Appellant coming in the opposite direction from Nyanza in his vehicle. He pulled over to the side of the road, got out, and stood leaning against the vehicle. He also saw a mason who had worked for the Appellant pleading for help, but the Appellant waved him away. Upon arrival at Nyanza, Witness A saw the Appellant again who was directing the *Interahamwe* into position to surround the refugees who had been gathered together in one spot. When asked whether he knew the Appellant, the witness answered that he had known him for six years, having seen him many times and having worked for him.[750]

437. In its factual findings, the Trial Chamber accepted Witness A's eyewitness testimony that, on the way to Nyanza, he saw the Appellant coming in a vehicle from the direction of Nyanza, pulling over to the side of the road, getting out, and leaning against the vehicle.[751] The Trial Chamber also relied on Witness A's testimony that he saw the Appellant wave away one his employees who begged for his assistance.[752] The Trial Chamber also referred to Witness A's testimony that he saw the Appellant at Nyanza directing the *Interahamwe*, who were armed with grenades, machetes and clubs, into position to surround the refugees just prior to the killings.

438. The Appellant first points out that Witness A was the sole Prosecution witness relied upon by the Trial Chamber to find him guilty of the massacres at Nyanza.[753] The Appellant further contends that Witness A's testimony was unreliable, both on its own and when considered in the context of the evidence of other witnesses.[754] In support of this contention, the Appellant sets out the following points which allegedly reflect inconsistencies and contradictory statements:[755]

- whether Witness A had a radio of his own;[756]
- the radio station Witness A listened to on 7 April;[757]
- differences between Witnesses A's and Witnesses W's description of the Appellant's vehicle;[758]
- whether Witness A saw the Appellant in the Peugeot after the megaphone incident;[759]

[750] *Ibid*., paras. 267 to 270 and 274.
[751] *Ibid.*, para. 303.
[752] *Ibid.*, paras. 303 and 304.
[753] Rutaganda's Brief, para. 375.
[754] *Ibid.*, para. 377.
[755] In its Response, the Prosecution counters that these minor inconsistencies certainly do not demonstrate that the Trial Chamber acted unreasonably in relying on his evidence to hold the factual findings proven beyond a reasonable doubt. It also submits that when Witness A's evidence is considered as a whole, the impression is that of a witness who provided truthful, coherent, detailed and accurate testimony, and who responded directly and concretely to the questions asked of him by the parties and the Bench. Finally, the Prosecution observes that Rutaganda's Brief contains numerous inaccuracies and mis-citings of Witness A's evidence. See Prosecution's Response, paras. 7.24, 7.25 and 7.27.
[756] Rutaganda's Brief, para. 378 (1). The Appellant cites T, 20 March 1997, pp. 92 to 93, and T, 24 March 1997, pp. 18 to 19.
[757] *Ibid*., para. 378(2). See T, 20 March 1997, p. 93; T, 24 March 1997, p. 22.
[758] *Ibid*., para. 378(4). The Appellant cites T, 20 March 1997, p. 116 (Witness A); T, 28 May 1997, p. 130, and T, 29 May 1997, pp. 20 to 21 (Witness W).

- the fact of having seen the Appellant during the October 1993 megaphone incident;[760]
- the roadblocks;[761]
- the surrounding of the ETO compound by the *Interahamwe*;[762]
- the number of people at the ETO compound;[763]
- Colonel Rusatira's visit to the ETO compound on 8 April;[764]
- who was selling food;[765]
- whether *Interahamwe* had surrounded the ETO compound before the UNAMIR soldiers left;[766]
- the time when the *Interahamwe* came into the ETO compound;[767]
- whether CDR and MDR youths were at Sonatubes;[768]
- the mason who approached the Appellant on the road to Nyanza;[769]
- the position of the *Interahamwe* in relation to refugees at Nyanza;[770]
- the fact that Hutus were told at Nyanza to show identity cards and allowed to leave;[771]
- how long the attack at Nyanza lasted;[772]
- *Interahamwe* removing, raping and killing women;[773] and
- Witness A knowing the Appellant.[774]

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[759] *Ibid*., para. 378(5). The Appellant cites T, 20 March 1997, pp. 118 to 120.
[760] *Ibid*., para. 378(3) and (6) Appellant cites T, 20 March 1997, pp. 113 to 114 and p. 120, and T, 24 March 1997, p. 42.
[761] *Ibid*., para. 378(8). See also T, 20 March 1997, pp. 127 and 128.
[762] *Ibid*., para. 378(9). The Appellant cites T, 1 October 1997, pp. 26 and 208 (Captain Lemaire) and T, 20 March 1997, pp. 127 and 132 and T, 24 March 1997, p. 53 (Witness A).
[763] *Ibid*., para. 378(10). The Appellant cites T, 20 March 1997, pp. 134 to 135 and T, 24 March 1997, p. 65.
[764] *Ibid*., point (12). Reference to Witness A's testimony (T, 21 March 1997, pp. 13 to 14) and to Captain Lemaire's testimony (1 October 1997, p. 187).
[765] *Ibid*., para. 378(11) and (13). The Appellant cites T, 21 March 1997, pp. 10 to 11 and 17, and T, 24 March 1997, p. 66 (Witness A). For W, the Appellant cites T, 29 May 1997, p. 8.
[766] *Ibid*. para. 378(14). Reference to T, 21 March 1997, p. 18 (Witness A), and T, 1 October 1997, pp. 210 to 211 (Captain Lemaire).
[767] *Ibid*., para. 378 (15). The Appellant cites the following Transcripts as regards Witness A: T, 21 March 1997, pp. 19 to 21 and T, 24 March 1997, p. 89; Witness H: T, 25 March 1997, pp. 110 to 111; Witness DD: T, 27 May 1997, p. 113.
[768] *Ibid*., para. 378(16). Witness cites Witness A's testimony (T, 24 March 1997, p. 112).
[769] *Ibid*., para. 378(17). The Appellant cites T, 21 March 1997, pp. 33 to 35 (Witness A).
[770] *Ibid*., para. 378(18). The Appellant cites T, 21 March 1997, p. 45 (Witness A) and T, 28 May 1997, p. 76 (Witness DD).
[771] *Ibid*., para. 378 (19). Witness cites Witness A's testimony (T, 21 March 1997, pp. 49 to 50 and T, 24 March 1997, p. 118).
[772] *Ibid*., para. 378 (20). The Appellant cites T, 21 March 1997, p. 54 and T, 25 March 1997, p. 36 (Witness A) and T, 26 March 1997, p. 9 (Witness H).
[773] *Ibid*., para. 378 (21). The Appellant cites T, 21 March 1997, p. 54 (Witness A).
[774] *Ibid*., para. 378 (7). The Appellant cites T, 20 March 1997, p. 116; T, 24 March 1997, pp. 34 to 35 and T, 8 April 1994, p. 27 and 32 (Rutaganda's testimony).

439. The Appeals Chamber notes that in his Reply, the Appellant acknowledges that there were no inconstancies in the testimony in relation to the following issues;[775]

- the October 1993 megaphone incident;

- Witness A knowing the Appellant;

- whether UNAMIR gave the refugees food and water.

440. Having reviewed the totality of Witness A's evidence, the Appeals Chamber finds no inconsistency with regard to the following issues:

- whether Witness A had a radio of his own;

- the radio station Witness A listened to on 7 April;

- the fact of having seen the Appellant during the October 1993 megaphone incident;

- the roadblocks;

- the surrounding of the ETO compound by the *Interahamwe*;

- the number of people at the ETO compound;

- who was selling food;

- whether the *Interahamwe* had surrounded the ETO compound before the UNAMIR soldiers left;

- the position of the *Interahamwe* in relation to refugees at Nyanza;

- the fact that Hutus were told at Nyanza to show identity cards and allowed to leave;

- how long the attack at Nyanza lasted; and

- *Interahamwe* removing, raping and killing women.

441. The Appeals Chamber notes that Witness A's testimony contains inconsistencies that it considers minor for the reasons outlined hereinafter, in relation to the following:

- differences between Witnesses A's and Witness W's description of the Appellant's vehicle;

- whether Witness A saw the Appellant in the Peugeot after the megaphone incident;

- the time when the *Interahamwe* came into the ETO compound;

- whether CDR and MDR youths were at Sonatubes; and

- the mason who approached the Appellant on the road to Nyanza.

442. It should be recalled that it does not suffice for the Appellant to challenge the Trial Chamber's assessment of the witness's reliability by invoking alleged inconsistencies in the statements of one

[775] Rutaganda's Reply, para. 7.12 (regarding para. 378(3) of Rutaganda's Brief), para. 7.17 (regarding para. 378(7) of Rutaganda's Brief) and para. 7.24 (regarding para.378(11) of Rutaganda's Brief).

witness or between his testimony and the testimony of another witness. It falls to the Appellant to show that no reasonable trier of fact could have found Witness A to be reliable after having considered the whole of his testimony. Furthermore, the Appeals Chamber stresses that according to the applicable standards for review of an error of fact on appeal, the Appellant must show that the evaluation of the witness's reliability was not only wholly erroneous, but also that such an error, if established, would occasion a miscarriage of justice. In such a case, it would be appropriate for the Appeals Chamber to substitute its own finding on the reliability of the impugned witness for that of the Trial Chamber.

443. To be sure, the Trial Chamber should take account of any inconsistencies in a witness's testimony. The Appeals Chamber, however, emphasises that it falls to the trier of fact to assess the inconsistencies highlighted in testimony and determine whether they impugn the entire testimony. Moreover, the jurisprudence of both Tribunals recognises that a Trial Chamber has the discretion to accept a witness' evidence, notwithstanding inconsistencies between said evidence and his previous statements, as it is up to the Trial Chamber to determine whether the alleged inconsistency is not sufficient to substantially cast doubt on the evidence of the witness concerned.[776] The question before the Appeals Chamber is whether the Trial Chamber made an error by considering some of the inconsistencies in Witness A's statements to be minor and immaterial to the reliability of the said witness, whom the Trial Chamber ultimately found to be a reliable witness.

444. The Appeals Chamber finds that the inconsistencies raised by the Appellant are insufficient to substantially cast doubt on Witness A's testimony, considering the charges against the Appellant in the Indictment. First, with regard to the colour of the vehicle Rutaganda was driving, the Appeals Chamber affirms that Witnesses A and W's description of the Appellant's vehicle differs only with respect to the colour.[777] However, the said witnesses identified the vehicle as belonging to the Appellant,[778] when they confirmed that the vehicle was a Peugeot and that it had a beer logo.[779] As to whether Witness A saw the Appellant in the Peugeot after the alleged October 1993 megaphone incident, the Appeals Chamber notes that the Trial Chamber did not consider this issue and finds the inconsistencies raised to be minor and irrelevant to the Appellant's participation in the massacres perpetrated at the ETO and Nyanza on 11 April 1994.

445. Concerning the Appellant's other allegations, the Appeals Chamber is of the view that, for the reasons explained hereinafter, the minor inconsistencies identified by the Appellant cannot impugn the substantive merits of the Trial Chamber's finding the witness to be credible and his testimony to be reliable.

446. With regard to the alleged inconsistencies in the testimonies of Witnesses A, H and DD as to *when* the *Interahamwe* came into the ETO compound, the Appeals Chamber understands that the Appellant challenges Witness A's credibility because of alleged inconsistencies in the evidence the Trial Chamber relied on in finding that 1) the witnesses "presented a similar account of the refugee situation at the ETO, the attack by the *Interahamwe* following the departure of UNAMIR troops"[780] and (2) "[W]hen the UNAMIR troops left the ETO on 11 April 1994, the *Interahamwe* and members of the Presidential Guard entered and attacked the compound, throwing grenades, firing guns and killing with machetes and clubs.[781] The Appeals Chamber notes that the Trial Chamber's findings are based on the reliability of the

[776] See, for example, *Musema* Appeal Judgement, para. 89, *Čelebići* Appeal Judgement, para. 497, and *Kupreškić* Appeal Judgement, para. 156. For instance, the Appeals Chamber emphasizes that in the instant case, the Trial Chamber did not hesitate to find Witness M's unreliable and to not take it into account, as it contained many substantial inconsistencies regarding dates, time, figures and chronology of events.
[777] See T, 20 March 1997, p. 116 (Witness A) and T, 28 May 1997, p. 130 and T, 29 May 1997, p. 20-21 (Witness W).
[778] See T, 20 March 1997, p. 116 (l. 12) and T, 28 May 1997, p. 129-130 and T, 29 May 1997, p. 20.
[779] See T, 20 March 1997, p. 116 and T, 28 May 1997, p. 130 and T, 29 May 1997 p. 20-21.
[780] Trial Judgement para. 292.
[781] *Ibid.*, para. 299.

testimonies of Witnesses A, H and DD, as well as that of Witness W, who is not mentioned by the Appellant in this sub-ground of appeal, all of whom testified that the *Interahamwe* came into the ETO compound *after the departure of the* UNAMIR *troops*.[782]

447. Having reviewed the transcript cited by the Appellant consisting of excerpts from Witness A's testimony, the Appeals Chamber notes that the inconsistencies raised are, indeed, minor as to the time when the *Interahamwe* came into the ETO compound and that, notwithstanding such minor inconsistencies, the testimony in question is corroborative on numerous points. As concerns the alleged inconsistency as to when the attack took place, the Appeals Chamber, having reviewed the transcripts cited by the Appellant, notes that when the question was put to the witness as to when the refugees decided to leave the ETO, he answered that twenty to thirty minutes elapsed before the decision was made to leave the ETO and head towards the Amahoro stadium. Thus, the time specified has no relation to the time when the *Interahamwe* came into the ETO compound.[783] The Appeals Chamber therefore takes the view that the Appellant's allegations do not discredit Witness A's entire testimony. The same applies to the question as to whether CDR and MDR youths were at Sonatubes, considering that, in answer to a Defence request for clarification, the witness corrected his earlier statement to the investigators of the Office of the Prosecutor.[784] The Appeals Chamber notes that, moreover, the Trial Chamber did not take that point into account in its factual findings.[785] Finally, as regards the alleged inconsistencies in Witness A's testimony regarding the mason who approached the Appellant on the road to Nyanza,[786] the Appeals Chamber emphasises that the Trial Chamber made reference thereto in its Judgement,[787] but that such inconsistencies are not material to Witness A's identification of the Appellant at Nyanza and on the road to Nyanza. Accordingly, the Appeals Chamber holds that, considering the nature of the inconsistencies, it was not unreasonable for the Trial Chamber to accept Witness A's evidence.

448. The Appeals Chamber therefore finds that the Appellant's allegations of errors of fact are without merit. It is the view of the Appeals Chamber that the Appellant has failed to demonstrate that the Trial Chamber erred by not considering the alleged inconsistencies in its overall evaluation of the evidence,

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[782] Trial Judgement, para. 268 (Witness A), para. 276 (Witness H), para. 280 (Witness DD) and para. 284 (Witness W).
[783] See T, 21 March 1997, pp. 19-21 and T, 24 March 1997, p. 89 (Witness A); Witness H: T, 25 March 1997, pp. 110 to 111; Witness DD: T, 27 May 1997, p. 113.
[784] See T, 24 March 1997, p. 112.
[785] Trial Judgement, paras. 292 to 304.
[786] See T, 21 March 1997, pp. 33 and 35 (Witness A). In this regard, the Appeals Chamber notes that as to whether witness A overheard Rutaganda, the witness clarified his statement when he responded to the questions put to him by the Presiding Judge. The following dialogue took place between the witness and the Presiding Judge:
MR. PRESIDENT:
[…] I would like for the witness to be clear because there are two possibilities. Either this person was going towards Rutaganda for protection and he gave him his hand gesture as if to say don't come near me but without saying anything or maybe he heard him say something?
THE WITNESS:
I didn't hear the words he actually said but when the person I was speaking with came back to the crowd, he came back next to me and I asked him why he gone up to Rutaganda and he told me that he had gone because he thought that Rutaganda would safe him but that Rutaganda told him to get away.
MR. PRESIDENT:
But that is not the same thing, earlier you said that he raised his hands and said don't come up near me. What exactly happen please be clear? Prosecutor, what are we putting on the record?
MR. PROSPER:
I guess that Rutaganda made a gesture that can be interpreted as go away or do not come near me with his hands blushing away type of gesture.
MR. PRESIDENT:
It is on the record. […]
[787] Trial Judgement, para. 303.

which it found reliable, and that the Appeals Chamber must reverse the Trial Chamber decision.[788] The Appeals Chamber, therefore, dismisses the arguments mentioned *supra*, in paragraph 52 of this Judgement.

449. Lastly, as regards the contention that the Trial Chamber should have taken into account the fact that Witness A was the sole witness to have testified that, on 8 April, Colonel Rusatira went to the ETO school and asked Hutus to separate themselves from the group, after which 600 to 1000 people left the group,[789] the Appeals Chamber recalls that the evidence of a single witness on a material fact does not require, as a matter of law, any corroboration.[790] Whether a Trial Chamber will rely on a single witness testimony as proof of a material fact, will depend on various factors that have to be assessed in the circumstances of each case.[791] That Witness A was the only witness who testified regarding Colonel Rusatira's visit does not affect the probative value of his entire testimony. As such, the Appellant's arguments on this point must fail.

2. Witness H

450. In paragraph 303 of the Trial Judgement, the Trial Chamber found that Witness H also saw the Appellant on the way to Nyanza, standing in a group talking to a member of the *Interahamwe*, whom he recognized, and other people. In challenging this finding, the Appellant alleges that there are inconsistencies relating to (1) Witness H's position en route to Nyanza and what he saw on the way, and (2) whether the *Interahamwe* led the group towards the road with the soldiers.[792] In response, the Prosecution submits that it fails to see how the Appellant can consider this testimony as inconsistent.[793]

451. Concerning the first alleged inconsistency, the Appeals Chamber notes that, on 26 March 1997, the following exchange took place between Prosecution and Witness H:[794]

> Q. Did you see any people killed on that way?
>
> A. When we left the paved road and headed towards Nyanza we saw bodies along the road These were people who had been killed when we fled the ETO. We continued along this road and they continued to threaten us, to beat us, and in the part of the crowd where I was, the side where I was, there were not any deaths up until the time when we arrived at Nyanza. However, there were wounded.

452. The Appeals Chamber also notes that, on cross-examination by the Defence on 27 March 1997, the following dialogue took place:[795]

> Q. Very well. Are you able to indicate to us whether you were towards the center of this crowd as it was walking or were you towards the back of the group of refugees?
>
> A. We were going up towards the right side but sometimes I moved towards the middle because the Interahamwe were beating and killing people who were along the sides.

453. While the witness was unclear as to where he was positioned on the road, he is, however, quite clear as to the primary issue of whether the Appellant was present on the road to Nyanza. Given the fact

[788] See in general, *Aleksovski* Appeal Judgement, para. 64.
[789] Rutaganda's Brief, para. 378 (12).
[790] See for example, *Musema* Appeal Judgement, para. 139, *Aleksovski* Appeal Judgement, para. 62; and *Tadić* Appeal Judgement, para. 65.
[791] See *Aleksovski* Appeal Judgement, para. 63 (citing *Tadić* Appeal Judgement, para. 65).
[792] Rutaganda's Brief, para. 396 (8) (Reference to T, 26 March 1997, pp. 3-4 and T, 27 March 1997, p. 36) and para. 396 (10) (the Appellant refers to T, 25 March 1997, p. 115 – Witness H – and T, 27 May 1997, p. 50 – Witness DD -).
[793] Prosecution's Response, paras. 7.146 and 7.152.
[794] T, 26 March 1997 (Witness H).
[795] T, 27 March 1997 (Witness H).

that the Appellant was among thousands of refugees en route to Nyanza, the Appeals Chamber does not consider the witness's precise location on the road to be material to the witness's credibility. The Appeals Chamber does not find his testimony inconsistent and, therefore, finds that the Trial Chamber was correct in accepting Witness H's explanation.

454. Concerning the second alleged inconsistency, the Appellant submits that no other witness testified that *Interahamwe* led the group of refugees to the road with the soldiers. The Appeals Chamber holds that, pursuant to the decisions cited in the Introduction of this Judgement in relation to the issue of corroboration,[796] the fact that no other witness testified that the *Interahamwe* led the group back to the road does not render Witness H's testimony incredible. What matters is the reliability and credibility accorded to the entire testimony by the Trial Chamber. The Appeals Chamber therefore finds this argument to be without merit.

3. Witness W

455. The Trial Chamber also found Witness W to be a reliable witness.[797] In presenting this witness's testimony, the Trial Chamber stated that the witness, a Tutsi man, also a neighbour of the Appellant's, testified that he knew the Appellant as the vice-president of the *Interahamwe*, and also as an engineer and a businessman.[798] Witness W testified that he went to the ETO, because the UNAMIR troops were there, but that after they left, *Interahamwe* and the Presidential Guard immediately came into the ETO compound.[799] Witness W testified that on the way to Nyanza, he recognised some of the *Interahamwe* and observed the Appellant's vehicle bringing in *Interahamwe* as reinforcements. He testified that the Appellant could have been in this vehicle, which he only saw from afar, but he did not actually see the Appellant. He also testified that the Appellant had participated in setting up roadblocks in the company of others a few days before the ETO and Nyanza massacres.

456. The Trial Chamber, while stating that the witness did not see the Appellant at the ETO nor at Nyanza, did however rely upon Witness W's testimony that he saw a vehicle belonging to the Appellant bringing in *Interahamwe* as reinforcements on the way to Nyanza.[800] Based on his evidence as well as that of Witnesses A and H, the Trial Chamber found beyond a reasonable doubt that the Appellant was present and participated in the forced diversion of refugees to Nyanza and that he directed and participated in the attack at Nyanza.[801]

457. The Appellant raises general issues regarding Witness W's testimony. He contends, first of all, that Witness W, who harboured animus towards him (which is why, according to him, the witness tended to fabricate and exaggerate), was the only witness who testified that a vehicle brought in *Interahamwe* as reinforcements.[802] He further submits that that there is no basis for a safe and fair inference that the Appellant had anything to do with the bringing in of the *Interahamwe* as reinforcements, and that the fact that the witness observed the Appellant's vehicle does not mean that he saw the Appellant.[803]

458. The Appeals Chamber reaffirms that it is for the Appellant to establish on appeal the alleged error that has occasioned a miscarriage of justice. The Appellant cannot simply advance such general arguments on appeal. The Appeals Chamber also notes that the Trial Chamber did not rely on Witness W's testimony in finding that Rutaganda was present, but took account of the testimonies of the two

[796] See Introduction, paras. 23 and 24.
[797] *Ibid.*, para. 300.
[798] Trial Judgement, paras. 283 and 285.
[799] Trial Judgement, para. 284.
[800] *Ibid.*, para. 304.
[801] *Ibid.*
[802] Rutaganda's Brief, para. 411.
[803] *Ibid.*, para. 413.

direct witnesses, namely Witnesses A and H, who saw the Appellant on the way to Nyanza. Considering the unspecific nature of the allegation and the failure to demonstrate the alleged error committed by the Trial Chamber, the Appeals Chamber finds such a contention to be without merit.

459. The Appellant also contends that Witness W's testimony is unreliable, as it contains inconsistent and contradictory statements, which the Trial Chamber should have taken into consideration.[804] In support of this contention, the Appellant raises the following issues which allegedly show that the evidence is unreliable:[805]

- the colour of Rutaganda's vehicle;[806]
- the time of the roadblock incident;[807]
- the Appellant's location when Witness W saw him on his way to Luberizi;[808]
- the alleged seeing of the *Interahamwe* armed with bloody machetes;[809]
- Witness W's opportunity to hear the Appellant;[810]
- what Witness W overheard;[811]
- overhearing the Appellant order construction of roadblocks and killing Tutsis;[812]
- the roadblocks and the killings;[813]
- Witness W's reaction at the time;[814]
- where Witness W fled to and how many nights he spent hiding in the bush;[815]
- whom Witness W hid with, and with whom he arrived at the ETO compound;[816]

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[804] Rutaganda's Brief, paras. 409 to 443.
[805] In its Response, the Prosecution submits that it was quite reasonable for the Trial Chamber to rely on the testimony of Witness W, even though he simply testified to seeing the Appellant's vehicle on the road to Nyanza. Moreover, the Prosecutor disagrees with the Appellant's contention that the testimony contains substantial inconsistencies which allegedly show that Witness W is unreliable. Although the Prosecution acknowledges that there are some inconsistencies, it explains that they are minor and do not discredit Witness W's testimony. See Prosecution's Response, paras. 7.206 to 7.240.
[806] Rutaganda's Brief, paras. 412 and 413. The Appellant cites T, 28 May 1997, p. 130; T, 29 May 1997, p. 20 to 21 (Witness W); T, 24 March 1997, p. 114, and T, 21 March 1997, p. 36 to 37 (Witness A).
[807] *Ibid*., paras. 417 to 419 where Rutaganda cites T, 28 May 1997, pp. 133 to 138 and p. 149; and T, 29 May 1997, p. 37.
[808] *Ibid*., para. 420. The Appellant cites T, 28 May 1997, pp. 140 and 143.
[809] *Ibid*., para. 421 to 422. Reference to T, 28 May 1997, p. 149.
[810] *Ibid*., para. 423 to 424. The Appellant cites T, 28 May 1997, p. 140 andpp. 22 to 25, and T, 29 May 1997, pp. 49 to 52.
[811] *Ibid*., 425 to 427. Reference to T, 28 May 1997, p. 141.
[812] *Ibid*., paras. 428 to 429. The Appellant cites T, 28 May 1997, pp. 141 and 146.
[813] *Ibid*., paras. 430 and 431. Rutaganda cites T, 28 May 1997, p. 141, and T, 29 May 1997, p. 54.
[814] *Ibid*., paras. 432 to 434. Rutaganda cites T, 28 May 1997, pp. 144, 148, 125, 137, 138; T, 29 May 1997, pp. 50 and 53, and pp. 147 and 148.
[815] *Ibid*., paras. 435 and 436. The Appellant cites T, 28 May 1997, pp. 144, 145, 149, 153, 154, 41; and T, 29 May 1997, pp. 43 to 44.
[816] *Ibid*., paras. 437-439. The Appellant cites T, 28 May 1997, p. 154, and T, 29 May 1997, pp. 44 to 45 and 60; Trial Judgement, para. 286.

- when the *Interahamwe* entered the ETO compound;[817]

- whether Witness W overheard the Rusatira conversation.[818]

460. Having reviewed the relevant portions of Witness W's testimony,[819] the Appeals Chamber does not find it to be inconsistent or contradictory with regard to the following issues:

- the alleged seeing of the *Interahamwe* armed with bloody machetes;

- what Witness W overheard;

- overhearing the Appellant order construction of roadblocks and killing Tutsis;

- the roadblocks and the killings;

- when the *Interahamwe* entered the ETO compound;

- whether Witness W overheard the Rusatira conversation.

461. The Appeals Chamber, however, finds minor inconsistencies in W's testimony relating to the following issues, but considers that the inconsistencies did not affect Witness W's credibility for reasons set out *infra*:

- the colour of the vehicle;

- the time of the roadblock incident;

- the Appellant's location when Witness W saw him on his way to Luberizi;

- Witness W's opportunity to hear the Appellant;

- Witness W's reaction at the time;

- where Witness W fled to and how many nights he spent hiding in the bush;

- who Witness W hid and arrived with at the ETO.

462. The Appeals Chamber again recalls that it is primarily for the Trial Chamber to assess the credibility of witnesses. Moreover, as trier of fact, the Trial chamber is not obliged to recount and justify its findings in relation to *every* submission made during trial[820] and, as in the instant case, if a party alleges the existence of inconsistencies in the testimony of a witness, the Appeals Chamber must give a margin of deference to the Trial Chamber's findings unless the Appellant demonstrates that an error of fact was committed and that it occasioned a miscarriage of justice.

463. What is at issue in the instant case is to determine whether the Trial Chamber erred by relying on Witness W's testimony in spite of the inconsistencies highlighted by the Appellant, inconsistencies that, he contends, impugn Witness W's reliability.

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[817] *Ibid*., para. 440. Reference to T, 29 May 1997, p. 9 and pp. 16 to 17 (afternoon session).
[818] *Ibid*., para. 441 to 443. The Appellant cites T, 29 May 1997 (afternoon session) pp. 11 and 13, and T, 1 October 1997, pp. 188 to 189 and pp. 191, 195 and 196 (Captain Luc Lemaire's testimony).
[819] T, 28 and 29 May 1997, Witness W.
[820] See *Čelebići* Appeal Judgement, para. 498.

464. Having reviewed the transcripts referred to by the Appellant, the Appeals Chamber finds the alleged errors of fact to be without merit. Admittedly, there is some confusion in Witness W's testimony, or inconsistencies with regard to events, particularly prior to the events alleged in the Indictment. Nevertheless, the Appeals Chamber finds that the inconsistencies highlighted by the Appellant, consisting in part of mere suppositions, or in an attempt to interpret Witness W's testimony in the Appellant's favour, are minor and cannot demonstrate that no reasonable tribunal could have accepted Witness W's evidence regarding the facts alleged in the Indictment. The Appeals Chamber also recalls that the Trial Chamber relied upon Witness W's testimony only in relation to the presence of a vehicle belonging to the Appellant on the road to Nyanza. As stated earlier, the Trial Chamber's conclusion regarding the Appellant's presence is based mainly on the testimonies of Witnesses A and H, direct witnesses, who observed Rutaganda on the road to Nyanza.

465. Concerning the alleged discrepancies identified by the Appellant in Witnesses W and A's testimonies regarding the colour of the vehicle on the road to Nyanza,[821] the Appeals Chamber states that Witness W only saw Rutaganda's vehicle and testified that he did not see the Appellant himself: he identified the vehicle as being white and green in colour with a beer logo.[822] Witness A, for his part identified a red vehicle, perhaps a Land Rover or Pajero, against which the Appellant was leaning on the road to Nyanza.[823] The Appeals Chamber emphasises that, in response to a question from a Judge, Witness A stated that the vehicle identified was not a Peugeot, as mentioned in his earlier testimony on 20 March 1997 concerning the October 1993 events.[824] Although Witness A's testimony regarding the colour of the Appellant's vehicle may appear contradictory at first glance, in reality, it is not so, considering that Witnesses A and W did not testify to the same facts: Witness A testified to having *seen Rutaganda* leaning against a red vehicle,[825] while Witness W testified to having *see Rutaganda's vehicle* identified as green and white.[826] The Appeals Chamber is therefore of the view that it was correct for the Trial Chamber to rely on Witness W's evidence, as it only contains minor inconsistencies.

466. For the foregoing reasons, the Appeals Chamber is of the view that the Appellant has failed to demonstrate the alleged errors of fact on the basis of which he contends that the Trial Chamber improperly exercised its discretion in its evaluation of the evidence of Witnesses A, DD, H and W and made a finding that no reasonable tribunal could have made. This ground of appeal is, therefore, dismissed.

D. Consideration of an alleged miscarriage of justice due to error of law concerning the admission of additional evidence

467. The Appeals Chamber now turns to consider the Appellant's arguments in relation to additional evidence. Before considering the arguments on the merits, its necessary to recall the relevant appellate proceedings, and the standard of review on appeal where additional evidence has been admitted.

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[821] Rutaganda's Brief, paras. 412 and 413. The Appellant cites T, 28 May 1997, p. 130; T, 29 May 1997, p. 20 (Witness W); T, 24 March 1997, p. 114; T, 21 March 1997, p. 36 to 37 (Witness A).

[822] See T, 29 May 1997, pp. 17 to 22.

[823] See T, 24 March 1997, pp. 106 to 114.

[824] At the hearing of 21 March 1997, the following dialogue took place regarding the events on the road to Nyanza (T, 21 March 1997, pp. 37 and 38) :

> "Q. What type of car was it?
> A. It was a Land cruiser
> […]
> Q. Therefore it was not a Peugeot or the volsvagon (*sic*) that you talked about yesterday?"

It should be recalled that on 20 March 1997 (p. 116), Witness A testified about the vehicle in which he saw Rutaganda during the events of October 1997 (T, 20 March 1997, p. 111): "It was a blue pick up truck of the Peugeot brand".

[825] T, 24 March 1997, p. 114.

[826] T, 29 May 1997, pp. 19-20.

1. Procedural Background

468. On 4 November 2002, five months into the Appeal deliberations, the Appellant filed an urgent motion[827] seeking, *inter alia*, an order pursuant to Rule 115 of Rules for admission of additional evidence. Considering that at that same time, the Prosecution was in the process of making some disclosures to the Appellant, the Appeals Chamber ordered the Appellant to file, pursuant to Rule 115 of the Rules, a consolidated motion by 6 January 2003 at the latest.[828] The Appellant filed the Consolidated Motion on 3 January 2003,[829] seeking, *inter alia*, an order for the admission of several items of additional evidence, including an investigation report prepared by Mr. Martin Seutcheu, Investigator with the Office of the Prosecutor (the "Seutcheu Report"). The Report had been prepared at the request of the Prosecution, following correspondence between the Office of the Prosecutor and Professor André Guichaoua, professor of Sociology at the *Université de Lille*, France, dated 10 November 2002 ("Communication of 10 November 2002"). In the said communication, Professor Guichaoua allegedly stated: *"d'après mes informations il [Rutaganda] n'aurait pas été plus présent à Kicukiro que Rusatira*" (the "Statement"). The Prosecution sought additional information from Professor Guichaoua and disclosed the information to the Appellant in the form of the written report of Mr. Seutcheu.

469. In an incidental motion,[830] the Appellant contended that the Prosecution should have disclosed to him the nature and source of the Communication of 10 November 2002, pursuant to Rule 68 of the Rules. The Appeals Chamber dismissed the Appellant's motion in a decision rendered on 13 February 2003.[831] The Appeals Chamber, nevertheless, held that the Communication of 10 November 2002 appeared relevant for the purpose of considering the admissibility of the Seutcheu Report under Rule 115 of the Rules, and ordered that it be provided to the Appeals Chamber; the Prosecution did so on 14 February 2003.[832] The Appeals Chamber subsequently held that the interests of justice required that the Communication of 10 November 2002 be provided also to the Appellant, subject to the relevant protective measures.[833]

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[827] Urgent Defence Motion for an Order Varying the Grounds of Appeal Pursuant to Rule 107*bis* and Rules 114 and 116 of the Rules of Procedure and Evidence; for Disclosure Pursuant to Rules 66(B) and 68 of the Rules of Procedure and Evidence; for a Rehearing of Oral Argument in the Appeal Pursuant to Article 24 of the Statute of the International Tribunal for Rwanda, and for the Admission of Additional Evidence Pursuant to Rule 115(A) and (B) of the Rules of Procedure and Evidence, as well as a Request for Extension of the Page Limit Applicable to Motions", of the Statute of the International Tribunal for Rwanda, and for the Admission of Additional Evidence Pursuant to Rule 115(A) and (B) of the Rules of Procedure and Evidence, as well as a Request for Extension of the Page Limit Applicable to Motions, filed on 4 November 2002.

[828] Decision on the Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order, 12 December 2002.

[829] Consolidated Defence Motion for an Order Varying the Grounds of Appeal Pursuant to Rule 107*bis* and Rules 114 and 116 of the Rules of Procedure and Evidence; for a Rehearing of Oral Argument in the Appeal Pursuant to Article 24 of the Statute of the International Tribunal for Rwanda, and for the Admission of Additional Evidence Pursuant to Rules 115(A) and (B) of the Rules of Procedure and Evidence, as well as a Request for Extension of the Page Limit Applicable to Motions, 3 January 2003.

[830] Urgent Defence Motion for Disclosure Pursuant to Rules 66 B) and 68 of the Rules of Procedure and Evidence, and for a Reconsideration of Deadlines Imposed in Judge Jorda's Order of December 12, 2002, 18 December 2002.

[831] *Décision sur la* "Urgent Defence Motion for Disclosure Pursuant to Rules 66 B) and 68 of the Rules of Procedure and Evidence, and for a Reconsideration of Deadlines Imposed in Judge Jorda's Order of December 12, 2002", 13 February 2003 ("Decision of 13 February 2003"). By this Decision, the Appeals Chamber held, *inter alia*, that the Prosecution had disclosed the relevant information pursuant Rule 68 of the Rules by means of the Seutcheu Report.

[832] Prosecution Filing Pursuant to the Appeals Chamber's Decision Dated 13 February 2003 (Partly *ex parte*, Confidential), 14 February 2003.

[833] Order for the Prosecution to Provide the Defence With the Communication of 10 November 2002 and for Protective Measures (Confidential), 24 February 2003.

470. In a decision rendered on 19 February 2003,[834] the Appeals Chamber held that in light of the Communication of 10 November 2002, the Seutcheu Report was relevant and credible and could sufficiently show that the Appellant's convictions for genocide and extermination as crimes against humanity were unsafe. The Appeals Chamber also considered that it was necessary to hear Professor Guichaoua as a witness in order to determine whether the Seutcheu Rapport actually revealed an error of fact of such magnitude as to occasion a miscarriage of justice. Professor Guichaoua was summoned to appear as a witness pursuant to Rules 98 and 107 of the Rules.[835] All the other motions by the Appellant for admission of additional evidence were dismissed.

471. In a decision and order rendered on 25 February 2003,[836] the Appeals Chamber allowed the Appellant to present new evidence in relation to the ETO school and Nyanza, it being understood that these submissions were to be limited to the impact the new evidence would have on the Appeal. The submissions on appeal and Professor André Guichaoua's deposition were heard at the 28 February 2003 Hearing.

472. Before examining the submissions on the merits, the Appeals Chamber will recall the applicable standards of review on appeal where additional evidence has been admitted.

2. Standard of Review on Appeal

473. Pursuant to Article 24 of the Statute the Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the grounds of an error of law invalidating the decision or an error of fact which has occasioned a miscarriage of justice. Where additional evidence has been admitted on appeal, the Appeals Chamber is required to determine whether the additional evidence actually reveals an error of fact of such magnitude as to occasion a miscarriage of justice.[837] In accordance with Rule 118(A) of the Rules and the relevant jurisprudence,[838] the test to be applied by the Appeals Chamber in deciding whether or not to uphold a conviction where additional evidence has been admitted is: has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings?[839] Where the Appeals Chamber finds that a reasonable trier of fact could have reached a conclusion of guilt based on the evidence before the Trial Chamber *together with* the additional evidence, it must uphold the Trial Chamber decision.

3. Whether the additional evidence actually reveals an error of fact of such magnitude as to occasion a miscarriage of justice

474. The Appellant contends that he did not participate in the events at the ETO and Nyanza, Kicukiro *commune*, on 11 and 12 April 1994.[840] At the 28 February 2003 Hearing, he reiterated some of the arguments submitted in his Appeal, namely that the Trial Chamber erred by rejecting his alibi[841] and by finding Witnesses A, H, W and DD to be credible witnesses.[842] He also contended that the Trial Chamber

[834] Decision on the Consolidated Defence Motion for an Order Varying the Grounds of Appeal, for the Rehearing of Oral Arguments in the Appeal and for the Admission of Additional Evidence, and Scheduling Order, dated 19 February 2003 and filed on 14 May 2003 ("Decision of 19 February 2003").
[835] See Decision of 19 February 2003, *Citation à comparaître* [summons] dated 24 February 2003, redacted version filed on 14 May 2003 ("*Citation à comparaître*").
[836] *Ordonnance portant calendrier* [Scheduling Order] dated 25 February 2003, redacted version filed on 14 May 2003.
[837] The Appeals Chamber could have remitted the case to the Trial Chamber for it to consider any new evidence. In the instant case, the Appeals Chamber decided to rule on the matter (*Kupreskic* Appeal Judgement, para. 70).
[838] See mainly *Kupreskic* and *Musema* Appeal Judgements.
[839] *Musema* Appeal Judgement, paras. 185 and 186; *Kupreskic* Appeal Judgement, paras. 75 and 76.
[840] T(A), 28 February 2003, pp. 59 and 68.
[841] T(A), 28 February 2003, pp. 59, 65 and 77.
[842] T(A), 28 February 2003, pp. 67 and 74.

would have acquitted him if it had considered the evidence before it *together* with the additional evidence.[843] The Appellant also submits that Professor Guichaoua's testimony corroborated the defense of alibi offered at trial,[844] as it established that he was not present at the ETO and Nyanza on 11 April 1994.[845]

475. The Prosecution responded that the Statement, considered in the light of Professor Guichaoua's testimony, could not lead to the conclusion that no reasonable tribunal of fact could have found that the Appellant did not participate in the events at the ETO and Nyanza.[846] According to the Prosecution, Professor Guichaoua's testimony reveals that he does not possess information as to whether or not the Appellant was present at the ETO and Nyanza on 11 April 1994.[847] Therefore, his testimony cannot be given such weight as to [848] cast doubt on the evidence tendered at trial, including, *inter alia*, the direct evidence of three eyewitnesses who saw the Appellant at the ETO, Nyanza and on the road to Nyanza on 11 April 1994.[849]

476. The Appeals Chamber has considered, *supra*,[850] the Appellant's contention that the Trial Chamber committed an error by rejecting his alibi,[851] and finding Witnesses A, H, W and DD to be credible witnesses.[852] Each of the sub-grounds of appeal has been dismissed.[853] The Appeals Chamber therefore finds the testimonies of Witnesses A, H, W and DD to be reliable and credible. The question the Appeals Chamber must consider in this instance is whether the Trial Chamber's factual findings, although they were safe *at trial*, may actually be unsafe in view of the additional evidence. In order to answer this question, the Appeals Chamber must first determine whether the additional evidence tends to show that the Appellant was present at the ETO and Nyanza on 11 April 1994. If required, it will then assess the probative value of the said evidence and its impact on the testimonies of Witnesses A, H, W and DD, in the light of the relevant Trial Chamber findings.

477. The additional evidence the Appeals Chamber is to consider includes the Communication of 10 November 2002, the Seutcheu Report and Professor Guichaoua's deposition. Before considering this evidence, the Appeals Chamber must first dispose of a preliminary question raised by the Appellant in his closing arguments at the 28 February 2003 Hearing. The Appellant contends that Professor Guichaoua was guarded in his testimony and changed his account of the facts contained in the Communication of 10 November 2002 and the Seutcheu Report.[854] The Appellant avers that this was because Professor Gichaoua was hoping to "undo the damage his candid remark had made".[855] He also submits that Professor Guichaoua thought he was talking "within the family" in the Communication of 10 November 2002 and the Seutcheu Report[856] – which could imply that Professor Guichaoua therefore considered that he "worked for the Office of the Prosecutor".[857] The Appellant's submissions reveal that,

[843] T(A), 28 February 2003, pp. 68 and 66.
[844] T(A), 28 February 2003, p. 60.
[845] T(A), 28 February 2003, p. 65.
[846] T(A), 28 February 2003, pp. 72 to 73.
[847] T(A), 28 February 2003, pp. 72 to 73.
[848] T(A), 28 February 2003, pp. 72 to 73
[849] T(A), 28 February 2003, pp. 73.
[850] See Part V of this Judgement.
[851] T(A), 28 February 2003, pp. 59, 68 and 77.
[852] T(A), 28 February 2003, pp. 59 and 66.
[853] See Parts V and VIII of this Judgement.
[854] The Appellant contends that Professor Guichaoua made attempts to "minimize the force of the extraordinary statement which he made in [the Communication of 10 November 2002] – which he repeated to the Prosecution investigator, Mr. Seutcheu, [and has] repeated again in court" (see: T(A), 28 February 2003, p. 55; see also pp. 62 to 63).
[855] T(A), 28 February 2003, p.76.
[856] See, *inter alia*, T(A), 28 February 2003, p. 64.
[857] T(A), 28 February 2003, p. 63.

in his view, Professor Guichaoua was more inclined to tell the truth in his discussions with the Office of the Prosecutor than at the 28 February 2003 Hearing. The Appellant therefore prayed the Appeals Chamber to reject the "qualifications".[858] If the Appeals Chamber were to allow this motion, it would give more weight to the "facts" contained in the Communication of 10 November 2002 and the Seutcheu Report.

478. Having considered the Communication of 10 November 2002, the Seutcheu Report, Professor Guichaoua's deposition and the parties' submissions, the Appeals Chamber hereby dismisses the Appellant's allegation that Professor Guichaoua changed his version of the facts at the 28 February 2003 Hearing. On the contrary, the Appeals Chamber observes that Professor Guichaoua confirmed his Statement unequivocally.[859] Pursuant to the decisions rendered on this subject,[860] Professor Guichaoua was ordered to appear as a witness specifically to explain his Statement and reveal the information on which he relied. The Appeals Chamber notes that that is precisely what Professor Guichaoua did in his testimony at the 28 February 2003 Hearing. For these reasons, the Appellant's preliminary motion is dismissed.

479. The Appeals Chamber will now consider the additional evidence consisting of the Communication of 10 November 2002, the Seutcheu Report and Professor Guichaoua's deposition. In its Decision of 13 February 2003, the Appeals Chamber found that the Communication of 10 November 2002 was relevant for the purpose of considering the admissibility of the Seutcheu Report, pursuant to Rule 115 of the Rules.[861] In its Decision of 19 February 2003, the Appeals Chamber held that the Communication of 10 November 2002 showed that the Seutcheu Report was relevant, credible and had the capacity to show that the Appellant's convictions for genocide and extermination as crimes against humanity were unsafe.[862] The relevant passage of the Communication of 10 November 2002 reads as follows:

> *[…] (même si d'après mes informations il [Rutaganda] n'aurait pas été plus présent à Kikukiro que Rusatira !) […]* [even if according to the information available to me, he (Rutaganda) was not any more present at Kicubiro than Rusatira]

The relevant passages of the Seutcheu Report read as follows:

> *[…] [J]'ai [c'est M. Seutcheu qui parle] essayé de l'amener [M. Guichaoua] à clarifier le contenu d'une communication concernant spécifiquement Georges Rutaganda [la Communication du 10 novembre 2002]. Dans cette communication, il affirmait, parlant de Rutaganda, que « d'après mes informations il n'aurait pas été plus présent à Kicukiro que Rusatira » [l'Affirmation]. Le Professeur Guichaoua a confirmé avoir fait cette déclaration.* [I (It's Mr. Seutcheu talking) tried to have him (Professor Guichaoua) clarify the content of the communication (Communication of 10 November 2002) specifically with respect to Georges Rutaganda]. In the said Communication, he stated –referring to Rutaganda- that "according to the information available to me, he was not any more present at Kicukiro than Rusatira" (the "Statement"). Professor Guichaoua confirmed having made the statement.]
>
> *[…] Je lui ai demandé s'il confirmait détenir des informations qui montreraient que Rutaganda n'était pas présent à Kicukiro en Avril 1994. Il m'a répondu en disant que c'est très simple car lorsque vous lisez l'emploi du temps de Léonidas Rusatira, […] à l'envers il apparaît que, de tous les gens qu'il [M. Guichaoua] a interrogé, personne n'a fait mention de Rutaganda. […] [J]e lui ai demandé si toutes ces personnes interrogées étaient capables d'identifier physiquement Georges Rutaganda. Il m'a répondu en disant qu'au Rwanda tout le monde connaissait Rutaganda. […]* [I asked him to confirm information to the effect that Rutaganda was not in Kicukiro in April 1994. He answered that it was simple because when you go back over Rutaganda's schedule, it shows that among all the people he (Prof. Guichaoua) interviewed, none mentioned Rutaganda. […] I asked him if all the people he

[858] T(A), 28 February 2003, p. 55; see also pp. 74 to 75.
[859] T(A), 28 February 2003, p. 6.
[860] See mainly Decision of 19 February 2003 and *Citation à comparaître*.
[861] Decision of 13 February 2003, p. 7.
[862] Decision of 19 February 2003, p. 6.

> interviewed were capable of identifying Georges Rutaganda. He answered that in Rwanda, everyone knew Rutaganda.]

480. The excerpts from the Communication of 10 November 2002 and the Seutcheu Report tend to suggest that the Appellant was not present at the ETO and Nyanza, Kicukiro *commune*, on 11 April 1994. Nevertheless, the relevant passages of the Communication of 10 November 2002 and the Seutcheu Report are not, in themselves, of significant probative value, considering that, on the one hand, the Seutcheu Report consists of a non-judicial statement produced by a third party – Professor Guichaoua – and, on the other hand, neither document specifies the nature or tenor of the information on which the Statement is based. As such, such evidence can neither invalidate nor cast doubt on the Trial Chamber's findings that the Appellant was present at Kicukiro on 11 April 1994, as they are based on the testimonies of Witnesses A, H, W and DD. It is therefore necessary to consider Professor Guichaoua's testimony in order to assess the weight to be accorded to the Statement contained in the Communication of 10 November 2002 and reproduced in the Seutcheu Report.

481. At the 28 February 2003 Hearing, Professor Guichaoua testified on the content of the Communication of 10 November 2002, and the context in which the Communication was made. He reaffirmed that *"d'après […] [s]es informations il [Rutaganda] n'aurait pas été plus présent à Kicukiro que Rusatira"*[863] [according to the information available to him, he (Rutaganda) was not any more present at Kicukiro than Rusatira]. He also repeated that "*tout le monde connaissait Rutaganda à cette époque là"* (i.e. April 1994)[864] [everyone knew Rutaganda at the time]. Concerning his statement that the Appellant was not present at Kicukiro, Professor Guichaoua stated that he did not regard it as a "conclusion", but rather as a personal opinion" or "feeling".[865] Questioned on the issue, he explained that he had formed that opinion in the following context:

> […] during research that I did as part of an incidental case [i.e. the *Rusatira case*],[866] I had access to different information which I was gathered [*sic*] and that information never mentioned the name of Mr. Rutaganda. And therefore, I had decided, *a contrario*, that one could have reservations or uncertainties about the fact that he was present at that place"[867]

In his testimony, Professor Guichaoua stated that his opinion:

> […] relies on no particular investigation, or particular inquiry as regards the Rutaganda case and ETO".[868]

482. Specifically with regard to the information underlying Professor Guichaoua's personal feeling, his deposition reveals that:

- his research was aimed at verifying Colonel Rusatira's schedule on 10, 11 and 12 April 1994;[869] the said research was not aimed at obtaining information about the Appellant;[870]

- during his research, he did not ask the various people he interviewed whether the Appellant was present at the ETO compound, Nyanza or the Sonatubes crossroads, at Kicukiro;[871]

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[863] T(A), 28 February 2003, p. 6.
[864] T(A), 28 February 2003, p. 17.
[865] T(A), 28 February 2003, pp. 6 and 7, 16 and 17 and 41. Professor Guichaoua also spoke of a "personal feeling" (T(A), 28 February 2003, p. 16).
[866] T(A), 28 February 2003, p. 21.
[867] T(A), 28 February 2003, p. 7. The only questions Professor Guichaoua allegedly asked concerning the ETO (T(A), 28 February 2003, p. 8), but it seems that he also has information regarding Sonatubes and Nyanza (T(A), 28 February 2003, p. 34)
[868] T(A), 28 February 2003, p. 16.
[869] T(A), 28 February 2003, pp. 12, 23, 29, 31, 44 and 49.
[870] T(A), 28 February 2003, pp. 7, 18

- he did not conduct an inquiry into the 11 April 1994 events[872] or try to reconstruct the events at the ETO school, Nyanza or the Sonatubes crossroads, at Kicukiro;[873]

- he never asked anyone precisely where the Appellant was during the said events;[874]

- as to the background documents: they were not aimed at determining Appellant's movements on 11 April 1994;[875] some of them[876] concerned a time period different from the one referred to in paragraphs 13 through 16 of the Indictment against the Appellant; others[877] contained no indication as to whether the authors knew whether or not the Appellant was present at the ETO or Nyanza.[878]

483. The Appeals Chamber is aware that Professor Guichaoua has already testified as Prosecution expert witness in certain cases before the Tribunal. The Appeals Chamber, nevertheless, takes the view that the question of fact in issue – to wit, whether or not the Appellant was present at Kicukiro on 11 April 1994 – does not require an expert opinion. Indeed, the Decision and Order of 19 and 25 February 2003, respectively specified that Professor Guichaoua was not to testify as an expert witness.[879] Professor Gichaoua's testimony was therefore considered as that of an ordinary witness.

484. In his closing submissions at the 28 February 2003 Hearing, the Appellant submitted that Professor Guichaoua's testimony "proved" that he was not present at the ETO and Nyanza on 11 April 1994.[880] He contended that Professor Guichaoua conducted a "thorough and detailed investigation" of Colonel Rusatira's presence at the ETO[881] and that he "attempted to educate himself about the matter at ETO and Nyanza" on 11 April 1994.[882] The information obtained by Professor Guichaoua is allegedly particularly relevant due to the fact that Colonel Rusatira and the Appellant were joined in the *Rusatira* Indictment.[883]

485. The Appeals Chamber rejects each of the aforementioned arguments. As has been recalled, Professor Gichaoua's testimony reveals that his research was aimed only at verifying Colonel Rusatira's schedule on 10, 11 and 12 April 1994.[884] The research was not aimed at obtaining information about the Appellant[885] or at reconstructing the 11 April 1994 events at the ETO, Nyanza and Sonatubes.[886]The contention that the Appellant and Colonel Rusatira were joined in the Indictment against Colonel Rusatira is without merit. On the one hand, the indictments of the Appellant and Colonel Rusatira are different in both form and substance.[887] On the other hand, although the Indictment against Colonel Rusatira refers to the Appellant, the one against the Appellant does not refer to Colonel Rusatira. In any event, the fact that

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[871] T(A), 28 February 2003, p. 55.
[872] T(A), 28 February 2003, pp. 26 and 34.
[873] T(A), 28 February 2003, p. 26.
[874] T(A), 28 February 2003, p. 34.
[875] T(A), 28 February 2003, pp. 35 and 36.
[876] Mainly documents and statements obtained from UNAMIR.
[877] Mainly the statement of an ambassador to Rwanda during the relevant period, and the statement of someone who was hiding at Colonel Rusatira's house on 11 April 1994.
[878] T(A), 28 February 2003, pp. 41 to 44; see also p. 46.
[879] In his closing statement at the 28 February 2003 Hearing the Appellant contended that Professor Guichaoua had appeared "as a Prosecution expert [witness]" (T(A), 28 Febuary 2003, p. 77; see also pp. 55, 65 and 68.).
[880] T(A), 28 February 2003, p. 65.
[881] T(A), 28 February 2003, p. 73.
[882] T(A), 28 February 2003, pp. 67 and 76.
[883] T(A), 28 February 2003, p. 79
[884] T(A), 28 February 2003, p. 49.
[885] T(A), 28 February 2003, p. 18.
[886] T(A), 28 February 2003, pp. 26 and 30.
[887] The Indictment against the Appellant was confirmed on 16 February 1996, while the one against Colonel Rusatira was confirmed on 12 April 2002. The latter Indictment was withdrawn on 14 August 2002. The Prosecution did not file a motion for joinder pursuant to Rule 49 of the Rules.

both indictments are similar as regards the ETO and/or Nyanza events does not necessarily imply that the information obtained by Professor Guichaoua is relevant to the present case.[888]

486. The Appellant contends that Professor Guichaoua's testimony is relevant insofar as it corroborates "by way of negative evidence" the defence of alibi that he offered in the instant case.[889] He contends that the information Professor Guichaoua obtained proves that he was not where the Trial Chamber found that he was.[890] The Appeals Chamber rejects this argument. The sources of information cited by Professor Guichaoua, although not entirely unrelated to the proceedings, do not appear to be relevant to the matter at issue. Professor Guichaoua's testimony clearly demonstrated that: he never asked any of the people he interviewed about the Appellant's presence at the ETO, Nyanza or the Sonatubes crossroads;[891] he did not ask anyone about the Appellant's whereabouts on 11 April 1994;[892] the documents he consulted did not concern the Appellant's movements, or the relevant period of the Indictment against him; with the exception of speculation by Professor Guichaoua, it appears that the authors of the documents he consulted were not in a position to know the Appellant's whereabouts on 11 April 1994.[893] In fact, when questioned about this subject, Professor Guichaoua unequivocally confirmed that he had no tangible proof as to whether or not the Appellant was present at Kicukiro on 11 April 1994.[894]

487. The Appeals Chamber is of the view that the information on which Professor Guichaoua's personal opinion is based cannot rationally prove that the Appellant was not present at Kicukiro on 11 April 1994. In his testimony, Professor Guichaoua himself stated that:

> […] the mere fact that I had contrario material does not allow me to conclude to the presence or absence of the person concerned. One cannot confuse or mix up things which can be demonstrated and things which one feels strongly about and in this particular case, I have not demonstrated either the presence or the absence of. I have just shared my opinion.[895]

488. The Appeals Chamber therefore takes the view that Professor Guichaoua's testimony as well as the Communication of 10 November 2002 and the Seutcheu Report do not have sufficient probative value to cast doubt on Witnesses A, H, W and DD's evidence on which the Trial Chamber relied for its findings regarding the Appellant's presence at Kicukiro on 11 April 1994. The reasonable doubt standard in criminal law cannot consist in imaginary or frivolous doubt based on empathy or prejudice. It must be based on logic and common sense, and have a rational link to the evidence, lack of evidence or inconsistencies in the evidence. In the instant case, the additional evidence considered by the Appeals Chamber lacks credibility due to the information on which it is based. It does not demonstrate whether or not the Appellant was present at the ETO and Nyanza on 11 April 1994. Therefore, the additional evidence does not tend to show that the Trial Chamber's findings in this case are incorrect.

489. For these reasons, the Appeals Chamber finds that the Appellant has failed to prove that, based on the evidence presented at trial, together with the additional evidence, no reasonable tribunal of fact could have found the Appellant guilty of participation in the ETO and Nyanza massacres, and in the forcible

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[888] Moreover, the Appeals Chamber recalls that by its Decision of 19 February 2003, it dismissed the Appellant's contention that the withdrawal of the Indicment against Colonel Rusatira demonstrated that his convictions for genocide and extermination as crime against humanity was unsafe.
[889] T(A), 28 February 2003, pp. 73 to 74.
[890] T(A), 28 February 2003, p.65.
[891] T(A) (French), 28 February 2003, p. 55.
[892] T(A), 28 February 2003, p. 30.
[893] Professor Guichaoua acknowledged that his sources were not at the ETO nor Nyanza at the time of the massacres and that, accordingly, they could not provide him with information regarding Rutaganda's presence at the ETO based on their personal observations. (T(A), 28 February 2003 2003, pp. 31 to 42).
[894] T(A), 28 February 2003, pp. 7 and 73.
[895] T(A), 28 February 2003, p. 17.

diversion of refugees to Nyanza, Kicukiro *commune* on 11 April 1994. This ground of appeal is accordingly dismissed.

IX. THE KILLING OF EMMANUEL KAYITARE

490. The Appellant put forwards several arguments in support of this ground of appeal, whereby he challenged the Trial Chamber's factual findings as to his responsibility in the killing of Emmanuel Kayitare. The said arguments include both allegations of errors of law and fact and relate mainly to the assessment of the evidence presented at trial and the interpretation of the Indictment. The Appellant's submissions on these issues are imprecise. The Appeals Chamber nonetheless considered all the written and oral arguments, and identified the alleged errors in support of this ground of appeal as follows:

(1) errors of law and fact for having found, at paragraphs 336[896] and 337[897] of the Judgement, that the testimonies of Witnesses AA and U are mutually corrobative;[898]

(2) errors of fact and law in the assessment of the testimonies of Witnesses AA and U;[899]

(3) error of fact for failing to note that some of the facts alleged in the Indictment were not proved, or were contradicted by evidence presented at trial;[900]

(4) errors of fact in the assessment of the evidence concerning the burial sites.[901]

491. The Appeals Chamber will now examine the errors alleged by the Appellant *seriatim*.

492. As concerns the errors relating to the assessment of the testimonies of Witnesses AA and U, the Appellant alleges that the Trial Chamber committed errors of law and fact by finding, on the one hand, that the said testimonies were mutually corroborative and, on the other hand, that they established beyond reasonable doubt that he killed Emmanuel Kayitare.[902] More specifically, Trial Chamber allegedly committed errors in its factual findings at paragraphs 336 and 337 of the Judgement.[903]

493. In light of the jurisprudence of the International Tribunal and the ICTY, the Trial Chamber is best placed to hear, assess and weigh the evidence presented at trial.[904] Therefore, it is for the Trial Chamber to establish whether a witness is credible or not.[905] Likewise, whether it will rely on one or more testimonies as proof of a material fact will depend on various factors that have to be assessed in the circumstances of each case.[906] It may be that a Trial Chamber would require the testimony of a witness to be corroborated, but according to the established practice of the *ad hoc* tribunals, that is not a requirement.[907] Where there are two conflicting testimonies, it falls to the Trial Chamber, before which

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[896] Rutaganda's Brief, para. 451.
[897] *Ibid*., paras. 452 to 454.
[898] T(A), 4 July 2002, pp.100 to 103; Supplemental Document, paras. 18(1) and 18(7); Rutaganda's Brief, pp. 1240 to 1237 and 1230 to 1227; Rutaganda's Brief, 1895 to 1893; Notice of Appeal, paras. 72 to 74.
[899] Supplemental Document, paras. 18(2) to 18(5) and 18(10); Rutaganda Brief, pp. 1237 to 229, 1324, 1320 to 1317; Rutaganda's Reply, paras. 1893 to 1888; Notice of Appeal, paras. 72 and 75.
[900] Supplemental Document, paras. 18(8) and (9); Rutaganda's Brief, pp. 1242 and 1241; Rutaganda's Reply, pp. 1897 and 1896; Notice of Appeal, paras. 72 and 73.
[901] Supplemental Document, para. 18(6); Rutaganda's Brief, p. 1225; Notice of Appeal, paras. 72, and 76-79.
[902] T(A), 4 July 2002, pp.103 to 106; Supplemental Document, paras. 18(1) and 18(7); Rutaganda's Brief, p. 1240 to 1237 and 1230 to 1227; Rutaganda's Reply, 1895 to 1893; Appeal Brief, paras. 72 and 74.
[903] Rutaganda's Brief, paras. 451 to 454.
[904] *Kayishema and Ruzindana* Appeal Judgement, para. 187.
[905] *Musema* Appeal Judgement, para. 18; *Akayesu* Appeal Judgement, para. 242.
[906] *Musema* Appeal Judgement, para. 90; *Kayishema and Ruzindana* Appeal Judgement, para. 187; *Akayesu* Appeal Judgement, para. 132; *Aleksovski* Appeal Judgement, para. 63; *Tadic* Appeal Judgement, para. 65; *Celebici* Appeal Judgement, para. 506.
[907] *Musema* Appeal Judgement, para. 36, citing the *Kayishema and Ruzindana* Appeal Judgement, paras. 154 and 229; *Aleksovski* Appeal Judgement, para. 62; *Tadic* Appeal Judgement, para. 65, and *Celebici* Appeal Judgement, paras. 492 and 506. See also *Kunarac* Appeal Judgement, para. 268.

the witness testified, to decide which of the testimonies has more weight.[908] As recalled earlier, unless the Appellant establishes that the Trial Chamber committed an error of law or fact warranting the Appeals Chamber's intervention, the Appeals Chamber has to give a margin of deference to the Trial Chamber's evaluation of the evidence presented at trial. [909]

494. In the instant case, the Appellant, first of all, contends that the Trial Chamber committed an error of law and fact by finding, at paragraph 336 of the Trial Judgement, that Witness AA's testimony was "substantially corroborated" by Witness U.[910] Paragraph 336 of the Trial Judgement reads as follows:

> "Based on AA's testimony, *as substantially corroborated by Witness U*, the Chamber is satisfied beyond any reasonable doubt that, on 28 April 1994, the *Interahamwe* conducted a house-to-house search in the Agakingiro neighbourhood, asking people to show their identity cards. The Tutsi and people belonging to certain political parties were taken towards the "Hindi Mandal" temple, near Amgar garage. The Accused was present at the location where the people caught were gathered. He wore a military uniform, comprising a coat and trousers, and carried a rifle." (Emphasis added).

The Appellant submits that, unlike Witness AA, Witness U:[911] testified to the events that occurred around 8 April 1994; never mentioned that people were asked to show their identity cards in a house-to-house search or that a search was conducted; never testified to "Tutsis" and "people belonging to certain political parties being taken towards the "Hindi Mandal" temple, near Amgar garage; and did not testify to the clothes that the Appellant wore.

495. The Prosecution's Response did not cover all the discrepancies alleged by the Appellant.[912] The Prosecution admits, however, that Witness U gave a date different from that given by Witness AA, and that, since he was not present at the time of the searches, his account could not corroborate Witness AA's on this point.[913]

496. The Appeals Chamber has considered Witness U's testimony. In the light of its examination, the Appeals Chamber is of the view that, for most of the material facts referred to in paragraph 336 of the Trial Judgement, Witness U does not corroborate Witness AA. Indeed, Witness U corroborates Witness AA only as to the location[914] and the Appellant's presence at the said location,[915] while their respective accounts of the other material facts are not corroborative. These items do not constitute the substance of the material facts referred to in paragraph 336 of the Judgement**.** Consequently, the Appeals Chamber considers that it was unreasonable for the Trial Chamber to hold that Witness U's testimony "substantially corroborated" Witness AA. The Trial Chamber thus committed an error of fact. The question as to whether this error leads to a miscarriage of justice will be examined subsequently.

497. Secondly, the Appellant relies on paragraph 337 of the Trial Judgement for his contention that the Trial Chamber committed an error of law and fact in finding that the testimonies of Witness AA and U

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[908] *Kayishema and Ruzindana* Appeal Judgement, para. 325.
[909] *Kayishema and Ruzindana* Appeal Judgement, para. 187.
[910] T(A), 4 July 2002, pp.102 to 106; Supplemental Document, para. 18(1); Rutaganda's Brief, pp. 1240 to 1237; Rutaganda's Brief, pp. 1895 to 1893.
[911] Rutaganda's Brief, paras. 450 and 451.
[912] Prosecution's Response, para. 8.17.
[913] Prosecution's Response, para. 8.18.
[914] Witness U also testified to the events that occurred "near the Amgar garage" (T, 10 October 1997, pp. 14, 13 and 27).
[915] T, 10 October 1997, pp. 9, 11, 44 and 45.

were mutually corroborative as regards "the circumstances surrounding the killing of Emmanuel Kayitare by the Appellant".[916] Paragraph 337 of the Trial Judgement reads as follows:

> […] after considering the respective testimonies of Witnesses AA and U, the Chamber is satisfied that *they are corroborative as regards the circumstances surrounding the killing of Emmanuel Kayitare, a Tutsi*. (Emphasis added)

498. The Appellant asserts that the testimonies on the killing of Emmanuel Kayitare are not corroborative, but rather contradictory on 12 points. The points in respect of which the Appellant alleges the existence of inconsistencies can be summarized as follows : (1) the date of the killing, (2) the time of the killing (3) the time of day during which the killing occurred; (4) the place of the killing; (5) the question as to whether he was already at the location where the victims were gathered; (6) the incident immediately preceding the killing; (7) the incident immediately following the killing; (8) the weapons he was carrying at the time of the killing; (9) the origin of the machete used for the killing; 10) the clothes he wore at the time of the killing; 11) the part of Emmanuel Kayitare's body that was hit; 12) whether a young Hutu rescued Witness AA after the killing.

499. In its Response, the Prosecution admits that certain discrepancies exist, but does not specify which ones.[917] The Prosecution maintains that, in any event, the Appeals Chamber was right in finding that the accounts were corroborative of each other.[918]

500. The Appeals Chamber considered the testimonies of Witnesses AA[919] and U[920] in their entirety. Based on its analysis, the Appeals Chamber is of the opinion that, of the 12 examples cited by the Appellant, two are unfounded, [921] three show that the testimonies are not corrobative of each other, and seven reveal significant discrepancies. The Appeals Chamber's observations in respect of the lack of corroboration and the existence of discrepancies are as follows:

- the testimonies are contradictory with respect to the date of the killing: Witness AA testified that Emmanuel Kayitare was killed on 28 April 1994;[922] Witness U testified that the killing occurred two days after President Habyarimana's plane was shot down, during the night of 6 April 1994;[923]

- the testimonies are inconsistent as to the time of the killing and the time of day during which the killing occurred: Witness AA witnessed an incident which occurred around 10 a.m;[924] Witness U testified that Emmanuel Kayitare was killed after 3 o'clock in the afternoon;[925]

- the testimonies are contradictory on the question as to whether Rutaganda was already at the location when the victims were gathered on the day of the killing: Witness AA testified that Rutaganda was already there when Emmanuel Kayitare was brought;[926] Witness U testified that Rutaganda arrived at the location together with the victims, including Emmanuel Kayitare;[927]

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[916] T, 4 July, pp.103 to 106; Supplemental Document, para. 18(7); Rutaganda's Brief, pp. 1240 to 1237; Rutaganda's Reply, pp. 1895 to 1893.
[917] Prosecution's Response, para. 8.20.
[918] Prosecution's Response, para. 8.20.
[919] T, 6 and 7 October 1997.
[920] T, 10 October 1997.
[921] The allegations in paras. 498(4) and 498(12), *supra*.
[922] T, 6 October 1997, p. 48, 51 and 62; T, 7 October 1997**,** pp**.** 35 and 36**,** 54 and 74.
[923] T, 10 October 1997, pp. 8 and 9, 15 and 28.
[924] T, 6 October 1997, pp. 48; T, 7 October 1997, p. 26.
[925] T, 10 October 1997, pp. 7 and 8**.**
[926] T, 6 October 1997, pp**.** 49 and 129**.**
[927] T, 10 October 1997, pp. 8, 10, 40 and 41.

- the testimonies are contradictory with respect to the incident immediately preceding the killing: Witness AA testified that Rutaganda grabbed Emmanuel Kayitare and killed him at the moment when the latter was attempting to flee, but was recognized and called by a man called "Cekeri";[928] Witness U, for his part, testified that Emmanuel Kayitare and "Venant" were tied together with their shirts when the latter was brought to the location, and that Rutaganda untied the shirts and said "I'm going to give you an example of how you should work" before killing Emmanuel Kayitare;[929]

- the testimonies are not corroborative with respect to the incident that occurred immediately after the killing: Witness U testified that Rutaganda immediately shot at the man named "Venant" with his Kalachnikov, after killing Emmanuel Kayitare;[930] Witness AA did not testify to any such thing;[931]

- the testimonies contradict each other as regards the weapons Rutaganda was carrying at the time of the killing: Witness AA testified that the Appellant was carrying a pistol and grenades, but no machete;[932] Witness U testified that Rutaganda had a machete hanging from his belt and a Kalachnikov on his shoulder – which he sometimes refers to as a "rifle";[933]

- the testimonies are inconsistent as to the where the machete used for the killing came from: according to Witness AA, the Appellant killed Emmanuel Kayitare with the machete he got from the man named "Cekeri";[934] while Witness U testified that Rutaganda used the machete that was hanging from his belt;[935]

- the testimonies are not corroborative as to the clothes Rutaganda wore at the time of the killing: Witness AA testified that Rutaganda wore a military uniform;[936] Witness U testified that Rutaganda was with a group of *Interahamwe*, and that "[some of them] were wearing military uniforms and others were dressed in civilian clothing", without otherwise specifying what outfit Rutaganda was wearing;[937]

- the testimonies are not corroborative as to which part of Emmanuel Kayitare's body was hit: Witness AA testified that the victim was struck on the nape of the neck;[938] Witness U testified that the victim was struck on the head and the blow "split his head in two".[939]

501. The Appeals Chamber holds the view that the lack of corroboration and the aforementioned discrepancies, for the most part, relate to important aspects of the criminal conduct for which the Appellant is indicted, as described in paragraph 18 of the Indictment. As recalled earlier, where there are two conflicting testimonies, it falls to the Trial Chamber before which the witness testified to decide which of the testimonies has more weight[940] and/or whether the discrepancies are such as would cast reasonable doubt and/or establish that the alleged acts did not occur.

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[928] T, 6 October 1997, p. 51.
[929] T, 10 October 1997, p. 10.
[930] T, 10 October 1997, pp. 10, 11, 37 and 38.
[931] T, 6 October 1997 and T, 7 October 1997.
[932] T, 6 October 1997, pp. 51 to 56; T, 7 October 1997, pp. 33 and 34.
[933] T, 10 October 1997, pp. 10, 11 and 37.
[934] T, 6 October 1997, p. 53; T, 7 October 1997, pp. 30 and 31.
[935] T, 10 October 1997, p. 10.
[936] T, 6 October 1997, p. 53 and 64.
[937] T, 10 October 1997, p. 5.
[938] T, 6 October 1997, p. 56; T, 7 October 1997, pp. 41 to 53.
[939] T, 10 October 1997, pp. 10, 37 and 38.
[940] *Kayishema and Ruzindana* Appeal Judgement, para. 325.

502. In the instant case, not only did the Trial Chamber find the testimonies of Witnesses AA and U to be equally credible,[941] but it also concluded that they were corroborative of each other as regards the circumstances surrounding the killing of Emmanuel Kayitare by the Appellant. In the light of its analysis, the Appeals Chamber does not share that view, and considers that it was unreasonable for the Trial Chamber to find the testimonies mutually corroborative. It appears that the Trial Chamber thus committed an error of fact.

503. The Appeals Chamber will, at this juncture, determine whether the errors of fact committed in paragraphs 336 and 337 of the Trial Judgement occasioned a miscarriage of justice in the instant case.

504. It has been reaffirmed that corroboration, as such, is not required in order to establish a material fact.[942] Nevertheless, the impugned Trial Judgement reveals that before making its factual findings, the Trial Chamber first determined whether the Prosecution evidence was corroborative. The Judgement does not contain any specific reasons for this decision. For its part, the Appeals Chamber did not have the opportunity to hear the Witnesses AA and U and/or to examine them; it is therefore not in a position to determine, *inter alia*, which of the two testimonies has more weight. Moreover, an examination of the impugned Judgement does not enable the Appeals Chamber to know whether the Trial Chamber would have entered the same findings if it had not found the testimonies to be corrobative.[943]

505. Under such circumstances, the Appeals Chamber, in accordance with the established practice of the Tribunal, cannot substitute its own finding for that of the Trial Chamber.[944] It is settled case-law that an appeal is not a *de novo* review.[945] Based on this principle, therefore, it does not fall to the Appeals Chamber to conduct a *de novo* trial of the Appellant as regards the killing of Emmanuel Kayitare and/or to determine whether a different assessment of the evidence presented at trial would have sustained a finding guilt. According to the standards applicable on appeal, the Appeals Chamber must enter a judgement of acquittal "if an appellant is able to establish that no reasonable tribunal of fact could have reached a conclusion of guilt upon the evidence before it." [946] Considering the Judgement in the instant case, such a standard requires the Appeals Chamber to assess the evidence presented at trial as an indivisible whole.

506. In the case at bar, the Appeals Chamber considers that no tribunal of fact could have reached the conclusion, as did the Trial Chamber, that the testimonies of Witnesses AA and U were corroborative and that, considered *together*, they established the Appellant's guilt *beyond any reasonable doubt* in respect of paragraph 18 of the Indictment. The Trial Chamber's factual and legal findings in relation to the killing of Emmanuel Kayitare must therefore be set aside. The Appeals Chamber notes that this leads to the acquittal of the Appellant on Count 7 of the Indictment, namely, murder as crime against humanity. However, the invalidation of those findings does not affect the reasons for the conviction for the crime of genocide.

507. As the Trial Chamber's factual conclusions have been set aside, the Appeals Chamber considers that there is no need to further review the other arguments raised by the Appellant in support of the present ground of appeal. The question as to whether the acquittal on Count 7 affects the single sentence of life imprisonment is considered in Part XIII of the present Judgement.

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[941] Trial Judgement, paras 195 and 334.
[942] *Kunarac* Appeal Judgement, para. 268. See also *Kayishema and Ruzindana* Appeal Judgement, para. 322.
[943] In paragraph 344 of the Trial Jugement, the Trial Chamber ends its analysis by stating: "[…] on the basis of the testimonies of Witnesses AA and U, the Chamber finds that it has been established beyond any reasonable doubt that the Accused struck Emmanuel Kayitare with a machete and that the latter died instantly."
[944] *Akayesu* Appeal Judgement, para. 178, citing *Celebici* Appeal Judgement, paras. 434 and 435.
[945] See, *inter alia*, *Musema* Appeal Judgement, para. 17 and *Kunarac* Appeal Judgement, para. 36.
[946] *Akayesu* Appeal Judgement, para. 178, citing *Celebici* Appeal Judgement, paras. 434 and 435.

X. *INTERAHAMWE ZA MRND* MOVEMENT

508. Under this ground of appeal, the Appellant submits that the Trial Chamber prejudged him as guilty of the acts alleged in the Indictment, on the grounds that he was vice-president of the *Interahamwe za MRND* National Committee. The Appellant contends that the Trial Chamber erred by:

(1) failing to distinguish between the *Interahamwe za* MRND and the *Interahamwe* movements;

(2) assuming that the *Interahamwe za MRND* continued to exist after 6 April 1994 and played a role in the atrocities, contrary to the available evidence; and

(3) concluding that Rutaganda was in a position of responsibility in the *Interahamwe* movement, in the absence of evidence.[947]

509. Paragraph 2 of the Indictment states, *inter alia*, that on 6 April 1994, the Appellant was serving as second vice-president of the National Committee of the *Interahamwe*, the youth militia of the MRND (*Interahamwe za MRND*). The Appellant contends that the *Interahamwe za MRND* ceased to exist after 6 April 1994. He alleges that after that time, the term "*Interahamwe"* was no longer linked to the *Interahamwe za MRND* movement and became a term applied to persons who joined in the massacres and/or who fought the RPF. It is the argument of the Appellant that the Trial Chamber erred both by not distinguishing between the *Interahamwe za MRND* and *Interahamwe*, contrary to the evidence presented at trial, and by assuming that the *Interahamwe za MRND* continued to exist after 6 April 1994.[948] According to the Appellant, each of those errors contributed to the convictions against him, as his alleged position of authority in the *Interahamwe* created an "atmosphere of guilt", leading the Trial Chamber to pre-judge his guilt for the crimes referred to in the Indictment.[949] The Appeals Chamber notes that paragraph 399 of the Trial Judgement is the only passage cited by the Appellant in support of these allegations.

510. The Prosecution submits, *inter alia*, that under this ground of appeal, the Appellant is seeking a trial *de novo* and that he has failed to show any errors on the part of the Trial Chamber.[950] It contends that paragraph 399 of the Trial Judgement is relevant not to the position of authority of the Appellant, but to the Trial Chamber's findings on whether the Appellant had the requisite specific intent to commit genocide.[951] The Prosecution maintains that notwithstanding, the Trial Chamber did not err in finding that, on the evidence, the Appellant was in a position of authority during the events referred to in the Indictment.[952]

511. The Appeals Chamber notes that in the light of its examination of the Appellant's arguments in their entirety, the excerpts from the transcripts the Appellant has cited[953] show that substantial evidence relating to the *Interahamwe* and/or the *Interahamwe za MRND* movements was presented during the trial. Contrary to the submissions of the Appellant,[954] the Trial Judgement shows that the Trial Chamber considered such evidence, particularly the evidence tending to show that the meaning of the term

[947] Supplemental Document, para. 19; Rutaganda's Brief, paras. 480 to 488; Rutaganda's Reply, paras. 9.09 to 9.122. Prosecution's Response, paras. 9.1 to 9.37.
[948] See paras. 508(1) and 508.2 of the present Judgement.
[949] See para. 508(3) of the present Judgement.
[950] Prosecution's Response, paras. 9.7 to 9.10.
[951] *Ibid*., paras. 9.11to 9.22.
[952] *Ibid*, paras. 9.23 to 9.36.
[953] The Appellant cites excerpts from the testimonies of Witnesses Reyntjens, Nsanzuwera, T, A, H, DD, M, U, J, AA, Q, DDD, DNN, DS, DSS and Shimamungu.
[954] See paras. 508.1 and 508.2.

Interahamwe, and the role of the movement, changed in the course of the year 1994. The Appeals Chamber notes that the Trial Judgement referred to the Appellant's contention that the term *Interahamwe* attained a negative connotation and came to be used to describe, in popular usage, after 6 April 1994, a large or loosely organized militia which is said to have fought against the RPF.[955] Likewise, the Judgement recalled the testimony of a Prosecution expert witness whereby "the *Interahamwe* evolved from the youth wing of a political party into a militia".[956] However, the Appellant contends,[957] the Judgement contains no factual finding as to whether there was a distinction between the *Interahamwe* and the *Interahamwe za MRND*, or whether the *Interahamwe za MRND* movement continued to exist after 6 April 1994**.**

512. The Appeals Chamber recalls that with regard to errors of fact, the appealing party must show both the error that was committed and the miscarriage of justice resulting there from.[958] It is therefore futile on appeal to repeat arguments that failed at trial, unless it can be demonstrated that the dismissal of such arguments actually resulted in an error. With respect to miscarriage of justice, the Appeals Chamber has already specified that the Appellant must show that it was critical to the verdict reached by the Trial Chamber[959] or that the assessment of the evidence was totally erroneous,[960] and that, therefore, flagrant injustice resulted there from.

513. In the instant case, although the Indictment refers to the Appellant's position within the *Interahamwe za MRND* movement, the Appeals Chamber notes that the Appellant was not indicted or tried for crimes committed by *Interahamwe* or *Interahamwe za MRND* members, or for having prepared or organized the genocide as second vice-president of the National Committee of the MRND youth wing. It clearly emerges from both the Indictment[961] and the Trial Judgement[962] that the Appellant was indicted, tried and convicted for his personal participation in the alleged acts. The question as to whether the *Interahamwe za MRND* movement is different from the group of attackers designated in the Trial Judgement by the term "*Interahamwe"* is of no relevance in the instant case. Indeed, it emerges from the Trial Chamber's factual findings, and the reasons for the convictions, that the Appellant's criminal responsibility does not derive from his official position in any movement, or from acts committed by *Interahamwe* members. In this instance, the Appellant is held responsible for his direct participation in the acts charged.

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[955] Trial Judgement, para. 379.
[956] *Ibid.*, para. 380.
[957] See paras. 508.1 and 508.2.
[958] See, *inter alia*, *Bagilishema* Appeal Judgement, para. 10.
[959] *Kupreskic* Appeal Judgement, para. 29, citing the *Bagilishema* Appeal Judgement, para. 14
[960] *Kunarac* Appeal Judgement, para. 39 citing *Kupreskic* Appeal Judgement, para. 30.
[961] Pursuant to para. 9 of the Indictment, the Appellant was charged under para. 6(l) of the Statute, with being individually responsible for the crimes alleged against him. Under paras. 10 to 19 of the Indictment, the Prosecution accuses the Appellant of, *inter alia*: having *distributed guns and other weapons to Interahamwe* members in Nyarugenge *commune* (para. 10); having *stationed Interahamwe members at a roadblock* near his office at the "Amgar" garage in Kigali (para. 11); having *ordered* that Tutsis who had been separated at a roadblock be detained, and for having *directed* men under his control to take 10 Tutsi detainees to a deep, open hole near the Amgar garage, kill them with machetes and throw their bodies into the hole (para. 12); having *participated in the attack at the ETO school*, during which a large number of Tutsis were killed (para. 14); of having *forcibly transferred survivors at the ETO school* to a gravel pit near the Nyanza primary school (para. 15); of having *directed and participated in the attacks at Nyanza* (para. 16); of having *conducted house-to-house searches* for Tutsis and their families in Massango *commune* (para. 17); of having *collected*, together with *Interahamwe* members, residents from Kigali and *detaining* them near the Amgar garage (para. 18); of having *pursued and killed* Emmanuel Kayitare (para. 18); and of having *ordered people to bury the bodies of victims* in order to conceal his crimes from the international community (para. 19). The Appeals Chamber holds that the aforementioned paragraphs of the Indictment clearly show that the Appellant was indicted for his direct and personal involvement in the crimes referred to in the Indictment, in April and June 1994.
[962] See Trial Judgement, *inter alia*, paras. 197, 198, 199, 261, 300, 304, 385, 386, 388, 389, 390, 391, 392, 397, 416 and 418.

514. Accordingly, the questions as to whether the Appellant actually held a position of authority within the *Interahamwe* after 6 April 1994 or whether *Interahamwe za MRND* movement existed after that time are of no moment. With the exception of the reference to paragraph 399 of the Trial Judgement (under Part XI), the Trial Chamber did not take into account the Appellant's position of authority in its factual and legal findings. The Appeals Chamber, therefore, rejects the Appellant's contention that the Trial Chamber committed an error of fact by failing to distinguish between the *Interahamwe* and the *Interahamwe za MRND* movements in its Judgement, and by assuming that the *Interahamwe za MRND* movement existed after 6 April 1994 and played a role in the atrocities.

515. With respect to the contention that the Trial Chamber found, in the absence of proof, that the Appellant held a position of responsibility within the *Interahamwe*,[963] the Appeals Chamber notes that, contrary to the Appellant's submissions, the Trial Judgement reveals that he had actual influence on the attackers referred to as the *Interahamwe* in the Trial Judgement.[964] Considering that on the evidence presented at trial, the Appellant had actual influence on the *Interahamwe* attackers, thereby giving him, *de facto*, a position of authority, the question as to whether or not the position of influence was due to his official position within the *Interahamwe za MRND* movement is of no moment.

516. The Appeals Chamber also notes that the Trial Chamber took account of the Appellant's position of authority only for the purpose of assessing his state of mind in participating in the crimes underlying his conviction for genocide.[965] Therefore, the position of authority did not weigh in the Trial Chamber's decision to convict him for extermination as crime against humanity. With respect to the conviction for genocide, the Appeals Chamber observes that the question as to whether the Trial Chamber erred by referring to the position of authority in its analysis of the *dolus specialis*,[966] was also raised in the ground of appeal in respect of genocide.

517. For these reasons, the Appeals Chamber rejects the Appellant's contention that the Trial Chamber committed an error of fact in finding, in the absence of proof, that he held a position of authority within the *Interahamwe* movement, and refers the Appellant to its findings in relation to paragraph 399 of the Trial Judgement, under Part XI of the present Judgement.

518. In light of the aforementioned conclusions, the Appeals Chamber holds that the ground of appeal concerning the *Interahamwe za MRND* must fail.

[963] Supplemental Document, paras. 19; Rutaganda's Brief, paras. 480 to 488; Rutaganda's Reply, paras. 9.09 to 9.121., Prosecution's Response, paras. 9.23 to 9.36.
[964] See, *inter alia*, paras. 197 to 199, 300 and 304 of the Trial Judgement.
[965] Trial Judgement, para. 399.
[966] *Ibid*.

XI. GENOCIDE

519. Under this ground of appeal, the Appellant challenges the conviction entered against him by the Trial Chamber for the crime of genocide, as alleged in Count 1.[967] The Appeals Chamber understands that the arguments put forward in support of this ground of appeal consist of two main arguments and one alternative argument, all of which can be summarised as follows:[968]

(1) error of law for having applied the erroneous legal test in determining the *dolus specialis* (or special intent);[969]

(2) error of fact for having found that the evidence in this case established beyond any reasonable doubt that the Appellant possessed the requisite special intent;

(3) alternatively, error of fact for having found that the evidence in this case established beyond any reasonable doubt that genocide occurred in Rwanda in 1994.

520. The Appeals Chamber will consider *seriatum* each of the errors-in-chief alleged by the Appellant. Should the main arguments fail, the alternative argument will also be considered. The Appeals Chamber recalls that, as such, the setting aside of the Trial Chamber's findings in relation to the killing of Emmanuel Kayitare does not affect the Trial Chamber's findings in relation to the crime of genocide.

A. Error as regards the test to be applied in determining the *dolus specialis*

521. In paragraphs 61 and 398 of the Trial Judgement, the Trial Chamber relied, *inter alia*, on the *Akayesu* Trial Judgement in setting out the test to be applied in determining specific genocidal intent. The Appellant contends that the "test in *Akayesu*"[970], conforms less to the Statute[971] than the test used in the *Kayishema*/*Ruzindana* Trial Judgement.[972] He contends that the Trial Chamber erred in not applying the "test in *Kayishema/Ruzindana"* to the instant case.[973]

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[967] Rutaganda's Brief, p. 1076/H and para. 663.
[968] Supplemental Document, pp. 40 and 41, para. 21.
[969] In this section, the Appeals Chamber uses both terms interchangeably.
[970] See *Akayesu* Trial Judgement, para. 523: "On the issue of determining the offender's specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act ."
[971] Rutaganda's Brief, paras. 677 to 681 and 684; Rutaganda's Reply, paras. 12.04 to 12.09, 12.11 and 12.15. According to the Appellant, the "test in *Kayishema/Ruzindana*" "preserves" the *mens rea* and presumption of innocence requirements.
[972] According to the Appellant, the Appeals Chamber in *Kayishema*/*Ruzindana* indeed "implicitly disapproved" of the approach in *Akayesu* (Rutaganda's Reply, paras. 12.12 and 12.13). With respect to the test, see *Kayishema/Ruzindana* Trial Judgement, para. 93: "Regarding the assessment of the requisite intent, the Trial Chamber acknowledges that it may be difficult to find explicit manifestations of intent by the perpetrators. The perpetrators' actions, including circumstantial evience, however may provide sufficient evidence of intent. The Commission of Experts in their Final Report on the situation in Rwanda also noted this difficulty. Their Report suggested that the necessary element of intent can be inferred from sufficient facts, such as the number of group members affected. The Chamber finds that the intent can be inferred either from words or deeds and may be demonstrated by a pattern of purposeful action. In particular, the Chamber considers evidence such as the physical targeting of the group of their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning; the systematic manner of killing. Furthermore, the number of victims from the groups is also

522. The Appellant asserts that the Trial Chamber, in particular, erred in law in finding that the specific intent could be inferred from the "general context of the perpetration of acts by others".[974] The impact of applying such a test is manifested in paragraphs 398 and 399 of the Trial Judgement.[975] Paragraph 399 of the Trial Judgement allegedly shows, in particular, that the Appellant was found guilty of genocide without his specific acts being examined.[976] Instead, the Trial Chamber inferred his "guilt by association with a guilty organisation" or from "similarity of conduct".[977] According to the Appellant, facts other than the "general context" should have been proven in order to establish that he was possessed of the specific genocidal intent.[978] He contends that the Trial Chamber committed an error of law which invalidates the Judgement, by relying solely on this demonstration.[979]

523. Before examining the determination of *dolus specialis* by the Trial Chamber, the Appeals Chamber deems it necessary to provide some clarifications regarding the *mens rea* required by Article 2 of the Statute. Article 2 provides that:

> 1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this Article.
>
> 2. Genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.
>
> 3. The following acts are punishable:
>
> (a) Genocide;
>
> (b) Conspiracy to commit genocide;

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important. In the Report of the Sub-Commission on Genocide, the Special Rapporteur stated that "the relative proportionate scale of the actual or attempted destruction of a group, by any act listed in Articles II and III of the Genocide Convention, is strong evidence to prove the necessary intent to destroy a group in whole or in part." (Footnotes omitted).

[973] Rutaganda's Reply, paras. 12.04 to 12.09, 12.11 and 12.15.

[974] T(A), 4 July 2002, pp. 149, 163 and 164; Supplemental Document, para. 21. "[…] *the particular acts charged from the general context of the perpetration of acts by others"*. The Appeals Chamber emphasizes that this interpretation constitutes a rephrasal, by the Appellant, of the Trial Judgement. The relevant passage of the Judgement reads as follows: "[…] The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others." (See Trial Jugement, para. 398).

[975] Rutaganda's Reply, paras. 12.09 and 12.17.

[976] *Ibid*., para. 12.17.

[977] Rutaganda's Brief, para. 681 and 684; Rutaganda's Reply, para. 12.11. The Appellant also refers the Appeals Chamber to the "parallel" arguments he developed in Rutaganda's Response to the Prosecution Appeal Brief, but does not indicate the relevant paragraphs.

[978] Rutaganda's Brief, para. 685.

[979] *Ibid.*, para. 685; Supplemental Document, pp. 40 and 41.

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.

524. As recalled by the Appeals Chamber of ICTY in *Jelisic*, the Statute[980] defines the specific intent required for the crime of genocide as "the intent to accomplish certain specific types of destruction"[981] against a targeted group. Pursuant to the Statute, therefore, specific intent implies that the perpetrator seeks to destroy, in whole or in part, a national, ethnic, racial or religious group as such, by means of the acts enumerated under Article 2 of the said Statute.[982] In order to prove specific intent, it must be established that the enumerated acts were directed against a group referred to under Article 2 of the Statute and committed with the intent to destroy, in whole or in part, the said group as such.

525. The crime of genocide sometimes implies several offenders participating in the commission of the crime. The Appeals Chamber concurs with the Appellant that in order to find a person guilty of genocide, it must be established that such a person was personally possessed of the specific intent to commit the crime at the time he did so. Nonetheless, as stated by the Appeals Chamber in *Kayishema*/*Ruzindana*, "explicit manifestations of criminal intent are […] often rare in the context of criminal trials".[983] In the absence of explicit, direct proof, the *dolus specialis* may therefore be inferred from relevant facts and circumstances.[984] Such an approach prevents perpetrators from escaping convictions simply because such manifestations are absent.[985] The validity of this interpretation was confirmed by the Appeals Chambers of both *ad hoc* Tribunals.[986] With respect to the facts and circumstances from which specific intent may be inferred, the ICTY Appeals Chamber in *Jelisic* stated that such facts are, *inter alia*:

> […] *the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims* on account of their membership of a particular group, *or the repetition of destructive and discriminatory acts.*[987] (Emphasis added)

The ICTY Appeals Chamber also indicated that the existence of a plan or policy is not "a legal ingredient" of the crime of genocide,[988] but that proving the existence of such a plan or policy may facilitate proof of the crime.[989] Moreover, the *Kayishema*/*Ruzindana* Appeal Judgement reveals that making anti-Tutsi utterances or being affiliated to an extremist anti-Tutsi group is not a *sine qua non* for establishing *dolus specialis.*[990] The Appeals Chamber holds the view that establishing such a fact may, nonetheless, facilitate proof of specific intent.

526. The Appeals Chamber will now examine the Trial Chamber's determination of the *dolus specialis*. It appears helpful, to this end, to examine paragraphs 398, 399 and 400 of the Trial Judgement, which read as follows:

> 398. In its findings on the applicable law with respect to the crime of genocide, the Chamber held that, in practice, intent may be determined, on a case by case basis, through a logical inference from the material evidence submitted to

[980] Article 4(2) of the ICTY Statute corresponds to Article 2(2) of the ICTR Statute.
[981] *Jelisic* Appeal Judgement, para. 45: "The intent to accomplish certain specified types of destruction".
[982] *Ibid.*, para. 46.
[983] *Kayishema/Ruzindana* Appeal Judgement, para. 159.
[984] *Kayishema/Ruzindana* Appeal Judgement, para. 159; *Jelisic* Appeal Judgement, para. 47.
[985] *Kayishema/Ruzindana* Appeal Judgement., para. 159.
[986] *Jelisic* and *Kayishema/Ruzindana*, respectively.
[987] *Jelisic* Appeal Judgement, para. 47.
[988] *Ibid*, para. 48.
[989] *Ibid.*, para. 48.
[990] *Kayishema/Ruzindana* Appeal Judgement, para. 160.

it, and which establish a consistent pattern of conduct on the part of the Accused. Quoting a text from the findings in the *Akayesu* Judgement, it holds:

> "On the issue of determining the offender's specific intent, the Chamber considers that the intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the Accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act."

399. The Chamber notes that many corroborating testimonies presented at trial show that the Accused actively participated in the widespread attacks and killings committed against the Tutsi group. The Chamber is satisfied that the Accused, who held a position of authority because of his social standing, the reputation of his father and, above all, his position within the Interahamwe, ordered and abetted in the commission of crimes against members of the Tutsi group. He also directly participated in committing crimes against Tutsis. The victims were systematically selected because they belonged to the Tutsi group and for the very fact that they belonged to the said group. As a result, the Chamber is satisfied beyond any reasonable doubt that, at the time of commission of all the above-mentioned acts which in its opinion are proven, the Accused had indeed the intent to destroy the Tutsi group as such.

400. Moreover, on the basis of evidence proffered at trial and discussed in this Judgement under the section on the general allegations, the Chamber finds that, at the time of the events referred to in the Indictment, numerous atrocities were committed against Tutsis in Rwanda. From the widespread nature of such atrocities, throughout the Rwandan territory, and the fact that the victims were systematically and deliberately selected owing to their being members of the Tutsi group, to the exclusion of individuals who were not members of the said group, the Chamber is able to infer a general context within which acts aimed at destroying the Tutsi group were perpetrated. Consequently, the Chamber notes that such acts as are charged against the Accused were part of an overall context within which other criminal acts systematically directed against members of the Tutsi group, targeted as such, were committed. (Footnotes omitted).

527. An overall analysis of paragraphs 398 through 400 of the Judgement reveals that the Appellant erroneously interpreted the legal standard applied by the Trial Chamber, as well as the facts and circumstances on which the Trial Chamber relied in determining the Appellant's specific intent.

528. The Appellant contends that the standard applied by the Trial Chamber implies that it was not necessary to prove the *dolus specialis*. This contention is entirely unfounded. According to the principles recalled earlier, the standard applied in paragraph 398 of the Trial Judgement is in keeping with the generally accepted practice of the *ad hoc* Tribunals. The Appeals Chambers of the International Tribunal and the ICTY also confirmed that in the absence of explicit, direct evidence, specific intent may be inferred from other facts, such as the general context and the perpetration of other acts systematically directed against a given group. Such an approach does not imply that the guilt of an accused may be inferred only from his affiliation with "a guilty organisation."

529. Moreover, an analysis of paragraphs 399 and 400 of the Trial Judgement reveals that the Appellant was not convicted of the crime of genocide on the basis of any particular theory of guilt by association. Paragraph 399 of the Trial Judgement clearly shows that the Trial Chamber found that the Appellant was possessed of the specific intent based on his specific acts, namely his direct participation in the widespread massacres committed against the members of the Tutsi group, and his ordering and abetting the commission of crimes against the Tutsis. The Trial Chamber also noted that the victims were systematically selected on account of their membership of the Tutsi group. Viewed in its context, the additional reference to the Appellant's position of authority underscores the impact of his presence at the scene of the crimes and his exceptional ability to aid and abet the commission of the said crimes against members of the Tutsi group, due to the position of influence he held in the community.

530. Furthermore, it emerges from the Trial Judgement that the Trial Chamber considered the impact of the general context of the acts aimed at destroying the Tutsi group[991] *after* having noted, based on the Appellant's acts, that he had indeed the specific intent.[992] The Appeals Chamber fails to see which passage of the Trial Judgement the Appellant relies on in order to contend that the *dolus specialis* was inferred from acts of others or from the general context. Paragraphs 399 and 400 of the Trial Judgement reveal that the Trial Chamber based its finding that the Appellant had the specific intent on the analysis of his own acts and conduct.

531. For all these reasons, this ground of appeal is dismissed.

B. Error in the assessment of the evidence

532. In his second ground of appeal, the Appellant contends that the Trial Chamber committed an error of fact that has occasioned a miscarriage of justice, by finding that the evidence presented proved beyond any reasonable doubt that he was possessed of the specific intent.[993] In particular, he contends that the evidence relating his interactions with certain members of the Tutsi group should have led a reasonable tribunal of fact[994] to find that *dolus specialis* was not proved beyond a reasonable doubt.[995] The Appellant advances several arguments in support of his ground of appeal.

533. Before examining the Appellant's arguments, the Appeals Chamber notes that it emerges from the submissions on appeal that the Appellant does not contest the fact that the acts considered by the Trial Chamber were directed against members of the Tutsi group, owing to their being members of the said group. However, the Appellant contends that, on the basis of the evidence presented, the Trial Chamber should have concluded that it had not proved beyond any reasonable doubt that he personally had the intent to destroy this group. Nonetheless, the Appeals Chamber is not certain whether the Appellant reproaches the Trial Chamber for misapprehending some of the evidence or for committing an error in determining the probative value of the said evidence.

534. In any event, the Appeals Chamber recalls that, with respect to an allegation of error of fact, it does not suffice for the Appellant to offer various possible conclusions the Trial Chamber could have reached based on the evidence presented before it.[996] Two judges, both acting reasonably, can, indeed, come to different conclusions.[997] For the Appeals Chamber to intervene, the Appellant must, *inter alia*, demonstrate that no reasonable tribunal could have come to the conclusion as the one he contests[998] or that the Trial Chamber's assessment of the evidence was wholly erroneous.[999] The Appeals Chamber notes that most of the arguments put forward by the Appellant in this instance do not suggest any such demonstration. Nevertheless, the Appeals Chamber will examine the allegations *seriatim*.

535. In his first argument, the Appellant alleges that the following evidence raises reasonable doubt as to whether he had the intent to destroy, in whole or in part, the Tutsi group;[1000]

- He saved the lives of Tutsis during the massacres, sometimes at great personal risk and financial expense;[1001]

[991] Trial Judgement, para. 400.
[992] *Ibid*., para. 399.
[993] Supplemental Document, p. 41, para. 21(1).
[994] *Ibid*., p. 41.
[995] Rutaganda's Brief, para. 686 and Rutaganda's Reply, para. 12.19.
[996] *Kayishema/Ruzindana* Appeal Judgement, para. 143.
[997] *Ibid*., para. 143 citing *Tadic* Appeal Judgement, para. 64.
[998] See, inter alia, *Musema* Appeal Judgement, para. 17.
[999] See, inter alia, *Kupreski* Appeal Judgement, para. 30.
[1000] Rutaganda's Brief, para. 686(a).

- He befriended Tutsis;[1002]

- He hosted Tutsi refugees during the massacres;[1003]

- He provided food and drink to Tutsis during the material times;[1004] [1005]

- He carried Tutsi refugees in his car through roadblocks;[1006]

- He employed Tutsis,[1007] including during the massacres (e.g., his lawyer was Tutsi,[1008] as well as the person who drove his car between Rwanda and Zaire[1009]);

- Witness DEE, a Tutsi, testified for him.[1010]

536. The Appeals Chamber observes that the Trial Judgement does not refer to the totality of the evidence presented by the Appellant. The Appeals Chamber, nonetheless, recalls that, in general, a Trial Chamber is not required to articulate every step of its reasoning for each particular finding it makes.[1011] The Appeals Chambers of both *ad hoc* Tribunals have held that although the evidence produced may not have been referred to by a Trial Chamber, it may nevertheless be reasonable to assume that the Trial Chamber had taken it into account.[1012] Where evidence is not referred to in the Judgement, it is for the Appellant to show that the Trial Chamber indeed disregarded it.[1013]

537. The Appeals Chamber holds the view that the Appellant's first argument does not satisfy such a burden of proof. In the instant case, the Appeals Chamber therefore believes it is justified to consider that the Trial Chamber took account of the evidence referred to. Indeed, it emerges from the Trial Judgement that the Trial Chamber considered several testimonies regarding the Appellant's unusual behaviour, such as welcoming Tutsi refugees,[1014] allowing a Tutsi arrested at a roadblock to be given food and drink[1015] and going to great lengths to save a friend's Tutsi wife.[1016] Moreover, according to the transcript of the hearing of 17 June 1999, the Appellant emphasized this aspect of his defence in his closing arguments.[1017] In the absence of any showing by the Appellant, the Appeals Chamber does not see on what basis it could be assumed, in this instance, that the Trial Chamber disregarded evidence randomly selected by the Appellant. In any event, the Appeals Chamber holds the view that a reasonable trier of fact could very well not take account of some of the illustrations provided by the Appellant, which appear immaterial within the context of the numerous atrocities systematically and deliberately perpetrated against members of the Tutsi group, owing to their being members of thereof. The first argument is therefore dismissed.

[1001] *Ibid*., para. 686(a)(i).
[1002] *Ibid*, para. 686(a)(ii).
[1003] *Ibid*, para. 686(a)(iii).
[1004] *Ibid*, para. 686(a)(iv).
[1005] *Ibid*, para. 686(a)(ix).
[1006] *Ibid*, para. 686(a)(v).
[1007] *Ibid*, para. 686(a)(vi).
[1008] *Ibid*, para. 686(a)(vii).
[1009] *Ibid*, para. 686(a)(x).
[1010] *Ibid*, para. 686(a)(viii).
[1011] *Musema* Appeal Judgement, para. 18 citing *Celebici* Appeal Judgement, para. 481.
[1012] *Musema* Appeal Judgement, para. 19 citing *Celebici* Appeal Judgement, para. 483.
[1013] *Musema* Appeal Judgement., para. 21; *Celebici* Appeal Judgement, para. 498.
[1014] Trial Judgement, para. 255.
[1015] *Ibid*., paras. 220 and 221.
[1016] Trial Judgement, para. 471.
[1017] See mainly T, 17 June 1999, pp. 10 to 13, 22 and 23, 43 and 44, and 102 and 103.

538. In his second argument, the Appellant contends that the Trial Chamber's conclusion that he had *dolus specialis* is without "solid" foundation.[1018] He contends that the Trial Chamber would have reached a conclusion of reasonable doubt,[1019] were it not for the following errors:

- having relied on the testimonies of Witnesses C, V and EE at paragraph 315 of its Judgement;[1020]

- having found the weapons distribution on 24 April 1994 relevant to the conviction for genocide (paragraph 385 of the Trial Judgement);[1021]

- having failed to sufficiently take account of the testimony of Expert Witness François-Xavier Nsanzuwera, cited in paragraph 369 of the Trial Judgement.[1022]

539. To start with, the Appeals Chamber dismisses the allegation relating to paragraph 315 of the Trial Judgement. The testimonies of Witnesses C, V and EE were considered in the context of the facts alleged in paragraph 17 of the Indictment. It clearly emerges from paragraph 393 of the Trial Judgement that the Appellant was not found guilty of the crimes alleged in paragraph 17 of the Indictment. Therefore, even assuming that the Trial Chamber committed an error in its assessment of the testimonies of Witnesses C, V and EE, such error did not occasion a miscarriage of justice.

540. With respect to the allegation relating to the weapons distribution on 24 April 1994,[1023] the Appeals Chamber deems it useful to recall the impugned passage of the Trial Judgement:[1024]

> [The Chamber] also finds that it is established beyond a reasonable doubt that on or about 24 April 1994, in the Cyahafi Sector, the Accused distributed Uzzi guns to the President of the *Interahamwe* of Cyahafi during an attack by the *Interahamwe* on the *Abakombozi*.[1025]

The Appellant argues that the *Abakombozi* were not Tutsis, but members of the youth wing of the PSD, a political party opposed to the MRND.[1026] According to the Appellant, the weapons distribution on 24 April 1994 was therefore essentially, politically motivated.[1027] He submits that, as such, it casts reasonable doubt as to his specific intent.[1028]

541. The Appeals Chamber observes that the Appellant merely asserts that the *Abakombozi* were not Tutsis, without giving any evidence to back up this assertion.[1029] For this reason, the Appellant's contention is devoid of merit. Moreover, the Appeals Chamber stresses that, even if the group was not composed of Tutsis exclusively, that does not rule out the weapons distribution on 24 April 1994 being part of a plan directed against the Tutsi group or, otherwise, contributing to the destruction of the Tutsi group. In any event, the Appellant's submissions do not show any error on the part of the Trial Chamber that led to a miscarriage of justice. By miscarriage of justice is meant, *inter alia*, that a defendant is

[1018] Rutaganda's Brief, para. 686(c).
[1019] *Ibid*., paras. 686(c), and 686(c)(ii) and (iii).
[1020] *Ibid*, para. 686(c)(i).
[1021] *Ibid*, para. 686(c)(ii).
[1022] *Ibid*, para. 686(c)(iii).
[1023] *Ibid*, para. 686(c)(ii).
[1024] Trial Judgement, para. 385, *in fine*.
[1025] *Ibid*., para. 385, *in fine*.
[1026] Rutaganda's Brief, para. 686(c)(ii).
[1027] *Ibid*., para. 686(c)(ii).
[1028] *Ibid*., para. 686(c)(ii).
[1029] The Appeals Chamber notes that the evidence presented at trial tends to show that the *Abakombozi* were not exclusively Hutus (see, for example, T, 11 March 1998).

convicted despite the lack of evidence on a material element of the crime.[1030] The Appeals Chamber notes that even if the Trial Chamber had not relied on the weapons distribution of 24 April 1994, the other findings in paragraphs 383 through 402 of its Judgement provide a solid foundation for a reasonable tribunal of fact to consider that the Appellant was possessed of the specific intent.

542. With respect to the testimony of Expert Witness François-Xavier Nsanzuwera, the Appellant contends that the said testimony alone shows that the attacks were politically motivated and, therefore, that the Tutsis were not the exclusive targets thereof.[1031] Nsanzuwera's testimony is summarized as follows in paragraph 369 of the Trial Judgement:

> According to Expert Witness Nsanzuwera, the Tutsi were systematically targeted as such, because they were considered to be opponents of the regime. The militia, including the *Interahamwe*, killed Tutsis and Hutus who opposed the Hutu regime, the victims of these massacres being civilians. Mr. Nsanzuwera also confirmed the *Interahamwe*'s involvement in the killing of Tutsis was not spontaneous but well planned. (Footnotes omitted)

543. The Appeals Chamber observes that the section of the Trial Judgement containing paragraph 369 concerns neither the Appellant's conduct nor his mental predisposition, but rather the evidence in respect of the general allegations made in paragraphs 6 through 8 of the Indictment.[1032] Therefore, as such, this argument cannot show that the assessment of the evidence on the Appellant's *dolus specialis* is wholly erroneous. The arguments in support of this contention are entirely unfounded in light of the applicable standard of review on appeal.

544. For these reasons, the Appeals Chamber dismisses the Appellant's second argument.

545. For his third argument, the Appellant also relies on the testimony of François-Xavier Nsanzuwera as described in paragraph 369 of the Trial Judgement. In particular, he contends that the findings contained in paragraphs 369 and 400 of the Trial Judgement are inconsistent as to whether the Tutsis were targeted owing to their being members of the Tutsi group or to "being considered opponents of the regime".[1033]

546. Paragraph 400 of the Trial Judgement reveals that the Trial Chamber's conclusion regarding the existence of a general context within which acts aimed at destroying the Tutsi group were perpetrated is based on the conclusions regarding the general allegations in paragraphs 5 through 8 of the Indictment. Paragraph 369 of the Trial Judgement is under this section and relates specifically to the general allegations in paragraphs 6, 7 and 8 of the Indictment. The Appeals Chamber observes that, unlike paragraph 400 of the Trial Judgement, paragraph 369 contains neither legal findings nor even a single factual conclusion that rests on an overall assessment of the evidence presented before the Trial Chamber. Rather, paragraph 369 of the Trial Judgement is aimed at summarising one of the many testimonies that were offered at trial. The Appeals Chamber notes that the Trial Chamber considered this testimony in its assessment of the widespread and/or systematic nature of the attacks directed against the civilian Tutsi population.[1034] The Appeals Chamber also notes that the Trial Chamber's factual conclusions with respect

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[1030] *Furundzija* Appeal Judgement, para. 37 cited, *inter alia*, in the *Musema* Appeal Judgement, Footnote No. 24, and *Kunarac* Appeal Judgement, para. 39.
[1031] Rutaganda's Brief, para. 686(c)(iii).
[1032] Paras. 6 to 8 of the Indictment state that:

> 6. In each paragraph charging crimes against humanity, crimes punishable by Article 3 of the Statute of the Tribunal, the alleged acts were committed as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds.
> 7. At all times relevant to this Indictment, a state of internal armed conflict existed in Rwanda.
> 8. The victims referred to in this Indictment were, at all relevant times, persons taking no active part in the hostilities.

[1033] Trial Judgement, para. 369; Rutaganda's Brief, para. 686(c)(vi).
[1034] Trial Judgement, paras. 371 and 372.

to the general allegations in paragraphs 6, 7 and 8 of the Indictment tend to show that the Tutsis were targeted owing to their being members of the said group.[1035]

547. The Appeals Chamber stresses that, in general, committing crimes as part of a widespread or systematic attack against a civilian population does not imply that such crimes, or others, were not committed with the intent of destroying, in whole or in part, a group referred to under Article 2 of the Statute. In any event, the Appeals Chamber notes that once more, in the instant case, the Appellant's allegations do not show the unreasonableness of the Trial Chamber's conclusions with respect to the general context. The Appellant has failed to explain or show that the assessment of the *totality of the evidence* on the general context was erroneous. For this reason, the Appellant's third argument is rejected.

548. In his fourth and last argument, the Appellant alleges that paragraph 388 of the Trial Judgement raises reasonable doubt as to his intent to harm Tutsis exclusively.[1036] The impugned paragraph reads as follows:

> The Chamber is satisfied beyond any reasonable doubt that in April 1994, Tutsis who had been separated at a roadblock in front of the Amgar garage were taken to the office of the Accused inside the Amgar garage and the Accused thereafter directed that these Tutsis be detained within the Amgar garage. The Accused subsequently directed men under his control to take to take fourteen detainees, at least four of whom were Tutsis, to a deep hole near Amgar garage. On the orders of the Accused and in his presence, his men killed ten of the detainees with machetes. The bodies of the victims were thrown into the hole.

The Appellant contends that it can be presumed that the other persons detained were not Tutsi, and therefore that there is reasonable doubt as to whether his intent was to harm Tutsis exclusively.[1037]

549. A review of the Trial Judgement reveals that the interpretation suggested by the Appellant is erroneous. Indeed, the Trial Chamber's analysis in paragraphs 242 through 251 of its Judgement reveals that, with the exception of four detainees, the ethnicity of the other detainees was not established beyond a reasonable doubt. That does not necessarily imply that the other detainees were Tutsi or that the Prosecution's failure to establish the ethnicity of the other detainees leads to the presumption that they were not Tutsi. In this instance, no conclusion can be reached as to whether the other detainees were Tutsi or Hutu. The Appellant's fourth argument is unfounded and must therefore fail.

550. For all these reasons, the Appeals Chamber dismisses the Appellant's second main argument. It is the opinion of the Appeals Chamber, after considering the arguments advanced by the Appellant, that the evidence relied on by the Trial Chamber establishes beyond reasonable doubt that the Appellant had the specific intent to destroy the Tutsi group.

551. Having dismissed all the main arguments, the Appeals Chamber will now examine the Appellant's alternative arguments.[1038]

C. Error as to the existence of a genocide in 1994

552. In his alternative argument, the Appellant contests paragraph 400 of the Trial Judgement,[1039] contending that the Trial Chamber committed an error of fact[1040] for having found that, on the evidence, the mass killings which occurred in Rwanda in April and May 1994 constituted a genocide.[1041] The

[1035] *Ibid*.
[1036] Rutaganda's Brief, para. 686(c)(iv).
[1037] *Ibid*., para. 686(c)(iv).
[1038] Rutaganda's Brief, p. 1076/H, para. 687.
[1039] *Ibid*., para. 686.
[1040] Supplemental Document, p. 41, para. 21(2).
[1041] *Ibid*., p. 41, para. 21(2); Rutaganda's Brief, paras. 687 and 692; Rutaganda's Reply, paras. 12.23 and 12.24(3).

Appellant submits that a careful analysis of the evidence in this case shows reasonable doubt as to whether the events of 1994 can be described in law as a genocide.[1042] He argues that no reasonable tribunal of fact could have reached such a conclusion,[1043] and that the Trial Chamber's assessment of the evidence was wholly erroneous.[1044] The Appellant alleges that the error occasioned a miscarriage of justice because, without having made the error, the Trial Chamber would not have entered a conviction on the genocide allegations.[1045]

553. The Appeals Chamber states that the Appellant's contention is, *prima facie*, unfounded. Indeed, the Trial Chamber did not actually conclude, in paragraph 400 of its Judgement, that the atrocities committed in the territory of Rwanda in April and May 1994 constituted a genocide, but considered that:

> […] From the widespread nature of such atrocities, throughout the Rwandan territory, and the fact that the victims were systematically and deliberately selected owing to their being members of the Tutsi group, to the exclusion of individuals who were not members of the said group, the Chamber is able to infer *a general context within which acts aimed at destroying the Tutsi group were perpetrated*. (Emphasis added)

554. The analysis upon which this conclusion rests was made by the Trial Chamber as part of its consideration of the Appellant's specific intent. The Appeals Chamber recalls that, in its consideration of the first main argument, it confirmed the validity of the approach by which *dolus specialis* was inferred from certain facts, such as the general context and the perpetration of other acts systematically directed against a targeted group. Moreover, the Appeals Chamber held, upon considering the second main argument, that the evidence upon which the Trial Chamber relied established beyond any reasonable doubt that the Appellant had the specific intent to destroy the Tutsi group. The Appeals Chamber reiterates that it clearly emerges from paragraph 399 of the Trial Judgement that the Trial Chamber inferred the Appellant's specific intent from his personal conduct. Indeed, paragraphs 399 and 400 of the Trial Judgement show that the Trial Chamber considered the impact of the general context only *after* noting that Appellant's acts established that he had the *dolus specialis.*[1046] Moreover, the Trial Chamber concluded in paragraph 399 that:

> […] As a result, the Chamber is satisfied beyond any reasonable doubt that, at the time of the commission of all the above-mentioned acts which in its opinion are proven, the Accused had indeed the intent to destroy the Tutsi group as such.

Hence, even assuming that the Trial Chamber committed an error in its assessment of the general context in paragraph 400 of its Judgement, which error has, in fact, has not been established in this instance, such error did not lead to a miscarriage of justice.

555. For all these reasons, the Appeals Chamber considers that the Appellant's alternative argument is devoid of merit and will therefore not examine the arguments relating thereto. This sub-ground is hereby dismissed.

[1042] Rutaganda's Brief, p. 1075/H.
[1043] Supplemental Document, p. 41 and Rutaganda's Reply, paras. 12.22 and 12.24(3).
[1044] Supplemental Document, p. 41.
[1045] Supplemental Document, p. 41 and Rutaganda's Brief, para. 687.
[1046] Trial Judgement, para. 399.

XII. PROSECUTION'S APPEAL ON WAR CRIMES

556. Pursuant to Article 4(a) of the Statute, Rutaganda (the "Respondent") was charged under Counts 4, 6 and 8 of the Indictment with violations of Article 3 common to the Geneva Conventions (murder).[1047] Count 4 concerns the killings at the ETO school, as described in paragraphs 13 and 14 of the Indictment. Count 6 relates to the killings at the gravel pit in Nyanza, as described in paragraphs 15 and 16 of the Indictment. Count 8 concerns the killing of Emmanuel Kayitare, as described in paragraph 18 of the Indictment.

557. In defining the elements required for conviction under Counts 4, 6 and 8, the Trial Chamber held that there must be a nexus[1048] between the offence and an armed conflict in order to satisfy the material requirements of common Article 3 of the Geneva Conventions and of Article 1 of Additional Protocol II to the Geneva Conventions. According to the Trial Chamber, the nexus requirement means that "the offence must be *closely related* to the hostilities or committed *in conjunction with* the armed conflict".[1049]

558. The Trial Chamber acquitted Rutaganda of Counts 4, 6 and 8 on the ground that the Prosecution had failed to establish the required nexus beyond a reasonable doubt.[1050] The Trial Chamber stated the basis of its conclusion in paragraphs 442 through 444 of its Judgement:[1051]

> 442. The Prosecutor argues that the *Interahamwe* orchestrated massacres as part of their support of the RAF in the conflict against the RPF, and as the Accused was in a position of authority over the *Interahamwe*, that, *ipso facto*, the acts of the Accused also formed part of that support. Such a conclusion, without being supported by the necessary evidence, is, in the opinion of the Chamber, insufficient to prove beyond reasonable doubt that the Accused is individually criminally responsible for serious violations of Common Article 3 and Additional Protocol II. Consequently, the Chamber finds that the Prosecution has not shown how the individual acts of the Accused, as alleged in the Indictment, during these massacres *were committed in conjunction with* the armed conflict.
>
> 443. Moreover, in the opinion of the Chamber, although the Genocide against the Tutsis and the conflict between the RAF and the RPF *are undeniably linked*, the Prosecutor cannot merely rely on a finding of Genocide and consider that, as such, serious violations of Common Article 3 and Additional Protocol II are thereby automatically

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[1047] Article 3 common to the four Geneva Conventions of 1949 establishes certain guarantees applicable in "armed conflict[s] not of an international character occurring in the territory of one of the High Contracting Parties." (75 U.N.T.S. 31, 32 (1950). Article 1 of Additional Protocol II to the Geneva Conventions provides, *inter alia*, that Additional Protocol II "develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application," and "shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." 1125 U.N.T.S. 609, 611 (1979).

Although the indictment does not mention Additional Protocol II, the Trial Chamber, [having considered that the accused is entitled to the benefit of the doubt and that the material requirements of Article 4 of the Statute are indivisible], held that any doubt about the necessity to establish the higher threshold requirements of Additional Protocol II in proving charges under Article 4 of the Statute must be resolved in favour of defendants. Thus, it ruled that the Prosecution had to establish those higher threshold requirements in order to secure convictions on Counts 4, 6 and 8. The Prosecution apparently recognized this duty at trial since it introduced evidence intended to satisfy the higher threshold. See Trial Judgement paras. 434 to 435.

[1048] Trial Judgement, para. 104. In the authoritative French version, the expression used is "*lien de connexité*", which has been translated into English as "nexus". The phrase *étroitement liée aux hostilités ou perpétrée dans le contexte du conflit armé"* has been rendered in English as "closely related to the hostilities or committed in conjunction with the armed conflict".

[1049] Trial Judgement, para. 104 (Emphasis added).

[1050] Trial Judgement, paras. 442, 444 and 445.

[1051] In the authoritative French version of the Trial Judgement, the phrase "in conjunction with" and the term "nexus" are both expressed in the phrase "*lien de connexité*".

> established. Rather, the Prosecutor must discharge her burden by establishing that each material requirement of offences under Article 4 of the Statute are met.
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> 444. The Chamber therefore finds that it has not been proved beyond reasonable doubt that there existed a nexus between the culpable acts committed by the Accused *and* the armed conflict. (Emphasis added)

559. The Prosecution appealed the acquittals on Counts 4, 6 and 8 of the Indictment. The Appeals Chamber recalls that as it found, under Part IX of this Judgement, no reasonable trier of fact could have found that the testimonies of Witnesses AA and U were corraborative and established beyond reasonable doubt that Rutaganda was guilty of the killing of Emmanuel Kayitare, described in paragraph 18 of the Indictment. Considering that paragraph 18 of the Indictment also forms the factual basis of Count 8 of the Indictment, the Appeals Chamber finds that the Prosecution's arguments concerning the said count cannot prosper. The Appeals Chamber therefore dismisses the ground of appeal concerning Count 8 of the Indictment and will, thus, focus its analysis on the arguments in respect of Counts 4 and 6.

560. The Prosecution asserts that it does not challenge the definition of the nexus requirement used by the Trial Chamber. Rather, it contends that the Trial Chamber made a reversible factual error when it found that the nexus had not been established beyond a reasonable doubt. In other words, the Prosecution argues that, based on the evidence presented at trial, no reasonable trier of fact could have concluded that the crimes charged in Counts 4 and 6 of the Indictment had not been shown beyond a reasonable doubt either to have been closely related to the armed conflict or to have been committed in conjunction with the armed conflict.

561. The Appeals Chamber notes that it was not disputed at trial that, at the time of the ETO and Nyanza killings – which form the basis of Counts 4 and 6 of the Indictment – the government and army of Rwanda (Rwandan Armed Forces, or "RAF"), on the one hand, and the Rwandan Patriotic Front ("RPF"), on the other, were engaged in a non-international armed conflict[1052] satisfying the requirements of common Article 3 of the Geneva Conventions and Article 1 of Additional Protocol II. The Appeals Chamber also notes that it was not disputed on appeal that the victims of the ETO and Nyanza killings were persons protected under Common Article 3 of the Geneva Conventions and Additional Protocol II.[1053]

562. The Prosecution's contention that no reasonable trier of fact could have failed to find that it had established beyond a reasonable doubt that a nexus existed between that armed conflict and the crimes charged in Counts 4 and 6 rests in significant part on the testimony of two expert witnesses, Francois-Xavier Nsanzuwera and Filip Reyntjens. According to the Prosecution, the expert testimony of Nsanzuwera and Reyntjens established that the *Interahamwe za MRND* transformed itself over the period

[1052] For the Trial Chamber's finding to this effect, see Trial Judgement, paras. 91 to 95, 378 to 382, and 436. The Defence conceded at the hearing on this Appeal that it had not raised the issue of the armed conflict's non-international character before the Trial Chamber. See T, 5 July 2002, p. 62. In its Response to the Prosecution's Appeal Brief, the Defence now challenges the Trial Chamber's finding that, at the time of the offences alleged, a non-international armed conflict existed in Rwanda. See Defence Response, paras. 170 to 188. The Appeals Chamber will not normally consider new allegations of error raised for the first time in a party's response. Moreover, as the Prosecution notes, a party's failure to raise an issue at trial will normally constitute a waiver of its right to raise the issue on appeal. See Prosecution Reply, paras. 1.4 and 3.1 to 3.6. In this case, because the Accused was acquitted of the charges involving the question of the non-international character of the armed conflict, its failure to raise the issue in its own appeal, as the Prosecution appears to concede, see Prosecution Reply, para. 1.9, may be excused. The Appeals Chamber need not decide whether the policy of waiver principle applies to bar consideration of a claim when it is raised, as the Defence has done in this case, in a response as an alternative ground for affirming the aspect of the Trial Chamber's Judgement that the other party has challenged on appeal, for the claim clearly fails on the merits. The various pieces of evidence to which the Rutaganda points are clearly insufficient to convince the Appeals Chamber that no reasonable trier of fact could have agreed with the Trial Chamber's determination that the armed conflict was of a non-international character.

[1053] Trial Judgement, paras. 437 and 438.

between the end of 1991 and April 1994 from a political party youth group into a well-trained paramilitary group closely allied with the RAF.[1054] The Prosecution contends that their experts showed that soldiers of the RAF provided military training to the members of the *Interahamwe za MRND* and that some of the army leaders most involved in the genocide influenced the activities of the *Interahamwe za MRND*.[1055] The experts also demonstrated connections between the *Interahamwe za MRND* and the national gendarmerie.[1056]

563. In the Prosecution's account, their experts established that those who carried out killings of civilians in 1994, in particular, members of the *Interahamwe* who participated, viewed their attacks on Tutsis as part of the war effort. From the point of view of the killers, the RPF's invasion of the country threatened to overturn the 1959 revolution and restore a Tutsi-dominated government to power. According to the ideology used to justify the killings, all Tutsis (and those Hutus unwilling to attack the Tutsis) were suspected collaborators of the invading RPF. Thus, killing them was a way of preventing the RPF from gaining either a military or a political victory. The government's civil defence mobilization of April 1994, in which the *Interahamwe* played a central role, was aimed at ensuring the success of the campaign against the supposed internal enemy. Furthermore, Rutaganda's position of influence in the *Interahamwe za MRND* meant that he played a significant role in the campaign.[1057] Thus, "because of the nature and activities of the *Interahamwe*, the fact that the Tutsi were considered as 'enemy' during the time of the armed conflict, as well as the role played by Rutaganda in that organisation, there existed a close link between culpable acts of the Appellant and the armed conflict." [1058]

564. In the Appeals Chamber's understanding of the Prosecution's claim, the Prosecution contends that the Trial Chamber actually found that the Prosecution had established all propositions beyond a reasonable doubt, save the assertion which suggests a nexus between Rutaganda's actions and an armed conflict.[1059] In support of this contention, the Prosecution refers to conclusions reached by the Trial Chamber in considering the issue as to whether Rutaganda was among the persons to whom responsibility could be imputed under Article 4(a) of the Statute – an issue which the Appeals Chamber subsequently found to be unnecessary to prove for establishing responsibility for such violations. [1060] The relevant passages of the Trial Judgement read as follows:

> 439. The Accused was in a position of authority vis-à-vis the *Interahamwe* militia. Testimonies in this case have demonstrated that the Accused exerted control over the *Interahamwe*, that he distributed weapons to them during the events alleged in this Indictment, aiding and abetting in the commission of the crimes and directly participating in the massacres with the *Interahamwe*. The expert witness, Mr. Nsanzuwera, testified that the *Interahamwe* militia served two roles during April, May and June 1994, on the one hand, they supported the RAF war effort against the RPF, and on the other hand, they killed Tutsi and Hutu opponents.
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> 440. Moreover, as testified by Mr. Nsanzuwera, there is merit in the submission of the Prosecutor that, considering the position of authority of the Accused over the *Interahamwe*, and the role that the *Interahamwe* served in supporting the RAF against the RPF, there is a nexus between the crimes committed and the armed conflict. In support thereof, the Prosecutor argues that the *Interahamwe* were the instrument of the military in extending the scope of the massacres.

[1054] Prosecution's Reply, paras. 2(38) to 2(43).
[1055] *Ibid*., paras. 2(43) through 2(50).
[1056] *Ibid*, para. 2(51).
[1057] *Ibid*, paras. 2(52) to 2(72).
[1058] *Ibid*, para. 2(72).
[1059] *Ibid*, paras. 2(63) to 2(65).
[1060] *Akayesu* Appeal Judgement, paras. 430 to 445. In particular, paragraph 444, which reads: "The nexus between violations and armed conflict implies that, in most cases, the perpetrator of the crime will have a special relationship with one party to the conflict. However, such a special relationship is not a condition precedent to the application of common Article 3 and, hence of Article 4 of the Statute."

> 441. Thus, the Chamber is also satisfied that the Accused, as second vice-president of the youth wing of the MRND known as the *Interahamwe za MRND* and being the youth wing of the political majority in the government in April 1994, falls within the category of persons who can be held responsible for serious violations of the provisions of Article 4 of the Statute.

565. Finally, in tying these general claims to the specific crimes charged in Counts 4 and 6 of the Indictment, the Prosecution recounts the evidence at trial showing that the *Interahamwe* took a lead role in the killings charged in those counts with the support of RAF soldiers and that Rutaganda took part as a leader of the *Interahamwe*.[1061]

566. The Respondent offers essentially three responses to the Prosecution's argument. First, the Respondent contends that under cover of a claim of factual error, the Prosecution is really seeking to demonstrate a legal error, namely, a mistaken definition of the nexus requirement.[1062] According to the Respondent, the Prosecution's approach would so weaken the nexus requirement that, in order to show a close relation between an offence and a qualifying armed conflict, it would suffice either to show that the accused was a member of an organization – here, the *Interahamwe za MRND* – that played a role in the war effort, or that crimes of the same kind as those with which the accused was charged were committed in support of the war effort. The Respondent submits that if the Tribunal were to endorse these "guilt by association" or "similarity of conduct" approaches to the nexus requirement, it would blur the distinction between war crimes and crimes against humanity. "It neither advances justice nor respects the integrity of the concept of a 'war crime,'" in the Respondent's view, "to describe as war crimes, those acts of victimization that are not part of the armed conflict and which can be prosecuted in any event as 'crimes against humanity".[1063]

567. Second, the Respondent challenges the Prosecution's claim that the Trial Chamber did in fact find that the Prosecution had established a link between acts of genocide by the *Interahamwe za MRND* in general and the armed conflict. The Respondent maintains that in paragraphs 439 and 440, quoted at length above, the Trial Chamber was merely characterizing claims by Prosecution witnesses, not endorsing those claims itself.[1064]

568. Third, the Respondent argues that, even on the loose definition of the nexus requirement urged by the Prosecution, the evidence at trial simply was insufficient to establish the required nexus beyond a reasonable doubt.[1065]

569. The Appeals Chamber of the ICTR has not previously endorsed a particular definition of the nexus requirement.[1066] The Appeals Chamber of the ICTY has done so twice. The first time, in the *Tadic*

[1061] Prosecution's Brief, paras. 2(77) to 2(89).
[1062] Rutaganda's Reply, paras. 21 to 36, 14 to 17.
[1063] *Ibid*, para. 11.
[1064] *Ibid*, paras. 18 and 38 to 49.
[1065] *Ibid*, paras. 51 to 163
[1066] In the *Akayesu* case, the ICTR Appeals Chamber observed that "common Article 3 requires a close nexus between violations and the armed conflict." (*Akayesu* Appeal Judgement, para. 444.) It then stated: "This nexus between violations and the armed conflict implies that, in most cases, the perpetrator will probably have a special relationship with one party to the conflict. However, such a special relationship is not a condition precedent to the application of common Article 3 and hence of Article 4 of the Statute." (*Idem).* The Appeals Chamber expressly noted that the definition of the nexus requirement had not been raised on appeal. (*Idem*, Footnote 807) Trial Chambers of this Tribunal have four times considered charges under Article 4 of the Statute in their judgements. The definitions of the nexus requirement used in the four cases were similar but not identical to each other. In the *Akayesu* case, the Trial Judgement stated that the nexus requirement means that the acts of the accused have to be committed "in conjunction with the armed conflict." (*Akayesu* Trial Judgement, para. 643) In *Kayishema-Ruzindana*, the Trial Chamber used four different formulations to characterize the nexus requirement, apparently considering them synonymous. It sometimes stated that there must be "a direct link" or "a direct connection" between the offences and the armed conflict. (*Kayishema-Ruzindana* Trial Judgement, paras. 185, 602, 603, 623 ["direct link"]; 188, 623 ["direct connection"]. It

Jurisdiction Decision, the Appeals Chamber stated that the offences had to be "closely related" to the armed conflict, but it did not spell out the nature of the required relation.[1067] In the *Kunarac* Appeal Judgement, it endorsed the same standard. It then provided the following details, which appear relevant to the Prosecution appeal in this case:

> 58. What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict. The Trial Chamber's finding on that point is unimpeachable.
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> 59. In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, *inter alia*, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties .[1068]

570. This Chamber agrees with the criteria highlighted and with the explanation of the nexus requirement given by the ICTY Appeals Chamber in the *Kunarac* Appeal Judgement. It is only necessary to explain two matters. First, the expression "under the guise of the armed conflict" does not mean simply "at the same time as an armed conflict" and/or "in any circumstances created in part by the armed conflict". For example, if a non-combatant takes advantage of the lessened effectiveness of the police in conditions of disorder created by an armed conflict to murder a neighbour he has hated for years, that would not, without more, constitute a war crime under Article 4 of the Statute. By contrast, the accused

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also stated that the offences have to be committed "in direct conjunction with" the armed conflict. (*Idem*, para. 623). Finally, it stated that the offences had to be committed "as a result of" the armed conflict". (*Idem*). In the *Musema* case, the Trial Chamber took the view that the offences must be "closely related" to the armed conflict. (*Musema* Trial Judgement, para. 260). In the *Ntakirutimana* Case (currently on appeal), the Trial Chamber acquitted one of the accused of the count under Article 4(a) of the Statue based, *inter alia*, on the Prosecution's failure to establish a nexus between the offence and the armed conflict, but it offered no definition of the nexus requirement. (*Elizaphan and Gérard Ntakirutimana* Trial Judgement, para. 861).

[1067] *Tadić* Appeal Judgement, 2 October 1995, para. 70.

[1068] *Kunarac* Appeal Judgement, paras. 58 to 59. Before and after these paragraphs, the ICTY Appeals Chamber stated the following:

> 57. There is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring states or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there, and continue to apply until a general conclusion of peace or, in the case of internal armed conflicts, until a peaceful settlement is achieved. A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place. As indicated by the Trial Chamber, the requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting. It would be sufficient, for instance, for the purpose of this requirement, that the alleged crimes were closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict.
>
> 60. The Appellants' proposition that the laws of war only prohibit those acts which are specific to an actual wartime situation is not right. The laws of war may frequently encompass acts which, though they are not committed in the theatre of conflict, are substantially related to it. The laws of war can apply to both types of acts . The Appeals Chamber understands the Appellants' argument to be that if an act can be prosecuted in peacetime, it cannot be prosecuted in wartime. This betrays a misconception about the relationship between the laws of war and the laws regulating a peacetime situation. The laws of war do not necessarily displace the laws regulating a peacetime situation; the former may add elements requisite to the protection which needs to be afforded to victims in a wartime situation.

in *Kunarac*, for example, were combatants who took advantage of their positions of military authority to rape individuals whose displacement was an express goal of the military campaign in which they took part. Second, as paragraph 59 of the *Kunarac* Appeal Judgement indicates, the determination of a close relationship between particular offences and an armed conflict will usually require consideration of several factors, not just one. Particular care is needed when the accused is a non-combatant.

571. Although the Trial Chamber's Judgement and the Prosecution's appeal against it both predated the *Kunarac* Appeal Judgement, this Chamber understands both the Trial Judgement and the Prosecution's appeal as resting on an understanding of the nexus requirement consistent with the one just explained.[1069] The Appeals Chamber therefore dismisses the Respondent's contention that the Prosecution is attempting to establish a new definition of the nexus requirement.

572. The Appeals Chamber's understanding of paragraphs 439 through 441 of the Trial Chamber's Judgement accords with neither of the parties' interpretations. In those paragraphs, the Trial Chamber, on the one hand, characterized both the testimony by various witnesses and arguments by the Prosecution, and on the other stated its own findings, one of those findings being that "there is merit in the submission of the Prosecutor that ... there is a nexus between the crimes committed and the armed conflict."[1070] The Appeals Chamber considers that that assertion appears to contradict the Trial Chamber's statements in paragraphs 442 and 444 that the Prosecution had failed to establish a nexus between "the individual acts of the Accused" or the "culpable acts committed by the Accused" and the armed conflict.[1071]

573. The Prosecution's contention is that every reasonable trier of fact, (1) having found a general link between Rutaganda and one of the parties to the armed conflict; (2) having found a general link between killings by the *Interahamwe za MRND* and the armed conflict, and (3) having made several other findings about the role of the *Interahamwe* and Rutaganda in the particular crimes of conviction, could not help but find the required nexus between the crimes for which the respondent was convicted and the armed conflict. The Appeals Chamber notes that the error alleged by the Prosecution does not concern as such the factual conclusions reached by the Trial Chamber; rather, it concerns the Trial Chamber's refusal to make a last inference leap based on those observations.[1072] In its Reply, the Prosecution states its argument concisely in the following terms:

> It is the Prosecution's case that there is clear and reliable evidence leading to the only reasonable conclusion that the crimes for which the Respondent was convicted ... were linked to the armed conflict between the State of Rwanda and the RPF in 1994. The reasons are as follows:
>
> (1) the Government had a policy of targeting Tutsis
>
> (2) the *Interahamwe* was created[,] trained and utilised by the Government to execute the policy
>
> (3) the respondent played a leading role in the *Interahamwe*; and

[1069] The *Kunarac* Appeal Judgement had been handed down by the time of the hearing of this Appeal, and the Prosecution expressly embraced the *Kunarac* Appeal Judgement's explanation of the nexus requirement at the hearing. (T(A), 5 July 2002, pp. 20 to 22, 58). The Defence also acknowledged the *Kunarac* definition, though it sought to give it a more restrictive interpretation than did the Prosecution (*Idem*, pp. 81 and 82).
[1070] Trial Judgement, para. 440.
[1071] Trial Judgement, paras. 442 and 444.
[1072] With respect to the Prosecution's arguments that the Trial Chamber should have reached other factual conclusions than the ones included in the Trial Judgement, the Appeasl Chamber – having considered these arguments and reviewed the relevant passages of the trial record – holds that the Prosecution has not satisfied the test to be applied in establishing an error of fact in an appeal against acquittal.

> (4) the *Interahamwe* and the Respondent actively targeted and murdered Tutsi civilians pursuan[t] to this policy.[1073]

574. The Appeals Chamber stresses that the only issue in the present appeal is whether the Trial Chamber committed an error of fact that occasioned a miscarriage of justice by finding that the Prosecutor had established beyond a reasonable doubt the existence of a nexus between the crimes for which Rutaganda was convicted and the armed conflict. Before examining the Prosecution's argument concerning the acquittals entered in respect of Counts 4 and 6, the Appeals Chamber deems it necessary to recall the applicable standard of review with respect to allegations of factual error in an appeal against acquittal.[1074] In this instance, it is not enough for the Prosecution to show that a reasonable trier of fact could have come to a different conclusion from that reached by the Trial Chamber by making the inferential leap it urges this Chamber to make. The Prosecution must show that no reasonable trier of fact would have failed to make that leap, that is, that no reasonable trier of fact would have had any reasonable doubt that the required nexus between the crimes for which the Respondent was convicted and the armed conflict had been established.

575. Moreover, the Appeals Chamber recalls that, under the section of this Judgement relating to the *Interahamwe za MRND* movement, it found that the question whether "*Interahamwe za MRND"* was the same organisation as the group of attackers designated in the Trial Judgement by the term "*Interahamwe"* was of no relevance in this case.[1075] The Trial Chamber's factual conclusions and the convictions handed down do not rest on Rutaganda's criminal responsibility for the acts committed by the *Interahamwe* by virtue of his position of authority he held within the movement, but rather, on the acts he personally committed. His position as second vice-president of the *Interahamwe za MRND* was considered only in assessing his capability to direct and incite the commission of the alleged crimes, as he was a well-known figure in society owing to this position. As stated by the Appeals Chamber, the question as to whether Rutaganda actually held a position of authority in either of the movements after 6 April 1994 is of no moment, as the evidence presented reveals that he exercised, *de facto*, a position of influence over the *Interahamwe* attackers present at the ETO and Nyanza. The Appeals Chamber will now examine the arguments advanced by the Prosecution with respect to each of the impugned counts.

576. The Appeals Chamber will first consider the killings at ETO that form the basis of Count 4 of the Indictment. The Trial Chamber found that on or before 11 April 1994:

> The *Interahamwe*, armed with guns, grenades, machetes and clubs, gathered outside the ETO compound, effectively surrounding it […] When the UNAMIR troops left the ETO on 11 April 1994, the *Interahamwe* entered and attacked the compound, throwing grenades, firing guns and killing with machetes and clubs. A large number of Tutsis, including many family members and others known to the witness, were killed in this attack. […] the Accused was present and participated in the attack on Tutsi refugees.[1076]

577. The Appeals Chamber is of the view that no reasonable trier of fact could have concluded, as did the Trial Chamber, that the Prosecution had failed to establish a nexus between the acts committed by Rutaganda and the armed conflict, with respect to the ETO killings. As noted above, in paragraph 440 of its Judgement, the Trial Chamber found that the Prosecution had established a nexus between the ETO killings and the armed conflict. Given the Trial Chamber's other conclusion that:

- Rutaganda participated in the attack on Tutsi refugees at the ETO school;

- He exercised *de facto* influence and authority over the *Interahamwe*;

[1073] Prosecution's Reply, para. 2.7.
[1074] *Bagilishema* Appeal Judgement, paras. 13 and 14.
[1075] See Part X of this Judgement.
[1076] Trial Judgement, paras. 299 to 300.

- The *Interahamwe* were armed with guns, grenades and clubs;

- The *Interahamwe*, alongside the soldiers of the Presidential Guard, entered the ETO compound throwing grenades, firing guns and killing the refugees with machetes and clubs; and

- The victims of the killings were persons protected under common Article 3 of the Geneva Conventions and Additional Protocol II,

the Appeals Chamber concludes that no reasonable trier of fact could have failed to find that a nexus between the armed conflict and Rutaganda's participation in the particular killings charged in Count 4 had been established beyond a reasonable doubt.

578. With respect to the killings on the way to Nyanza and at Nyanza itself, the Trial Chamber found that many of the refugees from the ETO School tried to get to the Amahoro Stadium, where they thought they would find sanctuary under RPF protection. They were stopped on the way and diverted to Nyanza. The Trial Chamber then concluded that:

> Flanked on both sides by *Interahamwe*, approximately 4 000 refugees were forcibly marched to Nyanza. Along the way, these refugees were abused, threatened and killed by soldiers and by the *Interahamwe* surrounding them, who were armed with machetes, clubs, axes and other weapons […] When they arrived at Nyanza, the refugees were stopped by the *Interahamwe*, assembled together and made to sit down in one spot, below a hill on which there were armed soldiers. They were surrounded by Interahamwe and soldiers.

The Hutus were allowed to leave the group, then:

> Grenades were […] thrown into the crowd by the *Interahamwe*, and the soldiers began to fire their guns from the hillside. […] Following the shooting and grenades, the soldiers told the *Interahamwe* to begin killing people.

After more than one hour of killing, "[t] soldiers then told the *Interahamwe* to look for those who were not dead and finish them off." The *Interahamwe* did so, both that night and the following morning […] "[T]he Accused was present and participated in the forced diversion of refugees to Nyanza and […] directed and participated in the attack at Nyanza."[1077]

579. Again, the Appeals Chamber is of the view that no reasonable trier of fact could have failed to find, as did the Trial Chamber, that the Prosecution had not established, beyond a reasonable doubt, the nexus between Rutaganda's acts and the armed conflict, in relation to the forced diversion of refugees to Nyanza and the attack that took place there. Indeed, the Appeals Chamber considers that, in view of the Trial Chamber's conclusions, namely, on the one hand, that the Prosecution had established beyond a reasonable doubt the existence of a nexus between the killings at Nyanza and the armed conflict, and, on the other hand:

- that Rutaganda had participated in and directed the attack at Nyanza;

- that Rutaganda exercised influence putting him in a position of authority over the *Interahamwe*;

- that the RAF and the *Interahamwe* threatened and killed refugees on the way to Nyanza;

- that Rutaganda transported *Interahamwe* as reinforcements;

- that the soldiers and the *Interahamwe* were armed, *inter alia*, with machetes, clubs and axes;

- that upon arrival at Nyanza, the *Interahamwe* stopped the refugees and made them sit down below

[1077] Trial Judgement, paras. 301 to 302 and 304.

a hill on which there were armed soldiers;

- that Rutaganda ordered the *Interahamwe* to position themselves around the refugees and surround them before the killing;

- that the soldiers subsequently participated in the killing of refugees alongside the *Interahamwe*;

- that the RAF soldiers told the *Interahamwe* to kill and look for those who were not dead and finish them off;

- that the victims of the killings were persons protected under common Article 3 of the Geneva Conventions and Additional Protocol II,

no reasonable trier of fact could have failed to make the inferential leap to find beyond a reasonable doubt that there existed a nexus between Rutaganda's participation in the killings at Nyanza and the armed conflict. In the instant case, the role of RAF troops in directing the activities of the *Interahamwe* makes particularly clear the unreasonableness in failing to find the required nexus. [1078]

580. To have concluded that no reasonable trier of fact could have made all the factual findings reached by the Trial Chamber and yet found that the Prosecution had failed to establish beyond a reasonable doubt a nexus between Rutaganda's participation in the ETO and Nyanza killings and the armed conflict, the Appeals Chamber considers that the Trial Chamber committed an error of fact. The Trial Chamber's erroneous conclusion that a nexus had not been established is the only basis for its acquittal of Rutaganda on Counts 4 and 6. The Appeals Chamber considers that the error is thus one which has occasioned a miscarriage of justice, in that the Trial Chamber failed to discharge it obligation by not deducing all the legal implications from the evidence presented.

581. The Appeals Chamber holds that correction of the error would require entry of convictions on both counts 4 and 6 of the Indictment.[1079] However, before reversing the acquittal entered by the Trial Chamber, the Appeals Chamber must be satisfied that it can find the Respondent guilty of murder as violation of common Article 3 of the Geneva Conventions based on the facts already forming the basis of the convictions for genocide and extermination as crimes against humanity.

582. Although the Respondent did not raise this question, the Appeals Chamber observes that, in accordance with the principles it endorses in *Musema*, the convictions on Counts 4 and 6 of the Indictment do not constitute unlawful multiple convictions for the same crimes. In *Musema*, the Appeals Chamber, endorsing the principles adopted by the ICTY Appeals Chamber in *Celebici*, stated that:

> […] multiple convictions […] are permissible only if each statutory provision involved has a materially distinct element not contained in the other.[1080]

In the instant case, the Trial Chamber found Rutaganda guilty of genocide (Count 1), and extermination and murder as crime against humanity (Counts 2 and 7, respectively). Since the Appeals Chamber quashed the conviction for the killing of Emmanuel Kayitare (Count 7), the convictions for Counts 1 and 2 rest on the Respondent's participation in separate criminal acts, namely: the killing of several people at Nyarugenge on 8, 15 and 24 April 1994; the shooting to death of 14 persons behind the Amgar garage in April 1994; the ETO and Nyanza massacres.

[1078] Viewing the ETO and Nyanza killings as interconnected parts of a larger sequence of events, the Appeals Chamber is of the view that the apparent authority exercised by soldiers over the *Interahamwe* during the Nyanza killings also contributes to the inescapable finding that there existed a nexus between the ETO killings and the armed conflict.
[1079] See Article 24 of the Statute.
[1080] *Musema* Appeal Judgement, paras. 361 and 363 citing the *Čelebići* Appeal Judgement, paras. 412 and 413.

583. The Appeals Chamber considers that each of the convictions against Rutaganda on Counts 4 and 6 (murder as violation of common Article 3 of the Geneva Conventions) has a materially distinct element not required for the convictions on Counts 1 and/or 2, namely the existence of a nexus between the alleged crimes and the armed conflict satisfying the requirements of common Article 3 of the Geneva Conventions and Article 1 of Additionnal Protocol II. The conviction on Count 1 requires proof of a materially distinct element not required for the convictions on Counts 4 and 6, namely specific intent (*dolus specialis*). Finally, the conviction on Count 2 requires proof of a materially distinct element not required for the convictions on Coutns 4 and 6, namely a widespread or systematic attack against a civilian population.

584. For these reasons, the Appeals Chamber allows the Prosecution's appeal and, pursuant to Articles 6(1) and 4(a) of the Statute, holds that it has been established beyond reasonable doubt that Georges Rutaganda is individually responsible for the crimes of murder as violations of common Article 3 of the Geneva Conventions and, accordingly, convicts him on Counts 4 and 6 of the Indictment.

585. The consequences of these convictions on Rutaganda's sentence are discussed in Part XIII of this Judgement.

XIII. RECONSIDERATION OF THE SENTENCE

586. The Appellant abandoned the appeal he had initially filed against the sentence.[1081] However, under the section "Relief Requested" in his Appellant's Brief, he requested that, if the Appeals Chamber quashed one or more of his convictions, but not all of them, it should "reconsider whether the sentence given to Mr. Rutaganda remains appropriate, in all of the circumstances."[1082]

587. The Prosecution did not present any arguments in response to the Appellant's request for relief.[1083] In the appeal it filed against the acquittal on Counts 4, 6 and 8: murder as violation of Common Article 3 of the Geneva Conventions, the Prosecution indicated that it would not be necessary to reconsider the penalty if it was successful in its appeal, as the Trial Chamber had already sentenced the Appellant to a single sentence of life imprisonment.[1084]

588. The Appeals Chamber will therefore not reconsider the penalty on the grounds of an error of law or fact committed by the Trial Chamber in handing down the sentence, pursuant to Article 24 of the Statute. Considering that the verdict was revised as regards Counts 4, 6 and 7 – murder as violation of common Article 3 of the Geneva Conventions and murder as crime against humanity –, the Appeals Chamber has jurisdiction, in the instant case, to determine whether the evidence Trial Chamber considered in determining the verdict is still valid.[1085]

589. It transpires from the Trial Judgement that the Trial Chamber sentenced the Appellant to a single sentence of life imprisonment for all the counts on which he was found guilty, [1086] namely Counts 1, 2 and 7 alleging the crime of genocide, extermination as crime against humanity and murder as crime against humanity respectively.[1087] Having examined the appeals lodged by the Appellant and the Prosecution, the Appeals Chamber hereby revises the verdict as follows: it affirms the convictions for Counts 1 and 2, namely, genocide and extermination as crime against humanity;[1088] it reverses the acquittal on Counts 4 and 6 and finds the Appellant guilty of murder as violation of common Article 3 of the Geneva Conventions; it sets aside the conviction on Count 7 and acquits the Appellant of murder as crime against humanity; and it affirms the verdict on all the other counts.

[1081] At the Appeals hearing of 4 July 2002, the Appeals Chamber stated that the Appellant appealed his sentence in his Notice of Appeal, but did not put forward any arguments relating thereto in his Appellant's Brief or subsequent written submissions (namely, the Reply and the Supplemental Document). In general, case-law provides that "[that 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 the arguments and authorities." (*Kayishema-Ruzindana* Appeal Judgement, para. 46). The Appeals Chamber therefore asked the Appellant to indicate whether he had abandoned his appeal against the sentence (T(A), 4 July 2002, pp. 14 and 162), and he confirmed that he had done so (T(A), 4 July 2002, p. 163).

[1082] Rutaganda's Brief, para. 706: "[…] if this Honourable Appeal Chamber quash one or more of the conviction, but not all of them, that it reconsider whether the sentence given to Mr. Rutaganda remains appropriate, in all the circumstances."

[1083] It transpires from paragraph 13.3 of the Prosecution's Response that the Prosecution misapprehended the request made in paragraph 706 of Rutaganda's Brief. The arguments submitted in paras. 13.3 through 13.11 of the Prosecution's Response are of no assistance to this effect.

[1084] T(A), 5 July 2002, p. 2.

[1085] In the circumstances of the present case, notably the fact that the crimes forming the basis of the convictions handed down on appeal on Counts 4 and 6 were disposed of by the Trial Chamber, the Appeals Chamber does not deem it necessary to return the case to the Trial Chamber for review and determination of the penalty. Just like in situations where the Appeals Chamber finds that an acquitted person is guilty, the Appeals Chamber considers that, depending on the circumstances of each case, there are situations where it is preferable to return the case to the Trial Chamber for determination of the penalty.

[1086] Trial Judgement, p. 173.

[1087] Trial Judgement, p. 163.

[1088] Without prejudice to the invalidation of the findings in respect of the killing of Emmanuel Kayitare.

590. The Appeals Chamber reviewed in detail the Trial Chamber's examination at paragraphs 447 through 473 of the Trial Judgement on the determination of the penalty. The Appeals Chamber notes in particular that the Trial Chamber relied heavily on the fact that the crime of genocide has the unique feature of being committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.[1089] The Trial Chamber thus found that the crime of genocide constitutes the "crime of crimes"[1090] which must be taken into account in deciding the sentence.[1091] The Appeals Chamber recalls that there is no hierarchy of crimes under the Statute, and that all the crimes specified therein are serious violations of international humanitarian law.[1092] In the instant, an analysis of the Trial Chamber's conclusions reveals that the key features of its finding on the seriousness of the offence are based on considerations of the Appellant's conduct and on the fact that genocide is inherently an extremely serious crime. The Appeals Chamber considers such an observation correct in the context of this case. The Appeals Chamber further notes that the Trial Chamber considered the extreme gravity of the crime of genocide, with which the Appellant was charged, as the first aggravating circumstance.[1093] The other factors which weighed in favour of a heavier penalty were that the Appellant: used his status in the community to carry out his crimes;[1094] played a leading role in the execution of the crimes;[1095] and never showed remorse for the commission of the crimes.[1096] The Trial Chamber found that the aggravating circumstances – notably the abuse of his position of authority and his attitude subsequent to the commission of the crimes[1097] – "outweigh[ed] the mitigating circumstances".[1098]

591. The Appeals Chamber holds the view that a penalty must reflect the totality of the crimes committed by a person and be proportionate to both the seriousness of the crimes committed and the degree of participation of the person convicted. The gravity of the crime is a key factor that the Trial Chamber considers in determining the sentence.[1099] In the instant case, the Trial Chamber considered the extreme seriousness of the crimes mainly because the crimes were motivated by heinous prejudices based on such factors as race or ethnicity and for the specific intent of destroying the Tutsi group. The gravity of the Appellant's conduct was emphasized because he abused his personal position in the community to commit the crimes and because of his attitude subsequent to the commission of the crimes.

592. In the opinion of the Appeals Chamber, the finding of not guilty on Count 7, namely murder as a crime against humanity, therefore has no effect on the gravity of the crimes and the Appellant's conduct on which the Trial Chamber relied in deciding the penalty. The Appeals Chamber further recalls that the Trial Chamber noted in its factual findings that of the 4000 persons taken to Nyanza, only approximately 200 survived the massacre.[1100] It emerges that revision of the verdict in respect of both the acquittals and the new convictions, does not affect the validity of the factual elements which form the basis of the sentence of life imprisonment. Accordingly, the Appeals Chamber holds that reconsideration of the sentence handed down by the Trial Chamber is unnecessary.

[1089] Trial Judgement, para. 451.
[1090] *Ibid.*
[1091] *Ibid.*
[1092] *Kayishema/Ruzindana* Appeal Judgement, para. 367.
[1093] Trial Judgement, para. 468.
[1094] *Ibid*., para. 469.
[1095] *Ibid*, para. 470.
[1096] *Ibid*, para. 473.
[1097] *Ibid*, para. 473.
[1098] *Ibid*., para. 473.
[1099] *Musema* Appeal Judgement, para. 382. See also, *Celebici* Appeal Judgement, para. 847.
[1100] Trial Judgement, paras. 301 and 302.

XIV. DISPOSITION

For the foregoing reasons, **The Appeals Chamber**,

Considering Article 24 of the Statute and Rule 118 of the Rules;

Noting the respective written submissions of the parties and their oral arguments at the hearings of 4 and 5 July 2002 and of 28 February 2003;

Sitting in open court;

Unanimously Allows the ground of appeal raised by the Appellant, Georges Rutaganda, in relation to the conviction on Count 7 of the Indictment (murder as crime against humanity for the killing of Emmanuel Kayitare) and **Quashes** the conviction on this Count;

Allows by majority (Judge Pocar appends a Dissenting Opinion), the Prosecution's appeal of the acquittal of Georges Rutaganda for murder as violation of Article 3 common to the Geneva Conventions, on counts 4 and 6 of the Indictment, and **Reverses** the acquittal on the said Counts;

Recalls that the Prosecution abandoned its second ground of appeal;

Unanimously **Rejects** all the other grounds of appeal raised by the Appellant, Georges Rutaganda;

Unanimously **Rejects** the Prosecution's appeal of the acquittal of Georges Rutaganda for murder in violation of common Article 3 of the Geneva Conventions, in respect of Count 8 of the Indictment;

Unanimously **Finds** Georges Rutaganda not guilty of Count 7 (murder as crime against humanity);

Finds by majority (Judge Pocar dissenting), Georges Rutaganda guilty on Counts 4 and 6 of the Indictment (murder as a violation of Article 3 common to the Geneva Conventions);

Unanimously Affirms the conviction of Georges Rutaganda on Count 1 (genocide), and on Count 2 (extermination as crime against humanity);

Unanimously Affirms the acquittal of Georges Rutaganda on Count 8 (murder as violation of Article 3 common to the Geneva Conventions);

Affirms the single sentence of life imprisonment handed down;

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

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

Theodor Meron	Fausto Pocar	Claude Jorda
Presiding Judge	Judge	Judge

Mohamed Shahabuddeen Judge	Mehmet Güney Judge

Judge Meron, presiding, and Judge Jorda append a Separate Opinion to this Judgement.

Judge Pocar appends a Dissenting Opinion to this Judgement.

Judge Shahabuddeen appends a Separate Opinion to this Judgement.

Done at Arusha, Tanzania
On 26 May 2003.

[Seal of the Tribunal]

Separate Opinion of Judges Meron and Jorda

We write this separate opinion to urge the Appeals Chamber to thoroughly examine the issue of entering new convictions at appellate level which, at this stage, can no longer be appealed. Pursuant to Article 24 of the Statute, the Appeals Chamber shall hear appeals from the Prosecution, including appeals based on errors of fact, and may "affirm, reverse or revise" the decisions of the Trial Chamber. Article 25 of the Statute of ICTY gives the same power to the Appeals Chamber of that Tribunal. On at least one occasion, the ICTY Appeals Chamber has interpreted that provision as permitting it to reverse an acquittal and enter a conviction in lieu thereof, although, in that case, the issue as to whether the Appeals Chamber was competent to do so was not expressly addressed by the majority of the judges.[1] Although the Statutes of both this Tribunal and ICTY prescribe certain limited forms of review of Appeals Chamber decisions, such as the review proceedings provided for under Article 25 of the Statute of this Tribunal, they do not provide a right of appeal from a conviction entered, for the first time, by the Appeals Chamber. In our opinion, the absence of any right whatsoever to appeal such a conviction, save in the case where the matter is remitted to the Trial Chamber, is likely to infringe upon the fundamental principle of fairness recognized both in international law and many national legal systems.

In the present case, it is not necessary to deal with this issue. Indeed, although the Appeals Chamber entered convictions on two counts, the underlying criminal conduct was already covered by convictions handed down by the Trial Chamber. Consequently, the new convictions do not attract a heavier penalty. Moreover, no party has raised the question of any further appeal. However, given the importance of the issue raised, it is absolutely necessary for the Appeals Chamber to deal with it in the future, in order to find solutions consistent with fundamental principles of fairness and due process.

Done on the 26th of May 2003,
At Arusha, Tanzania

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Theodor Meron	Claude Jorda
Presiding Judge	Judge

[1] See *Tadic* Appeal Judgement, paras. 170 and 171 and paras. 235, 236 and 237; 327. Judge Nieto-Navia raised this issue in his Separate Opinion. In that same case, the Defence did not challenge the Appeals Chamber's competence to enter new convictions in its response to the grounds of appeal raised by the Prosecution.

DISSENTING OPINION OF JUDGE POCAR

While I agree with the conclusion of the majority that the Trial Chamber erred in its failure to determine that a nexus existed between the ETO and Nyanza crimes and the armed conflict, I dissent from the majority's decision to reverse the acquittals entered by the Trial Chamber in relation to Counts 4 and 6, and to enter new convictions on appeal.

Article 24 of the ICTR Statute provides that the Appeals Chamber may hear appeals from the Prosecutor on errors of law invalidating the decision, or errors of fact which have occasioned a miscarriage of justice. It further provides that the Appeals Chamber may affirm, reverse, or revise the decisions taken by the Trial Chambers. By its literal terms, the Statute may not appear to prohibit the reversal by the Appeals Chamber of an acquittal entered by a Trial Chamber and the subsequent entry of a conviction on appeal – even in the absence of the possibility to appeal that initial decision to convict taken by the Appeals Chamber.

Indeed, the ICTR Statute might even be interpreted as allowing the reversal of an acquittal and entry of conviction on appeal, in light of some case law of the International Criminal Tribunal for the former Yugoslavia ("ICTY"). The corresponding article governing appeals in the Statute of the ICTY is Article 25, and its terms are identical to those of Article 24 of the ICTR Statute.

In the *Tadić* case, a Trial Chamber of the ICTY had acquitted Duško Tadić on the basis that Article 2 of the ICTY Statute, concerning grave breaches of the Geneva Conventions, was inapplicable because it had not been proven that the victims at any relevant time were protected persons within the meaning of the Conventions. The Appeals Chamber, however, found that the victims referred to were indeed protected persons, and it reversed the Trial Chamber's verdict on the various counts concerned. It also found that the Trial Chamber had erred when it held that it could not, on the evidence before it, be satisfied beyond a reasonable doubt that the Appellant was criminally liable for the offenses charged in three other counts of the indictment, and it proceeded to find him guilty of these counts as well. The Appeals Chamber remitted the matter of sentencing to a Trial Chamber, and in its decision on the remittal, it noted the oral arguments of the parties wherein they had indicated that they recognized the competence of the Appeals Chamber itself to pronounce sentences but considered "that the Appeals Chamber was also competent to remit sentencing to a Trial Chamber, which latter course they considered preferable in the circumstances of the case."[1]

In the *Aleksovski* Appeal Judgment,[2] however, the Appeals Chamber, finding that the Trial Chamber had erred in its exercise of discretion in imposing sentence, did not remit the question, but proceeded to increase the sentence itself, despite the impossibility of an appeal from its decision.

In the *Čelebići* Appeal Judgment,[3] on the other hand, a number of issues related to sentence were remitted to a Trial Chamber. The Appeals Chamber departed from its previous practice, where it had rendered decisions reversing acquittals (*Tadić*) or increasing sentence (*Aleksovski*) which were not subject to appeal. In the chapter of the judgment related to sentencing, the Appeals Chamber began by noting its decision to quash certain convictions on the basis of cumulative convictions considerations. It then stated:

[1] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Order Remitting Sentencing to a Trial Chamber, 10 Sept. 1999, p. 3.
[2] *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 Mar. 2000.
[3] *Prosecutor v. Delalić et al*, Case No. IT-96-21-A, Judgement, 20 Feb. 2001 (hereinafter "*Čelebići* Appeal Judgment").

> Because the Appeals Chamber has had no submissions from the parties on these issues and, because there may be matters of important principle involved, it will be necessary for such consideration to be given after the parties have had the opportunity to make relevant submissions. As the Appeals Chamber cannot be reconstituted in its present composition, and as, *in any event, a new matter of such significance should be determined by a Chamber from which an appeal is possible*, the Appeals Chamber proposes to remit these issues for determination by a Trial Chamber.[4]

Hence, in the *Čelebići* Appeal Judgment, the Appeals Chamber expressly recognized that certain issues are so important that they should be determined by a Chamber from which it is possible to lodge an appeal – in order to preserve the right of appeal.[5]

Such an approach is in full conformity with the principle articulated in Article 14(5) of the International Covenant on Civil and Political Rights ("ICCPR"), which states: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."[6] This provision was explicitly referred to in the Report of the Secretary General (S/25704) pertaining to the establishment of the ICTY, approved by the Security Council in Resolution 827 (1993). Paragraph 116 of this Report states:

> The Secretary-General is of the view that the right of appeal should be provided for under the Statute. Such a right is a fundamental element of individual civil and political rights and has, inter alia, been incorporated in the International Covenant on Civil and Political Rights. For this reason, the Secretary-General has proposed that there should be an Appeals Chamber.

The Report sets out an important principle, and it is entirely possible to interpret the Statute in conformity with this principle, through a decision to remit a case to a Trial Chamber when the Appeals Chamber considers that a new conviction should be entered or a sentence increased. As a result, even if the text of the Statute would literally allow for a different interpretation, the interpretation that is in conformity with the principle affirmed should be chosen.

Furthermore, the ICCPR is not only a treaty between States which have ratified it, but, like other human rights treaties, also a document that was adopted – unanimously – as a resolution by the General Assembly. As such, it also expresses the view of the General Assembly as to the principles enshrined therein. It would therefore have to be assumed that the Security Council, as a UN body, would act in compliance with that declaration of principles of the General Assembly. Only a clear-cut decision to depart from it would lead to a different conclusion. But in this case, as mentioned, the intention of the Security Council to comply with the ICCPR was explicitly demonstrated through its approval of the Report of the Secretary General. It does not matter, in this context, that the principle contained in Article 14(5) has been subjected to reservations by a few States which have ratified the ICCPR – out of 149 State parties, only about 10 have expressed reservations, and some of these reservations have a different scope as compared with the case at issue – or that other regional legal instruments such as the Seventh Protocol to the European Convention on Human Rights may have taken a different approach.

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[4] *Čelebići* Appeal Judgment, para. 711 (emphasis provided).

[5] Within the ICTR, the issue as to whether the Appeals Chamber may itself enter a new conviction on appeal has not arisen prior to this appeal. Although an appeal from the Prosecution was heard following the entry of acquittals by the Trial Chamber in the *Bagilishema* case, the Appeals Chamber affirmed the acquittals and ordered Bagilishema's immediate release. Hence the issue concerning the ability of the Appeals Chamber to reverse an acquittal and enter a conviction, in the absence of the possibility of the defense to appeal the fresh conviction, did not arise. See *Le Procureur c/ Ignace Bagilishema*, Affaire no ICTR-95-1A-A, Arrêt, 3 juillet 2002.

[6] The French text provides: "Toute personne déclarée coupable d'une infraction a le droit de faire examiner par une juridiction supérieure la déclaration de culpabilité et la condamnation, conformément à la loi. "

It should also be noted that the right of appeal has been preserved in the jurisprudence and Rules of Procedure and Evidence of the ICTY, in contempt cases. In the *Tadić* case, the Appeals Chamber, ruling in the first instance, found former counsel Milan Vujin guilty of contempt.[7] Mr. Vujin sought leave to appeal this judgment, and leave was granted by a bench.[8] In its appeal judgment, the Appeals Chamber began by noting that Rule 77 of the Rules (as it then existed) did not expressly provide for the right to appeal a contempt conviction of the Appeals Chamber.[9] It then considered, however, that the Rules must be interpreted "in conformity with the International Tribunal's Statute which, as the United Nations Secretary-General state[d] in his report of 3 May 1993 (S/25704) must respect the 'internationally recognized standards regarding the rights of the accused' including Article 14 of the [ICCPR]".[10] The Appeals Chamber then recalled the guarantees contained in Article 14(5) of the ICCPR and stated that "Article 14 of the International Covenant reflects an *imperative norm of international law* to which the Tribunal must adhere."[11] It proceeded to consider the merits of Mr. Vujin's complaint, pointing out that while the preferred course "would have been for the contempt trial to have been initially referred to a Trial Chamber, thereby providing for the possibility of appeal, rather than being heard by the Appeals Chamber, ruling in the first instance[,] … it is the duty of the International Tribunal to guarantee and protect the rights of those who appear as accused before it."[12]

Following this decision of the ICTY Appeals Chamber, Rule 77 of the ICTY Rules was amended to provide: "In the case of decisions under this Rule by the Appeals Chamber sitting as a Chamber of first instance, an appeal may be submitted in writing to the President within fifteen days of the filing of the impugned decision. Such appeal shall be decided by five different Judges as assigned by the President." If the right of appeal is preserved in cases of contempt arising before the Appeals Chamber sitting in the first instance, it is difficult to imagine that this right may be denied to an appellant for whom possible convictions of genocide, war crimes, or crimes against humanity are at issue.

In any event, it should be evident that, where the rights of the accused are concerned, in case of doubt as to whether a particular right exists, such a doubt must operate in favor of the accused. Indeed, whereas the right of the defendant to appeal his post-trial conviction is a general principle of law applicable in many domestic jurisdictions, the right of the prosecution to appeal an acquittal does not enjoy the same degree of universality. As a result, such a right should be interpreted restrictively, taking into account the rights of the accused, and preserving his right of appeal. Certainly, decisions taken more recently by the Appeals Chamber of the ICTY (*Čelebići* Appeal Judgment and *Tadić* (Vujin) contempt appeal judgment), as well as amendments to its Rules of Procedure and Evidence, manifestly incline in this direction.

Against this approach, one might argue that, an error having been identified by the Appeals Chamber in this case, the necessary consequence is that the acquittal entered by the Trial Chamber was erroneous. If remitted to a Trial Chamber, the latter would reach the same conclusion as the Appeals Chamber would, and, the argument might continue, such a remittal would only incur a waste of judicial resources. However, such an argument is not an excuse to derogate from a

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[7] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan. 2000.
[8] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A-AR77, Decision on the Application for Leave to Appeal, 25 Oct. 2000. The Bench concluded that "the arguments advanced in support of the Application … justify a more thorough review by the Appeals Chamber." *Id.* at p. 4.
[9] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A-AR77, Appeal Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 27 Feb. 2001, p. 3.
[10] *Id.*
[11] *Id.* (emphasis provided).
[12] *Id*. at p. 4.

fundamental human right. Furthermore, it presupposes that in no case would an appellant be able to identify an issue warranting fresh consideration by the Appeals Chamber in an appeal from a conviction or increased sentence entered by a Trial Chamber following a remittal by the Appeals Chamber.

However, a remittal to a Trial Chamber is not the only remedy possible when an error is identified by the Appeals Chamber.[13] The Appeals Chamber always possesses a margin of discretion in its choice of remedy, provided that this discretion is exercised on proper judicial grounds, balancing factors such as "fairness to the accused, the interests of justice, the nature of the offenses, the circumstances of the case [at] hand and considerations of public interest"[14] – and provided that the exercise of this discretion does not cause prejudice to the parties.

In the present case, the acts committed at the ETO school (para. 14 of the indictment) and at Nyanza (paras 15 and 16 of the indictment), also formed the basis, in part, of the charges contained in Counts 1 and 2. The convictions entered under these two counts have been affirmed by the Appeals Chamber. Therefore, a remittal to a Trial Chamber would unduly prolong the proceedings and would not be in the interests of justice. In addition, the error made by the Trial Chamber having been corrected, no prejudice could result to the Prosecution. For these reasons and in the circumstances of this case, it would not be appropriate to order that the case be remitted for further proceedings. The acquittals entered by the Trial Chamber should be left undisturbed.

Done on the 26th of May 2003,
at Arusha, Tanzania.

_____
Judge Fausto Pocar

[13] *See Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgment, 5 July 2001, paras 72, 73, 77 (where the Appeals Chamber found that the Trial Chamber's conclusion that there was insufficient evidence to show an intent to destroy the group, did not meet the standard for acquittal under Rule 98*bis*(B), and sustained the prosecution's appeal on this point; however, after pointing out that the choice of remedy lay in its discretion and that this discretion must be exercised on proper judicial grounds, the Appeals Chamber declined to reverse the acquittal entered by the Trial Chamber and to remit the case for further proceedings, including a retrial, considering that it was not in the interests of justice to do so and that the facts of the case did not constitute "appropriate circumstances").
[14] *Id.* at para. 73.

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

1. I agree with the judgment of the Appeals Chamber, but propose to deal with what appears to be a preliminary question as to whether the Appeals Chamber has competence to substitute convictions for acquittals, as the prosecution asks it to do. The question has not been raised by either side but, as it touches the competence of the Appeals Chamber and is within its notice, there is an obligation to look into it before going further.[1]

A. The issue

2. Some jurisdictions do not permit the prosecution to appeal from an acquittal. Some permit it to appeal on law only, without disturbing the acquittal. Some permit it to appeal against an acquittal, either on law or on fact or on a question of mixed law and fact. These models, considered in various combinations, were considered by interested bodies prior to the adoption of the Statute by the Security Council.[2] What is the principle which the Security Council adopted?

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.

3. With respect to the corresponding provisions of the ICTY Statute, paragraph 117 of the report of the Secretary-General, appended to the ICTY Statute and approved by the Security Council, stated:

[1] For the duty of the court to satisfy itself that it has jurisdiction, whether or not the point has been argued, see, by analogy, Judge Basdevant's dissenting opinion in *Certain Norwegian Loans, I.C.J.Reports 1957*, p. 9, at p. 74. The maxim *jura novit curia* applies.

[2] See generally Mark C. Fleming, "Appellate Review in the International Criminal Tribunals", (2002) 37 *Texas International Law Journal*, 111.

> The right of appeal should be exercisable on two grounds: an error on a question of law invalidating the decision or, an error of fact which has occasioned a miscarriage of justice. The Prosecutor should also be entitled to initiate appeal proceedings on the same grounds.

4. The import of this language was recognised by the judges when making Rule 99(B) of the Rules of Procedure and Evidence, which authorises a Trial Chamber to order the continued detention of an acquitted accused where the Prosecutor advises the Trial Chamber in open court of the Prosecutor's intention to file notice of appeal. Article 24(2) of the Statute, in turn, empowers the Appeals Chamber to "affirm, reverse or revise the decisions taken by the Trial Chambers". The combined effect of the two limbs of article 24 is that the Appeals Chamber may substitute a conviction for an acquittal and may do so either on fact or on law or on both.

5. The ICTY Appeals Chamber substituted a conviction for an acquittal in *Tadić*[3]. In *Aleksovski*,[4] it made a new finding against the accused on a question of aiding and abetting although not making a conviction, the matter being treated as pertinent to sentence which for certain reasons was not increased; on another branch of the case, it disagreed with the Trial Chamber as to the gravity of the crimes and increased sentence.[5] In *Bagilishema*,[6] this Appeals Chamber, though affirming an acquittal by the Trial Chamber, entertained an appeal by the Prosecutor who sought a conviction in lieu of the acquittal. Obviously, in appropriate circumstances the Appeals Chamber would have substituted a conviction for the acquittal, its stated view being that "[c]e type d'appel est prévu par le Statut du Tribunal dans son article 24, qui dispose que les deux parties peuvent interjeter appel, et ce, sur des questions de droit et de fait."[7]

6. Thus far, there would seem to be something against the proposition that "the Statute was not intended to authorise the Appeals Chamber to reverse an acquittal by the court of first instance and enter a conviction at the appellate level."[8] Nevertheless, it is proposed to go a little further by examining the aspects mentioned below.

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[3] IT-94-1-A, of 15 July 1999.
[4] IT-95-14/1-A, of 24 March 2000, paras. 155-172, 189 and 192(6).
[5] Ibid., paras. 174-191 and 192(7).
[6] ICTR-95-1A-A, of 3 July 2002. See in particular paras. 8-14.
[7] Ibid., para. 8.
[8] Virginia Morris and Michael P. Scharf, *An Insider's View of the International Criminal Tribunal for the former Yugoslavia*, Vol.1, New York, 1995, p. 295. And see, also by them, *The International Criminal Tribunal for Rwanda*, Vol. 1, New York, 1998, p. 606. See also Mark C. Fleming, "Appellate Review in the International Criminal Tribunals", (2002) 37 *Texas International Law Journal*, 135.

7. First, it may be said that the Appeals Chamber has competence to convict only if there is a right of appeal from a conviction by it, that under the Statute there is no such right of appeal, and that accordingly the Appeals Chamber has no competence to make a conviction, whether based on an error of law or on an error of fact. Thus, it is not merely a question whether there is a right of appeal from a conviction made by the Appeals Chamber; that, by itself, assumes that the Appeals Chamber can convict. The question is an anterior one of whether the Appeals Chamber has jurisdiction to convict if there is no right of appeal from the conviction. In my view, the Statute provides for no right of appeal from a decision of the Appeals Chamber but this does not prevent it from making a conviction in lieu of an acquittal by a Trial Chamber. The issues involved are considered in the following section.

8. Second, it may be said that the Appeals Chamber may make a conviction provided it is not based on facts. To that argument, *Tadić*[9] is a sufficient response. If the proposition was being advanced that the Appeals Chamber could only reverse an acquittal on grounds of law, it would be helpful to show that its decision in that case was really based on law notwithstanding an apparent outcrop of facts; but it will not be persuasive to suggest that some of the crucially important facts were not assessed differently by the ICTY Appeals Chamber from the way in which they were assessed by the Trial Chamber[10] and that this was not the true ground of relevant parts of the decision. In *Bagilishema*, this Appeals Chamber had no doubt that it was competent to allow an appeal on facts by the prosecution against an acquittal, observing only that in this respect the prosecution had a heavier task than that which confronted a convicted person who sought to appeal on facts from his conviction.[11]

9. Nor is there a basis for suggesting that the reference to "miscarriage of justice" in article 24(1) of the Statute necessarily points only to an appeal by the accused. No doubt, "miscarriage of justice" is customarily associated with an appeal by a convicted person in jurisdictions in which the prosecution has no right of appeal from an acquittal.[12] But that is not a reason for supposing that where, as here, the prosecution clearly has a right of appeal, the meaning customary in such jurisdictions of necessity overbears the natural and ordinary meaning of the words as capable of including a miscarriage of justice to either side arising from a mistake in the assessment of facts.

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[9] IT-94-1-A, of 15 July 1999.
[10] In paragraph 183 of its judgment, the Appeals Chamber said: "In the light of the facts found by the Trial Chamber, the Appeals Chamber holds that, in relation to the possibility that another armed group killed the five men, the Trial Chamber misapplied the test of proof beyond reasonable doubt. On the facts found, the only reasonable conclusion the Trial Chamber could have drawn is that the armed group to which the Appellant belonged killed the five men in Jaskići."
[11] ICTR-95-1A-A, of 3 July 2002, para. 14, last two sentences.
[12] Fleming, *supra*, p. 141.

10. The prosecution side embraces the interests of the international community. Certainly, the interests of the international community comprehend the necessity to ensure that the defence has a fair trial. But justice is also due to the international community. If the Trial Chamber's assessment of facts is patently erroneous, there could be a miscarriage of justice to that community. I do not appreciate why the prosecution, as representing the interests of that community, may not appeal on the ground that there has been an "an error of fact which has occasioned a miscarriage of justice" within the meaning of article 24(1) of the Statute. I do not propose to add anything more on this second question, and so I turn to the first.

B. The Statute provides for no right of appeal from a decision made by the Appeals Chamber, but the absence of such a right does not prevent the Appeals Chamber from making a conviction

11. The appeal provisions of the ICTY Statute correspond to those of the Statute of this Tribunal. In paragraph 116 of the Secretary-General's Report to the Security Council on the draft Statute of the ICTY, there was a statement that "the right of appeal … is a fundamental element of individual civil and political rights and has, inter alia, been incorporated in the International Covenant on Civil and Political Rights" ("ICCPR"). But the question is not as to the applicability of the ICCPR but as to its meaning, or more particularly what is the extent of the right of appeal to which it refers. There is no question that there is a right of appeal from a conviction made by the Trial Court. Is there a right of appeal from a conviction made by the Appeals Chamber? If there is not such a right of appeal, does this mean that, by reason of the ICCPR, the Appeals Chamber cannot make such a conviction?

12. The relevant provision is of course Article 14(5) of the ICCPR. This states: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." Referring to the provision, one commentator says that should "a conviction … first result at the appellate level, the person convicted must be afforded a further right of appeal."[13] It is easy to accommodate that view where the conviction is made by an intermediate court of appeal in a three-stage system. But what where the conviction is sought to be made by a court of appeal in a two-stage system? To say that there has to be a right of appeal from a conviction made on appeal means that a conviction cannot be made by an appeal court in such a system.

13. It is proposed to consider the resulting problem on two alternative bases. First, article 14(5) of the ICCPR has the effect of imposing a prohibition on the making of a conviction on appeal in the absence of a right of appeal from the conviction, but there can be reservations to that prohibition and the circumstances of the Tribunal operate to give it the benefit of an appropriate reservation. Second, the prohibition so imposed is not absolute but itself permits of exceptions being made. Again, the circumstances of the Tribunal operate to give it the benefit of an appropriate exception.

14. Beginning with the first of these two alternatives, it is to be observed that statements made by some states on ratification of the ICCPR took the position that the requirement for a right of appeal from a conviction would not apply in relation to a conviction made on appeal. These statements turn on a distinction between legal systems which do not permit appeals from acquittals at first instance and legal systems which do, with the consequence that, in the second category, a conviction may, for the first time, be made at the appellate stage. In the latter case, if there is no third tier in the judicial system, it will not be possible to comply with article 14(5) of the ICCPR if this imposes an absolute prohibition on the making of a conviction on appeal in the absence of a right of appeal from the conviction.

15. Paragraph 4(b) of the Austrian statement said that article 14 of the ICCPR will be applied, provided that -

> paragraph 5 is not in conflict with legal regulations which stipulate that after an acquittal or a lighter sentence passed by a court of the first instance, a higher tribunal may pronounce conviction or a heavier sentence for the same offence, while they exclude the convicted person's right to have such conviction or heavier sentence reviewed by a still higher tribunal.

16. Paragraph 3(a) of the statement made by Germany stipulated that article 14(5) of the ICCPR shall be applied in such manner that -

> [a] further appeal does not have to be instituted in all cases solely on the grounds the accused person, having been acquitted by the lower court, was convicted for the first time in the proceedings concerned by the appellate court.

[13] Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, Strasbourg, 1993, p. 268.

A reservation by Belgium stated:

> Paragraph 5 of the article [i.e., article 14] shall not apply to persons who, under Belgian law, are convicted and sentenced at second instance following an appeal against their acquittal of first instance or who, under Belgian law, are brought directly before a higher tribunal such as the Court of Cassation, the Appeals Court or the Assize Court.

A Norwegian reservation said that in cases –

> where the defendant has been acquitted in the first instance, but convicted by an appellate court, the conviction may not be appealed on grounds of error in the assessment of evidence in relation to the issue of guilt. If the appellate court convicting the defendant is the Supreme Court, the conviction may not be appealed whatsoever.

A reservation by Luxembourg read:

> The Government of Luxembourg declares that it is implementing article 14, paragraph 5, since that paragraph does not conflict with the relevant Luxembourg legal statutes, which provide that, following an acquittal or conviction by a court of first instance, a higher tribunal may deliver a sentence, confirm the sentence passed or impose a harsher penalty for the same crime. However, the tribunal's decision does not give the person declared guilty on appeal the right to appeal that conviction to a higher appellate jurisdiction.

17. There were other reservations excepting the validity of a conviction of senior officials on trial by the highest court - necessarily without appeal.[14] Thus, Italy's reservation to article 14(5) of the ICCPR read:

> Article 14, paragraph 5, shall be without prejudice to the application of existing Italian provisions which, in accordance with the Constitution of the Italian Republic, govern the conduct, at one level only, of proceedings instituted before the Constitutional Court in respect of charges brought against the President of the Republic and its Ministers.

[14] P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer) 3rd ed., p. 687, stating that, in cases in which a person is tried and convicted by the highest tribunal, it "is obvious that … review by a higher tribunal is not possible."

18. Some of these statements lean towards interpretative declarations, others towards reservations. As to the difference, it is said that "[i]f a statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty in its application to the State, it constitutes a reservation. Conversely, if a so-called reservation merely offers a State's understanding of a provision but does not exclude or modify that provision in its application to that State, it is, in reality, not a reservation".[15] Thus considered, it is clear that some at any rate of these statements were reservations. So the question which arises is this: if the effect of the ICCPR is to impose a prohibition on the making of a conviction on appeal unless there is a right of appeal from the conviction, can the prohibition be excluded by a reservation?

19. It would not be compatible[16] with the object and purpose of the ICCPR as a principal human rights treaty[17] to make a reservation to its requirement, one of clear centrality, that a trial must be fair. The Human Rights Committee has rightly observed that "while reservations to particular clauses of Article 14 [of the ICCPR] may be acceptable, a general reservation to the right to a fair trial would not be."[18] But a reservation to a requirement for an appeal from a conviction which is made on appeal does not mean that the reserving state is signifying an intention not to be bound by the requirement for a fair trial. No doubt the right to an appeal is a guarantee of the right to a fair trial, but the non-availability of a right of appeal from a conviction made on appeal does not mean that the requirement for fairness does not apply; the requirement applies at all stages of the proceedings, even during a final appeal from which there is necessarily no appeal.

20. It may be noted that, in respect of a conviction of a senior official on his trial before a Constitutional Court, the Human Rights Committee has upheld the validity of a reservation from the obligation to permit an appeal.[19] The Human Rights Committee therefore accepted that the right to an appeal can be removed in proper cases. It follows, in my view, that a reservation in respect of a requirement for the provision of a right of appeal from a conviction made on appeal is not incompatible with the object and purpose of the ICCPR.

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[15] Paragraph 3 of the General Comment of the Human Rights Committee (1995) 34 I.L.M. 839.
[16] See article 19(c) of the Vienna Convention of the Law of Treaties, 1969, which provides for the making of a reservation which is not prohibited by the treaty, or outside of specified reservations which are permitted, and, if it is not of these kinds, is not "incompatible with the object and purpose of the treaty".
[17] This is correctly stressed in the literature. See, in particular, the Human Rights Committee's General Comment, UN Document CCPR/C/21/Rev.1/Add.6, 2 November 1994, in 34 I.L.M. 839.
[18] The character of such a treaty has been stressed in the literature. See para.8 of the General Comment of the Human Rights Committee, *supra.*
[19] *Diulio Fanali*, Communication No. 75/1980: Italy. 31/03/83. CCPR/C/18/75/1980. (Jurisprudence), para..11.6.

21. If a state-party to the ICCPR can make such a reservation, what is the position of the Tribunal? The Tribunal, not being a state-party, could not make a reservation. If the principles of the ICCPR apply to the Tribunal - as they do - this must be on the basis that the Tribunal is given a benefit equivalent to the opportunity possessed by states to make reservations. This must mean that the provisions of the ICCPR have to be construed with modifications which take account of the special circumstances of the Tribunal.

22. This view is consistent with the jurisprudence of the ICTY. Paragraph 19 of the decision of the ICTY Trial Chamber in *Delalić* made reference to a provision of the ICCPR but also to the non-applicability of the provision because of "the unique circumstances under which the International Tribunal operates."[20] More generally, the point was made by the ICTY Trial Chamber in *Kunarac* that "notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law."[21]

23. I reach the conclusion then that, by reason of its circumstances, the Tribunal stands free of any prohibition imposed by article 14(5) of the ICCPR on the making of a conviction on appeal in the absence of a right of appeal from the conviction.

24. The second alternative argument is that it is possible that states participating in the ICCPR were signifying, either by making the abovementioned statements or by omission to object to them, that, in their view, the ICCPR did not impose an absolute prohibition on the making of a conviction on appeal in the absence of a right of appeal from the conviction but that it permitted exceptions. Other developments seem consistent with this understanding.

25. Article 2, paragraph 1, of the Seventh Protocol to the European Convention on Human Rights, which entered into force in 1988, provides that "[e]veryone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal." Paragraph 2 then states:

[20] IT-96-21-T of 25 September 1996.
[21] IT-96-23-T & IT-96-23/1-T, of 22 February 2001, para. 471.

> This right shall be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

26. So, there, the fact that the conviction was made "following an appeal against acquittal" does not automatically give a right of appeal; such a case may be regarded as having been excepted out of the requirements of paragraph 1 of article 2 of the Protocol.

27. Forty-one states have signed that Protocol to the European Convention on Human Rights; 35 of these states have also ratified the Protocol. I do not consider that, in article 2, paragraph 2, of the Protocol, these 35 states (which were also parties to the ICCPR) intended to act at variance with any obligations under article 14(5) of the ICCPR. Rather, they were indicating that their view was that there was nothing in that provision which was efficacious to prohibit them from making exceptions to the obligation to provide for an appeal from a conviction. Certainly, with a total of 41 states (including the six states which signed the Seventh Protocol but have not yet ratified it) taking the position that a court of appeal could make a conviction even if there was no right of appeal from the conviction, it could not be said that there was any customary international law to the opposite effect.

28. Again, I consider that, given the special circumstances of the Tribunal, it acts within the realm of permissible exceptions when it makes a conviction on appeal in the absence of a right of appeal from that conviction.

29. Thus, whether the proper meaning of article 14(5) of the ICCPR is that it has the effect of imposing a prohibition on the making of a conviction on appeal unless there is a right of appeal from the conviction but permits a reservation being made to that prohibition, or that the prohibition is not absolute but itself permits of exceptions being made, it follows that a conviction may be made on appeal to the Appeals Chamber although there is no right of appeal from such a conviction. If, on the contrary, the view is held that such a conviction may be made but only on the basis that there is such a right of appeal, consideration may be given to certain structural implications of the suggested right of appeal and to the juridical force of any decision purporting to set aside such a conviction.

30. With respect to the structural aspects, if there is a right of appeal from a conviction made by the Appeals Chamber, to what body would it lie? There being no other appeals court, the appeal would have to lie to another panel of the same Appeals Chamber. But, since each panel

equally represents the Appeals Chamber, that looks like saying that a convicted person can appeal from the Appeals Chamber to the Appeals Chamber: the members may be different, but the institution is the same. So it bears observing that what is involved here is not a reconsideration. In a case of reconsideration, the later deciding entity is, in law, the same as the previous deciding entity. This case involves an appeal. In an appeal, there is a hierarchical relationship of authority between the two bodies, even if they otherwise have the same legal status. This is recognised in article 14(5) of the ICCPR, which speaks of the review being conducted by a "higher tribunal". One panel of the Appeals Chamber is not a "higher tribunal" than another panel of the Appeals Chamber: each is a form through which the same Appeals Chamber acts.

31. The structure of the Tribunal, as laid down by the Security Council, establishes a two-tier system. To suggest that there has to be a right of appeal from a conviction made by the Appeals Chamber is an attempt to create a three-tier system in which the second panel will be sitting as a "higher tribunal". That has to be done by the main law. It cannot be done by case law. Nor can it be done by amending the Rules.[22] Wide as the rule-making competence is, Rules made under article 14 of the Statute are intended to regulate matters which are "appropriate" to the functioning of the structure created by the Statute, not to vary it. Human rights cannot operate of their own force to amend the structure established by the Security Council; they will be effecting such an amendment if they are regarded as sufficient to give a right of appeal to a "higher tribunal" from a conviction made by the Appeals Chamber.

32. Further, if there is a right of appeal from one panel of the Appeals Chamber to another panel of the Appeals Chamber, it has to be remembered that a contempt, which was the subject of *Tadić*,[23] may equally be committed before the second panel. So there would have to be a right of appeal to a third panel, and so on. Several "higher tribunals" may be needed. The Tribunal would soon run out of available judicial personnel. In *Lonhro*,[24] for the reasons given in that case,[25] a contempt of the House of Lords was determined by another committee of the appellate committee

[22] This has been done in cases of contempt of the ICTY Appeals Chamber by Rule 77(K), passed on 12 July 2002 by the ICTY plenary. The validity of the provision may be considered.
[23] IT-94-1-A-AR77 of 27 February 2001.
[24] [1990] 2 A.C.178
[25] What happened was that the members of the original committee effectively recused themselves and so the second committee acted in their place. Lonhro had sent four of the five members of the original committee, individually, copies of certain offending material. Their "Lordships were therefore reluctant to leave Lonhro with a sense of grievance, however misguided, by insisting on hearing the proceedings themselves."([1990] 2 AC 178). That consideration does not apply where the offence is directed to the court in its corporate capacity; on the contrary, as was observed by Lord Keith in *Lonhro*, " … the normal and natural forum for the hearing of contempt relating to proceedings before this House is the House itself." ([1990] 2 AC 176).

of the House. But there was no question of an appeal lying from the adjudicating committee to another committee.

33. An appeal from one formation of a judicial entity to another formation of the same entity – say, the plenary – may be possible, but only where such an appeal is authorised by the master law. In this case, has the master law - the Statute - done so? It seems to indicate the contrary intent. For, whatever the formation of the Appeals Chamber, by the Statute the formation can hear an appeal only from decisions of a lower body in the hierarchy. This is evidenced by paragraph 1 of article 24 of the Statute; paragraph 2 empowers the Appeals Chamber to "affirm, reverse or revise the decisions taken by the Trial Chambers". So the Statute did not contemplate that decisions of the Appeals Chamber could be challenged on appeal.[26] Even if the decision of the first panel of the Appeals Chamber is regarded as a decision made "in the first instance,"[27] that does not make that panel of the Appeals Chamber a "Trial Chamber". At any rate, in a case of the kind under review, the first panel does not hear the case in the same way as a Trial Chamber does; it hears the case on appeal.

34. With respect to the juridical force of the decision of the second panel of the Appeals Chamber, nothing in the Statute or in the ICCPR authorises the strangeness of an arrangement whereby one panel of the same judicial body can overturn a decision of, or remit to, or otherwise direct, another panel of the same judicial body. It is difficult to see that the Statute gives more juridical force to decisions of one panel of the Appeals Chamber than to those of another. Thus, two decisions of equal juridical force and on the same matter would be left on record. There would appear to be some difficulty in reconciling this with the implications of Judge Anzilotti's dictum that it "is clear that, in the same legal system, there cannot at the same time exist two rules relating to the same facts and attaching to these facts contradictory consequences ... [E]ither the contradiction is only apparent ... or else one [rule] prevails over the other ..."[28]

[26] The "gatekeeping" character of a bench of three judges of the Appeals Chamber is not being considered; in any event, there is really no appeal from their decision to the full Appeals Chamber on whether an appeal should go forward, even though the latter may come to a different conclusion as to whether the appeal should have been referred to it.
[27] In *Tadić*, IT-94-1-A-AR77 of 27 February 2001, para. (i) of the operative paragraph stated that "the Judgement of the Appeals Chamber, ruling in the first instance is upheld." As a nullity cannot be upheld, the implication is that the validity of the judgment of the Appeals Chamber in so far as it concerned conviction, which was sought to be appealed from, was recognised.
[28] *Electricity Company of Sofia and Bulgaria, P.C.I.J., Series A/B, No. 77*, p. 90, dissenting opinion; and see, *ibid*., at p. 105 per Judge Urrutia, also dissenting. Mr Elihu Lauterpacht, Q.C., thought that Judge Anzilotti's view could be

35. Apart from the contempt decision of the ICTY Appeals Chamber in *Tadic*,[29] there is no precedent for empowering one panel of the Appeals Chamber to hear an appeal from a decision by another panel of the same Chamber. My respectful view is that, in this Appeals Chamber, preference is to be given to the dissenting opinion of Judge Wald in that case.

36. These difficulties in the "panel" solution lead to examination of an alternative possibility. This is that the Appeals Chamber, if it considers that there should be a conviction, should refrain from convicting and instead refer the case to the Trial Chamber in order to preserve a right of appeal from a conviction made by the latter. But the idea is not persuasive. This is because the Trial Chamber can scarcely disregard the indications previously given by the Appeals Chamber if it is to reverse its decision to acquit, and because an ultimate appeal to the Appeals Chamber would collide with those same indications. The principle of fairness which is sought to be served would thus be defeated.

37. If, as I think, nothing in conventional law, customary international law, or general principles of law prohibits the making of a conviction by the Appeals Chamber in lieu of an acquittal by a Trial Chamber and without a right of appeal from the conviction, is the position different in respect of sentencing by the Appeals Chamber for such a conviction? It is difficult to see why. Sentencing is a consequence of conviction and is complementary to the latter. Accordingly, it is expected to be done by the convicting tribunal. In particular circumstances, the Appeals Chamber may remand the case to a Trial Chamber for sentence to be passed in respect of a conviction made by the Appeals Chamber.[30] But, if that is possible in some circumstances, it is not obligatory in all circumstances. The reason for it cannot be the object of providing the accused with a right of appeal. If, as I consider, there is no right of appeal from a conviction by the Appeals Chamber, it is difficult to see why there has to be a right of appeal from a sentence passed by it for such a conviction.

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challenged but he did not pursue the point. See *1973 I.C.J. Pleadings, Nuclear Tests (Australia v. France)*, Vol. 1, p. 238.

[29] IT-94-1-A-AR77 of 27 February 2001.

[30] This was done in *Tadić*, IT-94-1-A, of 10 September 1999. Initially the Appeals Chamber deferred sentencing, by itself, to a further stage of the appeal proceedings. See *Tadić*, IT-94-1-A, of 15 July 1999, para. 327(6), in which it said that it was deferring "sentencing on the Counts mentioned in sub-paragraphs (4) and (5) above to a further stage of sentencing proceedings". In later remitting sentencing to a Trial Chamber, the Appeals Chamber in *Tadić* was careful to say "that, for the purposes of this case, it is sufficient for the Appeals Chamber to decide … that it is competent to remit sentencing to a Trial Chamber and that in the circumstances of the case it is preferable to do so". This was said after it was noted that the parties had "indicated that they recognised the competence of the Appeals Chamber itself to pronounce sentences but considered that the Appeals Chamber was also competent to remit sentencing to a Trial Chamber, which latter course they considered preferable in the circumstances of the case". See IT-94-1-A, of 10 September 1999, p. 3. The Appeals Chamber did not tie itself to a position that it was not competent both to convict and to sentence.

C. Conclusion

38. One of two possible grounds for objecting to the competence of the Appeals Chamber to substitute a conviction for an acquittal by the Trial Chamber is that there is no right of appeal from a conviction made by the Appeals Chamber. If, indeed, there is a right of appeal from a conviction made by the Appeals Chamber, as was thought to be the position in *Tadic*[31] and as was sought to be implemented in that case, that answers the objection and so leaves the Appeals Chamber free to make a conviction. However, for the reasons given, I do not think the objection is sound: there is no right of appeal from a conviction by the Appeals Chamber but this does not prevent the Appeals Chamber from making such a conviction. The other possible ground of challenge to the competence of the Appeals Chamber – or to part of its competence - to substitute a conviction for an acquittal by a Trial Chamber is that this may be done provided that the conviction is not based on facts. For the reasons given, I do not think that argument is right.

39. It is possible that, if many appeals were successively available, an acquittal by the court of first instance could be replaced by a conviction by the first appeal court, only in turn to be restored by the second appeal court, to be in turn replaced by a conviction by the third appeal court, and so on. The suggestion of decisional futility is not surprising. In one jurisdiction, it was once estimated that about 33 per cent. of all appeals succeeded, whether from the lower courts to an intermediate court of appeal or from the latter to a higher court of appeal. Thus, as it was observed, there was "no reason for believing that if there was a higher tribunal still the proportion of successful appeals to it would not reach at least that figure."[32] To insist on further rights of appeal is to ignore the truth that the "fundamental human right is not to a legal system which is infallible but to one that is fair."[33] That has to be borne in mind in designing the architecture of a legal system: there has to be an end to litigation.

[31] IT-94-1-A-AR77, of 27 February 2001.
[32] Lord Justice Atkin, "Appeal in English Law" (1927-29), 3 Camb. L.J. 1, at 9.
[33] *Maharaj v. Attorney-General of Trinidad and Tobago (No. 2)*, [1979] A.C. 385, P.C., at 399, per Lord Diplock. See also *Bell v. Director of Public Prosecutions (Jamaica)*, [1985] 1 A.C. 937, P.C., per Lord Templeman.

40. Thus, I hold that there is no right of appeal from a conviction made by the Appeals Chamber, but that, notwithstanding the absence of such a right of appeal, the Appeals Chamber is competent to make a conviction, whether or not this is based on facts.

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

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Mohamed Shahabuddeen

Dated this 26th day of May 2003
At Arusha
Tanzania

ANNEX A: APPEAL PROCEEDINGS

(a) Summary of facts relating to filings on appeal

1. Georges Rutaganda (the "Appellant") and the Office of the Prosecutor (the "Prosecution") filed appeals on 5 and 6 January 2000, respectively, against the Judgement and Sentence rendered on 6 December 1999 in the instant case. On 9 July 2001, the Prosecution notified the Appeal Chamber that it was abandoning its second ground of appeal.[1] By order dated 7 March 2003, the President of the Appeals Chamber designated himself as the Pre-Hearing Judge ("PHJ").[2] Judges Jorda, Shahabuddeen, Güney, Pocar and Meron were assigned to the present case on 30 November 2001.[3]

2. On 11 January 2000, the Appellant filed a motion for the inadmissibility of the Prosecutor's Notice of Appeal, on the grounds that the time limit set forth in Rule 108 of the Rules had not been respected.[4] The Prosecution responded on 21 January 2000 and filed a motion the same day seeking an extension of the deadline for filing its Notice of Appeal.[5] On 12 January 2000, Appellant also filed with the Appeals Chamber of a Motion for leave to modify its Notice of Appeal.[6] By decision dated 15 March 2000,[7] the PHJ ruled on the motions as follows: the motion for inadmissibility of the Prosecutor's Notice of Appeal was rejected; the motions for an extension of the deadlines and for leave to amend the notice of appeal were granted. The amended Appellant's Notice of Appeal, annexed to the Motion of 12 January 2000, was filed that same day, to wit 15 March 2000 ("Notice of Appeal").

3. On 23 November 2000, the Appellant filed a motion for leave to amend his Notice of Appeal so as to add two additional grounds of appeal,[8] motion to which the Prosecution

[1] "Notice Abandoning Ground Two (2) of the Prosecution's Notice of Appeal Dated 5 January 2000", filed on 9 July 2001.
[2] "Designation of Pre-Hearing Judges", 7 March 2000.
[3] "*Ordonnance du président relative à la composition de la Chambre d'appel pour une affaire*", 30 November 2001. See also "Order Assigning a Judge to a Case Before the Appeals Chamber", filed on 12 March 2003 where Judge Meron, newly elected President of the ICTY, in his capacity as President of the Appeals Chamber of both ICTY and ICTR, assigned Judge Jorda to the case. The Appeals Chamber Bench for this case was therefore composed of Judge Meron, Judge Pocar, Judge Jorda, Judge Shahabuddeen and Judge Güney.
[4] "Motion for Inadmissibility of the Prosecutor's Notice of Appeal (Rule 108 of the Rules of Procedure and Evidence of the ICTR)", 11 January 2000.
[5] "The Prosecution's Response to the Defence Motion to Reject the Prosecutor's Notice of Appeal and the Prosecution's Motion to Extend the Time Limits for Filing the Prosecution's Notice of Appeal (Rule 116 of the Rules of Procedure and Evidence)", 21 January 2000.
[6] "*Requête pour amender l'Acte d'appel de l'Appelant"* (Rule 108 of the Rules of Procedure and Evidence (Annex: *Acte d'appel corrigé*), 12 January 2000.
[7] "Decision (1. Motion for Inadmissibility of the Prosecutor's Notice of Appeal; 2. Motion to Amend Appellant's Notice of Appeal; 3. Motion to Extend the time-limits for filing the Prosecution's Notice of Appeal), 15 March 2000.
[8] "Motion to Amend the Appellant's Notice of Appeal (Article 20 of the Statute; Rule 54 and 107 of the Rules of Procedure and Evidence)", 23 November 2000. The grounds can be summarised as follows: (1) the conviction should be quashed and a new trial ordered because the Trial Chamber relied upon "inadmissible" evidence, as the said evidence was neither disclosed to the Appellant nor admitted into the

responded on 1 December 2000.[9] The Appeals Chamber dismissed the Motion on 5 April 2001 on the grounds, *inter alia*, that "the allegation of bias" was already covered in the Notice of Appeal and that the Appellant was free to develop this issue in his Appellant's Brief, but only insofar as it was directly related to the ground appeal already included in his Notice of Appeal.[10]

4. On 26 October 2000, the Appellant filed an application to amend the certified English translation of his Notice of Appeal, alleging that it contained "prejudicial" translation errors.[11] By decision rendered on 14 November 2000, the PHJ ruled that said Motion was to be addressed to the Registry.[12] An amended, certified translation of the Notice of Appeal was filed by the Registry on 18 February 2002.[13]

(b) Appeal Briefs

5. On 27 March 2000, the Appellant filed a Motion for Declaratory Judgement and Ancillary Motion for Extension of Time-Limits,[14] requesting, *inter alia*, that the time-limits set forth in the version of Rule 111 of the Rules prior to the amendment of 21 February 2000[15] be applicable in the instant case. In its Response of 6 April 2000,[16] the Prosecution requested to have the same due date. By decision dated 20 April 2000, the PHJ granted the motion in part by ordering, notably, that the Parties file their Appeals Briefs within 90 days from the certification of the trial record.[17]

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evidence before it (namely Document 42 of Volume I and Documents 233 and 234 of Volume IV of the Trial Record); the fact that the Trial Chamber had such documents before it and relied upon them in its decision shows that it was biased; **(**2) the conviction should be quashed and a new trial ordered because of the Prosecutor's failure to discharge its obligation to disclose the evidence consisting of Documents 233 and 234 of Volume IV of the Trial Record**.**

[9] "Prosecution Response to the Appellant's Motion to Amend his Notice Of Appeal ", 1 December 2000; the Defence filed its reply on 4 December 2000 ("Appellant's Reply").

[10] "Decision (Motion to Amend the Appellant's Notice of Appeal)", 5 April 2001. According to the Decision of 5 April 2001, the Appellant was therefore not authorised to develop *in extenso* the arguments contained in his Appellant's Brief.

[11] "Appellant's Motion to Amend the Official Translation of the Notice of Appeal", 26 October 2000.

[12] "*Décision*", 14 November 2000.

[13] "Amended Notice of Appeal (Pursuant to Appellant's Motion to Amend the Official Translation of the Notice of Appeal Filed on 25 October 2000) (Rule 108 of the RPP of the ICTR)", 18 February 2002.

[14] "Motion for Declaratory Judgement and Ancillary Motion for Extension of Time-Limits (Rules 54 and 116 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda)", 27 March 2000. This motion was amended on 11 April 2000 (See Appellant's "Motion to Amend his Motion for declaratory Judgement and Ancillary Motion for Extension of Time-Limits (Rules 54 and 107 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda)", 11 April 2000).

[15] At the Plenary of the ICTR Judges, on 21 February 2000, Rule 111 of the Rules was amended so as to include the provision that the Appellant's brief was to be filed within 90 days of the filing of the Appellant's brief (and not of the certification of the trial record).

[16] "The Prosecution's response to the Defence motion to extend the time limit for filing the appeal brief", 6 April 2000.

[17] "Decision (Motion for Declaratory Judgement and Ancillary Motion for Extension of Time Limits), 20 April 2000.

6. The Registry certified the trial record on 28 July 2000. However, by Memorandum dated 17 August 2000, it informed the Parties that the trial record was not complete. In another Memorandum dated 7 September 2000, the Registry informed the Parties that the record on appeal had been sent to them by DHL on 1 September 2000. On 21 September 2000, the Prosecution filed a Motion seeking clarification of the time limit to file the Appellant's Brief on the grounds that the parties had been notified of the dates for certification.[18] On 6 October 2000, the PHJ confirmed that the time limits would be calculated from the time of the parties' receipt of the certified documents of the record on appeal, and, therefore, that the deadline for filing the Prosecution's Appeal Brief would start to run from 11 September 2000.[19] The Prosecution Brief was filed on 11 December 2000, in accordance with the Decision of 6 October 2000.

7. On 17 November 2000, the Appellant filed a first extremely urgent motion to quash certification of the trial record, on the grounds, *inter alia*, that the record contained errors and omissions.[20] On 29 November 2000, the Appellant filed another extremely urgent motion, reiterating, *inter alia*, the prayer made in his first motion for an extension of the time limit.[21] By order rendered on 4 December 2000,[22] the PHJ directed the Registry to make the necessary corrections to the certified record and to file the said corrections and remaining information in the form of an addendum within 15 days of the said Order. The PHJ also specified that the Appellant was to file his Appellant's Brief within 30 days after service of the said Addendum.

8. The addendum referred to in the Decision of 4 December 2000 was filed by the Registry on 4 January 2001. On 5 January 2001, the Registry wrote to the PHJ informing him that the assignment regarding the Addendum had not been completed. A second letter, dated 9 January 2001, stated that a period of 15 working days was needed to complete the assignment. On 8 January 2001, the Appellant filed an extremely Urgent Motion for Suspension of Time Limits and Other Matters, on the grounds that he had been assigned a new Lead Counsel on 5 January 2001 and that the record on appeal was still incomplete.[23] By decision rendered on 9 January 2001, the PHJ requested the Registrar to serve the supplemental addendum on the parties as soon as possible, and allowed the Appellant an extension of 15 days to file a response to the Prosecution's Appeal Brief, and 60 days to file his Appellant's Brief, starting from the date of service of the addendum, in its final form, on the parties.[24]

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[18] "Prosecution's Motion to Seek Clarification of the Time Limit to File The Appellant's Brief", 21 September 2000.
[19] "Decision", filed on 6 October 2000.
[20] "Extremely Urgent Motion to Quash Certification of the Trial Record for Completion and Correction of the Record and for Ancillary Relief", 17 November 2000.
[21] "Appellant's Extremely Urgent Motion for the Suspension of Time Limits for Filing Appellant's Brief", 29 November 2000.
[22] "*Ordonnance (requête en annulation de la certification du dossier d'appel et suspension des délais*)", 4 December 2000.
[23] "Extremely Urgent Motion for Suspension of Time Limits and Other Matters", 8 January 2001.
[24] "Order (8 January 2001 motion for suspension of time limits)", filed on 10 January 2001

9. The Registry filed a supplemental *Addendum* on 6 February 2001 and a second supplemental *addendum* on 14 February 2001.[25] On 16 February 2001, the Appellant brought before the Appeals Chamber an extremely urgent motion for the time limits set forth in the PHJ's Decision of 9 January 2001 to start either from the date of receipt of the completed A*ddendum* or from the date of the Appeals Chamber Order.[26] By Decision dated 17 February 2001,[27] the PHJ ruled that the start time of the time limits set by the Order of 9 January 2001 (on the filing by the Appellant of his Brief in Respondent's and his Appellant's Brief) was 14 February 2001.

10. On 27 February 2001, the Appellant filed an extremely urgent motion requesting an extension of time of 45 days for the filing of his Respondent's Brief and 90 days for the filing of his Appellant's brief on the ground that it was necessary that a Co-Counsel be assigned, as he could not on his own file his briefs within the time limit granted by the Decision of 16 February 2001[28]. By Order dated 2 March 2001, the PHJ allowed the Appellant a "final extension" and ordered that the latter was to file his Respondent's Brief within 30 days and his Appellant's Brief within 60 days of service of the said Order.[29]

11. The Appellant filed his Respondent's Brief on 2 April 2001 and his Appellant's Brief on 1 May 2001, in accordance with the PHJ's Order. The Prosecution filed its Brief in Reply on 17 April 2001, pursuant to Rule 113 of the Rules. Moreover, the Appellant filed an *Erratum* and an Appendix to his Appellant's Brief on 14 and 24 May 2001, respectively.

12. On 21 May 2001, the Prosecution filed an urgent motion for extension of time, on the grounds, *inter alia*, that leave to extend the time limits would enable it to avoid filing amended briefs, in view of the latest Judgements issued by the Appeals Chamber in *Akayesu* and *Kayishema/Ruzindana*, and that the Appellant's Brief was exceptionally voluminous.[30] By Order dated 30 May 2001, the PHJ granted the Motion, ordering the Prosecution to file its Respondent's Brief by 1 July 2001 at the latest.[31] The Prosecution filed its Respondent's Brief on 2 July 2001, in accordance with the PHJ's Order.[32] The Prosecution also filed a *Corrigendum* to the said Brief on 11 October 2001.

13. On 25 June 2001, the Appellant filed an extremely urgent motion, for extension of the time limits for the filing of his Brief in Reply on the grounds, *inter alia*, that it would not be feasible for him to complete his brief within the fifteen (15) days provided for in Rule 113 of

[25] Although the latter document was filed on 13 February 2001, the PHJ's Decision of 16 February 2001 states that in light of the documents filed by the Registrar, certification of the record was completed on 14 February 2001.
[26] "Extremely Urgent Motion for Suspension of the Time Limits for Filing Appellant's Response to the Prosecutor's Appeal Brief and the Appellant's Brief", 16 February 2001.
[27] "Decision (Motion to Suspend Time Limits for Filing Briefs) ", filed on 17 February 2001.
[28] "Extremely Urgent Motion for Suspension of the Time Limits and Other Matters", 27 February 2001.
[29] "Scheduling Order (Extremely Urgent Motion for Suspension of Time Limits)", 2 March 2001
[30] "Prosecution's Urgent Motion for Extension of Time Limits", 21 May 2001.
[31] "*Ordonnance* (Prosecution's Urgent Motion for Extension of Time Limits)," 30 May 2001.
[32] 1 July 2001 (Sunday) was not a working day at the Tribunal.

the Rules.[33] By Order issued on 2 July 2001, the PHJ declined to rule on the Motion, as he deemed it premature, considering that the Prosecution's Respondent's Brief had not yet been filed.[34] On 4 July 2001, the Appellant a filed a renewed urgent motion for extension of the time limits for filing his Brief in Reply, requesting that the Appeals Chamber grant him an additional 45 days to file his brief in reply.[35] By Order issued on 6 July 2001, the PHJ noted that while the motion for extension of time limits was meritorious, the 45 days requested were excessive; an extension of 15 days was therefore granted.[36] The Appellant filed his Brief in Reply on 1 August 2001, in accordance with the PHJ's Order.

14. On 13 December 2001, the Appellant filed an urgent motion for translation, requesting the Appeals Chamber to order the Registrar to have all the filings on appeal by the parties translated.[37] By Order issued on 25 January 2002, the PHJ granted the said motion for translation, while specifying, however, that the said translation was not a condition for holding hearings on appeal, thereby rejecting the argument put forward by the Prosecution in its Brief in Response.[38]

15. On 26 April 2002, the PHJ noted that Rutaganda's filings on appeal were not sufficiently clear and ordered the latter to file, by 10 May 2002 at the latest, a new document clearly and precisely setting out his grounds of appeal.[39] On 29 April 2002, the Appellant filed an extremely urgent motion seeking, *inter alia*, an extension of the time limit for filing the new document.[40] On 7 May 2002, the PHJ granted the said Motion in part and ordered the Appellant to file the new document by 3 June 2002 at the latest.[41] On 3 June 2002, the Appellant filed the additional document setting out the grounds of appeal.[42]

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[33] "Extremely Urgent Motion For Extension of the Time-Limits for Filing the Defence Brief in Reply to the Prosecutor's Response", 25 June 2001.

[34] "Order (Extremely Urgent Motion for Extension of the Time-Limits for Filing of the Defence Brief in Reply to the Prosecutor's Response)", 2 July 2001.

[35] "Renewed Extremely Urgent Motion for Extension of the Time-Limits for Filing the Defence Brief in Reply to the Prosecutor's Response", 4 July 2001.

[36] "Order (Renewed Extremely Urgent Motion for Extension of the Time-Limits for Filing the Defence Brief in Reply to the Prosecutor's Response)", 6 July 2001.

[37] "Urgent Motion for Translation of the Parties' Appeal Briefs", 13 December 2001.

[38] "Order (Urgent Motion for Translation of the Parties' Appeal Briefs)", 25 January 2002.

[39] "Decision Ordering Clarification, and Scheduling Forthcoming Hearings", 26 April 2002.

[40] "Extremely Urgent Motion for Adjournment of the Oral Hearing in this Matter, and an Extension of Time for Filing of Additional Materials Required Pursuant to the Order of the Honourable Judge Claude Jorda, Dated 26 April 2002", 29 April 2002.

[41] "*Décision* (Extremely Urgent Motion for Adjournment of the Oral Hearing in this Matter, and an Extension of Time for Filing of Additional Materials Required Pursuant to the Order of the Honourable Judge Claude Jorda, Dated 26 April 2002)", 7 May 2002.

[42] "Grounds of Appeal Supplemental Defence Document pursuant to the Order of the Honourable Judge Claude Jorda, Presiding Judge, dated 26 April 2002", filed 3 June 2002.

(c) Assignment of new Counsel

16. By Decision dated 5 January 2001,[43] the Registrar granted a Request filed on 4 January 2001 by Lead Counsel, Ms. Tiphaine Dickson, to withdraw from the case for health reasons, and assigned Co-Counsel, Mr. David Jacobs, as Lead Counsel for Georges Nderubumwe Anderson Rutaganda. Professor Allan Hutchinson was assigned as Co-Counsel on 1 February 2001.

17. On 7 March 2001, Lead Counsel, Mr. David Jacobs, wrote to the Registrar requesting the withdrawal of Co-Counsel, Mr Hutchinson,[44] and the assignment of Mr. David Paciocco to replace him. Mr. David Paciocco was assigned as the Appellant's Counsel on 13 March 2001.[45]

(d) The Hearings on Appeal

18. On 26 April 2002, the PHJ issued a first Scheduling Order stating that the hearings on appeal in this matter were to begin on Monday, 27 May 2002.[46] On 29 April 2002, the Appellant filed an extremely urgent motion requesting, *inter alia*, the adjournment of the hearing on appeal on the grounds that it was physically impossible for him to comply with the deadline set in the Order 26 April 2002.[47] On 7 May 2002, the PHJ granted the motion in part by ordering the adjournment of the hearing, stating that a new order was to specify the date and details of the hearings on appeal.[48] On 22 May 2002, the PHJ issued a second scheduling order, stating that the hearings on appeal would be held on Thursday, 4 and Friday, 5 July 2002, and that a new scheduling order would specify the details of the hearings on appeal at a later date.[49] The order was issued on 26 June 2002.[50]

(e) Prosecution's Request for Clarification

19. On 5 June 2002, the Prosecution filed an urgent request seeking clarification as to whether, on the one hand, Rule 66(B) (and by implication, Rule 67 of the Rules) apply to proceedings on appeal, and, on the other hand, whether written witness statements fall under

[43] "Decision of Withdrawal of Ms. Tiphaine Dickson as Lead Counsel of Mr. Georges Rutaganda and Assignment of Mr. David Jacobs as Lead Counsel of Mr. Georges Rutaganda", rendered on 5 January 2001.
[44] In his "Extremely Urgent Motion for Suspension of the Time-Limits For Filing Appellant's Response to the Prosecutor's Appeal Brief and the Appellant's Brief", filed on 16 February 2001, Lead Counsel, Mr. Jacobs, informed the Appeals Chamber that Co-Counsel, Mr. Hutchinson, had notified him of his decision to withdraw from the case on 15 February 2001.
[45] "Decision of Withdrawal of Mr Allan Hutchinson as Co-Counsel of Mr. Georges Rutaganda and Assignment of Mr. David Paciocco as Co-Counsel of Georges Rutaganda", rendered on 13 March 2001.
[46] "Decision Ordering Clarification, and Scheduling Forthcoming Hearings", 26 April 2002.
[47] *Ibid.* "Extremely Urgent Motion for Adjournment of the Oral Hearing in this Matter, and the Extension of Time for Filing of Additional Materials Required Pursuant to the Order of Honourable Judge Claude Jorda, Dated 26 April 2002 – 2036/A-2033/A", filed on 29 April 2002.
[48] See Footnote 40, *supra*.
[49] "Scheduling Order", 22 May 2002.
[50] "Scheduling Order" and "Corrigendum" dated 26 and 27 June 2002, respectively.

the scope of Rule 66(B) of the Rules.[51] Considering the nature of the motion and the fact that the hearings on appeal were due to begin in less than 30 days, the PHJ ordered the Appellant to file his response no later than 12 June 2002.[52] The Appellant did file his Response on 12 June 2002 and the Prosecution filed its Reply on 17 June 2002.[53]

20. In its 28 June 2002 Decision on the Prosecution's urgent motion, the Appeals Chamber ruled, *inter alia*, that Rule 66(B) and, by implication, Rule 67 of the Rules apply on appeal, with the exception of cases where the evidence requested for inspection by the Defence pursuant to Rule 66(B) of the Rules was available at trial. With regard to witness statements, the Appeals Chamber held that, even assuming they fall under the scope of Rule 66(B) of the Rules, the Appellant had not demonstrated in this instance that the said statements were not available at trial. Moreover, with regard to the evidence relating to the indictment against General Rusatira, considering that they were the subject of a decision rendered by Trial Chamber III on 12 April 2002, the Appeals Chamber found that it had no jurisdiction to order access thereto.[54]

21. On 1 July 2002, the Prosecution filed with the Appeals Chamber an extremely urgent motion seeking clarification as to whether Rule 66(B) of the Rules applies to witness statements obtained during appellate proceedings.[55] By Decision dated 4 July 2002,[56] the majority of the Judges of the Appeals Chamber decided that the written statements of witnesses should be considered as being included within the scope of materials to be disclosed by the Prosecutor to the Defence, as provided for under Rule 66(B) of the Rules.[57]

(f) Motions filed after the hearing on appeal

22. On 4 November 2002, the Appellant filed an urgent motion for disclosure and admission of additional evidence, requesting, *inter alia*, (1) that the *in camera* testimony of Witness X in the *Media* Case and any other evidence given by this witness, any evidence provided by members of the National Committee of the *Interahamwe za MRND* and any evidence that was relied upon for the decision to withdraw charges against Léonidas Rusatira be disclosed to him, pursuant to Rules 66(B) and 68 of the Rules; (2) that the Appeals Chamber issue an order admitting, pursuant to Rule 115 of the Rules, Witness X's testimony in the

[51] "Prosecution's Urgent Request for Clarification in Relation to the Applicability of Rule 66(B) to Appellate Proceedings and Request for Extension for the Page Limit Applicable to Motions", 5 June 2002.
[52] "Order", 6 June 2002.
[53] "Defence Response to Prosecution's Urgent Request for Clarification in Relation to the Applicability of Rule 66(B) to Appellate Proceedings and Request for Extension of the Page Limit Applicable to Motions", filed on 12 June 2002 and "Prosecution Reply to the Defence Response to the Prosecution's Urgent Request for Clarification In Relation to the Applicability of Rule 66(B) to Appellate Proceedings", filed on 17 June 2002.
[54] "*Décision* (Prosecution's Urgent Request for Clarification in Relation to the Applicability of Rule 66(B) to Appellate Proceedings and Request for Extension of the Page Limit Applicable to Motions)," 28 June 2002 (Judges Jorda and Shahabuddeen attached a *Déclaration* to this *Décision*).
[55] "Prosecution's Extremely Urgent Motion for Clarification of Whether Witness Statements are to be Disclosed During Appellate Proceedings Pursuant To Rule 66(B)", filed on July 2002.
[56] T(A), 4 July 2002, p. 18.
[57] Judges Claude Jorda and Mohamed Shahabuddeen appended a Dissenting Opinion.

Media Case as new evidence; (3) that the Appeals Chamber grant the Appellant leave to amend his Notice of Appeal in order to add two grounds of appeal; and (4) a re-hearing of the arguments on appeal**.**[58] The Prosecution filed its Response on 14 November 2002[59] and the Defence filed its Reply on 18 November 2002.[60]

23. By Decision dated 12 December 2002,[61] the Appeals Chamber, denied *inter alia*, the Appellant's motions for disclosure by the Prosecution of the *in camera* testimony of Witness X, other evidence given by Witness X and the evidence provided by the National Committee of the *Interahamwe za MRND*, on the grounds that the Appellant did not show in what way the Prosecution had failed to discharge its obligations as set forth in Rules 66(B) and 68 of the Rules. As regards the *in camera* testimony of Witness X, the Appeals Chamber stated that it was incumbent upon the Trial Chamber in the *Media* case to decide whether the Defence could be granted access to the said testimony and, if so, under what conditions.[62] Moreover, the Appeals Chamber declared that insofar as the Prosecution had undertaken to disclose to the Appellant the evidence relating to *Rusatira*, the motion relating thereto was otiose. The Appeals Chamber, however, ordered the Prosecution to complete disclosure of such evidence and, where necessary, any other evidentiary material, by 16 December 2002 at the latest.

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[58] "Defence Motion for an Order Varying the Grounds of Appeal Pursuant to Rule 107*bis* and Rules 114 and 116 of the Rules of Procedure and Evidence; for Disclosure Pursuant to Rules 66(B) and 68 of the Rules of Procedure and Evidence; for a Rehearing of Oral Argument in the Appeal Pursuant to Article 24 of the Statute of the International Tribunal for Rwanda, and for the Admission of Additional Evidence Pursuant to Rule 115(A) and (B) of the Rules of Procedure and Evidence, as well as a Request for Extension of the Page Limit Applicable to Motions", of the Statute of the International Tribunal for Rwanda, and for the Admission of Additional Evidence Pursuant to Rule 115(A) and (B) of the Rules of Procedure and Evidence, as well as a Request For Extension of the Page Limit Applicable To Motions", filed on 4 November 2002**.**

[59] "Prosecution Response to Urgent Defence Motion for an Order Varying Grounds of Appeal; for Disclosure; for a Rehearing of Oral Argument in the Appeal; Admission of Additional Evidence as well as a Request for Extension of Page Limit Applicable to Motions filed on 4 November 2002", filed on 14 November 2002. See also "Prosecution Response to the Defence Request for an Urgent Hearing on the Defence Motion Filed on 4 November 2002", filed on 6 November 2002.

[60] "Defence Reply to the Prosecution Response to the Urgent Defence Motion Pursuant to Rule 107bis and Rule 114 and 116 of the Rules of Procedure and Evidence; for Disclosure Pursuant to Rules 66(B) and 68 of the Rules of Procedure and Evidence; for a Re-Hearing of Oral Argument in the Appeal Pursuant to Article 24 of the Statute of the International Tribunal for Rwanda, and for the Admission of Additional Evidence Pursuant to Rule 115 (A) and (B) of the Rules of Procedure and Evidence, as well as Request for Extension of the Page Limit Applicable to Motions", filed on 18 November 2002.

[61] "Decision on the Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order", 12 December 2002.

[62] The Appeals Chamber ordered the Defence, if it wished, to request access to the confidential material before the Trial Chamber in the *Media* Case by 17 December 2002 at the latest, and the Defence did so on that date (See "Urgent Defence Motion Relating to the Appeal by Georges Rutaganda from his Convictions, Currently Before the Appeals Chamber, Requesting, Pursuant to an Order of The Honourable Appeals Chamber of 12 December 2002, an Order for the Release of Portions of the Closed Transcripts of Witness X Given in the Case *The Prosecutor v. Ferdinand Nahimana, Hassan Ngeze and Jean-Bosco Barayagwiza*", filed on 17 December 2002, which was granted by the Appeals Chamber on 20 December 2002 – See "Decision on the Urgent Defence Motion for the Release of Portions of the Closed Session Transcript of Witness *X*").

24. With regard to the Appellant's motion for the admission of Witness X's open session testimony as additional evidence, the Appeals Chamber stated that in view of the fact that the deliberations were in an advanced stage, it would consider such evidence only in exceptional circumstances. Considering that additional clarifications were required in order to establish the existence of exceptional circumstances in the instant, the Appeals Chamber ordered the Defence to file, by 6 January 2003 at the latest, a consolidated motion pursuant to Rule 115 of the Rules, in conformity with the Practice Direction on Formal Requirements for Appeals from Judgement. The Appeals Chamber indicated that it would dispose of the motions relating to the amendment of the Notice of Appeal and to a rehearing of the appeal once it had ruled on the consolidated motion.

25. On 18 December 2002, prior to filing his consolidated motion, the Appellant filed an urgent motion for disclosure of certain documents pursuant to Rule 66(B) and 68 of the Rules and for reconsideration of the deadlines imposed by the Decision of 12 December 2002.[63] By Decision dated 13 February 2003,[64] the Appeals Chamber denied the motion for disclosure on the grounds that the request relating to certain documents (Belgian Military Document) did not show in which way the Prosecution had failed to discharge its obligations by not disclosing the said documents (which, moreover, were not in its custody) and, also, because the Appellant had failed to show good cause for his requests for disclosure of certain letters. Nonetheless, the Appeals Chamber held that a communication, dated 10 November 2002, between the Office of the Prosecutor and Professor Guichaoua appeared relevant for the purpose of considering the admissibility of one document (the "Seutcheu Report") as additional evidence on appeal insofar as Mr. Seutcheu undertook investigations aimed at issuing the said Report, based on a statement by Professor Guichaoua that: *"D'après mes informations, [Rutaganda] n'aurait pas été plus présent à Kicukiro que Rusatira"*. The Appeals Chamber therefore ordered the Prosecution to transmit the Communication to the Appeals Chamber by 14 February 2003 at the latest, confidentially or *ex parte*, if it deemed it necessary, it being understood that such a protective measure could be modified if the interests of justice so required. The Prosecution filed the document on 14 February 2003.[65]

26. Pursuant to the Appeals Chamber Decision of 12 December 2002, the Defence filed its consolidated motion on 3 January 2003[66] seeking leave, on the one hand, to present four additional pieces of evidence and, on the other hand, to amend his Notice of Appeal and, lastly,

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[63] "Urgent Defence Motion for Disclosure Pursuant to Rules 66(B) and 68 of the Rules of Procedure and Evidence, and for a Reconsideration of Deadlines Imposed in Judge Jorda's Order of December 12, 2002", 18 December 2002. By confidential letter dated 31 December 2002, the Appellant was informed of its obligation to comply with the Decision of 12 December 2002 on the filing its consolidated motion.

[64] "*Décision sur la* 'Urgent Defence Motion for Disclosure Pursuant to Rules 66(B) and 68 of the Rules of Procedure and Evidence, and for a Reconsideration of Deadlines Imposed in Judge Jorda's Order of December 12, 2002'", 13 February 2003.

[65] "Prosecution Filing Pursuant to the Appeals Chamber's Decision Dated 13 February 2003 (Partly *Ex Parte*, Confidential)", 14 February 2003.

[66] "Consolidated Defence Motion for an Order Varying the Grounds of Appeal Pursuant to Rule 107*bis* and Rules 114 and 116 of the Rules of Procedure and Evidence; for a Rehearing Of Oral Argument in the Appeal Pursuant to Article 24 of the Statute of the International Tribunal for Rwanda, and for the Admission of Additional Evidence Pursuant to Rules 115(A) and (B) of the Rules of Procedure and Evidence, as well as Request for Extension of the Page Limit Applicable to Motions", 3 January 2003.

a rehearing of oral arguments on appeal. The Appellant sought leave to present four types of additional evidence: (1) the transcripts of both open and closed session testimony of Witness X in the *Media* Case, because, according to the Appellant, the said testimony supports the Defence evidence at trial that the National Committee to which the Accused belonged, was not involved in the atrocities; (2) a letter from Ms. Desforges dated 28 June 2002, and two letters from Professor Guichaoua dated 12 and 20 June 2002 on the basis of which, *inter alia*, the Prosecution decided to withdraw the indictment against Léonidas Rusatira, which withdrawal in itself, according to the Appellant, casts doubt on the reliability of key Prosecution witnesses who testified to Rusatira's involvement in the events which occurred at ETO and Nyanza; (3) a Belgian Military Document (Kibat-11 April 1994) which, allegedly, also casts doubt on the credibility of key Prosecution witnesses; and (4) Mr. Seutcheu's *compte rendu d'enquête* [investigation report] containing the aforementioned statement by Professor Guichaoua.

27. On 16 January 2003, the Prosecution filed its Response including confidential and *ex parte* annexes thereto, as well as a motion indicating that it reserved the right to file evidence in rebuttal if the Appellant was allowed to present additional evidence.[67] By Decision dated 4 February 2003, the Appeals Chamber held that it was not necessary to consider the motion and the *ex parte* and confidential annexes at this stage of the proceedings inasmuch as the Appeals Chamber had not yet disposed of the Consolidated Motion. The Appeals Chamber also specified that it had not taken account of the documents referred to in the confidential *ex parte* annexes. The Appellant filed his Reply on 20 January 2003[68] then, subsequent to an Appeals Chamber Decision,[69] he filed an abridged reply.[70]

28. On 19 February 2003, the Appeals Chamber dismissed the Appellant's motion to present additional evidence, with the exception of the request regarding the Seutcheu Report.[71] Indeed, the Appeals Chamber held that the testimony of Witness X, the reports of Ms. Desforges and Professor Guichaoua, as well as the Kibat-11 April 1994 document were not admissible on appeal, because, according to the Appeals Chamber, these documents were not relevant, credible and did not have the capacity to show that the convictions were unsafe. However, with regard to the Seutcheu Report, the Appeals Chamber was of the opinion that in the light of the Communication of 10 November 2002, the Report satisfied the requirements of Rule 115(A) and (B) of the Rules, as well as the criteria set out in the settled cases of the Tribunals. The Appeals Chamber also held that in order to determine whether this additional evidence actually revealed an error of fact of such a magnitude as to occasion a miscarriage of justice, it was necessary to hear Professor Guichaoua. The Appeals Chamber therefore reserved

[67] "Prosecution Response to Consolidated Defence Motion Pursuant to Article 24 of the Statute and Rule 114, 115 and 116 of the Rules", 16 January 2003.
[68] "Defence Reply to Prosecution Response to Consolidated Defence Motion Pursuant to Article 24 of the Statute and Rule 114, 115 and 116 of the Rules", 20 January 2003.
[69] "Decision on the Motion for Leave to Exceed the Page Limits Applicable to Motions", 23 January 2003.
[70] "Abridged Defence Reply to the Prosecution's Response to Consolidated Defence Motion Pursuant to Article 24 of the Statute and Rules 114, 115 and 116 and the Decision of the Appeals Chamber of January 23, 2003", 24 January 2003.
[71] "Decision on the Consolidated Defence Motion for an Order Varying the Grounds of Appeal, for the Rehearing of Oral Arguments in the Appeal and for the Admission of Additional Evidence, and Scheduling Order (Confidential) ", 19 February 2003.

its ruling on the issue of re-hearing the grounds of appeal related to the admission of the Seutcheu Report. By Confidential Order dated 24 February 2003, the Appeals Chamber ordered the Prosecution to provide the Defence with the Communication of 10 November 2002[72] and, on the same date, ordered Professor Guichaoua to testify.

29. By Scheduling Order dated 25 February 2003, the Appeals Chamber ordered, *inter alia*, that Professor Guichaoua was to be heard in open session on 28 February 2003 and also granted the motion to re-hear the arguments on appeal in relation to ETO and Nyanza.[73] By Order issued on the same date, the President of the Appeals Chamber, Judge Claude, ordered that Rutaganda be held at the Detention Unit at The Hague pending a further order.[74]

30. The day before the scheduled hearing, that is 27 February 2003, Professor Guichaoua filed a Request for protective measures with the Appeals Chamber, on the grounds that he did not wish to reveal the names of his sources in public.[75] The Appeals Chamber decided both that Professor Guichaoua was to testify in open session, it being understood that he was not required to reveal his sources,[76] and that if the parties wished to know the names of the sources, the court would go into closed session.

31. Following the hearing of 28 February 2003, the Appeals Chamber ordered the Registrar of the Tribunal to ensure that the open session transcripts were redacted of any reference to the Communication of 10 November 2002, considering that by its Decision on disclosure dated 10 November 2002, *supra*, the Appeals Chamber ordered the Appellant, and his Counsel, to respect the confidential nature of the Communication.[77]

32. Considering the fact that Professor Guichaoua did not seek any protective measures from the Appeals Chamber aimed at protecting his identity in view of the 28 February 2003 hearing, the Appeals Chamber decided to lift the confidentiality of the 19 February 2003 decision, *supra*, as well as the summons dated 24 February 2003 and the Scheduling Order of 25 February 2003.[78]

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[72] "Order for the Prosecution to provide the Defence With the Communication of 10 November 2002 and for Protective Measures (Confidential)", 24 February 2003.

[73] "*Ordonnance portant calendrier*", 25 February 2003. On 17 February 2003, before rendering this decision, the President of ICTY sought authorisation from the President of ICTR to hold an Appeals Chamber hearing at The Hague, pursuant to Rule 4 of the Rules. On 20 February 2003, the Appeals Chamber was authorised by the President of ICTR, Judge Navanethem Pillay, to exercise its functions away from the Tribunal.

[74] "*Ordonnance du Président relative au placement en détention de Georges Anderson Nderubumwe Rutaganda au quartier pénitentiaire du Tribunal International"*, 25 February 2003.

[75] "Request by André Guichaoua for Protective Measures and Assistance Pursuant to Rule 75 of the Rules of Procedure and Evidence of the ICTR, filed on 27 February 2003.

[76] T(A), 28 February 2003, pp. 6 and 7.

[77] "*Ordonnance*", 6 March 2003.

[78] "Decision lifting the confidentiality of an Appeal Chamber decision, order and summons", filed on 14 May 2003.

33. By Scheduling Order dated 24 April 2003, the Appeals Chamber scheduled a hearing for 26 May 2003 at Arusha, Tanzania, with a view to delivering the Appeals Chamber's Judgement in this case.

ANNEXE B: GLOSSARY

B. The Appeal

1. Filings of the parties

Rutaganda's Notice of Appeal	Amended Notice of Appeal dated 12 January 2000, filed on 15 March 2000
Prosecutor's Notice of Appeal	Notice of Appeal (Prosecutor), 6 January 2000
Supplemental Document	Grounds of Appeal, Supplemental Defence Document Filed Pursuant to the Order dated 26 April 2002, filed 3 June 2002
Rutaganda's Brief	Defence Appeal Brief, filed on 1 May 2001
Prosecution's Response	Prosecution's Response Brief, filed on 2 July 2001
Rutaganda's Reply Brief	Defence Reply Brief (Defence Reply to the Prosecution's response Brief), filed on 1 August 2001
Prosecution's Brief	Prosecution Appeal Brief, filed on 11 December 2000
Rutaganda's Response Brief	Defendant's Response to the Prosecution Appeal Brief, filed on 2 April 2001
Prosecution's Reply Brief	Prosecution Brief in Reply to Georges Rutaganda's Brief in Response, filed on 17 April 2001

2. References relating to the instant case

Indictment	Indictment in *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-I, confirmed on 16 February 1996
Hearings on appeal	Hearings on the arguments of the parties, 4 and 5 July 2002
Trial Chamber	Trial Chamber I of the International Tribunal
Appeals Chamber	The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International

	Humanitarian Law committed in the territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994
T	Transcripts of the Trial Chamber hearings in *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T.
T(A)	Transcript of the hearings on appeal held in Arusha (hearings of 4 and 5 July 2002).
Trial Chamber Judgement or Judgement	*The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Judgement and Sentence, 6 December 1999
MRND	*Mouvement révolutionnaire national pour la démocratie et le développement*
Prosecution	Office of the Prosecutor
Rules	Rules of Procedure and Evidence of the Tribunal
RTLM	*Radio Télévision Libre des Milles Collines*
Rutaganda or Appellant	Georges Anderson Nderubumwe Rutaganda

C. Cited Cases

Akayesu Appeal Judgement	Judgement, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, 1 June 2001 (Appeals Chamber)
Aleksovski Appeal Judgement	Judgement, *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, 24 March 2000 (Appeals Chamber of the ICTY)
Bagilishema Appeal Judgement	Judgement (Reasons), *The Prosecutor* v. *Ignace Bagilishem*, Case No. ICTR-95-1A-A, 13 December 2002 (Appeals Chamber).
Čelebići Appeal Judgement	Judgement, *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, *20 February 2001* (Appeals Chamber of the ICTY)
Elizaphan and Gérald Ntakirutimana	Judgement, The Prosecutor v. Elizaphan and

Trial Judgement	*Gérald* Ntakirutimana, Case No. ICTR-96-10 and ICTR-96-17-T, 21 February 2003 (Trial Chamber)
	Judgement, The Prosecutor v. Elizaphan and
Trial Judgement and ICTR-96-17-T, 21 February 2003 (Trial Chamber)	
Trial Judgement	
Furundžija Appeal Judgement	Judgement, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, 21 July 2000 (Appeals Chamber of the ICTY)
Jelisić Appeal Judgement	*Judgement, Prosecutor v. Goran Jelesić,* Case No. IT-95-10-A, 5 July 2001 (Appeals Chamber of the ICTY)
Kambanda Appeal Judgement	Judgement, *The Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-A, 19 October 2000 (Appeals Chamber)
Kayishema/Ruzindana Appeal Judgement	Judgement, *Clément Kayishema and Obed Ruzindana v. The Prosecutor*, Case No. ICTR-95-1-A, 1 June 2001 (Appeals Chamber)
Kunarac Appeal Judgement	Judgement, *Prosecutor* v. *Dragoljub Kunarac and others*, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, (Appeals Chamber of the ICTY)
Kupreskić Appeal Judgement	Appeal Judgement, *Prosecutor v. Zoran Kupreskić and others, Case No*. IT-95-16-A, 23 October 2001 (Appeals Chamber of the ICTY)
Musema Appeal Judgement	Judgement, *Alfred Musema v. The Prosecutor*, Case No. ICTR-96-13-A, 16 November 2001 (Appeals Chamber)
Serushago Appeal Judgement on the sentence	Reasons for Judgement, *Omar Serushago v. The Prosecutor*, Case No. ICTR-98-39-A, 6 April 2000 (Appeals Chamber)
Tadić Appeal Judgement	Judgement, *The Prosecutor v. Duško Tadić,* Case No. IT-94-1-A, 15 July 1999 (Appeals Chamber of the ICTY)
Tadić Appeal Judgement (allegations of contempt)	Judgement of Allegations of Contempt Against Prior Counsel, Milan Vujin, *Prosecutor v.*

	Duško Tadić, Case No. IT-94-1-A-R72, 31 January 2000 (Appeals Chamber of the ICTY)
Tadić Appeal Decision (Interlocutory Appeal)	Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Duško Tadić*, Case No. IT-94 1 A-R72, 2 October 1995 (Appeals Chamber of the ICTY)
Tadić Decision (Additional Evidence)	Decision on the Appellant's Motion for Extension of the Time-Limit and Admission of Additional Evidence, *Proscutor v. Duško Tadić*, Case No. IT-94-1-A, 15 October 1998 (Appeals Chamber of the ICTY)
Akayesu Trial Judgement	Judgement, *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, 2 September 1998 (Trial Chamber)
Blaškić Trial Judgement	Judgement, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, 3 March 2000 (Trial Chamber of the ICTY)
Čelebići Trial Judgement	Judgement, *Prosecutor v. Zejnil Delalić et al*, Case No. IT-96-21-T, 16 November 1998 (Trial Chamber of the ICTY)
Kayishema/Ruzindana Trial Judgement	Judgement, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, 21 May 1999 (Trial Chamber)
Tadić Trial Judgement	Judgement, *Prosecutor* v. *Dusko Tadić*, Case No. IT-94-1-T, 7 May 1997 (Trial Chamber of ICTY).

D. Other references

Registrar	Registrar of ICTR
Rules	Rules of Procedure and Evidence of the Tribunal
Statute	Statute of the International Tribunal
ICTR	International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law committed in the territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring

	States between 1 January 1994 and 31 December 1994
T	English version of the transcript of the Trial Chamber hearings in *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T
T(A)	English version of the transcripts of the Appeals Chamber hearings in *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-A.
ICTY	International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991
International Tribunal or Tribunal	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for such Violations in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994

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