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Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-01-71-A
16 January 2007
(1372/H – 1303/H)

P.T.

IN THE APPEALS CHAMBER

Before: **Judge Wolfgang Schomburg, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron

Registrar: **Mr. Adama Dieng**

Judgement of: **16 January 2007**

ICTR Appeals Chamber
Date: 16 January 2007
Action: P.T.
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EMMANUEL NDINDABAHIZI
(Appellant)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-01-71-A

JUDGEMENT

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CONTENTS

I. INTRODUCTION 1

A. THE APPELLANT 1
B. THE AMENDED INDICTMENT 1
C. THE JUDGEMENT 2
D. THE APPEAL 2
E. THE STANDARD FOR APPELLATE REVIEW 3

II. ALLEGED VAGUENESS OF THE INDICTMENT (SUB-GROUND OF APPEAL 1 – GITWA HILL) 4

A. SUBMISSIONS OF THE PARTIES 4
B. DISCUSSION 5
1. Alleged Defect in the Indictment – Applicable Law 5
2. Findings of the Trial Chamber 5
3. Analysis 6

III. ALLEGED ERROR IN FINDING THAT THE APPELLANT WAS IN GITWA (GROUNDS OF APPEAL 9 AND 10) 7

A. SUBMISSIONS OF THE PARTIES 7
B. DISCUSSION 8
1. Dates of Events at Gitwa Hill 8
2. Inconsistencies in Witness CGY's Testimony 9
3. Identification of the Accused by Witness CGN 15

IV. JUDGEMENT ALLEGEDLY RENDERED BEYOND THE SCOPE OF THE INDICTMENT (GROUND OF APPEAL 2) 17

A. SUBMISSIONS OF THE PARTIES 17
B. DISCUSSION 17
1. Appellant's Position in the Interim Government 17
2. Participation in the Meeting of 3 May 1994 and Alleged Role in the Resignation of Witness GKH 19
(a) Whether the Appellant's Convictions were Based on Material Facts not pleaded in the Indictment 19
(b) Whether the Appellant was Otherwise Prejudiced by the Trial Chamber's Consideration of these Elements 20

V. ALLEGED NON-DISCLOSURE OF EXCULPATORY EVIDENCE (GROUND OF APPEAL 4) 20

A. SUBMISSIONS OF THE PARTIES 20
B. DISCUSSION 21

VI. ALLEGED ERRORS IN THE ASSESSMENT OF DEFENCE EVIDENCE (GROUNDS OF APPEAL 5 AND 3) 24

A. WITNESS DQ 25
1. Submissions of the Parties 25
2. Discussion 25
B. WITNESS DN 25
1. Submissions of the Parties 25
2. Discussion 26
C. WITNESS DU 27
1. Submissions of the Parties 27
2. Discussion 28
D. EXPERT WITNESS BERNARD LUGAN 28

1. Submissions of the Parties 28
2. Discussion 29
E. WITNESS DX 29
1. Submissions of the Parties 29
2. Discussion 29
(a) Whether the Trial Chamber Improperly Considered the Prosecution's Arguments 30
(b) Whether the Trial Chamber Erred in Dismissing the Rule 92*bis* Motion 31
F. EXHIBIT D.34 32
G. EXHIBIT D.52 33
1. Submissions of the Parties 33
2. Discussion 33
H. CONCLUSION 34

VII. GROUNDS OF APPEAL 6 AND 8 – WITHDRAWN **34**

VIII. ALLEGED ERROR IN FINDING THAT THE APPELLANT WAS AT THE GASEKE ROADBLOCK (GROUND OF APPEAL 11) **34**

A. SUBMISSIONS OF THE PARTIES 34
B. DISCUSSION 34
1. Alleged Contradiction Between the Testimonies of Witness CGC and Other Witnesses 34
(a) Witness DC 35
(b) Witness DB 35
2. Conclusion 40

IX. ALLEGED VAGUENESS OF THE INDICTMENT (SUB-GROUND OF APPEAL 1 - GASEKE ROADBLOCK) **40**

X. ALLEGED ERROR IN FINDING A LEGAL BASIS FOR THE GENOCIDE CONVICTION (GROUND OF APPEAL 7) **41**

XI. GROUND OF APPEAL 12 – WITHDRAWN **41**

XII. ALTERNATIVE CONVICTIONS **41**

XIII. APPEAL AGAINST THE SENTENCE (GROUND OF APPEAL 13) **42**

A. SUBMISSIONS OF THE PARTIES 42
B. DISCUSSION 44

XIV. DISPOSITION **48**

XV. SEPARATE OPINION OF JUDGE SHAHABUDDEEN **50**

A. PRELIMINARY 50
B. IN HIS WRITTEN ARGUMENTS THE APPELLANT CONTENDED THAT HE DID NOT VISIT THE ROADBLOCK AT ALL 50
C. WHETHER THE APPELLANT VISITED THE ROADBLOCK AT ALL 51
D. THE APPELLANT DID NOT CONTEND THAT HIS VISIT TOOK PLACE BEFORE THE KILLING OF MR NORS 52
E. HOW LONG AFTER THE VISIT WAS MADE DID THE KILLING OCCUR? 53
F. CONCLUSION 56

XVI. PARTIALLY DISSENTING OPINION OF JUDGE GÜNEY **57**

XVII. ANNEX A – PROCEDURAL BACKGROUND **60**

A. NOTICE OF APPEAL AND BRIEFS 60
B. ASSIGNMENT OF JUDGES 61

C. ADDITIONAL EVIDENCE AND FURTHER MOTIONS 61
D. HEARING OF THE APPEAL 62
XVIII. ANNEX B – CITED MATERIALS/DEFINED TERMS 63

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 1994 and 31 December 1994 ("Tribunal") is seized of an appeal by Emmanuel Ndindabahizi against the Judgement rendered by Trial Chamber I on 15 July 2004 in the case of *The Prosecutor v. Emmanuel Ndindabahizi* ("Trial Judgement").[1]

I. INTRODUCTION

A. The Appellant

2. The Appellant, Emmanuel Ndindabahizi, was born in 1950[2] in Gashuru, Gitesi Commune, Kibuye Prefecture, Rwanda. Between September 1992 and 6 April 1994, he was *Directeur de Cabinet* in the Ministry of Finance, second in authority, reporting to the Minister only. In 1993 he was elected Executive Secretary of the *Social Democratic Party* (PSD) in Kibuye. He was sworn in as Minister of Finance of the Interim Government on 9 April 1994. The Appellant left Rwanda for Goma in the Democratic Republic of Congo (formerly Zaire) on 13 or 14 July 1994.[3]

B. The Amended Indictment

3. The amended indictment ("Indictment") of 1 September 2003 charges the Appellant with three counts, pursuant to Articles 2 and 3 of the Statute: genocide; extermination, a crime against humanity; and murder, a crime against humanity. The Indictment charges the Appellant with individual criminal responsibility under all modes of liability pursuant to Article 6(1) of the Statute for these crimes. Charges of direct and public incitement to commit genocide pursuant to Article 2(3)(c) of the Statute and of rape as well as all allegations of superior responsibility under Article 6(3) of the Statute had been withdrawn from the Indictment at the request of the Prosecution.[4]

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[1] Two annexes are appended to this Judgement: Annex A – Procedural Background and Annex B – Cited Materials/Defined Terms.

[2] The Appellant stated at trial that no further particulars as to the day or month are given in his documents, T. 24 November 2003, p. 1.

[3] Trial Judgement, para. 6.

[4] Decision on Prosecution Request to Amend Indictment, 30 June 2003, granting leave to the Prosecution "to amend its indictment so as to withdraw the charge of incitement to commit genocide, and related factual allegations" (p. 2). *See also* Decision on Prosecution Motion for Leave to Amend Indictment, 20 August 2003, and the oral Decision of the Trial Chamber on the first day of trial, T. 1 September 2003, pp. 1-2. Also, the Prosecution stated in closing arguments that it would not offer evidence in relation to paras 6, 7, 14, 17, 18, 22, 23, 24 and 26 of the Indictment, T. 1 March 2003, pp. 52-53; T. 2 March 2003, p. 54.

C. The Judgement

4. The Trial Chamber primarily found that, on 23 through 24 April 1994, the Appellant transported attackers to Gitwa Hill, distributed weapons there and expressly urged the attackers to kill Tutsi people.[5] For these acts, resulting in the death of thousands of Tutsi, the Trial Chamber convicted the Appellant pursuant to Article 6(1) of the Statute for instigating and aiding and abetting genocide (Count 1).[6] The Trial Chamber also convicted him for committing or, alternatively, instigating and aiding and abetting extermination as a crime against humanity at Gitwa Hill (Count 2).[7]

5. The Trial Chamber further found that in late May 1994 the Appellant encouraged those manning a roadblock at a place called Gaseke to stop and kill Tutsi, and that he distributed machetes and money to these men, who soon after the Appellant's departure apprehended and killed one person named Mr. Nors.[8] The Trial Chamber convicted the Appellant for these acts pursuant to Article 6(1) of the Statute for instigating and aiding and abetting genocide (Count 1),[9] and for instigating and aiding and abetting murder as a crime against humanity (Count 3).[10]

6. The Trial Chamber handed out a single sentence of imprisonment for the remainder of the Appellant's life.

D. The Appeal

7. The Appellant is appealing against all convictions and the sentence,[11] dividing his remaining ten grounds of appeal[12] into two categories, namely errors of law and errors of fact. The Appeals Chamber points out that several aspects of the grounds of appeal are inextricably intertwined. Therefore, related grounds of appeal have been grouped together as follows:

- Alleged vagueness of the Indictment (Ground of Appeal 1)
- Alleged error in finding that the Appellant was in Gitwa (Grounds of Appeal 9 and 10)
- Judgement allegedly rendered beyond the scope of the Indictment (Ground of Appeal 2)

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[5] Trial Judgement, paras 179-80.
[6] Trial Judgement, para. 464.
[7] Trial Judgement, para. 485.
[8] Trial Judgement, paras 230-31.
[9] Trial Judgement, paras 472-73.
[10] Trial Judgement, para. 490.
[11] Appellant's Brief, para. 319.
[12] Of the original thirteen grounds of appeal, the Appellant has abandoned grounds of appeal 6, 8 and 12. Ground of appeal 3 was merged with ground of appeal 5 and ground of appeal 9 with ground of appeal 10: *see* Appellant's Brief, pp. 2 and 3.

- Alleged non-disclosure of exculpatory evidence (Ground of Appeal 4)
- Alleged errors in the assessment of Defence evidence (Grounds of Appeal 5 and 3)
- Alleged error in finding that the Appellant was at the Gaseke roadblock (Ground of Appeal 11)
- Alleged error in finding a legal basis for the genocide conviction (Ground of Appeal 7)
- Appeal against the sentence (Ground of Appeal 13)

E. The Standard for Appellate Review

8. The settled standards of appellate review pursuant to Article 24 of the Statute are set out in the jurisprudence of the Tribunal.[13] The Appeals Chamber reviews only errors of law invalidating the decision of the Trial Chamber and errors of fact which have occasioned a miscarriage of justice.

9. As regards errors of law, the Appeals Chamber has repeatedly stated:

> Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant's arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[14]

10. As regards errors of fact, it is settled jurisprudence that

> [w]here the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.[15]

11. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the Trial Chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.[16] Arguments which do not have the potential to cause the impugned decision to be reversed or revised need not be considered on the merits.[17]

12. In order for the Appeals Chamber to assess the appealing party's arguments, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is being made, and "the Appeals Chamber cannot be expected to

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[13] *Gacumbitsi* Appeal Judgement, paras 6-10; *Ntagerura et al.* Appeal Judgement, paras 11-14.
[14] *Gacumbitsi* Appeal Judgement, para. 7 (with further references).
[15] *Ibid.*, para. 8 (with further references).
[16] *Ibid.*, para. 9 (with further references).
[17] *Ibid.*, (with further references).

consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies."[18] Also, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing and will dismiss arguments which are evidently unfounded without providing detailed reasoning.[19]

13. Finally, "there are situations where the Appeals Chamber may raise questions *proprio motu* or agree to examine alleged errors which will not affect the verdict but which do, however, raise an issue of general importance for the case-law or functioning of the Tribunal."[20] As the final arbiter of the law applied by the Tribunal, the Appeals Chamber must give the Trial Chambers guidance for their interpretation of the law.[21]

II. ALLEGED VAGUENESS OF THE INDICTMENT (SUB-GROUND OF APPEAL 1 – GITWA HILL)

A. Submissions of the Parties

14. The Appellant submits that the Trial Chamber committed an error of law in rendering a judgement on the basis of the vague and defective paragraphs 15 and 20 of the Indictment, which alleged that the attacks at Gitwa Hill took place on unknown days between 13 and 26 April 1994.[22]

15. The Prosecution submits that the Trial Chamber read paragraph 15 together with paragraph 16 of the Indictment and gave a holistic reading to paragraph 20,[23] thus finding that "[t]he dates in the Indictment gave the defence a good idea of when the alleged events in question occurred".[24] The Prosecution submits that no prejudice was caused and that the Appellant did not raise any objection to the pertinent evidence during trial.[25]

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[18] *Ibid.*, para. 10 (with further references).
[19] *Ibid.*, para. 10 (with further references).
[20] *Kordić and Čerkez* Appeal Judgement, para. 1031 (with further reference).
[21] *Ibid.*
[22] Appellant's Brief, paras 14, 17-20, 28-29.
[23] Respondent's Brief, paras 22, 25-27. Paragraphs 28 and 35 refer to jurisprudence supporting this point, citing *Rutaganda* Appeal Judgement, paras 297, 304.
[24] Respondent's Brief, para. 20, referring to Trial Judgement, para. 34.
[25] Respondent's Brief, paras 25, 44 and 51-55, pointing out that the Appellant did not raise any objection to the testimony of Witness CGC describing the killing of Mr. Nors. According to the Respondent, the doctrine of waiver applies on appeal because the Appellant does not explain how he was prejudiced.

B. Discussion

1. Alleged Defect in the Indictment – Applicable Law

16. The form of an indictment is primarily governed by Article 17(4) of the Statute requiring the Prosecution to set out, *inter alia*, a concise statement of the facts and the crime(s) charged, and Article 20(4) of the Statute enshrining, *inter alia*, an accused's right to be informed promptly and in detail of the nature and cause of the charge against him or her.[26] An indictment is defective if it does not state the material facts underpinning the charges with enough detail to enable an accused to prepare his or her defence.[27] Whether a fact is material depends on the nature of the Prosecution case.[28] The Appeals Chambers of both the ICTR and the ICTY have specified several factors that can determine the materiality of facts: for example, if the personal physical commission of criminal acts is charged, the indictment should set forth the victim's identity, the place and time of the events and the means by which the acts were committed.[29] The Appeals Chamber recalls, however, that "such detail need not be pleaded if the 'sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters'."[30]

2. Findings of the Trial Chamber

17. The Trial Chamber referred to paragraphs 15 and 16 (genocide, Count 1) and paragraph 20 (extermination, Count 2)[31] when convicting the Appellant for the massacre at Gitwa Hill.

18. The Trial Chamber addressed the objections placed before it with respect to the date range of 13 days for the massacre at Gitwa Hill pleaded in paragraph 15 (genocide) and paragraph 20 (extermination) of the Indictment. It recalled that the Defence did not object during trial to the admission of evidence relating to Gitwa Hill on the basis of lack of notice in the Indictment, that the Defence bore the burden of showing that it was materially prejudiced in the preparation of its case, and that no such showing was made.[32] The Trial Chamber noted that the testimony of the three Prosecution witnesses testifying to the events at Gitwa Hill provided dates that fell within the date

[26] *See also* Rule 47 of the Rules.
[27] *See Kamuhanda* Appeal Judgement, para. 17, and *Kupreškić et al.* Appeal Judgement, para. 88.
[28] *Kamuhanda* Appeal Judgement, para. 17, referring to *Kupreškić et al.* Appeal Judgement, para. 89.
[29] *Ntakirutimana* Appeal Judgement, para. 25.
[30] *Ntakirutimana* Appeal Judgement, para. 25, referring to *Kupreškić et al.* Appeal Judgement, para. 89.
[31] Trial Judgement, paras 458-64; 481-85. The remaining paragraphs under the extermination count referring to dates were withdrawn, *see supra* note 4. The allegation of throwing an explosive grenade in paragraph 16 of the Indictment has not been found to be proven.
[32] Trial Judgement, para. 35.

range set out in the Indictment.[33] Furthermore, the Trial Chamber made the following statements when finding that the Indictment was not defective:

> The dates in the Indictment gave the Defence a good idea of when the alleged events in question occurred, and a reasonable opportunity to investigate them and discover exculpatory information. The Indictment does not give the impression that the Accused participated in an attack on a single date throughout the period, but rather than [*sic*] he participated over the course of several days. The date range was not unreasonable in light of the nature of the events. [...] Given the continuity and notoriety of the attacks at Gitwa, it was not unreasonable for the Prosecution to have used the duration of the attacks to define the possible dates of the Accused's involvement. The Defence was reasonably able to meet the Prosecution case as presented in the Indictment.[34]

3. Analysis

19. The Indictment pleaded the time period for the events at Gitwa Hill with sufficient specificity. A date may be considered to be a material fact if it is necessary in order to inform a defendant clearly of the charges so that he may prepare his defence.[35] If a date is found to constitute a material fact, it must be pleaded with sufficient specificity, as stated by the ICTY Appeals Chamber:

> An indictment may also be defective when the material facts are pleaded without sufficient specificity, such as, unless there are special circumstances, when the times refer to broad date ranges [...].[36]

20. The precision with which dates have to be charged varies from case to case.[37] It has also been acknowledged by the ICTY Appeals Chamber that "[...] an accused may be charged with having participated [...] in an extensive number of attacks on civilians that took place over a prolonged period of time and resulted in large numbers of killings [...]."[38] Also, the ICTY Appeals Chamber held that "there may be instances where the sheer scale of the alleged crimes 'makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes'."[39] In cases where timing is of material importance to the charges, more specific information should be provided.[40] However, in particular in light of the events that occurred in Rwanda in 1994, the Appeals Chamber is mindful of the fact that it is not always possible to be precise as to the specific date on which the crimes charged were committed. Nevertheless, these considerations have to be balanced with the accused's right to be

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[33] Trial Judgement, paras 33-34.
[34] Trial Judgement, para. 34 (references omitted).
[35] *Tadić* Trial Judgement, para. 534, referring to Halsbury's Laws of England (London, Butterworths, 1990), Volume 11(2), para. 926; *see also Kupreškić et al.* Appeal Judgement, para. 88; *Ntakirutimana* Appeal Judgement, para. 25.
[36] *Kvočka et al.* Appeal Judgement, para. 31.
[37] *See supra* para. 16.
[38] *Kupreškić et al.* Appeal Judgement, para. 90.
[39] *Kupreškić et al.* Appeal Judgement, para. 89 (citing other ICTY Decisions).
[40] *See Kayishema and Ruzindana* Trial Judgement, para. 86.

informed in detail about the nature and cause of the charge against him in order to allow a comprehensive defence to be raised.

21. The Indictment alleges that over the course of 13 days a continued attack was sustained against Tutsi refugees taking shelter at Gitwa Hill.[41] Thus, the Prosecution case was premised upon a series of attacks which took place over the course of several days. The Defence itself also characterised the Prosecution case in this manner during closing arguments when it stated that the Appellant was accused in paragraphs 15 and 20 of the Indictment of "being in charge of a series of attacks".[42]

22. Given the nature of the Prosecution case, the date range of 13 days sufficiently specified the date range for the crimes alleged. It provided the Appellant with enough information to know the nature of the charges against him and to prepare his defence.[43] His participation was found to have occurred at various specific dates within the time period pleaded in the Indictment.[44]

23. Consequently, the first sub-ground of appeal in relation to the events at Gitwa Hill is rejected.

III. ALLEGED ERROR IN FINDING THAT THE APPELLANT WAS IN GITWA (GROUNDS OF APPEAL 9 AND 10)

A. Submissions of the Parties

24. The Appellant submits that the Trial Chamber erred in fact in relying on the testimonies of Witnesses CGY and CGN to find that he went to Gitwa Hill on 23 and 24 April 1994.[45] The Appellant does not present arguments about his alleged activities at Gitwa Hill, but denies that the trial record supports the finding that he was present.

25. The Prosecution responds that the Appellant merely repeats arguments that did not succeed at trial and fails to show how and why the Trial Chamber's findings are so unreasonable that they

[41] Indictment, paras 15 and 20.
[42] T. 2 March 2004, p. 10.
[43] The Appeals Chamber also notes that a date range of 13 days was accepted in the *Semanza* Trial Judgement in para. 48 (this finding was not appealed), and that a period of six days was not found to be too vague in the *Ntakirutimana* Appeal Judgement at para. 47.
[44] Trial Judgement, paras 179-81: namely 23 and 24 April 1994.
[45] Appellant's Brief, paras 187-243. The Appeals Chamber notes that the date of the final attack on 26 April 1994 is not disputed by the Parties.

warrant appellate intervention.[46] The Prosecution submits that the Trial Chamber was entitled to make findings based solely on the uncorroborated evidence of Witnesses CGY and CGN.[47]

B. Discussion

1. Dates of Events at Gitwa Hill

26. The Appellant submits that, on the basis of Witness CGN's testimony alone, the Trial Chamber erroneously dated acts imputed to the Appellant at Gitwa Hill on 24 April 1994, while the Prosecution dated these acts on 20 April 1994.[48]

27. During closing arguments, the Prosecution stated that

> [t]he second event [at Gitwa] is on the 20th of April, and that's Witness CGN. He says he saw the Accused arriving at Gitwa hill on the 20th of April [...].[49]

Later in closing arguments, however, the Prosecution argued:

> Witness CGN's statement says it was around [...] 20th to 25th of April [...].[50]

Furthermore, the Prosecution stated in its Pre-Trial Brief that Witness CGN saw the Appellant "between 20 and 25 April",[51] and the Prosecution Closing Brief referred to the testimony of Witness CGN when stating that he saw the Appellant at Gitwa "[a]round the 20th of April".[52] It is evident from the Trial Judgement records that the alleged discrepancies in the dates were not put to Witness CGN during cross examination.[53]

28. The Trial Chamber found that Witness CGN saw the Appellant in Gitwa on 24 April 1994, deducing this date from Witness CGN's statements that he saw the Appellant between 20 and 24 April, two days before the large attack dispersing the refugees from Gitwa Hill which was found to have occurred on 26 April 1994.[54]

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[46] Respondent's Brief, paras 193-96.
[47] Respondent's Brief, paras 197-200. In reply, the Appellant submits that he "is prepared to admit that the testimony of a single witness may suffice to prove a material fact, but only where such testimony is free of any contradictions or inaccuracies; but such is certainly not the case with Witnesses CGY and CGN" (Appellant's Reply, para. 51).
[48] Appellant's Brief, paras 200-06, 236; Appellant's Reply, para. 57.
[49] T. 1 March 2004, p. 31.
[50] T. 1 March 2004, p. 50.
[51] Prosecution Pre-Trial Brief, Appendix A, p. 8.
[52] Prosecution Closing Brief, para. 40. *See also* Prosecution Closing Brief, note 134, referencing T. 8 September 2003, p. 5, which is the Prosecution's summary of the statement of Witness CGN made at T. 8 September 2003, p. 4.
[53] Trial Judgement, para. 154.
[54] Trial Judgement, para. 149, note 175. Trial Judgement, para. 181, referring to the testimony of Witnesses CGY, CGN, and DC. *See also* written statement of Witness CGN, 27 April 2001, p. 3. This was affirmed by Witness CGN during trial, T. 8 September 2003, p. 4.

29. The question before the Appeals Chamber is whether this finding amounts to an error of fact occasioning a miscarriage of justice. The Appellant takes issue with the Trial Chamber assessing the evidence in its totality to "infer"[55] the date, when Witness CGN was only able to provide references that were non-date specific, *i.e.* the timing of an event in relation to another major event, namely the large attack and massacre which dispersed the refugees from Gitwa Hill. The Appeals Chamber notes that it was open for the Trial Chamber to make factual findings on the date of the events by examining the evidence as a whole[56] and, indeed, this may be particularly necessary when determining dates, as often witnesses may not recall an exact date but describe the timing of the event in relation to other variables.[57] The Appeals Chamber finds that the Trial Chamber reasonably concluded that Witness CGN was referring to events taking place on 24 April 1994.

30. Further, the Appellant complains that the submissions of the Prosecution caused the Defence to "focus" on 20 April 1994 in structuring their rebuttal case.[58] The Appeals Chamber notes that the trial transcripts show that the Defence stated during cross-examination: "[w]hen you [Witness CGN] saw Mr. Ndindabahizi between the 20th and 24th of April [...]",[59] which suggests that the Defence was aware of Witness CGN's time frame for the events in Gitwa. The Appeals Chamber finds that the Defence had notice of a reasonable timeframe relevant for Witness CGN's evidence, that is around 20 to 25 April 1994, and that the Prosecution did not narrow the allegations to 20 April 1994, as discussed above in this section.

31. For the reasons set out above, the Appellant has not demonstrated that the relevant findings of the Trial Chamber were unreasonable.

2. Inconsistencies in Witness CGY's Testimony

32. According to the Appellant, Witness CGY claimed that he travelled between Gitwa Hill and Karongi FM Hill every day between 15 and 26 April 1994,[60] apparently contradicting Witness CGN who allegedly demonstrated that it was not possible to travel between Gitwa Hill and Karongi FM Hill at that time.[61] The Trial Chamber expressly considered whether Witness CGN's testimony made it implausible that Witness CGY could have made daily trips between Gitwa Hill and Karongi FM Hill.[62] The Appellant submits that the Trial Chamber incorrectly reconciled the

[55] Trial Judgement, para. 149, note 175.
[56] *Rutaganda* Appeal Judgement, para. 304, referring to holistic reading of the Indictment.
[57] *See, e.g., Kajelijeli* Appeal Judgement, para. 115.
[58] Appellant's Brief, para. 205.
[59] T. 8 September 2003, p. 19.
[60] Appellant's Brief, paras 207-20; Appellant's Reply, paras 59-64.
[61] Appellant's Brief, paras 208-210: the Appellant refers to Witness CGN's testimony on the number of attacks and attackers, and the difficulty of escape.
[62] Trial Judgement, paras 134-36.

testimonies of Witness CGN and Witness CGY by referring to Witness CGN's lack of specificity as to the time when Gitwa Hill was surrounded, while Witness CGN in fact stated that from 14 through 20 April "attackers surrounded the hill and made escape impossible."[63]

33. The Appellant does not cite the full reasoning employed by the Trial Chamber in assessing the testimony of Witness CGY. The question of when Gitwa Hill was surrounded was not the sole basis for the Trial Chamber's finding that Witness CGY shuttled between Gitwa Hill and Karongi FM Hill. The Trial Chamber also found that Witness CGY explained that he moved at night and had a particular imperative to travel and care for his family hiding in different places in the locality, and the Trial Chamber noted that it did not have precise information on the positioning of the attackers.[64] Also, while travelling between two locations can be regarded as impossible by one witness, it can be reasonably assessed as possible by another witness. In this regard, it is notable that Witness CGY's testimony centred on his need to move between his different family members, whereas Witness CGN does not discuss such an imperative. Thus, the Appellant has failed to show a factual error in the Trial Chamber's finding.

34. The Appeals Chamber notes the findings of the Trial Chamber that Witness CGY "moved at night, which obviously reduced the risk of being discovered".[65] This finding could be inconsistent with the Trial Chamber's finding that Witness CGY was credible when he testified that he saw the Appellant at Gitwa Hill on 23 April 1994 at about 11.00 a.m.[66] It is noted, however, that Witness CGY also stated that he was involved in reconnaissance missions, including ascertaining "whether attacks were coming."[67] The Appeals Chamber also notes that the Trial Chamber extensively considered Witness CGY's testimony as to these missions.[68] While being hidden in a bush and conducting reconnaissance missions may appear contradictory, it must be recalled that a trier of fact often has to reconcile conflicting evidence of a witness, and that the Trial Chamber was

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[63] Appellant's Brief, para. 210, referring to the Trial Judgement, para. 151.
[64] Trial Judgement, para. 136.
[65] Trial Judgement, para. 136.
[66] Trial Judgement, paras 134-36, 142; Appellant's Brief, paras 215-16. *See also* T. 8 September 2003, p. 53.
[67] *See* written statement for Witness CGY, 10 May 2001, p. 4, cited at Trial Judgement, para. 135.
[68] T. 8 September 2003, pp. 55-56, referred to in Trial Judgement, para. 135, notes 160, 166:

> Q. [...] What was the object of those missions for information gathering, as it were?
> A. I will answer you. It was an important mission because this enabled us - we became [sic] to know where the attackers were coming from as well as the people, the inhabitants who were not supporting these attacks, and we were thus able to know the places where the attackers were coming from.
> Q. During these fact-finding missions did you have to go away from Gitwa hill, to go towards the attackers so that you could get better information regarding their numbers, for instance?
> A. This information could not be collected or gathered by one single individual. There were people who needed to go and look for the information, and since Gitwa was surrounded by more than three secteurs -- Gitwa is located in Rubanzo, next door there's Gitesi, Gitarama secteur, and Bishura and Kangabiro as well as the Rubanzo secteur -- so, you will realise that there must have

best placed to assess Witness CGY's evidence in its entirety together with his demeanour. In light of these considerations, it was reasonable for the Trial Chamber to conclude that Witness CGY was seeking to observe activities of the attackers,[69] whereas during the night he was providing for his family which was hiding in various locations.[70] It is notable in this context that, contrary to the Appellant's assertion,[71] the trial record shows that the two hills were located on the same side of the road, and the vantage point from which Witness CGY observed the Appellant was on the same side of this road,[72] therefore limiting the risk that Witness CGY would encounter roadblocks during the daytime, as alleged by the Appellant. Consequently, it has not been shown how the Trial Chamber was unreasonable in its findings.

35. The Appellant further submits that Witness CGY contradicted himself during his oral testimony by stating that he did not travel to Karongi FM Hill after 21 April 1994.[73] Already in his Closing Brief, the Appellant argued that Witness CGY initially stated that he was shuttling between Karongi FM Hill and Gitwa Hill between 15 and 26 April 1994,[74] whereas later he asserted that he did not go back to Karongi FM Hill after 21 April 1994. Nonetheless, Witness CGY stated that he saw the Appellant at a roadblock on 23 April 1994 about 600 metres from Karongi FM Hill.[75] The Trial Chamber addressed the issue in finding that "Witness CGY testified that he moved regularly between Gitwa Hill and the two places on Karongi Hill where his family was hidden, *at least until* 20 April."[76] The footnote to this text reads as follows:

> [...] At first, the witness testified that he moved back and forth between the two hills every day between 15 and 26 April, but then he later corrected himself to say that these journeys ceased on 20 April when his wife and children joined him on Gitwa Hill [...].[77]

From the trial transcripts, it is apparent that the confusion over the relevant dates arose during cross-examination when Defence counsel asked Witness CGY the following questions:

> MR. BESNIER (Defence): Did you do the shuttling between Karongi and Gitwa hill between the 15th of April and 26th of April regularly, everyday?
>
> WITNESS CGY: Yes.

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been many people who needed to go and try and find information from all corners, and it was not to me alone that that task was assigned.

[69] *See* written statement for Witness CGY, 10 May 2001, p. 4 cited at Trial Judgement, para. 135 and T. 8 September 2003, p. 41.
[70] T. 8 September 2003, p. 53.
[71] Appellant's Brief, para. 216.
[72] Exh. P2, page L0019869.
[73] Appellant's Brief, para. 207.
[74] Defence Closing Brief, pp. 129-30; Appellant's Brief, paras 213-18.
[75] Appellant's Brief, paras 212-15. This distance has been inferred by the Defence from Exh. P2, *see* Appellant's Brief, notes 156-58.
[76] Trial Judgement, para. 129, citations omitted (emphasis added).
[77] Trial Judgement, para. 129, note 143.

> MR. BESNIER: So each day you moved from the Gitwa hill to see your family at Karongi, and when you were reassured on the assault, you came back to the Gitwa hill; is that correct?
>
> WITNESS CGY: Yes, and that was the only way to cater for the food needs of my family, because we left some food items with some family friends who were taking care of them for us.
>
> MR. BESNIER: Why simply not remain with your family on the Karongi hill?
>
> WITNESS CGY: I told you and I repeat, just in case you did not understand. It was as if there were two distinct families. My family was living outside the refugee camp in the village, and another part of my family living within the camp.[78]

Witness CGY clarified soon after that:

> "[...] I was shuttling between the camp and these two places [Gitwa Hill and Karongi FM Hill]. It was as if I was living in these – all these places." [...]
>
> MR. BESNIER: My question is as follows: did you stay on Karongi FM hill between 15th April 1994 and 21 April 1994 without moving? [...]
>
> WITNESS CGY: [...] Well, I would be coming, going. I would go there and I would go back to where I came from. I would spend nights at Karongi. During the night I needed to move, to go to Gitwa and provide food, because I am the one who prepared meals for those people."[79]

Later during cross-examination, as identified by the Trial Chamber, Witness CGY clarified the date range, although it was through answering a "yes or no" question from Defence counsel:

> MR. BESNIER: Witness, to summarise some of the statements that we went through yesterday, will it be correct to say that you left Karongi on 20th April 1994, and that you hid yourself in a bush between the 20th and the 26th of April with your wife and your children?
>
> WITNESS CGY: Yes, that is correct.[80]

36. As stated above, Witness CGY made contradictory statements as to whether he went back to Karongi FM Hill after 21 April 1994. However, the Trial Chamber's finding that Witness CGY "moved regularly between Gitwa Hill and the two places on Karongi FM Hill where his family was hidden, at least until 20 April" is consistent with Witness CGY's statement that he saw the Appellant at a roadblock about 600 metres away from Karongi FM Hill on 23 April 1994.

37. Also, Witness CGY's testimony that he was hiding in a bush with his family between 20 and 26 April 1994 is not inconsistent with the finding that he saw the Appellant on 23 April 1994 about 600 metres from Karongi FM Hill. Witness CGY testified to constantly moving in the region of Karongi FM Hill and Gitwa Hill to care for his family which was located in different positions, and he stated that he conducted reconnaissance missions.[81] As stated above, while being hidden in a bush and conducting reconnaissance missions may appear contradictory, it must be recalled that a

[78] T. 8 September 2003, p. 50.
[79] T. 8 September 2003, pp. 52-53.
[80] T. 9 September 2003, p. 1.
[81] T. 8 September 2003, pp. 55-56.

trier of fact often has to reconcile conflicting evidence of a witness, and that the Trial Chamber was best placed to assess Witness CGY's evidence in its entirety together with his demeanour. The Appeals Chamber finds that the Appellant has failed to show that the finding of the Trial Chamber is unreasonable.

38. The Appellant further submits that there is a corroboration requirement given that the Defence argues that Witness CGY was contradicted by Witness CGN. The Appellant relies upon the *Bagilishema* Trial Judgement which states that the Prosecution must be "especially careful to rub out grey areas" of the testimony of witnesses who "while purportedly in hiding and in fear of their lives, nonetheless are able to move around from one crime scene to the next, gathering intelligence along the way."[82] However, the Appellant fails to cite the remainder of this passage in which the Trial Chamber points out that the Prosecution "hurried Witness O through her evidence", and another Prosecution witness gave evidence that was not consistent with Witness O.[83] Neither of these allegations can be made against the current case in point. It has already been demonstrated that the Appellant's concerns regarding Witness CGN's contradiction of Witness CGY on the possibility of movement around Gitwa Hill are unfounded, and thus there was no Prosecution witness contradicting Witness CGY. Furthermore, the Prosecution carefully led Witness CGY through his evidence and the Defence had an adequate opportunity to cross-examine.[84] Also, it is recalled that there is no requirement for corroboration.[85] Thus, the Appellant has failed to demonstrate how the findings of the Trial Chamber were unreasonable with respect to Witness CGY.

39. Finally, the Appellant argues that trial testimony of Witness CGY in the present case is contradicted by the following exchange from the *Musema* case:

> MR. PHILLIPS (PROSECUTOR): Whilst you were in the bush did you witness another attack?
>
> WITNESS CGY: There were no other attacks.
>
> MR. PHILLIPS (PROSECUTOR): On the 26 of April 1994 did you witness an attack?
>
> WITNESS CGY: Yes, there were many attacks from several places at the same time.[86]

40. Defence counsel put this alleged discrepancy to Witness CGY during trial. Witness CGY asserted that his testimony had been improperly recorded and the Prosecution suggested that the witness had not mentioned the attacks on 24 and 25 April 1994 as they were of minor significance

[82] *Bagilishema* Trial Judgement, para. 860.
[83] *Bagilishema* Trial Judgement, para. 860.
[84] T. 8 September 2003, pp. 30-61; T. 9 September 2003, pp. 1-20.
[85] In the Appellant's Brief, para. 54. *See also Kamuhanda* Appeal Judgement, para. 239.

compared to the large scale attack on 26 April 1994. The Trial Chamber accepted the explanation from the Prosecution, and also added that

> "[w]hether there were any attacks between 18 and 26 April does not appear to have been a matter of significance in the prior testimony and, accordingly, the witness may have omitted mention of relatively small-scale attacks. The Chamber notes that according to his prior statement of 10 May 2001, quoted by the Defence, the witness said that there were attacks on Gitwa Hill almost every day, but that they were small. The statement also refers to a small attack on 25 April." [87]

41. The Appellant has not demonstrated how this finding of the Trial Chamber is unreasonable. The Appellant does not address the full discussion in the Trial Judgement which also refers to the prior written statement of Witness CGY of 10 May 2001; in this statement, Witness CGY had said that there were attacks on Gitwa Hill almost every day. Furthermore, the different context of his testimony in *Musema* has to be considered. It is also noted that the citation from the *Musema* case provided by the Appellant omits the following passage:

> The Chamber notes that in such cases, witnesses may have provided conflicting evidence under solemn declaration. The Chamber will, in accordance with the general principles of the assessment of evidence [...], assess such evidence on a case-by-case basis. It will address the admissibility of such evidence, and, in evaluating the probative value of the evidence, will address the explanations given by the witness for the discrepancies between his or her testimonies, and the materiality of such apparent discrepancies.[88]

42. The Appeals Chamber notes with approval the need to assess prior contradicting testimony on a case-by-case basis. In the present case, the Trial Chamber discussed Witness CGY's prior testimony. The Trial Chamber stated that the attacks prior to 26 April 1994 did not appear to be of significance in *Musema*,[89] and it is noted that the transcripts show that the testimony in *Musema* focused on the attacks where the accused in that case was present.[90] The Trial Chamber in the present case further referred to Witness CGY's written statement that attacks occurred "almost every day"[91] as supported by his testimony at trial.[92] The Appeals Chamber is mindful of the fact that the Trial Chamber did not accept Witness CGY's testimony that his testimony in *Musema* had been improperly recorded. In so doing, the Trial Chamber addressed the explanations given by the witness for the discrepancies in his testimonies. The materiality of such discrepancies was addressed by the Trial Chamber when it rejected Witness CGY's explanation and accepted that of the Prosecution. Again, it is recalled that the Appeals Chamber will not lightly overturn findings of

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[86] Exh. D7, *Musema* T. 30 April 1999, pp. 44-45. *See* Appellant's Brief, paras 221-28; Appellant's Reply, paras 65-67.
[87] Trial Judgement, para. 140.
[88] *Musema* Trial Judgement, para. 88.
[89] Trial Judgement, para. 140.
[90] Exh. D7, *Musema* T. 30 April 1999, p. 45, *cf.* p. 24. Witness CGY confirmed both these attacks on 18 April 1994 and 26 April 1994 where Musema was present on examination by the President, T. 9 September 2003, p. 3.
[91] Trial Judgement, para. 140.
[92] T. 8 September 2003, pp. 41, 55 (stating "It wasn't every day that there would be an attack but there were four attacks" line 8); T. 9 September 2003, pp. 5, 11.

a trier of fact which is able to directly assess the demeanour of a witness giving live testimony.[93] For these reasons, the Appeals Chamber finds that the Appellant has not shown that the Trial Chamber's conclusion is one which no reasonable trier of fact could have made.

3. Identification of the Accused by Witness CGN

43. The Appellant argues that the Trial Chamber erroneously found that Witness CGN had sufficient prior knowledge from his alleged work at Trafipro in Kibuye to identify him in Gitwa on 24 April 1994, as the Appellant was working exclusively in Kigali at that time.[94]

44. The Appellant misrepresents the findings of the Trial Chamber. The Appellant states that, on the basis of Witness CGV's testimony,[95] the Trial Chamber found that the Appellant was a manager of the Trafipro shop in Kibuye.[96] However, the testimony of Witness CGV was only accepted in part by the Trial Chamber: While he was found not to be credible in claiming that the Appellant participated in an attack on Gitwa Hill on or about 17 April 1994[97] and in stating that he was the manager of the Trafipro shop in Kibuye,[98] this finding did not extend to Witness CGV's testimony as to the Appellant's presence at Trafipro in Kibuye.[99] Instead, the Trial Chamber stated that the "Accused's *occasional* presence at the Kibuye Trafipro is corroborated by Witness [...] CGV" in supporting the testimony of Witness CGN.[100] Thus, the Trial Chamber's finding that Witness CGV "made conflicting remarks about his basis for identifying the Accused"[101] was limited to remarks referring to the Appellant's status as a manager of the Trafipro shop in Kibuye, not to remarks on his occasional visits there.[102] It is recalled that it is permissible for a Trial Chamber to accept some elements of a witness's testimony while rejecting other elements.[103] Thus, the Trial Chamber was entitled to find that Witness CGV supported the conclusion that the Appellant's occasional presence at Trafipro in Kibuye provided a sufficient basis for Witness CGN's identification of the Appellant at Gitwa Hill.

45. As to Witness CGX, the Appellant correctly states that the Trial Chamber erroneously referred to him as one of the sources of the assertion that the Appellant was seen at the Trafipro

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[93] *Kajelijeli* Appeal Judgement, para. 50; *Kamuhanda* Appeal Judgement, para. 7; *Ntakirutimana* Appeal Judgement, para. 12; *Niyitegeka* Appeal Judgement, para. 8.
[94] Appellant's Brief, paras 229-34. "Trafipro" was a consumer cooperative with headquarters in Kigali.
[95] The Appeals Chamber notes that the Appellant erroneously referred to "Witness CGC" in para. 232 of his Appellant's Brief. In the Corrigendum to the Appellant's Brief, p. 3, he stated that he meant Witness CGV.
[96] Appellant's Brief, para. 232.
[97] Trial Judgement, para. 128.
[98] Trial Judgement, paras 125, 128.
[99] Trial Judgement, paras 117, 124, 125, 158.
[100] Trial Judgement, para. 158 (emphasis added).
[101] Trial Judgement, para. 128.
[102] Trial Judgement, paras 128, 158.

shop in Kibuye.[104] However, it is obvious that this mistake is merely a typographical error and that the Trial Chamber intended to refer to Witness CGM and not to Witness CGX. The Trial Chamber considered at length Witness CGM's testimony relating to Trafipro in Kibuye both before and after the relevant finding and accepted his account on the sighting of the Appellant there.[105]

46. The Appellant also states that the Trial Chamber accepted the testimony of Prosecution witnesses stating that they saw him at the Kibuye Trafipro between 1980 and 1985, although he was working for Elektrogaz in Kigali between 1981 and 1985.[106] The Trial Chamber found that the Appellant's work for Trafipro in Kigali from 1976 to 1981 "is not inconsistent with his occasional visits to the branch store in Kibuye during that period."[107] The Trial Chamber repeated this finding later, stating that Witness CGN "did not insist that the Accused has formal employment there."[108] The Trial Chamber was, thus, asserting that regardless of the location of the Appellant's work, it was still reasonable for him to have been present at the Kibuye Trafipro and seen by Prosecution witnesses to the extent needed as a foundation for prior identification. Thus, the findings of the Trial Chamber are reasonable.

47. Finally, the Trial Chamber accepted Witness CGN's testimony as to the vehicle which the Appellant "customarily used" when Witness CGN testified to seeing the Appellant on several occasions prior to 1994.[109] The question of the car used by the Appellant on 24 April 1994 appears to be only peripheral and does not affect the ability of Witness CGN to identify the Appellant. The Appellant has not demonstrated how the resolution of which car the Appellant normally used could have rendered unreasonable the Trial Chamber's assessment of Witness CGN's testimony concerning the events on 24 April 1994.

48. Consequently, the ninth and tenth grounds of appeal are rejected.

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[103] *Kupreškić et al.* Appeal Judgement, paras 332-33; *Kajelijeli* Appeal Judgement, para. 167; *Ntakirutimana* Appeal Judgement para. 280; *Kamuhanda* Appeal Judgement para. 248.
[104] Appellant's Brief, para. 230, referring to Trial Judgement, para. 158.
[105] Trial Judgement, paras 125, 252, 254-255, 258.
[106] Appellant's Brief, para. 230.
[107] Trial Judgement, para. 125.
[108] Trial Judgement, para. 158, note 192.
[109] Appellant's Brief, para. 233; Trial Judgement, paras 149, 153.

IV. JUDGEMENT ALLEGEDLY RENDERED BEYOND THE SCOPE OF THE INDICTMENT (GROUND OF APPEAL 2)

A. Submissions of the Parties

49. The Appellant submits that the Trial Chamber erred in law in making factual findings on three elements not contained in the Indictment, and requests the Appeals Chamber to set them aside:[110] first, his position as Minister of Finance in the Interim Government of Rwanda in April-June 1994; second, his participation in discussions at a meeting in Kibuye on 3 May 1994;[111] and third, his role in the resignation of Witness GHK as a Member of Parliament in June 1994.[112]

50. The Prosecution responds that the Trial Chamber did not rely on any of the elements challenged by the Appellant to find intent in convicting him.[113] The Prosecution submits that the Trial Chamber rightly explained that the evidence on these matters was only relevant as background or contextual information.[114]

B. Discussion

1. Appellant's Position in the Interim Government

51. The Appeals Chamber notes that the Appellant's position in the Interim Government was expressly mentioned twice in the Indictment.[115] Accordingly, this contention of the Appellant need not be discussed any further.

52. The Appellant also contends that the Trial Chamber improperly relied on his position in the Interim Government to find that he had the requisite criminal intent to commit the crimes charged. However, the Trial Chamber expressly stated that it was not persuaded that the Appellant's position was relevant to his *mens rea*, adding that "[t]he direct evidence of the Accused's conduct, if believed, provides ample indication of the state of mind of the Accused in respect of the specific

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[110] Appellant's Brief, para. 65. *See also* Appellant's Reply, paras 1-4, where the Appellant asks the Appeals Chamber to disregard as irrelevant the evidence of the Appellant's role in the demission of Witness GKH and in the events at Nyabahanga Bridge.
[111] Appellant's Brief, paras 47-48, 51-54 ("The Defence still believes that the Prosecution cunningly raised the issue of the Accused's participation in the meeting of 3 May 1994 in order to circumvent the issue of formally adding new charges, which would require using the procedure for amending an indictment."); Appellant's Reply, para. 19. Also, the Appellant denies having exhorted the PSD youth to serve in the civilian defence, or even having made reference to any RPF accomplices in the past in the PSD (Appellant's Brief, para. 52).
[112] Appellant's Brief, paras 30-33, 34-35, 60-63; Appellant's Reply, paras 16, 20-22.
[113] Respondent's Brief, paras 62-67.
[114] Respondent's Brief, paras 65, 68-71.
[115] *See* Indictment, Section I. The Accused, and Section II. Charges, para. 1.

acts with which he is charged."[116] The Trial Chamber then found that the Appellant had the requisite *mens rea* in relation to the crimes for which he was convicted, based on evidence of his conduct in the particular events.[117]

53. Similarly, the Appellant contends that the fact that he was a minister in the Interim Government was misused by the Trial Chamber to establish his motive to commit the crimes charged in the Indictment. This argument presupposes that the Prosecution was under an obligation to establish the Appellant's motive to secure a conviction. However, pursuant to settled jurisprudence, it is the intent (*mens rea*) that is decisive for liability purposes, not the motive (which can only be relevant to sentencing, if at all).[118] The Appellant did not show that the Trial Chamber erred in this regard. Indeed, while the Trial Chamber noted that his position in the Interim Government could be relevant to a possible motive,[119] it immediately cautiously added that this had little probative value to establish the charges and might be prejudicial to the Appellant.[120]

54. The Appellant further contends that the reference to his position in the Interim Government was an impermissible attempt to reintroduce a charge of superior responsibility.[121] However, he did not demonstrate that, by presenting evidence on his position in the Interim Government, the Prosecution intended to reintroduce such a charge. Also, the Trial Chamber did not understand the reference to the Appellant's position in the Interim Government as a charge of superior responsibility, and he was convicted for his own acts, not for those committed by his subordinates.

55. For the above reasons, the Appeals Chamber finds that the Appellant has not shown that the Trial Chamber improperly relied on his position in the Interim Government to convict him. Further, the Trial Chamber correctly recognized that the evidence of the Appellant's participation in the Interim Government could be relevant only for certain limited purposes, for instance as a matter of background information and in relation to his ability to incite and lead others to commit crimes.[122]

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[116] Trial Judgement, para. 51.
[117] *See* Trial Judgement, paras 462 (finding that the Appellant had the requisite intent to be convicted of genocide in relation to the events at Gitwa Hill) and 483 (finding that he had the requisite intent to be convicted of extermination for the same events). While the Trial Chamber did not expressly find that the Appellant had the requisite intent for genocide and murder in relation to the events at the Gaseke roadblock, this is implicit in paras 472-73 and 490.
[118] *See, e.g., Niyitegeka* Appeal Judgement, paras 52-53; *Kayishema and Ruzindana* Appeal Judgement, para. 161; *Tadić* Appeal Judgement, paras 269, 272.
[119] Trial Judgement, para. 50.
[120] Trial Judgement, para. 50.
[121] A charge previously withdrawn from the Indictment, *see* Decision on Prosecution Request to Amend Indictment, 30 June 2003.
[122] *See* Trial Judgement, paras 48, 68 and 483.

2. Participation in the Meeting of 3 May 1994 and Alleged Role in the Resignation of Witness GKH

56. It is undisputed that the Indictment did not plead the Appellant's participation in the meeting of 3 May 1994 and his alleged role in the resignation of Witness GKH. The Appellant objected at trial to the admission of evidence on these elements[123] and maintained his objection on appeal; thus, there was no waiver. Accordingly, the Appeals Chamber will first consider whether the Trial Chamber convicted the Appellant on the basis of his participation in the meeting of 3 May 1994 or his alleged role in the resignation of Witness GKH. Even if this is not the case, the Appeals Chamber will consider whether the proceedings against the Appellant were rendered unfair because of the Trial Chamber's discussion of the evidence on these elements.

(a) Whether the Appellant's Convictions were Based on Material Facts not pleaded in the Indictment

57. As explained above,[124] a Trial Chamber cannot convict an accused on the basis of material facts not pleaded in the indictment (unless the defect has been cured subsequently by the provision of timely, clear and consistent information). Thus, irrespective of whether the Appellant's participation in the meeting of 3 May 1994 and his alleged role in the resignation of Witness GKH were material facts that had to be pleaded in the Indictment,[125] the crucial question is whether the Trial Chamber relied on these elements to convict the Appellant. The Trial Chamber explicitly refused to consider the evidence related to the Appellant's participation in the meeting of 3 May 1994 and to his alleged role in the resignation of Witness GKH as evidence of his *mens rea*;[126] instead, as already discussed, it relied on other evidence to conclude that he had the requisite intent.[127] The Trial Chamber did not otherwise rely on the Appellant's participation in the 3 May meeting or his alleged role in the resignation of Witness GKH to convict the Appellant. Therefore, the Appeals Chamber finds that the Trial Chamber did not convict the Appellant on the basis of material facts which were not pleaded in the Indictment.

[123] *See* Trial Judgement, para. 47.
[124] *See supra* para. 16.
[125] In this context, the Appeals Chamber recalls that while the Prosecution must plead the material facts underpinning the charges in the indictment, it need not plead the evidence that will be used to prove those material facts. *See Stakić* Appeal Judgement, para. 116; *Ntakirutimana* Appeal Judgement, para. 25; *Kupreškić et al.* Appeal Judgement, para. 88; *Furundžija* Appeal Judgement, para. 147.
[126] Trial Judgement, paras 51 and 69.
[127] *See supra* para. 52.

(b) Whether the Appellant was Otherwise Prejudiced by the Trial Chamber's Consideration of these Elements

58. The Trial Chamber stated that the evidence of the Appellant's participation in the meeting of 3 May 1994 "could be probative of an alleged motivation to actively pursue a government policy of genocide against Tutsi,"[128] and later referred to this as an aggravating circumstance.[129] As discussed below, this conclusion was open to the Trial Chamber.[130]

59. As to the alleged role of the Appellant in the resignation of Witness GKH, it is unclear why the Trial Chamber made a finding on this.[131] Indeed, the Trial Chamber did not expressly refer to this finding later in the Trial Judgement. However, as no effect on the judgement has been shown, the Appeals Chamber considers that the proceedings against the Appellant were not rendered unfair by the Trial Chamber's discussion of this evidence.[132]

60. Accordingly, the second ground of appeal is rejected.

V. ALLEGED NON-DISCLOSURE OF EXCULPATORY EVIDENCE (GROUND OF APPEAL 4)

A. Submissions of the Parties

61. The Appellant submits that the Prosecutor failed to disclose[133] four documents which were in the possession of the Prosecution since 20 June 2001,[134] the first being a letter dated 20 June 2001 from the Governor of the National Bank of Rwanda ("Governor") forwarding the following three documents, which were allegedly drafted and signed by the Appellant in Kigali,[135] to the Prosecutor: two separate letters dated 13 and 23 April 1994 from the Appellant to the Governor, and an agreement signed by the Appellant relating to a grant by the Bank of a special advance to the State of Rwanda dated 23 April 1994. The Appellant argues that the documents show that he was in

[128] Trial Judgement, para. 69.
[129] Trial Judgement, para. 508 (ii) ("The Chamber considers it particularly aggravating that instead of promoting peace and reconciliation in his capacity as Minister, he supported and advocated a policy of genocide").
[130] *See infra*, para. 134. Further, since no effect on the verdict or the sentence has been shown, it is unnecessary to consider the Appellant's challenges to the use of the evidence on this event by the Trial Chamber.
[131] The Trial Chamber found that "in early or mid-June 1994 the Accused pressured Witness GKH to relinquish his post as an elected Member of Parliament for Kibuye Prefecture because he had a Tutsi wife" (Trial Judgement, para. 109).
[132] Again, since no effect on the verdict or the sentence has been shown, it is unnecessary to consider the Appellant's challenges to the use of the evidence on this event by the Trial Chamber. As to the allegation that the Trial Chamber exhibited bias in assessing the evidence of Witness DN, this has not been established: *see infra* para. 80.
[133] Appellant's Brief, paras 70-74.
[134] Appellant's Brief, para. 70.
[135] Appellant's Brief, paras 69 and 75, also referring to the admitted documents under Rule 115 in the Appeals Chamber's Decision on the Admission of Additional Evidence, 14 April 2004.

Kigali and not in Gitwa on 13 and 23 April 1994 (the latter a Saturday).[136] The Appellant also submits that if the Trial Chamber had these documents, it is highly probable that it would not have assessed the testimony from Witnesses CGN and CGY as reliable evidence.[137]

62. The Prosecution acknowledges that the documents ought to have been disclosed under Rule 68,[138] but argues that the admission of this additional evidence on appeal provided a sufficient remedy.[139] The Prosecution submits that the non-disclosure did not cause material prejudice because the Appellant was able to adduce other evidence on the substance of what the documents record.[140] Additionally, according to the Prosecution, the consequences of non-disclosure only touch upon the Appellant's alibi for 23 April 1994 and do not affect the findings concerning 24 April 1994 and the events at the Gaseke roadblock; therefore, the non-disclosure does not affect the convictions for genocide, and extermination and murder as crimes against humanity.[141]

63. The Prosecution questions why the Appellant did not attempt to secure the three documents which had his signature and argue a "Kigali alibi" at trial.[142] The Prosecution also argues that the potential "Kigali alibi" contained in the new documents is inconsistent with the "Gitarama alibi" which he argued earlier at trial,[143] and that under Rule 67(A) a new alibi cannot be argued on appeal.[144] Furthermore, it argues that it was routine for official documents to bear the Kigali letterhead even after the seat of the Interim Government was moved from Kigali to Gitarama.[145]

B. Discussion

64. With the additional evidence, the Appellant seeks to support an alibi different to the one raised at trial where he relied on Witness DP as an alibi witness. Witness DP testified that he saw the Appellant once or twice a day, excluding weekends, from 15 April to about 28 May 1994, at various times of day, either at the Appellant's office in the government compound or at one of the two commercial banks where Witness DP worked in Gitarama, as well as at occasional social meetings.[146] Thus, the alibi at trial placed the Appellant in Gitarama.[147] The Trial Chamber found

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[136] Appellant's Brief, paras 66-67, 72-79.
[137] Appellant's Brief, paras 75-81.
[138] Respondent's Brief, paras 134, 139.
[139] Respondent's Brief, paras 134 and 141; Decision on the Admission of Additional Evidence, 14 April 2005.
[140] Respondent's Brief, paras 135, 141-42.
[141] Respondent's Brief, paras 137, 167, 171.
[142] Respondent's Brief, paras 148-50.
[143] Respondent's Brief, para. 154.
[144] Respondent's Brief, paras 136, 155. The Respondent submits the rule is designed to enable the Prosecutor to investigate both places and witnesses relating to an alibi. The presence of the Appellant in Kigali after 12 April was not raised at trial. The lack of opportunity to investigate is allegedly not due to non-disclosure, because if the Appellant genuinely had a Kigali alibi then he should have raised it at trial.
[145] Respondent's Brief, paras 158-63. Note 214 refers to the Appellant's passport Exh. D.63 which was purportedly issued in Kigali but Witness DP testified the Appellant remained in Gitarama in May and June.
[146] Trial Judgement, para. 171.

that this testimony carried "very little weight" as the alibi could not account for the time outside of the meetings between Witness DP and the Appellant.[148]

65. The Appellant now seeks to rely on the documents admitted on appeal under Rule 115 to argue that he was in Kigali on the dates the documents were signed:[149] two of them are dated 23 April 1994 and one is dated 13 April 1994.[150] As to the former date, the Appellant argues that, as the document is purported to have been signed in Kigali, he could not have been in Gitwa on 23 April 1994, a date on which the Trial Chamber found that he had participated in attacks.[151]

66. The first issue is whether an Appellant is permitted to raise a new alibi on appeal. Pursuant to Rule 67(A)(ii)(a), the Prosecution has to be provided with notice of an alibi argument as early as practicable and prior to the commencement of trial. While Rule 67(B) states that failure to provide such notice "shall not limit the right of the accused" to rely on an alibi defence, the jurisprudence permits a Trial Chamber to consider the failure to provide the requisite notice in its assessment of the alibi.[152] The same legal principle applies in a situation where an alibi is raised for the first time on appeal. Rule 67 provides that the Defence can still raise an alibi even if no prior notice is provided; however, if for example the Appellant could have been reasonably expected to raise the new alibi during trial, the Appeals Chamber can take particular note of the failure to provide timely notice to the Prosecution in its assessment of the alibi. This does not contradict the finding of the ICTY Appeals Chamber that an "accused, generally, cannot raise a defence for the first time on appeal".[153] The Appeals Chamber recalls

> that an alibi 'does not constitute a defence in its proper sense'. In general, a defence comprises grounds excluding criminal responsibility although the accused has fulfilled the legal elements of a criminal offence. An alibi, however, is nothing more than the denial of the accused's presence during the commission of a criminal act.[154]

67. The second issue is that the alibi raised on appeal is different from the Gitarama Alibi raised at trial where Witness DP supported the Appellant's contention that he could not have committed the alleged crimes as he was working in Gitarama. The Appellant now argues that the additional evidence shows that he was in Kigali on the dates reflected therein.

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[147] Trial Judgement, paras 170-81.
[148] Trial Judgement, paras 177-78 and 265.
[149] Appellant's Brief, paras 67, 75-81.
[150] The evidence in relation to this date is not relevant for the purposes of the conviction for crimes committed at Gitwa Hill.
[151] Trial Judgement, para. 179.
[152] *Kajelijeli* Trial Judgement, paras 164-67; *Kamuhanda* Trial Judgement, para. 82; *Kayishema and Ruzindana* Trial Judgement, paras 233-39; *Kayishema and Ruzindana* Appeal Judgement, paras 106, 110-11; *Musema* Trial Judgement para. 107; *Niyitegeka* Trial Judgement, para. 50; *Semanza* Trial Judgement, para. 82.
[153] *Aleksovski* Appeal Judgement, para. 51.
[154] *Kamuhanda* Appeal Judgement, para. 167.

68. In assessing alibi evidence a Chamber must consider whether the Defence raised a reasonable doubt about the Prosecution's allegations.[155] On appeal, the Appeals Chamber then has to consider whether the Trial Chamber's method of assessing the alibi evidence was erroneous.[156] If additional evidence has been admitted, the Appeals Chamber will first determine, on the basis of the trial record alone, whether a reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt. Only if this is the case, will it determine whether, on the basis of the trial record and additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt.[157]

69. The Trial Chamber considered the Gitarama Alibi pertaining to 23 April 1994 to be inadequate.[158] The Appeals Chamber sees no error in the finding. Thus, the Appeals Chamber now turns to the question whether the documents admitted as additional evidence on appeal show that the Appellant was in Kigali on 23 April 1994.

70. The Appeals Chamber finds that the documents admitted as additional evidence do not establish the veracity of the Kigali alibi nor do the documents render the finding of the Trial Chamber on the Gitarama alibi unreasonable[159] or, read together, cast any doubt on the Trial Chamber's finding on the Appellant's presence at the crime site on 23 April 1994. The Appellant merely asserts that the letterheads of the documents bearing his signature show that he was in Kigali at the time of the indicated dates. If he was indeed in Kigali at these times working on the documents, his delay in raising the alibi affects the probative value of the documents: he would have been able to recall his own actions independently from the admission of the new documents, and he does not provide a reasonable explanation for the delay in raising the Kigali alibi. Also, the Appellant did not show that the documents admitted as additional evidence are different from a class of documents which could have been just routinely marked as being created in Kigali, the established seat of government, although they were signed at some other location.

71. The Appeals Chamber recalls that in the Rule 115 Decision of April 2005 it held that the question whether or not the Prosecution was under an obligation to disclose the four documents pursuant to Rule 68 of the Rules to the Appellant has to be dealt with only in the appeal judgement,

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[155] *Kamuhanda* Appeal Judgement, para. 167: "An alibi, in contrast to a defence, is intended to raise *reasonable doubt* about the presence of the accused at the crime site, this being an element of the prosecution's case, thus the burden of proof is on the prosecution" (emphasis added); *Kajelijeli* Appeal Judgement, para. 42; *Ntakirutimana* Appeal Judgement, paras 170-71.
[156] *Kamuhanda* Appeal Judgement, para. 210.
[157] *See Blaškić* Appeal Judgement, para. 24(c).
[158] Trial Judgement, paras 170-81.
[159] *See Blaškić* Appeal Judgement, para. 24(c).

as it refers to the Appellant's fourth ground of appeal.[160] No doubt the Prosecution should have disclosed these documents to the Appellant.[161]

72. However, in light of the above findings, it is neither necessary to consider the Appellant's submissions concerning the impact of the new alibi on the testimony of Witnesses CGY and CGN, [162] nor to further consider the Prosecution's alleged breach of its obligations under Rule 68.[163] The Appeals Chamber reiterates, however, that the onus on the Prosecution to comply with Rule 68 to the best of its ability is not a secondary obligation, and is as important as the obligation to prosecute.[164]

73. Consequently, the fourth ground of appeal is rejected.

VI. ALLEGED ERRORS IN THE ASSESSMENT OF DEFENCE EVIDENCE (GROUNDS OF APPEAL 5 AND 3)

74. The Appellant submits that the Trial Chamber violated his right to fair proceedings by ignoring some of the evidence he presented, by examining it in a manner that was systematically unfavourable to him, and by omitting to address fundamental points raised by the Defence.[165] The Prosecution responds that the Trial Chamber adhered to the relevant principles relating to the assessment of evidence.[166]

75. Each of the instances raised by the Appellant will now be briefly discussed; the Appeals Chamber will then consider whether the Appellant has shown that his right to fair proceedings was infringed. At the outset, the Appeals Chamber recalls that:

> [T]he Trial Chamber is not under the obligation to justify its findings in relation to every submission made during the trial [...]. [I]t is in the discretion of the Trial Chamber as to which legal arguments to address. With regard to the factual findings, the Trial Chamber is required only to make findings of those facts which are essential to the determination of guilt on a particular count. It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record. It is to be presumed that the Trial Chamber evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence [...]. If the Trial Chamber did not refer to the evidence given by a witness, even if it is in contradiction to the Trial Chamber's finding, it is to be presumed that the Trial Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings.[167]

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[160] Decision on the Admission of Additional Evidence, 14 April 2005, p. 8.
[161] This has also been admitted by the Prosecution, Respondent's Brief, paras 134, 139.
[162] Appellant's Brief, paras 75-81.
[163] Appellant's Brief, paras 70-74.
[164] *See Kordić and Čerkez* Appeal Judgement, para. 242.
[165] Appellant's Brief, paras 84-146.
[166] Respondent's Brief, paras 80, 83-92, 132-33.
[167] *Kvočka et al.* Appeal Judgement, para. 23 (references omitted).

A. Witness DQ

1. Submissions of the Parties

76. The Appellant avers that the Trial Chamber ignored crucial elements of the testimony of Witness DQ, in particular his evidence that the Appellant was absent from the scenes of genocide in Kibuye Prefecture and his statements as to the morality of the Appellant before the start of the massacres.[168]

77. The Prosecution responds that the features of Witness DQ's testimony which the Appellant claims the Trial Chamber ignored were not so centrally important that the Trial Chamber was required to assess them in detail.[169]

2. Discussion

78. It has not been shown that the Trial Chamber ignored parts of Witness DQ's evidence or that its assessment thereof was unreasonable. The Trial Chamber did refer to Witness DQ's evidence in the Trial Judgement[170] and, even though it did not refer expressly to the parts of Witness DQ's evidence mentioned by the Appellant, the Appellant has not shown that no reasonable trier of fact could have reached the findings reached by the Trial Chamber:

1) Witness DQ's testimony that the Appellant was never identified as one of the persons responsible for the massacres constituted hearsay evidence of unverifiable reliability; it would have been reasonable for a Trial Chamber to prefer the direct evidence of Prosecution witnesses incriminating the Appellant;

2) As to Witness DQ's evidence of the Appellant's morality before the start of the massacres, a reasonable trier of fact could have found that this was insufficient to cast doubt on the evidence of his involvement in the massacres.

B. Witness DN

1. Submissions of the Parties

79. In the Appellant's view, while the Trial Chamber admitted parts of Witness DN's testimony, it unfairly rejected or ignored other important parts of his testimony,[171] *inter alia*, portions of his evidence pertaining to a meeting on 3 May 1994,[172] his evidence that the Appellant did not force

[168] Appellant's Brief, paras 85-91; Appellant's Reply, para. 27.
[169] Respondent's Brief, paras 94-97.
[170] *See* Trial Judgement, para. 106.
[171] Appellant's Brief, paras 92-101. At paragraphs 126-128, the Appellant contends that Exh. D.41 (a written statement of Witness DN to the State Prosecutor of Kibuye, dated 26 March 2001) buttresses the credibility of his testimony.
[172] Appellant's Brief, para. 93.

Witness GKH to resign from his post of deputy,[173] and his evidence absolving the Appellant from the massacres.[174] The Prosecution responds that the Trial Chamber reasonably rejected part of Witness DN's evidence.[175]

2. Discussion

80. The Appellant has failed to show that the Trial Chamber unfairly rejected or ignored parts of Witness DN's evidence.

81. The argument of the Appellant with respect to the Trial Chamber's assessment of Witness DN's evidence on the meeting of 3 May 1994 is unclear.[176] The Appellant seems to suggest that the Trial Chamber erred in accepting Witness DN's testimony as to the statements made by the Appellant during the meeting while at the same time rejecting Witness DN's suggestion that the Appellant had been obliged to make those statements at the meeting because of his vulnerability as a member of the PSD.[177] However, it has not been shown that the Trial Chamber was unreasonable in accepting his testimony as to the statements made by the Appellant and in rejecting his suggestion as to why the Appellant made the statements. In particular, as the Trial Chamber noted, this suggestion was speculative and based on vague remarks about the position of PSD members at the time.[178]

82. With respect to the resignation of Witness GKH, the Trial Chamber reasonably preferred the testimony of Witness GKH to that of Witness DN:

1) The Trial Chamber rightly considered that Witness DN was not completely dispassionate on this issue.[179] The Appellant's argument that the Trial Chamber should not have invoked "confidential reasons" to rule on the credibility of this witness[180] is unconvincing: the "confidential reasons" were known to the Parties and it is only to protect the identity of Witness DN that the Trial Chamber spoke of "confidential reasons" in the Trial Judgement. Also, the Trial Chamber found that "Witness DN's testimony on this question appeared evasive and

[173] Appellant's Brief, paras 93, 100.
[174] Appellant's Brief, paras 95-99, 126-27. The Appellant recalls that Witness DN stated (Exh. D.41) that he had nothing to say about the activities of the Appellant during the period of the massacres. The Appellant argues that Witness DN testified that the Appellant was never mentioned as a person responsible of the massacres in meetings held during the war to convince the local population to cease the killings or in the *Gacaca* organized by detainees of Kibuye prison.
[175] Respondent's Brief, paras 100-05, 123-27.
[176] *See* Appellant's Brief, para. 93 ("Furthermore, Trial Chamber I found Witness DN to be credible as to the speech Emmanuel Ndindabahizi allegedly made during this meeting, and isolated this part of the testimony from its context so as to present it in an unfavourable light for the Defence.")
[177] *See* Trial Judgement, paras 87-88.
[178] *See* Trial Judgement, para. 88 and T. 4 November 2003, pp. 33-34 (Witness DN alleges that the PSD was perceived as too supportive of the RPF and that the Appellant could not have spoken openly against the killings).
[179] *See* Trial Judgement, paras 102-03.
[180] *See* Appellant's Brief, para. 94.

uncertain." [181] The Appellant does not argue that this assessment was unreasonable.

2) Witness DN's testimony did not undermine Witness GKH's evidence on his resignation. As explained by the Trial Chamber, "Witness DN had no direct knowledge of the conversation between Witness GKH and the Accused; his testimony was only that Witness GKH had not mentioned that the Accused had threatened him in order to induce his resignation."[182] The Trial Chamber was reasonable in concluding that it was unlikely that Witness GKH would have mentioned the threats of the Appellant to Witness DN.[183] It was reasonable for the Trial Chamber to find that "Witness DN's testimony concerning the reasons for the resignation of Witness GKH is not credible and deserves little weight."[184]

83. Finally, the Appellant argues that the Trial Chamber ignored Witness DN's evidence absolving the Appellant from any responsibility for the massacres in Kibuye Prefecture. In this connection, the Appellant points to the following three grounds: First, in Exh. D.41 (a letter written by Witness DN to the Rwandan Prosecutor), Witness DN "said nothing about the activities of the Appellant during the period of the massacres";[185] second, Witness DN testified that, at the end of April 1994, he organized meetings with the local population in an attempt to stop the killings; nobody identified the Appellant as one of the persons responsible for the violence;[186] third, none of Witness DN's co-detainees in a national prison in Rwanda ever incriminated the Appellant in relation to the massacres in Kibuye Prefecture.[187] However, the Appellant has not shown that, presented with this evidence, no reasonable trier of fact could have found as the Trial Chamber did. It was reasonable for the Trial Chamber to prefer the direct evidence of Prosecution witnesses implicating the Appellant in the crimes to Witness DN's hearsay evidence.

C. Witness DU

1. Submissions of the Parties

84. The Appellant submits that the Trial Chamber ignored Witness DU's evidence, which contradicted Witness CGM's testimony and exculpated the Appellant from any responsibility for the killing of Tutsi women married to Hutu men.[188] The Prosecution responds that the Trial Chamber correctly held that Witness DU's evidence had limited significance.[189]

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[181] Trial Judgement, paras 103; *see also* para. 105.
[182] Trial Judgement, para. 104. *See also* para. 100.
[183] *See* Trial Judgement, para. 104.
[184] Trial Judgement, para. 105.
[185] Appellant's Brief, para. 95.
[186] Appellant's Brief, para. 98, referring to T. 3 November 2003, pp. 33-34.
[187] Appellant's Brief, paras 96, 99, referring to T. 3 November 2003, p. 35.
[188] Appellant's Brief, paras 102-04.
[189] Respondent's Brief, para. 107, referring to Trial Judgement, paras 363 and 365.

2. Discussion

85. The Trial Chamber found, on the basis of Witness CGM's testimony, that the Appellant encouraged those at Nyabahanga Bridge roadblock to kill Tutsi women married to Hutu men.[190] However, the Appellant did not incur any liability in this relation because the Trial Chamber found that the evidence of Witness CGM was insufficient to establish that the conduct of the Appellant directly and substantially contributed to killings.[191] Thus, even if the Appeals Chamber were to prefer the evidence of Witness DU on this, the verdict would not be affected.

86. The Appeals Chamber notes that, although the Trial Chamber did not refer to the evidence of Witness DU in relation to the distribution of weapons and incitement at Nyabahanga Bridge at the end of May 1994, it did refer to it elsewhere in its Judgement.[192] As explained above,[193] the Trial Chamber is presumed to have taken into account the evidence before it, and the Appellant will be successful only if he can show that no reasonable trier of fact would have decided as the Trial Chamber did. In the present case, the Trial Chamber was presented with two competing accounts: First, the testimony of Witness CGM that Tutsi women married to Hutu men only started being killed after the Appellant incited these killings at the end of May 1994;[194] and second, the testimony of Witness DU that Tutsi women married to Hutu men were killed from the beginning of the war, and that these killings ceased after the Appellant called for an end to them when he came to the region in June 1994.[195] The Appellant argues that the Trial Chamber erred in accepting the account of Witness CGM, but his arguments are limited to asserting that the testimony of Witness DU contradicted that of Witness CGM, and he does not show that a reasonable trier of fact presented with the testimony of Witness DU would necessarily have rejected the testimony of Witness CGM.

D. Expert Witness Bernard Lugan

1. Submissions of the Parties

87. The Appellant asserts that the Trial Chamber erred in rejecting the evidence of Defence Expert Witness Bernard Lugan that the Appellant's accession to the Interim Government and his participation in the meeting of 3 May 1994 in Kibuye were part of a survival strategy.[196]

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[190] Trial Judgement, para. 264.
[191] Trial Judgement, para. 474.
[192] *See* Trial Judgement, paras 362-65.
[193] *See supra*, para. 75.
[194] T. 15 September 2003, pp. 7-9.
[195] T. 28 October 2003, p. 48.
[196] Appellant's Brief, paras 105-11. At paragraphs 107-08, the Appellant contends that, contrary to what the Prosecution asserted at trial, Dr. Lugan cannot be said to be postulating a racist, negativist and revisionist history of Rwanda.

2. Discussion

88. The Appellant merely repeats arguments that did not succeed at trial, without showing that the Trial Chamber's assessment of the evidence of Defence Expert Lugan was unreasonable and led to a miscarriage of justice.

E. Witness DX

1. Submissions of the Parties

89. The Appellant submits that the Trial Chamber unfairly denied his motion for the admission of Witness DX's written statement.[197] The Appellant argues that first, the Trial Chamber should not have considered the arguments of the Prosecution in response to the motion because the deadline to file a response had lapsed;[198] and second, that in dismissing the motion, the Trial Chamber did not understand the importance of Witness DX's statement for the Defence, particularly in that it showed that the Appellant was manipulated by the investigators of the ICTR and that the Indictment against him was fraudulent.[199]

90. In response, the Prosecution argues that the Appellant merely repeats arguments that were unsuccessful at trial without demonstrating how the Trial Chamber erred.[200] First, in rejecting the motion, the Trial Chamber did not have to decide whether the Prosecution's response to the motion was timely, nor did it give the Prosecution's arguments great weight;[201] and second, the Trial Chamber provided a detailed, clear and reasoned decision, specifying that parts of the written statement did not go to "proof of a matter other than the acts and conduct of the accused" (as required by Rule 92*bis* of the Rules) and that the other parts were so intertwined with the rest of the statement that it was difficult to split the statement into parts that could be admitted.[202]

2. Discussion

91. In its Decision on Rule 92*bis* Motion, the Trial Chamber found first that sections of the statement proffered (to wit, the sections stating that the Appellant could not have committed the crimes for which he was indicted because that would have been contrary to his character) were not admissible under Rule 92*bis* of the Rules because they went to the acts and conduct of the

[197] Appellant's Brief, paras 112-19. At paragraph 113, the Appellant submits that his motion met the formal requirements of Rule 92*bis* of the Rules. This is irrelevant as the Trial Chamber did not find that the motion failed to meet the formal requirements of Rule 92*bis* of the Rules: *see* T. 28 November 2003, pp. 24-26 ("Decision on Rule 92*bis* Motion").
[198] Appellant's Brief, paras 114-15.
[199] Appellant's Brief, paras 117-19, 142.
[200] Respondent's Brief, para. 112.
[201] Respondent's Brief, para. 114.

Appellant.[203] The Trial Chamber also refused to admit other parts of the statement because cross-examination on these parts would not be possible in light of the unwillingness of Witness DX to appear before the Trial Chamber.[204] Finally, the Trial Chamber considered whether the remaining parts of the statement could still be admitted pursuant to Rule 92*bis* of the Rules but refused to do this because it found that "everything is intertwined."[205] Thus, the Trial Chamber held that the statement proffered could not be admitted pursuant to Rule 92*bis* of the Rules.

92. The Appeals Chamber must consider whether the Appellant has shown that the Trial Chamber erred in its Decision on Rule 92*bis* Motion. A preliminary question is whether, as argued by the Appellant, the Trial Chamber improperly considered the Prosecution's arguments in response to the motion.

(a) Whether the Trial Chamber Improperly Considered the Prosecution's Arguments

93. The Appellant filed his motion on 27 October 2003.[206] The Prosecution filed a response on 27 November 2003.[207] At the hearing on 28 November 2003, the Trial Chamber invited the parties to make further oral submissions on the Rule 92*bis* Motion (and on the question whether the Prosecution had filed a timely response[208]). The Trial Chamber then rejected the Rule 92*bis* Motion, stating at the end that, "[w]ith this conclusion, the question doesn't arise whether the Prosecution's response is timely under Rule 92 *bis* (E), and we do not have to decide that matter."[209]

94. The Appellant argues that the Trial Chamber should not have considered the written response filed by the Prosecution nor should the Prosecution have been given a further chance to make oral submissions.[210] But the Appellant does not go as far as to argue that if the Prosecution's arguments were time-barred then the Trial Chamber was bound to admit the statement of

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[202] Respondent's Brief, paras 112, 116-17.
[203] Decision on Rule 92*bis* Motion, pp. 24-25.
[204] Decision on Rule 92*bis* Motion, p. 25 ("[...] we have noted in this document several matters which calls [*sic*] for cross-examination, such as page 7, when it is a matter of how the witness left Rwanda; at page 18 and 20, about Mr. Ndindabahizi's relationships to colleagues in various governments and also the parts concerning the legitimacy of the investigation by ICTR employees and the assertion that the Accused was subjected to some kind of blackmail.")
[205] Decision on Rule 92*bis* Motion, p. 25.
[206] "Requête aux fins d'admission d'un témoignage écrit (Article 92 bis du Règlement de procédure et de preuve)", filed confidentially on 27 October 2003 ("Rule 92*bis* Motion").
[207] "Prosecutor's Response to the Defence Motion for Admission of a Written [Statement of] Witness DX into Evidence under Rule 92 *bis* of the Rules of Procedure and Evidence", filed 27 November 2003 ("Response to Rule 92*bis* Motion").
[208] On this last point, *see* T. 28 November 2003, p. 18.
[209] Decision on Rule 92*bis* Motion, p. 26. Rule 92*bis* (E) of the Rules reads:

> Subject to any order of the Trial Chamber to the contrary, a party seeking to adduce a written statement or transcript shall give fourteen days notice to the opposing party, who may within seven days object. The Trial Chamber shall decide, after hearing the parties, whether to admit the statement or transcript in whole or in part and whether to require the witness to appear for cross-examination.

[210] Appellant's Brief, paras 114-15.

Witness DX. This is correct because, irrespective of the arguments made by the parties, the Trial Chamber must itself be convinced that the statement proffered meets the requirements of Rule 92*bis* of the Rules.[211] In particular, the Trial Chamber must be satisfied that the written statement "goes to proof of a matter other than the acts and the conduct of the accused as charged in the indictment."[212] Further, even if this requirement is met, the decision of the Trial Chamber is not an automatic one: the Trial Chamber must weigh "[f]actors in favour of admitting evidence in the form of a written statement" and "[f]actors against admitting evidence in the form of a written statement."[213] In this connection, the submissions of the parties may be useful to the Trial Chamber, but they are by no means indispensable.

95. The Appeals Chamber need not decide whether the Trial Chamber erred in not ruling on the admissibility of the Response to Rule 92*bis* Motion or in allowing the Prosecution to make oral representations on the Rule 92*bis* Motion because no prejudice to the Appellant has been shown.

(b) Whether the Trial Chamber Erred in Dismissing the Rule 92*bis* Motion

96. The Trial Chamber found that Witness DX's assertions that the Appellant was incapable of committing the crimes with which he was charged because of his character went to the matter of his acts and conduct.[214] Therefore, it held that these parts of the statement were inadmissible pursuant to Rule 92*bis* of the Rules.[215] The Appellant offers no argument to challenge this. Accordingly, it has not been shown that the Trial Chamber erred in this regard.

97. The Appellant takes issue with the Trial Chamber's decision not to admit Witness DX's assertions relating to the contacts between the Appellant and the investigators of the Office of the Prosecution starting in 1996 up to the moment the Appellant was indicted and arrested in 2001. The Appellant submits that this evidence was of considerable importance to prove that he had been manipulated by the ICTR investigators, and that he had been indicted only as a result of the failure of the discussions between him and the ICTR investigators.[216]

98. As recalled above, the decision on whether to admit written statements (or parts thereof) is a discretionary one. In the case at hand, the Trial Chamber refused to admit the relevant parts of

[211] *See Stakić* Appeal Judgement, para. 196, stating that even if the Prosecution does not object, the plain language of Rule 92*bis* gives the Trial Chamber discretion to decide whether to admit such statements.
[212] Rule 92*bis* (A) of the Rules.
[213] Rule 92*bis* (A)(i) and (ii) of the Rules. *See* also Rule 92*bis* (E) of the Rules ("The Trial Chamber shall decide, after hearing the parties, whether to admit the statement or transcript in whole or in part and whether to require the witness to appear for cross-examination.")
[214] Decision on Rule 92*bis* Motion, pp. 24-25.
[215] Decision on Rule 92*bis* Motion, p. 25.
[216] Appellant's Brief, paras 117-119.

Witness DX's statement because of the impossibility of cross-examining the witness.[217] The Appellant has not demonstrated that the Trial Chamber abused its discretion or rendered his trial unfair in deciding as it did. First, Rule 92*bis* of the Rules itself provides that the existence of "factors which make it appropriate for the witness to attend for cross-examination" weighs against admitting evidence in the form of a written statement.[218] The Appellant offers no argument that the Trial Chamber erred in finding that cross-examination was needed with regard to a series of elements of Witness DX's written statement[219] or that other factors in favour of admitting this evidence should have prevailed. Second, as to the Appellant's contention that Witness DX's statement would have shown that he was manipulated by the investigators of the ICTR or that the indictment against him was "fraudulent", the Appeals Chamber considers that in principle, the exercise of the discretion of who to indict is vested in the Prosecution. The role of the Confirming Judge is in principle limited to deciding whether a *prima facie* case has been established, and the role of the Trial Chamber is similarly limited to deciding whether the Prosecution has proved its case beyond reasonable doubt.[220] This is what the Trial Chamber did.

99. As to the remainder of Witness DX's statement, the Appellant provides no argument that the Trial Chamber erred in finding that it could not be admitted pursuant to Rule 92*bis* of the Rules because everything was "intertwined."[221] Thus, it has not been shown that the Trial Chamber erred in rejecting the remaining parts of Witness DX's written statement.

F. Exhibit D.34

100. The Appellant contends that, while the Trial Chamber accepted that Exh. D.34 was authentic, it failed to give proper weight to this exhibit when making its findings.[222] This argument has been considered under Ground 11, as it relates to the Trial Chamber's factual findings with respect to the events at the Gaseke roadblock.

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[217] Decision on Rule 92*bis* Motion, p. 25. In his motion, the Appellant had stated that "au debut du mois de septembre 2003, le témoin DX a fait état de difficultés tenant tout á la fois á son état de santé, á sa sécurité et á ses obligations professionnelles, et a finalement refusé d'effectuer le déplacement á Arusha pour y comparaître devant la Chambre de Première Instance I"(Rule 92*bis* Motion, para. 2).

[218] Rule 92*bis* (A)(ii)(c) of the Rules.

[219] The Trial Chamber referred to the issues of "how the witness left Rwanda[,] Mr. Ndindabahizi's relationships to colleagues in various governments and also the parts concerning the legitimacy of the investigation by ICTR employees and the assertion that the Accused was subjected to some kind of blackmail" (Decision on Rule 92*bis* Motion, p. 25).

[220] The Prosecution has discretion to decide who to indict (Articles 15, 17 of the Statute). While the indictment must be confirmed by a judge (Article 18 of the Statute and Rule 47 of the Rules), the role of the judge is limited to determining that a *prima facie* case has been established against the individual (Article 18 of the Statute). In the case at hand, the Appellant does not challenge the Confirming Judge's determination that a *prima facie* case had been made against him. The Appeals Chamber notes that ICTY Rule 73*bis* of the Rules does not form part of the ICTR Rules and in any event only permits the Trial Chamber to direct the Prosecution to limit the counts on which it proceeds.

[221] Decision on Rule 92*bis* Motion, p. 25.

[222] Appellant's Brief, paras 120-25.

G. Exhibit D.52

1. Submissions of the Parties

101. The Appellant submits that the Trial Chamber unfairly failed to attach any weight to the fact that the *Preliminary Report on Identification of Sites of the Genocide and Massacres that took place in Rwanda from April to July 1994*[223] does not mention him even though it purports to identify the perpetrators of the massacres at the sites of the genocide. The Appellant also argues that the report was presented by the Prosecution in other cases and that it is unfair not to accord it any probative value when used in support of the Defence's case.[224]

102. The Prosecution argues that it was within the Trial Chamber's discretion not to accord any weight to Exh. D.52, especially as the Chamber was unable to assess its reliability and found that it did not contradict Prosecution evidence.[225]

2. Discussion

103. The Trial Chamber explicitly considered this issue:

> The Defence has also at various points asserted that the absence of incriminatory statement regarding the Accused in certain documents should be considered by the Chamber as exculpatory evidence. Reference has been made, for example, to a preliminary report of a commission which had purportedly conducted extensive investigations into killings in Rwanda in 1994. The Defence tendered this lengthy report as an exhibit in connection with testimony by its expert witness, Dr. Bernard Lugan, who testified that there was no mention of the Accused in the report. The Chamber notes that the report, dated February 1996, is entitled "Preliminary". According to its preface, the document does not claim to be authoritative or exhaustive in its coverage. None of the authors of the report were called before the Chamber; there was no discussion of its methodology, particularly in reference to the specific events alleged in the Indictment; and there was no testimony on whether the preliminary report had been superseded by a final report. In these circumstances, the Chamber is unable to assess its reliability, and does not consider its contents to contradict Prosecution evidence.[226]

104. The Appellant merely reiterates the arguments he raised at trial, without demonstrating that the Trial Chamber erred in its assessment of this evidence. The Appeals Chamber finds no error in the Trial Chamber's analysis. As to the argument that the report was considered in support of the Prosecution's case in other cases, this does not show that the Appellant was treated unfairly. A Trial Chamber has discretion in the appreciation of evidence presented by the parties in the case before it, and there is no unfairness simply because another Trial Chamber decided otherwise in another case in respect of a particular piece of evidence. The Appellant has not shown in what way the jurisprudence mentioned by the Appellant is helpful to his case.

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[223] Exh. D.52.
[224] Appellant's Brief, paras 129-35, 145. *See also* Appellant's Reply, para. 28.
[225] Respondent's Brief, paras 128-31.
[226] Trial Judgement, para. 52 (reference omitted).

H. Conclusion

105. As discussed above, the Trial Chamber's assessment of the evidence presented by the Defence was reasonable. Thus, the Appellant has failed to establish that the Trial Chamber abused its discretion or exhibited bias in assessing the evidence. The fifth and the third grounds of appeal are rejected.[227]

VII. GROUNDS OF APPEAL 6 AND 8 – WITHDRAWN

VIII. ALLEGED ERROR IN FINDING THAT THE APPELLANT WAS AT THE GASEKE ROADBLOCK (GROUND OF APPEAL 11)

A. Submissions of the Parties

106. The Appellant argues that the Trial Chamber based its finding on his alleged visit to the Gaseke roadblock at the end of May 1994 solely upon the basis of the uncorroborated testimony of Witness CGC which was inconsistent with other evidence[228] and incorrect as to dates.[229]

107. The Prosecution states that reliance on uncorroborated evidence in a holistic way is permissible[230] and that the Trial Chamber did not err in accepting Witness CGC's evidence.[231]

B. Discussion

1. Alleged Contradiction Between the Testimonies of Witness CGC and Other Witnesses

108. The Appellant submits that the Trial Chamber's findings on contradictions between Witness CGC's testimony and the testimonies of Witness DC and Witness DB occasioned a miscarriage of justice.

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[227] As explained above, the Appellant's contentions relating to Exh. D.34 will be considered together with his arguments under Ground 11 of the appeal.
[228] Appellant's Brief, paras 252, 255 referring to Trial Judgement, paras 227, 229. Appellant's Reply, paras 87-88.
[229] Appellant's Brief, paras 244-50, 289-91. The Appellant reiterates his submissions with respect to the alleged lies of Witness CGC concerning Mr. Nors, the contradictions in Witness CGC's testimony and the identification of the Appellant, Appellant's Reply, paras 77-78, 79-86.
[230] Respondent's Brief, paras 226, 241-42, 244, citing case law from Australia, England, and Canada.
[231] Respondent's Brief, paras 227-28, 231-32, 234-39. The Appeals Chamber notes that the Prosecution submits in para. 246 that any finding other than that the Appellant was at the roadblock on or around 20 May 1994, as described by Witness CGC, "would be perverse". The Appeals Chamber is aware that the use of this term is appropriate in some legal systems. However, in other jurisdictions this term may have very different connotations. In German law, for instance, a reference to "perverted justice" could be equated with the last phase of the jurisprudence of the *Reichsgericht* during the Nazi-regime. In order to avoid any ambiguity, the Appeals Chamber calls upon the Prosecution to avoid employing this language in future proceedings.

(a) Witness DC

109. The Appellant argues that while the Trial Chamber found that Witness DC was not present at the roadblock prior to and during the killing of Mr. Nors,[232] it later referred to Witness DC's presence at the roadblock.[233] A careful review of the two findings reveals that they are reconcilable. It was reasonable for the Trial Chamber to accept Witness DC's testimony that he was *asked* to stay at the roadblock to assist in killing Mr. Nors, and to find also that Witness DC was in fact not present prior to or during the killing of Mr. Nors. The scenario envisaged in the Trial Judgement is as follows: Witness DB was found to have accompanied Mr. Nors through the Gaseke roadblock.[234] Witness DC then arrived at the roadblock and was asked to stay to assist in killing Mr. Nors on his return.[235] Witness DC states that he waited for three hours.[236] However, the evidence accepted by the Trial Chamber shows that Witness DB and Mr. Nors stayed for at least a day in Kibuye.[237] Therefore, the remainder of Witness DC's testimony was not found to be credible, namely his assertion that he waited at the roadblock for three hours and then assisted in the killing of Mr. Nors, without having seen the Appellant.[238] Witness CGC, however, was accepted to have been at the roadblock during the return journey of Witness DB and Mr. Nors, and to have seen the Appellant before their arrival.[239] The Appellant has advanced no further arguments on this issue. The Appeals Chamber finds that he did not show that the Trial Chamber's findings with respect to the alleged inconsistencies between Witness DC's and Witness CGC's testimony were unreasonable.

(b) Witness DB

110. The Appellant submits that the Trial Chamber erroneously accepted, first, the evidence of Witness CGC that the Appellant came to Gaseke on 20 May 1994 and that Mr. Nors was murdered shortly thereafter, and second, the logbook of Witness DB (Exh. D.34), which places the murder of Mr. Nors on 26 May 1994.[240]

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[232] Appellant's Brief, para. 252, referring to Trial Judgement, para. 229.
[233] Appellant's Brief, paras 253-55, referring to Trial Judgement, para. 470. *See* in this context *Semanza* Appeal Judgement, para. 155.
[234] Trial Judgement, para. 207.
[235] Trial Judgement, paras 213, 470.
[236] Trial Judgement, para. 214.
[237] Trial Judgement, para. 229.
[238] Trial Judgement, paras 227, 229.
[239] Trial Judgement, paras 217-18.
[240] Appellant's Brief, paras 120-25, 284-93.

111. The Prosecution responds that the Appellant does not show that the Trial Chamber erred in its assessment of Exh. D.34 or that its findings on the killing of Mr. Nors were unreasonable.[241]

112. In his examination-in-chief, Witness CGC could only approximate the date he saw the Appellant at the Gaseke roadblock;[242] in cross-examination, however, he was adamant that it happened on 20 May 1994 "though he could cite no reason for remembering the date as such."[243] He admitted that, contrary to what he asserted in his prior statement, he had not witnessed the killing of Mr. Nors at the roadblock, but had heard about the killing later.[244] Witness DB testified that his passenger Mr. Nors was killed on 26 May 1994, based on an entry in his logbook.[245]

113. The Trial Chamber found that Witness CGC's change in his testimony concerning his recollection of the date was "slightly surprising", as he did not offer any convincing explanation for this change.[246] Nevertheless, it accepted that the events to which Witness CGC testified took place "on or about 20 May 1994."[247] The Trial Chamber also found Witness DB to be credible and found that "the anomalies in the logbook are minor and it appears to be a routinely updated document."[248] The Trial Chamber then concluded that "in late May, 1994 the Accused encouraged those manning a roadblock at Gaseke to stop and kill Tutsi, and distributed machetes and money to them [...]. [O]n the same day, shortly after the Accused's departure, a man named Nors, also known by the name Nturusu, was apprehended there and killed at the Gaseke roadblock."[249]

114. The Trial Chamber did not expressly resolve the apparent contradiction between the dates given by Witnesses CGC and DB (and his logbook), but simply found that the events in question occurred in late May 1994. Since it accepted the testimony of Mr. Nors's driver – Witness DB – that the killing occurred on 26 May 1994, the Trial Chamber was under an obligation to discuss more thoroughly whether both witnesses were indeed testifying as to the same day. In this context, it is recalled that the Trial Chamber accepted Witness CGC's testimony that he "heard that a person named Nturusu [...] was killed at the roadblock about five minutes after his own release."[250] This is the only evidence placing the murder of Mr. Nors shortly after the visit of the Appellant at the

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[241] Prosecution Response, paras 118-22.
[242] T. 29 September 2003, pp. 23, 25.
[243] Trial Judgement, para. 215; T. 29 September 2003, pp. 45-46, 48, 52.
[244] T. 29 September 2003, pp. 33-34, 48, 51. Witness CGC referred to the victim as "Nturusu" or "Nturuso" (T. 29 September 2003, pp. 33, 48-49).
[245] Exh. D.34; T. 28 October 2003, pp. 82-83, 88, 92.
[246] Trial Judgement, para. 215.
[247] Trial Judgement, para. 215.
[248] Trial Judgement, para. 224. These anomalies referred to "dates in the date column [that] appeared to be out of sequence, and some of them, including the entry of the date of 26 May, appeared to be in a different handwriting than the rest", *ibid.*, para. 223.
[249] Trial Judgement, paras 230-31.
[250] Trial Judgement, para. 205.

roadblock.[251] However, Witness CGC did not provide any explanation as to why he could be sure that the killing happened shortly after the Appellant's visit. This is what Witness CGC stated during his examination-in-chief:

> Q. Nturusu, was this person killed before or after Mr. Ndindabahizi's visit? Can you recall?
>
> A. **If my memory serves me right, that person was killed after Ndindabahizi's departure.**
>
> Q. But would I be correct in saying that that person was not killed in your presence? You didn't see this, did you?
>
> A. **That person, yes, you're quite right. When this person was killed I was not present.**
>
> Q. Do you know if anything else happened at the roadblock whilst you were there, before your uncle rescued you, apart from Mr. Ndindabahizi's drive through there?
>
> A. People were being killed at that roadblock. Nothing else.
>
> Q. Were these people killed at the roadblock in your presence or before or after you had left? Can you help me with that?
>
> A. Before I arrived, people were being killed there, and even after I left the roadblock. I'm saying this because those who were manning the roadblock there only were to kill people. [...]
>
> Q. Do you recall making a statement to investigators, Mr. Witness, on the 10th of November 2000?
>
> A. I don't recall the date, because after that I experienced a problem and I fell ill. So I cannot remember those dates.
>
> Q. Okay. In that statement you referred to a Rwandan half-caste being killed after Mr. Ndindabahizi's departure. Do you recall saying that in the statement?
>
> A. I did not quite understand the term that you used. Yes, I made that statement.
>
> Q. Now, was this person killed in your presence or was this something you were told, Mr. Witness?
>
> A. **I have explained to you that that person was killed after my departure**, but I do not know how the investigators took down my statement. I think I explained to you that this person was killed after my departure.
>
> Q. So any reference in that statement to the fact that you were present at the roadblock when that incident happened is wrong, is it not, Mr. Witness?
>
> A. Do you mean the incident in which that person was killed?
>
> Q. Yes, Mr. Witness. You were not present, were you?
>
> A. **I have explained to you that that person was killed after my departure and that I do not know how the investigators took down my statement in that manner, because I had already left when that person was killed.**[252]

[251] T. 29 September 2003, pp. 33-34, 48, 51.
[252] T. 29 September 2003, pp. 33-34 (emphases added).

When cross-examined, Witness CGC responded to questions on this issue as follows:

> Q. The half-caste who was killed subsequently at the roadblock, and the person called Nturuso, is it the same -- is the one and the same person?
>
> A. It is that person called Nturuso, he was the half-caste.
>
> Q. But you admit today that you did not witness that killing, whereas you said the contrary in your statement to the investigators of the ICTR?
>
> A. Counsel, I expressed reservation and I did say that the investigators might have got it wrong or maybe the interpreter got it wrong, or for some other reason.
>
> Q. I understand, Witness. I just want to know, based on what you were told, if the killing of the half-caste had anything to do with the visit of Emmanuel Ndindabahizi to the roadblock?
>
> A. I have already said that regarding Ndindabahizi and the killing of that person, the killing of this person occurred subsequent to Ndindabahizi's departure. I don't know if you understand me, Counsel.
>
> Q. Very well. But this killing occurred after, but was it after, in the course of the same day, in the course of the week? Do you have any further information on this?
>
> A. Well, Counsel, I don't know if you understand what I'm saying. There wasn't a long lapse of time. I don't know if you need someone else to explain what I'm telling you, but I believe it's clear.
>
> MR. PRESIDENT: What did you say now, Mr. Witness, can you repeat your answer?
>
> THE WITNESS: I said that it was not after a long time -- it was not a long time thereafter. I cannot even say hours, let alone days. It was soon after the departure of Ndindabahizi.[253]

And in response to questions asked by Judge Bossa:

> JUDGE BOSSA: You mentioned that you were taken to the roadblock at around 11 o'clock in the morning; is that correct?
>
> THE WITNESS: I cannot tell you that that is the absolute truth. It was not during the evening, but neither was it very early in the morning. I gave a period of time which was approximate.
>
> JUDGE BOSSA: In the morning; okay. How long after that did the Accused arrive?
>
> THE WITNESS: Just a little after my arrival at that place.
>
> JUDGE BOSSA: Okay. And how long after that was the half-caste killed? Because you said he was killed in the morning as well.
>
> THE WITNESS: Briefly, that happened about five minutes after I left the roadblock.[254]

115. Thus, Witness CGC never explained (nor was he asked to[255]) how he learned that Mr. Nors was killed at the roadblock about five minutes after he (Witness CGC) had left.[256] Thus, the Trial

[253] T. 29 September 2003, p. 48.
[254] T. 29 September 2003, p. 51.

Chamber did not know how the person – or persons – who told Witness CGC about the killing knew about it; also, the Trial Chamber did not know on which basis the person – or persons – came to the conclusion that the killing happened some minutes after his departure. The finding that Mr. Nors was killed shortly after the Appellant's visit was thus based only on vague and unverifiable hearsay. While hearsay evidence is not *per se* inadmissible, it is well established that a Trial Chamber must be cautious in considering such evidence.[257] Hence, the Appeals Chamber finds, by majority, Judge Shahabuddeen dissenting, that the Trial Chamber failed to adhere to this principle and that no reasonable trier of fact could have reached the conclusion beyond reasonable doubt that Mr. Nors was killed shortly after the Appellant's visit on or about 20 May 1994.

116. In relation to the question whether the Appellant's actions on 20 May 1994 substantially contributed to the killing of Mr. Nors on 26 May 1994 – if Witness DB and Exh. D.34 were to be believed – the Appeals Chamber notes that Witness CGC testified that people were killed at the roadblock even before the Appellant's visit, that is, without his contribution.[258] Also, it is not established whether the persons who were instigated by the Appellant on 20 May 1994 were those who killed Mr. Nors on 26 May 1994. Thus, it is unclear whether the Appellant's acts substantially contributed to Mr. Nors's killing had it occurred six days after these acts or even later.

117. Also, the Trial Chamber did not make a finding on any criminal act of the Appellant during mid-April 1994 (*see* paragraph 25 of the Indictment) that could have substantially contributed to the murder of Mr. Nors in late May 1994 (*see* paragraph 11 of the Indictment). Thus, the Prosecution failed to establish a link between the murder of Mr. Nors at the Gaseke roadblock and a substantial contribution of the Appellant. Without that crime being committed, the Appellant cannot be held liable for instigating and aiding and abetting genocide for the murder of Mr. Nors

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[255] The fact that Defence counsel did not question Witness CGC as to how he could be sure that Nturusu had been killed five minutes after the witness had left the roadblock should not be held against the Appellant as it was the onus of the Prosecution to prove that the hearsay evidence was reliable and credible.

[256] Witness CGC testified that many people were killed at that roadblock both before and after the Appellant's visit. But Witness CGC did not explain why he recalled specifically that the murder of Nturusu (which murder he did not witness) happened shortly after the Appellant's visit. In fact, Witness CGC himself at first was not entirely certain that the murder of Nturusu occurred after the Appellant's departure: *see* T. 29 September 2003, p. 33 ("If my memory serves me right, that person was killed after Ndindabahizi's departure").

[257] *Rutaganda* Appeal Judgement, para. 34; *Akayesu* Appeal Judgement, paras 286-92; *Niyitegeka* Trial Judgement, para. 43; *Ntakirutimana* Trial Judgement, para. 33; *Bagilishema* Trial Judgement, para. 25; *Musema* Trial Judgement, para. 51. *See also Naletilić and Martinović* Appeal Judgement, para. 516; *Kordić and Čerkez* Appeal Judgement, para. 281. This principle was recognized by the Trial Chamber in this case: *see* Trial Judgement, para. 23. In this context, the Appeals Chamber notes that the Trial Chamber held in para. 216 of the Trial Judgement that "Rwandans do not always express clearly the difference between what they have seen with their own eyes and what they have heard". The Appeals Chamber does not accept this characterization as being specific to Rwandans. Rather, it interprets the Trial Chamber's finding as a general reference to inaccuracies which often occur in the testimony of witnesses, regardless of their nationality.

[258] T. 29 September 2003, p. 33.

pursuant to Article 6 of the Statute.[259] Instigating means prompting another person to commit an offence, thus requiring a subsequent criminal action.[260] Similarly, a conviction for aiding and abetting presupposes that the support of the aider and abetter has a substantial effect upon the perpetrated crime.[261] No reasonable trier of fact could have concluded beyond reasonable doubt that the killing of Mr. Nors was a result attributable to the Appellant's acts. In this context, the Appeals Chamber recalls that the Prosecution had withdrawn the charge of direct and public incitement to commit genocide.[262] Hence, the Trial Chamber erroneously convicted the Appellant for instigating and aiding and abetting the murder of Mr. Nors as a crime against humanity.

118. In this context, the Appeals Chamber notes that the pleadings of the parties have to be clear and unambiguous. On the basis of ambiguous submissions made by the Prosecution during closing arguments, the Appeals Chamber might have come to the conclusion that the Prosecution had abandoned its case in relation to the killing of Mr. Nors.

2. Conclusion

In light of the above, the Appellant's eleventh ground of appeal is granted.

IX. ALLEGED VAGUENESS OF THE INDICTMENT (SUB-GROUND OF APPEAL 1 - GASEKE ROADBLOCK)

119. As the eleventh ground of appeal is granted on the basis of the reasoning set out above, it is not necessary for the Appeals Chamber to consider under the first sub-ground of appeal relating to the Gaseke roadblock whether the case concerning Mr. Nors was withdrawn by the Prosecution.[263] By the same token, it is not necessary to consider allegations of the vagueness of the Indictment relating to Mr. Nors[264] as both issues are rendered moot.

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[259] The modes of liability as regulated under Article 6(1) of the Statute are also applicable to the crime of genocide pursuant to Article 2 of the Statute, *Ntakirutimana* Appeal Judgement, para. 500. *See also Krstić* Appeal Judgement, para. 138.
[260] *Kordić and Čerkez* Appeal Judgement, para. 27.
[261] *Blaškić* Appeal Judgement, para. 48.
[262] *See supra* note 4. As the offence of direct and public incitement to commit genocide is an inchoate offence, the legal assessment of such a charge may have been different.
[263] Appellant's Brief, paras 22, 172-77, referring to closing arguments, T. 1 March 2004, pp. 14-15, Appellant's Reply, paras 41-42.
[264] Appellant's Brief, paras 21-29. This argument was also raised during the appeal hearing: the Defence argued that ambiguity must be resolved in favour of the Appellant, at T. 6 July 2006, p. 18, *see also* T. 6 July 2006, pp. 26-27, 34, 64. The Prosecution argued that the act of instigation was not limited to Mr. Nors, T. 6 July 2006, p. 52.

X. ALLEGED ERROR IN FINDING A LEGAL BASIS FOR THE GENOCIDE CONVICTION (GROUND OF APPEAL 7)

120. In addition, for the reasons set out above under the eleventh ground of appeal, it is not necessary for the Appeals Chamber to consider whether the Appellant was erroneously convicted of instigating and aiding and abetting genocide at the Gaseke roadblock on the basis of the killing of Mr. Nors. Consequently, the seventh ground of appeal has become moot.

XI. GROUND OF APPEAL 12 – WITHDRAWN

XII. ALTERNATIVE CONVICTIONS

121. The Appeals Chamber *proprio motu* raises the issue of alternative convictions arising from paragraph 485 of the Trial Judgement:[265]

> [T]he Chamber finds that the Accused himself committed the crime of extermination. He participated in creating, and contributed to, the conditions for the mass killing of Tutsi on Gitwa Hill on 26 April 1994, by distributing weapons, transporting attackers, and speaking words of encouragement that would have reasonably appeared to give official approval for an attack. **Alternatively**, the Chamber finds that by these words and deeds, the Accused directly and substantially contributed to the crime of extermination committed by the attackers at Gitwa Hill, and is thereby guilty of both instigating, and of aiding and abetting, that crime. (emphasis added).

122. While an accused can be convicted for a single crime on the basis of several modes of liability, alternative convictions for several modes of liability are, in general, incompatible with the principle that a judgement has to express unambiguously the scope of the convicted person's criminal responsibility. This principle requires, *inter alia*, that the sentence corresponds to the totality of guilt incurred by the convicted person. This totality of guilt is determined by the *actus reus* and the *mens rea* of the convicted person. The modes of liability may either augment (*e.g.*, commission of the crime with direct intent) or lessen (*e.g.*, aiding and abetting a crime with awareness that a crime will probably be committed[266]) the gravity of the crime.[267] Thus, the criminal liability of a convicted person has to be established unequivocally.

123. However, the Appeals Chamber finds, by majority, Judge Güney dissenting, that the Trial Chamber did not convict the Appellant in the alternative. Rather, the Trial Chamber was seeking to

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[265] Upon invitation of the Appeals Chamber, this issue was discussed at the Appeals Hearing: T. 6 July 2006, pp. 53, 54, 58: the Prosecution argued that although conviction in the alternative is incorrect, it is not sufficient grounds to overturn the Trial Judgement, and suggested the term "additionally" would have been more appropriate. The Defence replied that it is not permissible to substitute language for the Trial Chamber, T. 6 July 2006, p. 67.

[266] *See Blaškić* Appeal Judgement, para. 50.

[267] In this context, the Appeals Chamber recalls that in *Krstić*, the ICTY Appeals Chamber stated that it had taken into account the sentencing practice of the courts of the former Yugoslavia applicable in that case, in particular the practice

provide a further characterisation of the Appellant's criminal conduct. The Trial Chamber was convinced beyond a reasonable doubt that the Appellant committed acts constituting extermination,[268] namely by distributing weapons, transporting attackers and speaking words of encouragement. Furthermore, the Trial Chamber also found that by such encouragement, the Appellant instigated and aided and abetted the crime of extermination. Therefore, the Trial Chamber wanted to emphasize that a full characterisation of the Appellant's conduct had to cumulatively refer to various modes of liability. The Appeals Chamber notes, however, that it is for a Trial Chamber to identify unambiguously the mode(s) of liability for which an accused is convicted and the relation between them. It has to be stated already here that the underlying acts and the crime itself remain the same, and no reduction or increase of the sentence is merited.

XIII. APPEAL AGAINST THE SENTENCE (GROUND OF APPEAL 13)

A. Submissions of the Parties

124. The Appellant submits that the Trial Chamber erred in fact and in law in concluding that the aggravating circumstances outweighed the mitigating circumstances in his case.[269]

125. With respect to the aggravating circumstances, the Appellant contends first that the fact that he was well-known and influential in the region where the crimes were committed and the fact that he held an official position in the Interim Government do not constitute two separate aggravating circumstances but express the same idea, since his position in the Interim Government explains why he had become a more well-known figure than the other workers of the public administration in Kibuye Prefecture. Further, argues the Appellant, his position in the Interim Government cannot, by itself, constitute an aggravating circumstance, because the Prosecution still has to establish the causal link between this position and the influence he used in his official capacity to facilitate the commission of genocide and crimes against humanity.[270]

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that "the sentence of a person who aided a principal perpetrator to commit a crime can be reduced to a sentence less than the one given to the principal perpetrator", *Krstić* Appeal Judgement, para. 270 (note omitted).

[268] The Trial Chamber stated that "[e]xtermination may be committed less directly than murder, as by participation in measures intended to bring about the deaths of a large number of individuals, but without actually committing a killing of any person" (Trial Judgement, para. 479). The words "without actually committing a killing" could mean, in the ordinary sense of the word, "without causing death". The Appeals Chamber finds, however, that the word "actually" in this context rather describes what other judgements have referred to as "indirectly" causing death, in particular as these judgements are referred to in para. 479 of the Trial Judgement: *Krstić* Trial Judgement, para. 498; *Vasiljević* Trial Judgement, para. 227; *Kayishema and Ruzindana* Trial Judgement, paras 143, 146.

[269] Appellant's Brief, paras 301-19.

[270] Appellant's Brief, paras 305, 311-13. Appellant's Reply, paras 90-91.

126. The Appellant also argues that the Trial Chamber erred in concluding that he supported a policy of genocide in his capacity as minister in the Interim Government, which was considered an aggravating factor by the Trial Chamber at sentencing. In his view, it has not been established that he committed any act of government relating to genocide.[271]

127. The Appellant further argues that the Trial Chamber erred in considering as an aggravating circumstance a summary of the substantive grounds that the Prosecutor charged in paragraph 21 of the Indictment.[272] The Appellant submits that the Trial Chamber should not look to the Indictment to find aggravating or mitigating circumstances.[273]

128. The Appellant also submits that the Trial Chamber erred in considering as an aggravating circumstance that he influenced and encouraged others to commit crimes because this influence and encouragement already constituted elements of the crimes for which he was convicted.[274] The Appellant further argues that the Trial Chamber contradicted itself in finding first that it had not been established that he instigated or aided and abetted the killing of Tutsi women married to Hutu men, and second that his statements encouraging the killing of Tutsi women who were married to Hutus constituted an aggravating circumstance.[275]

129. As to mitigating circumstances, the Appellant submits that he recently became aware of an allegedly new mitigating circumstance, specifically that "Fidèle Uwiyeze, one of the unprotected Prosecution witnesses in *Bizimungu et al.* [...] thanked [the Appellant] for saving his children's lives."[276]

130. The Prosecution responds that the Trial Chamber did not err in sentencing and, in particular, was free to consider the Appellant's ministerial position as an aggravating factor in sentencing: First, it was not an integral element of the crimes; and second, the jurisprudence of the Tribunal recognizes the abuse of a position of influence and authority in society as an aggravating factor.[277]

131. The Prosecution responds that the first two aggravating circumstances identified by the Trial Chamber are distinct: the Trial Chamber referred first to the abuse by the Appellant of the influence he had on the local population and second to the fact that the Appellant also had influence at the

[271] Appellant's Brief, para. 44.
[272] Appellant's Brief, para. 315.
[273] Appellant's Brief, para. 314.
[274] Appellant's Brief, para. 305. *See also ibid.*, paras 314-15, where the Appellant submits that the third aggravating circumstance is a reproduction of "the material elements that the Indictment put forward to support the charge of genocide and crimes against humanity (extermination and murder)" and that "the Indictment should not serve the Chamber in its search for aggravating or mitigating circumstances."
[275] Appellant's Brief, para. 316, referring to Trial Judgement, paras 474 and 508(iii).
[276] Appellant's Brief, paras 310, 318. Appellant's Reply, para. 92.
[277] Respondent's Brief, paras 72-73; 254-56, 258-59.

national level, which he should have used to promote peace and reconciliation instead of supporting and advocating a policy of genocide.[278] As to the third aggravating circumstance, the Prosecution submits that the Trial Chamber rightly considered that the Appellant actively influenced others to commit crimes by distributing machetes and money and that he publicly encouraged the killing of Tutsi women who were married to Hutu men.[279]

B. Discussion

132. The Appeals Chamber recalls the applicable standard of review for sentencing:

> The Appeals Chamber's review of an appeal of the sentencing portion of a judgement is not *de novo*. Trial Chambers are vested with broad discretion to tailor the penalties to fit the individual circumstances of the accused and the gravity of the crime. As a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a "discernible error" in exercising its discretion. It is for the Appellant to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing the sentence. A Trial Chamber's sentencing decision may therefore only be disturbed on appeal if the Appellant shows that the Trial Chamber erred in the weighing process either by taking into account what it ought not to have considered or by failing to take into account what it ought to have considered.[280]

133. The Trial Chamber identified the following as aggravating circumstances:

> (i) The Accused was a well-known and influential figure in his native prefecture of Kibuye, where his crimes were committed. As such, the Accused abused the trust placed in him by the population.
>
> (ii) At the time of the events, the Accused held an official position at the national level, as a member of the Interim Government. The Chamber considers it particularly aggravating that instead of promoting peace and reconciliation in his capacity as Minister, he supported and advocated a policy of genocide. He also participated in the commission of the massacres in Gitwa Hill, during which thousands of persons were killed.
>
> (iii) The Accused actively influenced others to commit crimes, by distributing machetes and money. He publicly encouraged the killing of Tutsi women who were married to Hutu.[281]

134. The Appellant has not demonstrated that the first two aggravating circumstances identified by the Trial Chamber are in fact the same aggravating circumstance. While it is arguable that the influence of the Appellant at the local level also derived to some extent from his position in the Interim Government, the important element in the first aggravating circumstance is the abuse of

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[278] Respondent's Brief, paras 248-50.

[279] Respondent's Brief, paras 251-52. The Prosecution contends that there was no contradiction in the reasoning of the Trial Chamber in this respect and it refers to paragraphs 508 and 264 of the Trial Judgement.

[280] *Semanza* Appeal Judgement, para. 312 (references omitted); *see also* as to ICTY jurisprudence: *Naletilić and Martinović* Appeal Judgement, para. 593:

> With regard to sentencing, Trial Chambers are vested with broad discretion in determining the appropriate sentence due to their obligation to individualise the penalties to fit the circumstances of the accused and the gravity of the crime. As a general rule, the Appeals Chamber will not substitute its own sentence for that of a Trial Chamber unless it can be shown that the Trial Chamber committed a discernible error in exercising its discretion or failed to follow the applicable law (internal references omitted).

trust. This differs from the second aggravating circumstance, in which the Trial Chamber considered, first, the fact that, instead of promoting peace and reconciliation as would be the duty of a Minister, the Appellant supported and advocated a policy of genocide;[282] and second, the large number of victims at Gitwa Hill.[283] There is thus no double-counting of the same aggravating circumstance.

135. Also, the Trial Chamber did not err in considering the large number of victims at Gitwa Hill as an aggravating circumstance relevant to the sentence. As to the conviction for genocide, there need not be a large number of victims to enter a genocide conviction. As for extermination, the *actus reus* requires "killing on a large scale".[284] While this does not "suggest a numerical minimum",[285] a particularly large number of victims can be an aggravating circumstance in relation to the sentence for this crime if the extent of the killings exceeds that required for extermination. In the present case, there is no indication that, in considering aggravating circumstances, the Trial Chamber looked at only those killings required for extermination when it specifically cited the fact that "thousands" of people were killed.[286]

136. The Appellant also argues that his position in the Interim Government does not *per se* constitute an aggravating circumstance. The Appeals Chamber agrees, recalling that:

> [a] high rank in the military or political field does not, in itself, merit a harsher sentence. But a person who abuses or wrongly exercises power deserves a harsher sentence. Consequently, what matters is not the position of authority taken alone, but that position coupled with the manner in which the authority is exercised.[287]

Thus, the Trial Chamber was entitled to refer to the Appellant's position as a Minister in the Interim Government in sentencing, in accordance with the case law of the Tribunal which recognizes that the abuse of a position of influence and authority in society can be taken into account as an aggravating factor.[288] The Trial Chamber did not find that the Appellant's position in the Interim Government in itself called for a harsher sentence. Instead, it found that it was the wrongful exercise of his powers that constituted the aggravating circumstance. The Appeals Chamber finds no error in this.

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[281] Trial Judgement, para. 508.
[282] *See also* the Trial Chamber's earlier findings concerning the meeting of 3 May 1994, *supra* para. 58.
[283] *See infra* para. 142.
[284] *Ntakirutimana* Appeal Judgement, para. 516.
[285] *Ntakirutimana* Appeal Judgement, para. 516.
[286] Trial Judgement, para. 508(ii).
[287] *Babić* Judgement on Sentencing Appeal, para. 80, referring to *Krstić* Trial Judgement, para. 709 and *Kayishema and Ruzindana* Appeal Judgement, paras 358-59.
[288] *See, e.g., Akayesu* Appeal Judgement, paras 414-15; *Ntakirutimana* Appeal Judgement, para. 563; *Kamuhanda* Appeal Judgement, paras 347-348; *Stakić* Appeal Judgement, para. 411.

137. As to the third challenged circumstance, the Appeals Chamber recalls that "where an aggravating factor for the purposes of sentencing is at the same time an element of the offence, it cannot also constitute an aggravating factor for the purposes of sentencing."[289] In the present case, the Trial Chamber convicted the Appellant for instigating and aiding and abetting genocide at Gitwa Hill,[290] as well as for committing, instigating and aiding and abetting extermination at Gitwa Hill.[291] These convictions were based on the factual finding that the Appellant transported assailants at Gitwa Hill, distributed weapons there and encouraged the killing of Tutsi.[292] The Trial Chamber could not also refer to these same factual findings as aggravating circumstances. Accordingly, the Trial Chamber erred in finding that the fact that the Appellant "actively influenced others to commit crimes, by distributing machetes and money"[293] constituted an aggravating circumstance.

138. However, the Trial Chamber correctly recalled that the sentence had to be first and foremost commensurate to the gravity of the offence,[294] and that the Appellant had been convicted of the most serious crimes.[295] The Trial Chamber then considered the mitigating and aggravating circumstances, finding that "the aggravating circumstances outweigh the mitigating circumstances".[296] There is only one genocide that was committed in Rwanda between 6 April 1994 and 17 July 1994 and that resulted in the killings of hundreds of thousands of Tutsi. In sentencing, acts in furtherance of this one genocide and attributable to the accused can be taken into account.

139. The Appeals Chamber notes that while the genocide in Rwanda cost the lives of hundreds of thousands of people, the Appellant's individual criminal responsibility has to be measured according to his own contributions and the killings resulting therefrom, taking into account his own position. The Appeals Chamber finds that the acquittal for the killing of Mr. Nors at the Gaseke roadblock does not materially diminish the gravity of the crimes for which the Appellant has been found guilty. The Appeals Chamber therefore finds no error in the Trial Chamber's assessment of the gravity of the Appellant's acts when determining the appropriate sentence.

140. The Trial Chamber also found that the Appellant "encouraged those at the roadblock [near Nyabahanga Bridge] to kill Tutsi women married to Hutu men"[297] without convicting the Appellant on this basis because it found that there was "insufficient evidence to establish that the

[289] *Blaškić* Appeal Judgement, para. 693. *See also Vasiljević* Appeal Judgement, paras 172-73.
[290] Trial Judgement, paras 462-64.
[291] Trial Judgement, para. 485.
[292] Trial Judgement, paras 179-80.
[293] Trial Judgement, para. 508(iii).
[294] Trial Judgement, para. 510.
[295] *See* Trial Judgement, para. 499.
[296] Trial Judgement, para. 509.

[Appellant's] conduct at the roadblocks [*sic*] directly and substantially contributed to the killing of Tutsi women married to Hutu men, or their children."[298] However, the Trial Chamber considered that the Appellant's encouragement of the killing of Tutsi women who were married to Hutu could be considered as an aggravating factor.[299]

141. There was no contradiction in the Trial Chamber's findings in this respect. The Trial Chamber did not impose liability because it found that there was insufficient evidence that the Appellant's words directly and substantially contributed to killings of Tutsi women married to Hutu men, but it did find that the Appellant effectively made statements encouraging such killings. This behaviour could therefore be considered as an aggravating factor.

142. The life sentence already stands on the basis of the Appellant's participation in genocide and extermination at Gitwa Hill, which resulted in the death toll of thousands of human beings. Having affirmed the sentence of life imprisonment, the acquittal for the crimes related to the killing of Mr. Nors at the Gaseke roadblock does not merit a reduction in sentence. By the same token, the question of further aggravation of sentence as found by the Trial Chamber for the Appellant's acts in encouraging the killing of Tutsi women who were married to Hutu need not be addressed.

143. A motion of the Appellant for the admission of allegedly mitigating evidence pursuant to Rule 115 of the Rules was rejected,[300] as was the request for reconsideration of this decision.[301]

144. The Appeals Chamber notes that the Appellant was arrested at Verviers, Belgium, on 12 July 2001 and was transferred to the United Nations Detention Facility in Arusha, Tanzania, on 25 September 2001.

[297] Trial Judgement, para. 264.
[298] Trial Judgement, para. 474.
[299] *See* Trial Judgement, para. 508(iii).
[300] Decision on the Admission of Additional Evidence, 4 April 2006.
[301] Decision on Defence "Requête de l'appelant en reconsidération de le décision du 4 avril 2006 en raison d'une erreur matérielle", 14 June 2006.

XIV. DISPOSITION

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

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

NOTING the written submissions of the parties and their oral arguments presented at the hearing on 6 July 2006;

SITTING in open session;

VACATES the Appellant's conviction for genocide under Count 1 in relation to the events at Gaseke roadblock;

VACATES the Appellant's conviction for murder under Count 3;

AFFIRMS the Appellant's convictions for genocide and extermination as a crime against humanity under Counts 1 and 2 in relation to the events at Gitwa Hill, pursuant to Article 6(1) of the Statute;

DISMISSES the appeal in all other respects;

AFFIRMS unanimously the sentence imposed by the Trial Chamber, subject to credit being given under Rule 101(D) and Rule 107 of the Rules for the period in which Emmanuel Ndindabahizi was deprived of his liberty for the purposes of this case, that is from 12 July 2001;

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

ORDERS, in accordance with Rules 103(B) and 107 of the Rules, that Emmanuel Ndindabahizi is to remain in the custody of the Tribunal pending his transfer to the State in which his sentence will be served.

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

Wolfgang Schomburg
Presiding Judge

Mohamed Shahabuddeen
Judge

Mehmet Güney
Judge

Liu Daqun
Judge

Theodor Meron
Judge

Judge Shahabuddeen appends a separate opinion.

Judge Güney appends a partially dissenting opinion.

Signed on the tenth day of January 2007 in The Hague,

Issued on the sixteenth day of January 2007 in Arusha

[SEAL OF THE TRIBUNAL]

XV. SEPARATE OPINION OF JUDGE SHAHABUDDEEN

1. I support the judgement rendered by the Appeals Chamber today, but regret that I do not have the good fortune to agree with the reasoning of my colleagues on one point. The point concerns the Trial Chamber's finding that Mr Nors was killed shortly after the visit by the appellant to the Gaseke roadblock. The Appeals Chamber considers that the finding was erroneous; I am of the opposite view.

A. Preliminary

2. In 1994, there was genocide in Rwanda[302]; Tutsis were being killed[303]; a roadblock was set up at Gaseke.[304] The Trial Chamber found that the appellant, who was the Minister of Finance and a Hutu, visited the roadblock. He distributed machetes and money to the persons who were manning the roadblock and asked them why Tutsis were being allowed to go through the roadblock without being killed;[305] he then left.[306] The Trial Chamber also found that a Mr Nors was killed by those manning the roadblock shortly after the appellant's visit[307]; he was killed because he was perceived to be a Tutsi.[308] Among the issues raised in the oral arguments on appeal is the question of the interval between the visit and the killing. The question concerns the causal relationship between the two events.

B. In his written arguments the appellant contended that he did not visit the roadblock at all

3. The question of the interval between the visit and the killing was not raised in the written arguments on appeal. It was raised orally at the appeal hearing, possibly in reaction to questions asked by the Appeals Chamber.[309] The written arguments on appeal raised only the question whether the appellant did in fact visit the roadblock, not the question, if he did make the visit, what was the interval between the visit and the killing. For example, the eleventh ground of appeal states as follows:

> La Chambre de Première Instance I a commis une erreur de fait qui a entraîné un déni de justice en concluant que l'appelant s'est rendu sur un barrage routier à Gaseke fin mai 1994.

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[302] *Karemera*, ICTR -98-44-AR73(c), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, para. 57 and Annex A.
[303] *Ibid.*
[304] Trial Judgement, para. 230.
[305] *Ibid.*, para. 204, and Trial Chamber's Transcript, 29 September 2003, pp. 29, 31, Witness CGC.
[306] Trial Judgement, para. 204.
[307] *Ibid.*, paras. 230-231.
[308] *Ibid.*, paras 231, 469.
[309] *See* Scheduling Order, ICTR-01-71-A, 11 May 2006, and a letter from the Presiding Judge to the parties dated 26 June 2006 asking questions.

> La Chamber a fondé sa conviction sur les seules déclarations du témoin CGC qui s'avèrent erronées quant aux dates et aux éléments factuels, contradictoires et incompatibles avec les déclarations d'autres témoins. Les preuves retenues par la Chambre à cet effet ne sont pas conformes aux standards de la preuve en matière de justice pénale internationale.[310]

4. Given the appellant's contention that he did not visit the roadblock at all, it is legitimate to assume that he judged that it would have been contradictory for him, in his written arguments on appeal, to take the position that the visit did occur but that it occurred too long before the killing to support a causal link between the two events. The date of the two events was indeed in discussion, but only from the point of view advanced by the appellant that he did not make the visit at all. The Appeals Chamber having allowed him to raise additional matters, he is free to argue the question. But his original stand has to be taken into account for the purpose of evaluating his new position.

C. Whether the appellant visited the roadblock at all

5. Because of the importance of the issue, it is proposed to consider first the appellant's original stand, namely, that he made no visit to the roadblock at all. The Trial Chamber found that he had. The appellant seeks to controvert this finding by appealing to a certain discrepancy. The Trial Chamber referred to the testimony of Witness CGC, whom it regarded as credible, that he saw the appellant visit the roadblock.[311] By contrast, the evidence of Witness DB, whom the Trial Chamber also regarded as credible and who it found was also at the roadblock, was that he did not see or hear of any visit by the appellant to the roadblock. So, if the witnesses had in mind the same time, here was a possible discrepancy as to whether the appellant visited the roadblock at all. How could it be resolved?

6. The Trial Chamber explained itself by saying the following in paragraph 221 of its judgement (footnote omitted):

> The Chamber now turns to Witness DB, who was of the view that the Accused played no role in the killing of Nors, based on his investigations into the circumstances of the Gaseke roadblock conducted after 1994. Aside from being hearsay evidence, the witness did not indicate the source of his information. Under these circumstances, the Chamber considers the evidence of what he subsequently discovered to have little weight against the eyewitness testimony of Witness CGC.

In paragraph 225 of its judgement, the Trial Chamber added:

> Witness DB's account of the killing of Nors is not inconsistent with Witness CGC's. Witness CGC testified that the Accused departed before the killing of Nors. The only basis for contradicting Witness CGC's evidence of the Accused's presence at the roadblock before the arrival of Nors, is Witness DB's unreliable hearsay evidence. Accordingly, the Chamber finds that Witness DB's testimony does not weaken or detract from Witness CGC's credibility.

[310] Acte d'appel, onzième moyen d'appel. *See also* Appellant's Brief, paras. 244ff; Respondent's Brief of the Prosecutor, paras. 222 ff; and Response to Respondent's Brief, paras. 76 ff.
[311] Trial Judgement, paras. 215, 219, 225, 230-231.

7. Thus, although the Trial Chamber found in favour of the credibility of Witness DB, that finding was not unqualified: the Trial Chamber made it clear that it did not accept his evidence on all points. On the specific question of the appellant's visit, it preferred the evidence of Witness CGC. And, as seen, it gave its reasons. On the assumption (which I later argue is correct) that the witnesses were speaking of the same time, there was indeed a conflict in evidence as to whether the appellant visited the roadblock. The Trial Chamber resolved the conflict by electing to believe one witness and not the other. That was the right of the Trial Chamber.

D. The appellant did not contend that his visit took place before the killing of Mr Nors

8. The Appeals Chamber does not have a roving magisterial jurisdiction to ensure, of its own motion, that the Trial Chamber was acting correctly in every detail; it may do that to avoid a miscarriage of justice, but not otherwise, and I do not think that that exceptional authority is attracted in this case. Criminal courts nowadays have a pre-trial procedure under which parties state what are the issues dividing them; and it is usual for an appellate court to say that there is no dispute on a point where there is none. An appeal is not an opportunity for shadow-boxing; it is concerned with real issues. It is therefore appropriate to have regard to what were the issues in contention before the Appeals Chamber.

9. Various theoretical questions could be asked of the stage at which the visit was made by the appellant in relation to the killing of Mr Nors. The possibility that the killing took place before the visit was rightly excluded by Mr Konitz, counsel for the appellant, when he said that the appellant "stopped at the roadblock several days before the crime, and there is absolutely no proof of any causal link".[312] A little earlier he explained this; he said, "[W]hat I'm asking is whether there was any investigation to find out that those who were manning the roadblock were the same, or whether they were replaced by others".[313] In other words, if the visit was long before the killing, the effect of any instructions given by the appellant during the visit might abate with time, especially if there was meanwhile a change of personnel: causality would be in question.

10. That is the nub of the problem raised by Mr Konitz: the sole issue was as to how long after the visit was the killing done. The appeal raises no issue as to the killing taking place before the visit. No such issue has in fact been raised, but it is important to set correctly the parameters of the question to be answered.

[312] Transcript of the oral arguments in the Appeals Chamber, 6 July 2006, p. 20; emphasis added.
[313] *Ibid.*, p. 19.

E. How long after the visit was made did the killing occur?

11. Now to be considered is the question raised in the oral arguments of Mr Konitz as to how long after the visit was made did the killing occur. The answer is made difficult by evidential discrepancies, particularly as to dates. Evidential discrepancies often occur in trials. When they do, it is the responsibility of the Trial Chamber to resolve them. The Appeals Chamber accepts the Trial Chamber's solution, absent clear error. The Trial Chamber cannot of course draw inferences from non-existent facts, but one has to be on solid ground before criticising it for doing so. I do not think that the Trial Chamber did so.

12. The matter is complicated because, as part of its reasoning on the question whether the Trial Chamber erred in holding that the killing took place shortly after the visit, the Appeals Chamber considers that Witness CGC gave no admissible evidence of the killing itself. This was because Witness CGC said that he learnt of the killing, without disclosing the source of his information or any other material relevant to the issue of reliability.[314] I respectfully agree with the Appeals Chamber that, although hearsay evidence is admissible, in the absence of disclosure of the bases of reliability, the evidence is not admissible. It seems to me, however, that there was other evidence of the killing, and that the failure of Witness CGC to give admissible evidence on it is not by itself germane to the question whether the killing took place shortly after the visit.

13. The Trial Chamber found in favour of the credibility of Witness CGC and, for the purposes at hand, of Witness DB also. Witness DB's evidence showed that Witness DB drove a car to the roadblock, with Mr Nors as a passenger.[315] As for Witness CGC, the Trial Chamber said, "Witness CGC testified that Witness DB was indeed the driver of the car carrying Nors when it was stopped at the roadblock".[316] It may be questioned whether in this passage the Trial Chamber meant to say that it found that Witness CGC was himself present when the car arrived at the roadblock. I consider that the natural sense of the Trial Chamber's language and of the proven events is that Witness CGC was indeed present.

14. Witness CGC's recorded evidence, given under cross-examination, was this:

> Q. Did you know him yourself?
>
> A. No, it was only at that location that I learnt of his existence and people spoke about him saying that he was called Nturuso.
>
> Q. Do you know any other name that he might have had or a nickname?

[314] Appeal Judgement, para. 115.
[315] Trial Judgement, paras. 209, 224-225.
[316] *Ibid.*, para. 224. *See also* Trial Chamber's Transcript, 29 September 2003, pp. 49, 50.

A. How would you want me to know that, Counsel?

Q. In your written statement you mentioned the fact that this half-caste was in his vehicle and that his driver was driving. Did you also come by this information through other persons?

A. You are referring to the driver? No, no, I knew the driver before. That is not something which was reported to me. I knew the driver.

Q. And the driver did indeed answer to the name which you mentioned in your written statement? I don't want to mention the name out loud, but you stated that he was driving his vehicle and you mentioned the name. Do you remember the name that you mentioned? Don't say it out loud.

A. Yes, of course, I know that name. I do remember his name but of course I won't say it out loud.[317]

There then followed a procedure in the Trial Chamber whereby Witness CGC disclosed the protected name of Witness DB; so the driver was indeed Witness DB. I should add that there is no dispute that "Nors" was the same as "Nturuso".

15. Whatever was the precise legal status of Witness CGC's written statement, the appellant had succeeded in placing on the record of the Trial Chamber what in my opinion amounted to an averment that Witness CGC was in a position to see both the half-caste and the driver. It also appears that the appellant did not separate himself from that averment. Accordingly, there was no debate suggesting that Witness CGC was not present when the car arrived with two people. The assumption of the appellant, put forward to the Trial Chamber in the above excerpt of the cross-examination of Witness CGC, was that Witness CGC was present when a car with two people arrived at the roadblock.

16. The real concern of the appellant was not with whether Witness CGC was present when the car arrived, but with whether Witness CGC personally knew enough of the two persons in the car to have been able to identify them. The appellant denied that the driver was Witness DB and that the passenger was Mr Nors. But if, as the appellant contended, Witness CGC was incapable of identifying Nors, he was not incapable of identifying Witness DB; as has been seen, Witness CGC's testimony was that he "knew the driver [Witness DB] before. That is not something which was reported to me. I knew the driver".[318] So Witness CGC knew Witness DB. And Witness DB plainly knew his passenger Mr Nors; Witness DB, an ambulance driver, knew Mr Nors as a medical assistant at the local hospital, and Mr Nors had asked Witness DB to give him a ride.[319] Also,

[317] Trial Chamber's Transcript, 29 September 2003, p. 49.
[318] *Ibid.*
[319] Trial Judgement, para. 207. *See also* Trial Chamber's Transcript, 28 October 2003, p. 81, Witness DB.

Witness DB gave clear and graphic testimony from which it could be reasonably inferred that Mr Nors was killed at the roadblock later that day.[320]

17. Since Witness CGC was present during the appellant's visit to the roadblock, since, in my view, he was also present when Witness DB and Mr Nors arrived there later that day, and since, according to Witness DB Mr Nors was killed shortly after leaving the roadblock, it follows from the above circumstances that Mr Nors was killed the same day on which the appellant visited the roadblock.[321]

18. A straight nexus is thus established between the appellant's visit to the roadblock and the killing of Mr Nors, the latter occurring after the former but both taking place on the same day. The killing may not have occurred five minutes after the visit, but the Trial Chamber would have been right to find that it took place "shortly after".[322] Further, proof of the nexus does not depend on hearsay evidence: it does not require proof of the killing by the unreliable hearsay evidence of Witness CGC.

19. Various dates for the killing of Mr Nors were suggested. Dates from about 20 May 1994 to 26 May 1994 were mentioned. The Trial Chamber found that the killing occurred "in late May, 1994",[323] which included that period. The difficulty of estimating time and of recalling precise dates on which events occurred many years before in circumstances of extreme trauma has to be taken into account in resolving conflicts of evidence as to exact dates. A solution is to be found by focusing on the factual events, as sought to be done above.

20. When the evidence is thus approached, there is no basis on which the Appeals Chamber can find that no reasonable trier of fact could have reached the conclusion, beyond reasonable doubt, "that in late May, 1994"[324] Mr Nors was killed and that the killing took place "shortly after the Accused's departure" from the Gaseke roadblock.[325] Other triers of fact might have reached a different conclusion, but that is not sufficient to show that "no reasonable trier of fact could have reached" the conclusion reached by the Trial Chamber.

21. Finally, it has to be remembered that the particular point as to the interval between the visit and the killing was not raised in the written arguments on appeal. As mentioned before, the point

[320] Trial Judgement, para. 209. *See also* Trial Chamber's Transcript, 28 October 2003, pp. 83-84, Witness DB.
[321] Trial Chamber's Transcript, 29 September 2003, p. 48, Witness CGC.
[322] Trial Judgement, para. 231.
[323] *Ibid.*, paras. 230-231.
[324] *Ibid.*
[325] *Ibid.*, para. 231.

was raised only orally, in possible reaction to questions asked by the Appeals Chamber preparatory to the hearings.

F. Conclusion

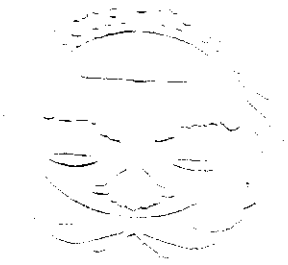
22. For these reasons, I regret that I am not able to support the reasoning of the majority of the Appeals Chamber. The different reason why I agree with the Appeals Chamber to acquit the appellant in respect of the killing of Mr Nors is that, towards the end of the trial, the prosecution created an ambiguity as to whether in fact the charge was withdrawn, with the result that the accused would have to be given the benefit of the doubt on the question of fact as to whether there was a withdrawal. The Appeals Chamber can choose the ground of its decision, but it is worth noting that the question whether there was a withdrawal is logically prior to the merits of the arguments relating to the charge that was allegedly withdrawn. Normally the question of withdrawal should be treated first. But there is no point in elaborating.

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

Mohamed Shahabuddeen
Judge

Signed 10 January 2007
At The Hague
The Netherlands

And delivered
16 January 2007
At Arusha
Republic of Tanzania



[Seal of the Tribunal]

XVI. PARTIALLY DISSENTING OPINION OF JUDGE GÜNEY

1. I agree with the Appeals Chamber's resolution of Emmanuel Ndindabahizi's appeal and with most of the reasons provided in today's Judgement. However, with respect, I am unable to accept the Appeals Chamber's affirmation *proprio motu* of the Trial Chamber's finding that Emmanuel Ndindabahizi himself committed the crime of extermination.[326] I therefore regret that I cannot support the findings of the Appeals Chamber with respect to paragraph 123.

2. In its Judgement, the Appeals Chamber finds *proprio motu* that "alternative convictions for several modes of liability are, in general, incompatible with the principle that a judgement has to express unambiguously the scope of the convicted person's criminal responsibility",[327] a statement with which I agree. In paragraph 123 of its Judgement, the Appeals Chamber also holds that "a full characterisation of the Appellant's conduct had to cumulatively refer to various modes of liability", *i.e.*, committing, instigating and aiding and abetting the crime of extermination.[328] The Appeal Judgement does not assess the characterisation by the Trial Chamber of the Appellant's criminal conduct; it simply upholds the Trial Judgement's finding, without considering its correctness. I have difficulty with the approach taken by the majority in this regard. More importantly, I disagree with the Trial Chamber's finding, upheld by the majority, that based on the circumstances of this case, the Appellant's conduct constitutes the "commission" of extermination. My reasons are as follows.

3. The Trial Chamber found that "[e]xtermination may be committed less directly than murder, as by participation in measures intended to bring about the deaths of a large number of individuals, but without actually committing a killing of any person."[329] In defining the *actus reus* for extermination, the Trial Chamber went beyond the findings of this Appeals Chamber in the *Ntakirutimana* Appeal Judgement and those of the ICTY Appeals Chamber in the *Stakić* Appeal Judgement. The Appeals Chambers in these cases defined the *actus reus* of extermination as "the act of killing on a large scale"[330] or the "systematical[] subject[ion of] a number of people to conditions of living that would inevitably lead to death."[331] If these precedents had been followed in this case, the acts of the Appellant could not have been characterised as "committing extermination".[332] Indeed, the Trial Chamber found that the evidence did not establish that the

[326] Appeal Judgement, paras 121 and 123.
[327] *Ibid.*, para. 122.
[328] *See* Trial Judgement, para. 485.
[329] Trial Judgement, para. 479.
[330] *Ntakirutimana* Appeal Judgement, para. 516; *Stakić* Appeal Judgement, para. 259.
[331] *Ntakirutimana* Appeal Judgement, para. 522; *Stakić* Appeal Judgement, para. 259.
[332] Except perhaps in the sense of participation in a joint criminal enterprise, but such mode of liability was not pleaded in this case.

Appellant himself killed any person by his acts at Gitwa Hill.[333] The Trial Chamber found that the Appellant committed the crime of extermination by distributing weapons, transporting attackers and encouraging them.[334] This cannot be considered as "systematically subjecting a number of people to conditions of living that would inevitably lead to death".[335] Moreover, it cannot be maintained that the killing of the refugees at Gitwa Hill would have occurred without the actions of the attackers themselves.

4. The Appeal Judgement does not provide reasons for upholding the Trial Chamber's characterisation of the Appellant's conduct as "committing" extermination. However, in a footnote, the majority suggests that "indirectly" causing death could also constitute committing extermination.[336] This seems to follow the approach in the *Gacumbitsi* case, in which the majority held that committing means not only "physically perpetrating the *actus reus* of the crime [or] participating in a joint criminal enterprise", but also "other acts of participation."[337] In my Partially Dissenting Opinion in *Gacumbitsi*,[338] I explained that this finding departs from prior decisions of both the ICTR and the ICTY Appeals Chambers without providing cogent reasons. I also explained that it blurs the essential distinction between "committing" a crime and other forms of liability recognised by the Statute and the jurisprudence. If any act of participation in a crime amounts to committing the crime, then all modes of liability are subsumed in the expression "committed" in Article 6(1) of the Statute and become redundant. This, at the very least, runs contrary to the principle *ut res magis valeat quam pereat*, according to which all provisions in the Statute should be given effect.

5. In my view, the criminal conduct of the Appellant can only be characterised as instigating and aiding and abetting the crime of extermination; it does not constitute "committing" that crime. In the circumstances of this case, the attackers at Gitwa Hill committed the crime. Their actions directly resulted in the deaths of the refugees and there were no other agents intervening between their acts and the death of the victims. The Appellant assisted, encouraged and lent moral support to these attackers, and his acts had a substantial effect upon the perpetration of the crime.

6. I conclude that the Trial Chamber erred in finding that Mr. Ndindabahizi "himself committed the crime of extermination".[339] I regret that the Appeal Judgement upholds this erroneous finding without considering the matter further. For the reasons stated above, I depart

[333] Trial Judgement, para. 481.
[334] *Ibid.*, para. 485.
[335] *Ntakirutimana* Appeal Judgement, para. 522; *Stakić* Appeal Judgement, para. 259 (emphasis added).
[336] Appeal Judgement, footnote 269.
[337] *Gacumbitsi* Appeal Judgement, paras 60-61.
[338] *Gacumbitsi* Appeal Judgement, Partially Dissenting Opinion of Judge Güney, paras 2-9.
[339] Trial Judgement, para. 485.

from the majority and disagree with paragraph 123 of the Appeal Judgement.

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

Mehmet Güney
Judge

Signed on the tenth day of January 2007,
in The Hague, The Netherlands,

Issued on the sixteenth day of January 2007,
in Arusha, Tanzania.

[Seal of the Tribunal]

XVII. ANNEX A – PROCEDURAL BACKGROUND

A. Notice of Appeal and Briefs

1. The Trial Judgement was delivered in the original English version on 15 July 2004. On 13 August 2004, the Appellant filed his Notice of Appeal, including 13 grounds of appeal. On 24 August 2004, the Appellant filed a motion seeking an extension of time for filing his Appellant's Brief on the basis that the French translation of the Trial Judgement was not yet available.[340] The request was granted on 26 August 2004, and the Appellant was ordered to file the Appellant's Brief within seventy-five days of receipt of the French translation of the Trial Judgement.[341] On 29 December 2004, the Appellant filed a motion seeking a suspension of the deadline for filing his Appellant's Brief on the basis that his lead counsel was quitting the profession of attorney.[342] The request was granted on 6 January 2005, and the Appellant was ordered to file the Appellant's Brief within seventy-five days after the assignment of new lead counsel by the Registrar.[343] On 1 April 2005, the Appellant again sought to extend the deadline for the Appellant's Brief on the grounds that his co-counsel and lead counsel required more time to acquaint themselves with the case.[344] This request was denied on 5 April 2005.[345]

2. The Appellant filed his Appellant's Brief in which grounds of appeal 6, 8 and 12 were withdrawn[346] on 9 May 2005.[347] On 14 June 2005, he filed a Corrigendum to his Appellant's Brief.[348] The Prosecution filed its Respondent's Brief on 17 June 2005[349] and a Corrigendum on 5 June 2006.[350] The Appellant requested an extension of the deadline for filing his Brief in Reply[351] which was granted until 15 days after receipt of the French translation of the Respondent's Brief.[352] The Appellant submitted a further request for delay in filing his Brief in Reply on the basis that he had not received the full translation of the Respondent's Brief until 31 October 2005.[353] This

[340] Requête aux fins de prorogation de délai pour le dépôt du mémoire en appel – articles 111 et 116 du règlement de procédure et de preuve, 24 August 2004.
[341] Decision on Emmanuel Ndindabahizi's Motion for an Extension of Time, 26 August 2004.
[342] Requête urgente aux fins de suspension des délais, 29 December 2004. This latter submission replaced the earlier submission, Requête urgente aux fins de prorogation de délai pour le dépôt du mémoire en appel, 14 December 2004.
[343] Decision on Emmanuel Ndindabahizi's Motion for an Extension of Time, 6 January 2005.
[344] Requête urgente aux fins de prorogation de délai pour le dépôt du mémoire en appel, 1 April 2005.
[345] Decision on 'Requête urgente aux fins de prorogation de délai pour le dépôt du mémoire en appel', 5 April 2005.
[346] Appellant's Brief, para. 11.
[347] Mémoire d'Appel, 9 May 2005.
[348] Corrigendum au Mémoire d'Appel, 14 June 2005.
[349] Respondent's Brief, 17 June 2005.
[350] Corrigendum to the Respondent's Brief of the Prosecutor, 5 June 2006.
[351] Requête urgente aux fins de prorogation de délai pour le dépôt de la réplique de l'appelant, 22 June 2005.
[352] Decision on Requête urgente aux fins de prorogation de délai pour le dépôt de la réplique de l'appelant, 28 June 2005.
[353] Requête urgente en extension de délai pour le dépôt de la réplique au procureur, 28 October 2005, and Requête en clarification de la date de réception du Mémoire de l'Intimé, 7 November 2005. The Prosecutor only replied to the

request was granted by the Appeals Chamber who ordered that the Brief in Reply, if any, be filed no later than 14 November 2005.[354] The Appellant submitted his Brief in Reply on that day.[355] On 9 November 2006, the Appellant filed a public version of the Appellant's Brief.[356]

B. Assignment of Judges

3. On 24 August 2004, the following Judges were assigned to hear the appeal: Judge Theodor Meron, Presiding; Judge Florence Mumba; Judge Mehmet Güney; Judge Wolfgang Schomburg; and Judge Inés Weinberg de Roca. Judge Schomburg was designated as Pre-Appeal Judge on 24 August 2004 [357] and as Presiding Judge on 21 November 2005. Subsequently, Judge Shahabuddeen was assigned to replace Judge Inés Weinberg de Roca,[358] and Judge Liu Daqun was assigned to replace Judge Florence Mumba.[359]

C. Additional Evidence and Further Motions

4. On 27 September 2004, the Appellant filed a motion seeking leave to present additional evidence in the form of four documents relating to his alleged alibi.[360] The Appeals Chamber granted the motion and gave leave to present the four documents as additional evidence pursuant to Rule 115 of the Rules.[361] On 28 February 2006, the Appellant filed a second motion seeking leave to present additional evidence relating to mitigating circumstances[362] which was dismissed by the

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former in: Prosecutor's Response to Appellant Emmanuel Ndindabahizi's Requête urgente en extension de délai pour le dépôt de la réplique au procureur, 1 November 2005.

[354] Order on Appellant's Requête urgente en extension de délai pour le dépôt de la Réplique au procureur and Requête en clarification de la date de réception du mémoire de l'intimé, 9 November 2005.

[355] Reply Brief, 14 November 2005.

[356] Mémoire d'Appel Version publique, 20 October 2006, filed on 9 November 2006.

[357] Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 24 August 2004.

[358] Order Replacing a Judge, 15 July 2005.

[359] Order Replacing a Judge, 18 November 2005.

[360] Requête de la défense en présentation de moyens de preuve supplémentaires - Art 115 du Règlement, 27 September 2004; Prosecutor's Response to Requête de la défense en présentation de moyens de preuve supplémentaires - Art 115 du règlement, 7 October 2004; Réplique de l'appelant (requête en présentation de moyens de preuve supplémentaires – Art 115 du règlement), 12 October 2004; Corrigendum to Prosecutor's Response to Requête de La Défense En Présentation de Moyens de Preuve Supplémentaires-Art. 115 du Règlement, 8 March 2005; Prosecutor's Additional Submission in Response to the 'Requête de La Défense En Présentation de Moyens de Preuve Supplémentaires-Art. 115 du Règlement (Pre-Appeal Judge's Directive of 8 March 2005), 22 March 2005; Observations de la Défense sur les Documents Communiqués par le Bureau du Procureur, 22 March 2005.

[361] Decision on the Admission of Additional Evidence, 14 April 2005.

[362] The Appellant's Second Motion to Present Additional Evidence (R.115), 28 February 2006; Prosecutor's Response to the Appellant's Second Motion to Present Additional Evidence (R.115), 10 March 2006; Réponse aux observations de l'intimé sur la deuxième requête de l'appelant en présentation de moyens de preuve supplémentaires, 20 March 2006.

Appeals Chamber on 4 April 2006.[363] On 24 April 2006, the Appellant filed a request for reconsideration of this decision of the Appeals Chamber,[364] which was rejected on 14 June 2006.[365]

5. Status conferences were held on 8 March 2005, 19 September 2005 and 8 February 2006. In the status conference on 8 February 2006, both parties were invited to make submissions on the definition of the crime against humanity of extermination.[366] Both parties made submissions,[367] and on 2 March 2006 the Presiding Judge invited the parties to respond to each other's submissions,[368] which both parties did.[369]

D. Hearing of the Appeal

6. Pursuant to a Scheduling Order of 11 May 2006,[370] the Appeals Chamber heard the parties' submissions on the appeal on 6 July 2006 in Arusha, Tanzania.

[363] Decision on the Admission of Additional Evidence, 4 April 2006.
[364] Requête de l'appelant en reconsidération de la décision du 4 avril 2006 en raison d'une erreur matérielle, 24 April 2006; Prosecutor's Response to Requête de l'appelant en reconsidération de la décision du 4 avril 2006 en raison d'une erreur matérielle, 26 April 2006.
[365] Décision on Defence Requête de l'appelant en reconsidération de la décision du 4 avril 2006 en raison d'une erreur matérielle, 14 June 2006.
[366] Scheduling Order, 6 January 2006.
[367] Mémoire supplémentaire de l'appelant sur l'élément matériel et moral de l'extermination, 28 February 2006; Prosecutor's Submissions on Elements of Extermination as a Crime against Humanity, 1 March 2006.
[368] Letter to the Parties: Invitation to Respond to Submissions on Extermination, 2 March 2006.
[369] Prosecutor's Response to Ndindabahizi's Mémoire supplémentaire de l'appelant sur l'élément matériel et moral de l'extermination, 15 March 2006; Réponse de l'appelant aux observations du procureur sur les éléments de l'extermination en tant que crime contre l'humanité, 15 March 2006.
[370] Scheduling Order, 11 May 2006.

XVIII. ANNEX B – CITED MATERIALS/DEFINED TERMS

A. List of Cited Tribunal Decisions

ICTR

AKAYESU
Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-A, Judgement, 1 June 2001 ("*Akayesu* Appeal Judgement")

BAGILISHEMA
Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-T, Judgement, 7 June 2001 ("*Bagilishema* Trial Judgement")

GACUMBITSI
Prosecutor v. Sylvestre Gacumbitsi, Case No. ICTR-01-64-A, Judgment, 7 July 2006 ("*Gacumbitsi* Appeal Judgement")

KAJELIJELI
Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-T, Judgement and Sentence, 1 December 2003 ("*Kajelijeli* Trial Judgement")

Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-A, Judgement, 23 May 2005 ("*Kajelijeli* Appeal Judgement")

KAMUHANDA
Prosecutor v. Jean de Dieu Kamuhanda, Case No. ICTR-99-54A-T, Judgement and Sentence 22 January 2003 ("*Kamuhanda* Trial Judgement")

Prosecutor v. Jean de Dieu Kamuhanda, Case No. ICTR-95-1-A, Judgement, 19 September 2005 ("*Kamuhanda* Appeal Judgement")

KAYISHEMA AND RUZINDANA
Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, Judgement, 21 May 1999 ("*Kayishema and Ruzindana* Trial Judgement")

Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001 ("*Kayishema and Ruzindana* Appeal Judgement ")

MUSEMA
Prosecutor v. Alfred Musema, Case No. ICTR-96-13-T, Judgement, 27 January 2000 ("*Musema* Trial Judgement")

NIYITEGEKA
Prosecutor v. Eliézer Niyitegeka, Case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003 ("*Niyitegeka* Trial Judgement and Sentence")

Prosecutor v. Eliézer Niyitegeka, Case No. ICTR-96-14-T, Appeal Judgement, 9 July 2004 ("*Niyitegeka* Appeal Judgement")

NTAKIRUTIMANA
Prosecutor v. Elizaphan and Gérard Ntakirutimana, Case No. ICTR-96-10 & ICTR-96-17-T, Judgement and Sentence, 21 February 2003 ("*Ntakirutimana* Trial Judgement and Sentence")

Prosecutor v. Elizaphan and Gérard Ntakirutimana, Case No. ICTR-96-10 & ICTR-96-17-A, Appeal Judgement, 9 December 2004 ("*Ntakirutimana* Appeal Judgement")

NTAGERURA *ET AL.*
Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe, Case No. ICTR-99-46-A, Judgement and Sentence, 7 July 2006 ("*Ntagerura et al* Appeal Judgement and Sentence")

RUTAGANDA
Prosecutor v. Georges Anderson Nderubunwe Rutaganda, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement")

SEMANZA
Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003 ("*Semanza* Trial Judgement and Sentence")

Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-A, Judgement, 20 May 2003 ("*Semanza* Appeal Judgement")

ICTY

ALEKSOVSKI
Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement")

BLAŠKIĆ
Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement")

FURUNDŽIJA
Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement")

KRSTIĆ
Prosecutor v. Radislav Krstić, Case No. IT-98-33-T, Judgement, 2 August 2001 ("*Krstić* Trial Judgement")

Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement")

Z. KUPREŠKIĆ, M. KUPREŠKIĆ, V. KUPREŠKIĆ, JOSIPOVIĆ, (PAPIĆ) AND SANTIĆ
Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Santić, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement")

NALETILIĆ AND MARTINOVIĆ
Prosecutor v. Mladen Naletilić and Vinko Martinović, Case No. IT-98-34-A, Appeal Judgement, 3 May 2006 ("*Naletilić and Martinović* Appeal Judgement")

STAKIĆ
Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Appeal Judgement, 22 March 2006 ("*Stakić* Appeal Judgement")

D. TADIĆ
Prosecutor v. Duško Tadić a/k/a "Dule", Case No. IT-94-1-T, Judgement, 7 May 1997 ("*Tadić* Trial Judgement")

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement")

VASILJEVIĆ
Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-T, Judgement, 29 November 2002 ("*Vasiljević* Trial Judgement")

Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement")

B. List of Abbreviations

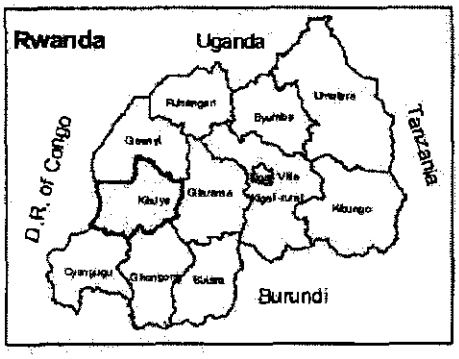
According to Rule 2 (B), of the Rules of Procedure and Evidence, the masculine shall include the feminine and the singular the plural, and vice versa.

Accused	Emmanuel Ndindabahizi
AT	Transcript page from hearings on appeal in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless specified otherwise.
cf.	[Latin: *confer*] (Compare)
Defence	The Accused, and/or the Accused's counsel
Exh(s).	Exhibit(s)
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
Indictment	*Prosecutor v. Emmanuel Ndindabahizi*, Case No. ICTR-01-71-I, Amended Indictment (Pursuant to Trial Chamber I's Decision of 1 September 2003), dated 1 September 2003
Ndindabahizi Appeal Brief	*Prosecutor v. Emmanuel Ndindabahizi*, Case No. ICTR-01-71-A, Appellant's Brief, filed 9 May 2005
Ndindabahizi Closing Brief	*Prosecutor v. Emmanuel Ndindabahizi*, Case No. ICTR-01-71-T, Defence Closing Brief, filed on 6 February 2003

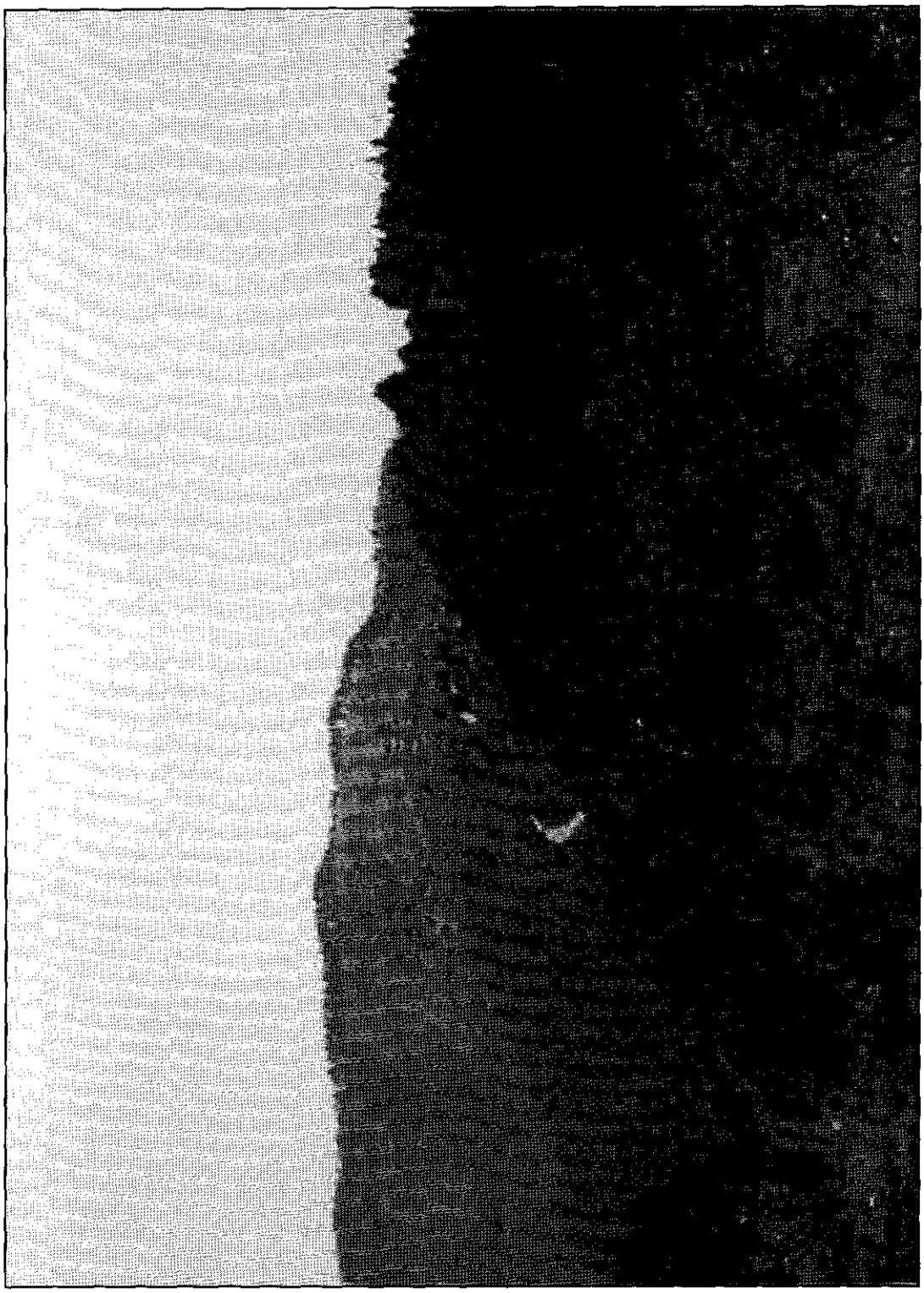
Ndindabahizi Reply Brief	*Prosecutor v. Emmanuel Ndindabahizi*, Case No. ICTR-01-71-A, Response to Respondent's Brief, filed 14 November 2005
Notice of Appeal	*Prosecutor v. Emmanuel Ndindabahizi*, Case No. ICTR-01-71-T, Acte d'Appel, filed on 13 August 2004
Prosecution	Office of the Prosecutor
Prosecution Response	*Prosecutor v. Emmanuel Ndindabahizi*, Case No. ICTR-01-71-A, Respondent's Brief of the Prosecutor, filed on 17 June 2005
Prosecution Pre-trial Brief	*Prosecutor v. Emmanuel Ndindabahizi*, Case No. ICTR-01-71-I, Prosecutor's Pre-Trial Brief, filed 1 August 2003
Prosecution Closing Brief	*Prosecutor v. Emmanuel Ndindabahizi*, Case No. ICTR-01-71-T, Prosecutor's Closing Brief, filed on 20 January 2004
Rules	Rules of Procedure and Evidence of the ICTR
Statute	Statute of the International Tribunal for Rwanda established by Security Council Resolution 955 (1994)
T.	Transcript page from hearings at trial in *Prosecutor v. Emmanuel Ndindabahizi*, Case No. ICTR-2001-71-I. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless specified otherwise.
UN	United Nations
UNDF	United Nations Detention Facilities for persons awaiting trial or appeal before the ICTR

Kibuye

Carte de Base



Limite de préfecture
Limite de commune
Limite de secteur
Chef-lieu de préfecture
Route non pavée
Fôret naturelle
Lac



From Gitwa Hill - towards Gasengesi Hill and road to Kiziba.