UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-05-88-A
20th October 2010
{857/H – 740/H}

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andrésia Vaz
Judge Carmel Agius

Registrar: Mr. Adama Dieng

Judgement of: 20 October 2010

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: Koffi Kumelio A. Afande
SIGNATURE: ... DATE: 20.oct.2010

CALLIXTE KALIMANZIRA

v.

THE PROSECUTOR

Case No. ICTR-05-88-A

JUDGEMENT

ICTR Appeals Chamber
Date: 20th October 2010
Action: R. Juma
Copied To: Judges, SLOs, LOs, ALOs, Parties, JRAU, LSS, JPU, Press and Public Affairs.

Counsel for Callixte Kalimanzira:

Mr. Arthur Vercken
Ms. Anta Guissé

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. Alphonse Van
Ms. Charity Kagwe-Ndungu
Mr. François-Xavier Nsanzuwera
Ms. Florida Kabasinga
Ms. Jane Mukangira

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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 ("Appeals Chamber" and "Tribunal," respectively) is seized of appeals by Callixte Kalimanzira ("Kalimanzira") and the Prosecutor ("Prosecution") against the Judgement rendered by Trial Chamber III of the Tribunal ("Trial Chamber") on 22 June 2009 in the case of *The Prosecutor v. Callixte Kalimanzira* ("Trial Judgement").[1]

I. INTRODUCTION

A. Background

2. Kalimanzira was born in 1953 in Muganza Commune, Butare Prefecture, Rwanda.[2] He is an agronomist by training.[3] Starting in 1986, Kalimanzira held various positions in the Rwandan government. These included serving as a sub-prefect of Butare and Byumba Prefectures, as an official in the Ministry of Agriculture and Livestock, and as the director of Rural Development for the Rwandan President's office.[4] He joined the Ministry of Interior in January 1992 as secretary general and served as *directeur de cabinet*, the ministry's second most senior official, from September of that year through the relevant events of 1994.[5]

3. The Trial Chamber convicted Kalimanzira for instigating and aiding and abetting genocide at the Butare-Gisagara roadblock around 22 April 1994, and for aiding and abetting genocide at Kabuye hill on 23 April 1994 and at the inauguration of Élie Ndayambaje as bourgmestre of Muganza Commune on 22 June 1994.[6] In addition, it convicted Kalimanzira for committing direct and public incitement to commit genocide at the Jaguar roadblock in middle to late April 1994, at the Kajyanama roadblock in late April 1994, at the Gisagara marketplace at the end of May 1994, and at the Nyabisagara football field in late May or early June 1994.[7] Kalimanzira was sentenced to a single term of 30 years of imprisonment.[8]

[1] For ease of reference, two annexes are appended: Annex A – Procedural History and Annex B – Cited Materials and Defined Terms.
[2] Trial Judgement, paras. 7, 79.
[3] Trial Judgement, paras. 79, 80.
[4] Trial Judgement, paras. 82-84.
[5] Trial Judgement, paras. 85, 87, 90.
[6] Trial Judgement, paras. 293, 393, 474, 739, 745.
[7] Trial Judgement, paras. 562, 589, 614, 729, 739, 745.
[8] Trial Judgement, para. 756.

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B. The Appeals

4. Kalimanzira presents 11 grounds of appeal challenging his convictions and requests the Appeals Chamber to release him.[9] The Prosecution responds that all grounds of Kalimanzira's appeal should be dismissed.[10] The Prosecution presents two grounds of appeal challenging the legal qualification of Kalimanzira's conviction for genocide in relation to Kabuye hill and the Butare-Gisagara roadblock as well as his sentence.[11] It requests the Appeals Chamber to change the forms of responsibility for these incidents to ordering and committing and to impose a sentence of life imprisonment.[12] Kalimanzira responds that the Prosecution's appeal should be dismissed.[13]

5. The Appeals Chamber heard oral submissions regarding these appeals on 14 June 2010.

[9] Kalimanzira Notice of Appeal.
[10] Prosecution Response Brief, paras. 1, 264.
[11] Prosecution Notice of Appeal.
[12] Prosecution Notice of Appeal, paras. 12-14, 26.
[13] Kalimanzira Response Brief, paras. 11, 16.

II. STANDARDS OF APPELLATE REVIEW

6. The Appeals Chamber recalls the applicable standards of appellate review pursuant to Article 24 of the Statute. The Appeals Chamber reviews only errors of law which invalidate the decision of the trial chamber and errors of fact which have occasioned a miscarriage of justice.[14]

7. Regarding errors of law, the Appeals Chamber has 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.[15]

8. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.[16] In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding may be confirmed on appeal.[17]

9. Regarding errors of fact, it is well established that the Appeals Chamber will not lightly overturn findings of fact made by the trial chamber:

> Where 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.[18]

10. 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

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[14] *Nchamihigo* Appeal Judgement, para. 7; *Bikindi* Appeal Judgement, para. 9; *Zigiranyirazo* Appeal Judgement, para. 8. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 9.

[15] *Ntakirutimana* Appeal Judgement, para. 11 (internal citation omitted). *See also Nchamihigo* Appeal Judgement, para. 8; *Bikindi* Appeal Judgement, para. 10; *Zigiranyirazo* Appeal Judgement, para. 9; *Boškoski and Tarčulovski* Appeal Judgement, para.10.

[16] *Nchamihigo* Appeal Judgement, para. 9; *Bikindi* Appeal Judgement, para. 11; *Zigiranyirazo* Appeal Judgement, para. 10. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 11.

[17] *Nchamihigo* Appeal Judgement, para. 9; *Bikindi* Appeal Judgement, para. 11; *Zigiranyirazo* Appeal Judgement, para. 10. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 11.

[18] *Krstić* Appeal Judgement, para. 40 (internal citations omitted). *See also Nchamihigo* Appeal Judgement, para. 10; *Bikindi* Appeal Judgement, para. 12; *Zigiranyirazo* Appeal Judgement, para. 11; *Boškoski and Tarčulovski* Appeal Judgement, para. 13.

intervention of the Appeals Chamber.[19] Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[20]

11. In order for the Appeals Chamber to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.[21] Moreover, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.[22] Finally, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and it will dismiss arguments which are evidently unfounded without providing detailed reasoning.[23]

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[19] *Nchamihigo* Appeal Judgement, para. 11; *Bikindi* Appeal Judgement, para. 13; *Zigiranyirazo* Appeal Judgement, para. 12. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 16.
[20] *Nchamihigo* Appeal Judgement, para. 11; *Bikindi* Appeal Judgement, para. 13; *Zigiranyirazo* Appeal Judgement, para. 12. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 16.
[21] Practice Direction on Formal Requirements for Appeals from Judgement, 15 June 2007, para. 4(b). *See Nchamihigo* Appeal Judgement, para. 12; *Bikindi* Appeal Judgement, para. 14; *Zigiranyirazo* Appeal Judgement, para. 13. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 17.
[22] *Nchamihigo* Appeal Judgement, para. 12; *Bikindi* Appeal Judgement, para. 14; *Zigiranyirazo* Appeal Judgement, para. 13. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 17.
[23] *Nchamihigo* Appeal Judgement, para. 12; *Bikindi* Appeal Judgement, para. 14; *Zigiranyirazo* Appeal Judgement, para. 13. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 17.

III. APPEAL OF CALLIXTE KALIMANZIRA

A. Alleged Violations of Fair Trial Rights (Ground 1)

12. Kalimanzira submits that the Trial Chamber violated his right to a fair trial.[24] In this section the Appeals Chamber considers three principal questions: (1) whether the Trial Chamber erred in its consideration of the Prosecution's alleged violation of its disclosure obligations pursuant to Rule 68 of the Rules; (2) whether the Trial Chamber violated the principle of equality of arms in conducting the case; and (3) whether the Trial Chamber erred in allowing the Prosecution to examine Defence witnesses based on material which was not disclosed prior to the commencement of cross-examination.

1. Rule 68 of the Rules

13. In the Trial Judgement, the Trial Chamber considered whether the Prosecution violated its disclosure obligations under Rule 68 of the Rules with respect to transcripts from the *Nyiramasuhuko et al.* case as well as any files concerning its witnesses from Rwandan *Gacaca* proceedings.[25] Kalimanzira submits that the Trial Chamber erred in finding that the Prosecution did not violate its disclosure obligations.[26]

14. The Appeals Chamber considers each category of material in turn, bearing in mind that, as such decisions relate to the general conduct of trial proceedings, this is a matter that falls within the discretion of the Trial Chamber.[27] A trial chamber's exercise of discretion will be reversed only if the challenged decision was based on an incorrect interpretation of governing law, was based on a patently incorrect conclusion of fact, or was so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.[28]

(a) *Nyiramasuhuko et al.* Transcripts

15. On 16 July 2008, after the close of its case, the Prosecution disclosed the trial transcripts of seven witnesses who testified in the *Nyiramasuhuko et al.* case, but not in Kalimanzira's, about the attack on Kabuye hill in Butare Prefecture.[29] On 9 February 2009, Kalimanzira sought to exclude the evidence relating to this attack provided by Prosecution Witnesses BXG, BDK, BDC, BWO,

[24] Kalimanzira Notice of Appeal, paras. 6-12; Kalimanzira Appeal Brief, paras. 8-47.
[25] Trial Judgement, paras. 42-60.
[26] Kalimanzira Appeal Brief, paras. 9-24.
[27] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence, 25 September 2006, para. 6 ("*Bagosora et al.* Appeal Decision of 25 September 2006").
[28] *Bagosora et al.* Appeal Decision of 25 September 2006, para. 6.
[29] Trial Judgement, paras. 51, 52.

BCF, BBO, and BXK or, in the alternative, to recall them for further cross-examination based on the Prosecution's failure to timely disclose the trial transcripts from the *Nyiramasuhuko et al.* case.[30] On 13 February 2009, the Trial Chamber admitted the transcripts into evidence and denied Kalimanzira's request.[31]

16. Kalimanzira renewed his objections in his Final Trial Brief and closing arguments.[32] In the Trial Judgement, the Trial Chamber held that there was no reason to reconsider its decision of 13 February 2009 on this issue.[33] It reiterated that the Prosecution did not violate its disclosure obligations because Kalimanzira did not demonstrate that the material in question was *prima facie* exculpatory.[34] The Trial Chamber ultimately convicted Kalimanzira for aiding and abetting genocide based on his role in the Kabuye hill incident.[35]

17. Kalimanzira submits that the Trial Chamber erred in finding that the Prosecution did not violate its disclosure obligations when it delayed handover of the *Nyiramasuhuko et al.* material and requests that the Appeals Chamber reverse his conviction based on the attack on Kabuye hill or alternatively remand the case for a new trial.[36] Kalimanzira contends that the transcripts were exculpatory and emphasizes that, given the overlap in the factual basis of the two trials, they would have been useful during cross-examination.[37]

18. Rule 68 of the Rules provides, *inter alia*, that the Prosecution "shall, *as soon as practicable*, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence."[38] The Appeals Chamber recalls that the Prosecution's obligation to disclose exculpatory material is essential to a fair trial.[39] The Appeals Chamber has always interpreted this obligation

[30] Trial Judgement, paras. 50, 51.
[31] Trial Judgement, paras. 48, 53. *See also* T. 13 February 2009 pp. 8-11.
[32] Trial Judgement, para. 48, *referring to* Kalimanzira Closing Brief, paras. 1178-1196, T. 20 April 2009 pp. 29, 30.
[33] Trial Judgement, paras. 49, 60.
[34] Trial Judgement, para. 58.
[35] Trial Judgement, paras. 393, 739.
[36] Kalimanzira Appeal Brief, paras. 10-20.
[37] Kalimanzira Appeal Brief, paras. 12, 13, 17, 18.
[38] Rule 68(A) of the Rules (emphasis added).
[39] *The Prosecutor v. Édouard Karemera et al.*, Case No. 98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006, para. 9 ("*Karemera et al.* Appeal Decision of 30 June 2006"); *The Prosecutor v. Édouard Karemera et al.*, Case No. 98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, para. 7 ("*Karemera et al.* Appeal Decision of 28 April 2006"); *The Prosecutor v. Théoneste Bagosora et al.*, Case Nos. ICTR-98-41-AR73, ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005, para. 44; *Kordić and Čerkez* Appeal Judgement, paras. 183, 242; *Blaškić* Appeal Judgement, para. 264; *Krstić* Appeal Judgement, para. 180; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004, p. 3 ("*Brđanin* Appeal Decision of 7 December 2004").

broadly.[40] To establish a violation of the Rule 68 disclosure obligation, the defence must establish that additional material is in the possession of the Prosecution and present a *prima facie* case that the material is exculpatory.[41] If the defence satisfies the trial chamber that the Prosecution has failed to comply with its Rule 68 obligations, then the trial chamber must examine whether the defence has been prejudiced by that failure before considering whether a remedy is appropriate.[42]

19. The Trial Chamber determined that the material at issue was in the possession of the Prosecution, but that Kalimanzira did not demonstrate that it was exculpatory.[43] Although the Trial Chamber correctly articulated the test for assessing disclosure violations,[44] the Appeals Chamber finds that it inappropriately applied an elevated standard in assessing whether the material was exculpatory within the meaning of Rule 68 of the Rules. Specifically, the Trial Chamber noted that the witnesses in the *Nyiramasuhuko et al.* case did not mention seeing Kalimanzira at Kabuye hill.[45] It observed that no questions were asked about him, and the transcripts, thus, "[did] not contradict the evidence adduced in the *Kalimanzira* trial,"[46] asserting that the failure "to make mention of Kalimanzira's presence at Kabuye hill during the period at issue does not mean that Kalimanzira could not have been there."[47]

20. The Trial Chamber's analysis appears to focus on the potentially low probative value of the *Nyiramasuhuko et al.* evidence. While that is certainly a relevant consideration in assessing whether an accused was prejudiced by late or non-disclosure of Rule 68 material, the Appeals Chamber recalls that the defence does not bear the burden of "contradict[ing]" the Prosecution's evidence.[48] It need only raise a reasonable doubt as to the accused's participation in a crime.[49] In addition, in order to establish a violation of disclosure obligations under Rule 68 of the Rules, the defence need only show that the material is *prima facie* or "potentially" exculpatory.[50] The Appeals Chamber

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[40] *Karemera et al.* Appeal Decision of 30 June 2006, para. 9. *See also Blaškić* Appeal Judgement, paras. 265, 266; *Krstić* Appeal Judgement, para. 180.
[41] *Kajelijeli* Appeal Judgement, para. 262. *See also Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-03-R, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification, 8 December 2006, para. 36 ("*Rutaganda* Review Decision"); *Karemera et al.* Appeal Decision of 28 April 2006, para. 13.
[42] *See Kajelijeli* Appeal Judgement, para. 262; *Krstić* Appeal Judgement, para. 153.
[43] Trial Judgement, paras. 57, 58.
[44] Trial Judgement, para. 56.
[45] Trial Judgement, para. 58.
[46] Trial Judgement, para. 58.
[47] Trial Judgement, para. 58.
[48] *Cf. Zigiranyirazo* Appeal Judgement, para. 19 ("The Appeals Chamber has recognized that language which suggests, *inter alia*, that an accused must 'negate' the Prosecution evidence, 'exonerate' himself, or 'refute the possibility' that he participated in a crime indicates that the Trial Chamber misapplied the burden of proof.") (internal citations omitted); *Muhimana* Appeal Judgement, para. 18 ("An accused does not need to prove at trial that a crime 'could not have occurred' or 'preclude the possibility that it could occur'.").
[49] *Cf. Zigiranyirazo* Appeal Judgement, para. 17.
[50] *Karemera et al.* Appeal Decision of 28 April 2006, para. 13. Rule 68(A) of the Rules states (emphasis added): "The Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the

considers that Kalimanzira did demonstrate that the absence of any reference to him in the relevant *Nyiramasuhuko et al.* testimony is *potentially* exculpatory. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in law in assessing whether the transcripts were *in fact* exculpatory in order to determine if a breach of the disclosure obligations under Rule 68 of the Rules occurred.

21. The Appeals Chamber is not convinced, however, that this error invalidated the Trial Chamber's decision. Notably, Kalimanzira did receive the material during the course of the trial, albeit after the close of the Prosecution's case. The question therefore becomes whether the Prosecution provided the material "as soon as practicable," as required by Rule 68(A) of the Rules. The Appeals Chamber has recognized that the voluminous nature of materials "in the possession" of the Prosecution may give rise to delays in disclosure.[51] There is no indication that the Prosecution acted in bad faith in disclosing the relevant material after the close of its case. Accordingly, the Appeals Chamber is not convinced that the timing of the Prosecution's disclosure violated Rule 68 of the Rules.

22. In any event, the Appeals Chamber further notes that, beyond asserting that this material would have been useful for cross-examination, Kalimanzira has not clearly demonstrated how he would have used any particular part of this material to discredit the Prosecution witnesses. The Trial Chamber reasonably determined that this type of evidence carried limited probative value.[52] In these circumstances, the Appeals Chamber is not convinced that Kalimanzira was prejudiced by the Trial Chamber's decision not to exclude Prosecution witnesses or recall them for further cross-examination.

(b) *Gacaca* Material

23. The Trial Chamber held that the Defence did not demonstrate that the Prosecution was in possession of documents from Rwandan *Gacaca* proceedings related to its witnesses and thus found

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Prosecutor *may suggest* the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence." The Appeals Chamber routinely construes the Prosecution's disclosure obligations under the Rules broadly in accord with their plain meaning. *See Bagosora et al.* Appeal Decision of 25 September 2006, para. 8, *citing Karemera et al.* Appeal Decision of 30 June 2006, paras. 9-13, *Krstić* Appeal Judgement, para. 180, *Blaškić* Appeal Judgement, paras. 265, 266.

[51] *Karemera et al.* Appeal Decision of 30 June 2006, n. 33, *citing Blaškić* Appeal Judgement, para. 300 ("[...] [T]he voluminous nature of the materials in the possession of the Prosecution may result in delayed disclosure, since the material in question may be identified only after the trial proceedings have concluded."), *Krstić* Appeal Judgement, para. 197 ("The Appeals Chamber is sympathetic to the argument of the Prosecution that in most instances material requires processing, translation, analysis and identification as exculpatory material. The Prosecution cannot be expected to disclose material which – despite its best efforts – it has not been able to review and assess. Nevertheless, the Prosecution did take an inordinate amount of time before disclosing material in this case, and has failed to provide a satisfactory explanation for the delay.") (internal citation omitted).

[52] *See* Trial Judgement, para. 387 ("The body of evidence reveals that there were thousands upon thousands of refugees suffering battle and massacre from an indeterminate number of attackers over a large landscape and time span; no witness alone could amply describe everything that transpired or identify everyone who was present. The Chamber finds the Defence evidence raises no reasonable doubt on eyewitness accounts that Kalimanzira was at Kabuye hill.").

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no violation of the Prosecution's disclosure obligations.[53] The Trial Chamber also noted that it had offered its assistance to the Defence in obtaining such material, but that Kalimanzira never acted on this proposal.[54]

24. Kalimanzira submits that the Trial Chamber erred in finding that the Prosecution did not violate its disclosure obligations with respect to the *Gacaca* documents of its witnesses.[55] He contends that the Prosecution refused his requests for assistance to obtain this material.[56] According to Kalimanzira, the Prosecution should have assisted him even though he did not file a formal request.[57] He emphasizes that the Prosecution has superior facilities to obtain such documents and was able to do so in connection with the cross-examination of Defence witnesses.[58]

25. The Appeals Chamber has previously held that the Prosecution has no obligation to obtain judicial material related to its witnesses from Rwanda.[59] As Kalimanzira has not shown that the Prosecution was in possession of this material, the Appeals Chamber finds no merit in his assertion that it violated its disclosure obligations. Bearing this in mind, the Appeals Chamber also considers that the Prosecution had no obligation to assist the Defence in obtaining these documents.[60] Although many trial chambers, in the exercise of their discretion, have asked the Prosecution to use its good offices to assist defence counsel in obtaining such material,[61] a review of the record reflects that Kalimanzira never made a request to this effect, notwithstanding the Trial Chamber's express willingness to assist in procuring these documents.[62]

2. Equality of Arms

26. In this sub-section, the Appeals Chamber considers two main submissions: (a) whether the Trial Chamber violated Kalimanzira's rights by not postponing the commencement of the trial due to the unforeseeable absence of his lead counsel; and (b) whether the Prosecution's strategy of

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[53] Trial Judgement, para. 44.
[54] Trial Judgement, para. 47.
[55] Kalimanzira Appeal Brief, paras. 21-24.
[56] Kalimanzira Appeal Brief, para. 21, *citing* T. 20 May 2008 pp. 17, 18 (French), T. 21 May 2008 p. 27 (French).
[57] Kalimanzira Appeal Brief, para. 22.
[58] Kalimanzira Appeal Brief, paras. 22, 23.
[59] *Rutaganda* Review Decision, para. 45. *See also Kajelijeli* Appeal Judgement, para. 263.
[60] The alleged disparity in resources between the Prosecution and Defence teams is addressed below. *See infra* para. 34.
[61] *Rutaganda* Review Decision, para. 46, *citing The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Decision on Matters Related to Witness KDD's Judicial Dossier, 1 November 2004, paras. 11, 15.
[62] Trial Judgement, para. 47 ("In the present case, the issue of procuring *Gacaca* records arose early in the trial during the cross-examination of a Prosecution witness, and the Chamber offered to assist the Defence. The Defence indicated its intention to file a written motion to specify what documents it would request the Prosecution to disclose or seek assistance to obtain. However, no such motion was ever filed.") (internal citation omitted).

reducing the number of allegations and witnesses during the course of the trial prejudiced the preparation of the Defence.[63]

(a) Absence of Kalimanzira's Lead Counsel during the First Trial Session

27. On 19 March 2008, the President of the Tribunal scheduled the opening of the trial in this case for 28 April 2008.[64] On 14 April 2008, Kalimanzira filed a motion to postpone the commencement of the trial until 10 May 2008 in light of the timing of the Prosecution's disclosure of unredacted witness statements.[65] During a status conference on 30 April 2008, the Presiding Judge granted this motion in part, and set the opening date of the trial for 5 May 2008.[66] After this oral decision was issued, Kalimanzira's co-counsel, Ms. Anta Guissé, informed the Presiding Judge that Kalimanzira's lead counsel, Mr. Arthur Vercken, had been hospitalized on 21 April 2008 and requested a further postponement of the trial until Mr. Vercken's recovery and arrival in Arusha.[67] Ms. Guissé explained that Mr. Vercken was currently prohibited from traveling, but that he might be able to travel during the week of 12 May 2008.[68]

28. After hearing the parties, the Presiding Judge decided not to postpone the commencement date.[69] He observed that Ms. Guissé appeared "articulate and competent" and that co-counsel were normally selected based on qualifications that would allow them to proceed in the absence of lead counsel.[70] In addition, he noted that the trial would be heard in half-day sessions, which would allow additional time for preparation.[71] During the course of further confidential discussions,[72] Ms. Guissé requested that cross-examination of Prosecution witnesses be postponed until Mr. Vercken's return.[73] The Presiding Judge granted this request in part, but noted that if Mr.

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[63] Kalimanzira also submits that the Trial Chamber was not impartial in its examination of the witnesses for each party. *See* Kalimanzira Appeal Brief, paras. 40-42. However, he does not support this argument under this ground of appeal and instead notes that it is developed in each individual ground. Consequently, the Appeals Chamber will address this argument in the grounds where it is specifically developed.

[64] *The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-PT, Scheduling Order Regarding the Commencement of the Trial, 19 March 2008, p. 2.

[65] *The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-I, Motion on Behalf of Callixte Kalimanzira Seeking a Postponement of the Commencement of Trial, 14 April 2008.

[66] Trial Judgement, Annex I, para. 771. *See also* T. 30 April 2008 p. 4. The trial did not start on 28 April 2008 as originally intended due to a change in the composition of the Bench. *See* Trial Judgement, Annex I, para. 770.

[67] T. 30 April 2008 pp. 4-6.

[68] T. 30 April 2008 p. 6.

[69] T. 30 April 2008 p. 9.

[70] T. 30 April 2008 p. 9.

[71] T. 30 April 2008 p. 9.

[72] T. 30 April 2008 p. 9 ("I think it might be reasonable to allow confidential discussion of this matter, so I will propose to adjourn the status conference now and to invite counsel on both sides to the Judges' lounge to discuss those matters which you have suggested should not be discussed in the public domain. So we will rise now and adjourn to the Judges' lounge.").

[73] T. 5 May 2008 p. 5 ("I would like to renew the exceptional request that was made before – that is, that the Defence start its cross-examination when Mr. Vercken comes. And as I said at the beginning of the hearing, he would probably be with us next week – maybe Monday [12 May 2008]. And also considering the calendar of activities for this week, we request that we only start our cross-examination in the presence of the lead counsel.").

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Vercken had not returned by 12 May 2008, Kalimanzira's co-counsel would be expected to proceed with cross-examination.[74]

29. During the week of 5 May 2008, the Trial Chamber heard the direct examination of Prosecution Witnesses BCF, BWO, BXK, BWK, and BDC. On 9 May 2008, Ms. Guissé informed the Trial Chamber that Mr. Vercken's condition had deteriorated and that he would not be able to attend trial proceedings on 12 May 2008 as initially projected.[75] Mr. Vercken did not ultimately attend any day of the first trial session, which lasted from 5 to 22 May 2008. Ms. Guissé therefore cross-examined the five initial witnesses between 12 and 20 May 2008. From 20 to 22 May 2008, the Trial Chamber also heard Prosecution Witnesses BDK, BWI, BXG, and BXH, whom Ms. Guissé cross-examined immediately following their examination-in-chief. Mr. Vercken was present in Arusha for the second trial session commencing on 16 June 2008. The Presiding Judge acknowledged his understandable absence during the first session and noted that "[Ms. Guissé] acquitted herself creditably in [Mr. Vercken's] absence."[76]

30. Kalimanzira submits that the Trial Chamber violated his right to equality of arms by refusing to delay the trial in Mr. Vercken's medically justified absence.[77] He notes that Ms. Guissé had only been assigned to the case for a short time (from 22 November 2007) prior to the commencement of trial.[78] According to Kalimanzira, her role as co-counsel was to act under the authority of his lead counsel, which was not possible when Mr. Vercken was hospitalized in Europe.[79]

31. According to Kalimanzira, the opening of the trial was the most important part of the case, particularly because this was when the Prosecution presented most of its witnesses relating to the most serious charge of genocide.[80] He submits that proceeding in the absence of Mr. Vercken prejudiced the preparation of the defence because investigative resources had to be diverted from the field to assist Ms. Guissé, who otherwise was not supported by other staff in Arusha; this further compounded the difficulties created by the Prosecution's late disclosure of unredacted statements.[81]

[74] T. 5 May 2008 p. 6.
[75] T. 9 May 2008 pp. 1, 2.
[76] T. 16 June 2008 p. 2.
[77] Kalimanzira Appeal Brief, paras. 25-32.
[78] Kalimanzira Appeal Brief, para. 25.
[79] Kalimanzira Appeal Brief, paras. 25, 27, 28, *citing* Directive on the Assignment of Defence Counsel, 14 March 2008, Article 15(E).
[80] Kalimanzira Appeal Brief, paras. 26, 29.
[81] Kalimanzira Appeal Brief, paras. 30, 31.

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To highlight the disparity, he notes that the Prosecution was represented by three prosecutors during this period.[82]

32. The Appeals Chamber can identify no error in the Trial Chamber's decision not to postpone the commencement of trial in the absence of Kalimanzira's lead counsel. As the Trial Chamber noted, the purpose of a co-counsel is not only to assist the lead counsel but indeed to conduct the case in order to allow the proceedings to continue in the event of an unforeseeable absence of the lead counsel. A review of the record reflects that the Trial Chamber was mindful of the additional difficulties that this situation imposed on the Defence and accommodated these by, *inter alia*, postponing the cross-examination of the first five witnesses.[83]

33. Significantly, Kalimanzira does not allege that Ms. Guissé's performance was ineffective. Indeed, as noted above, the Trial Chamber acknowledged her competence both at the outset of the session and after its conclusion. Furthermore, the record indicates that Ms. Guissé was in fact in consultation with Mr. Vercken during the first trial session and sought his instruction.[84] Kalimanzira also did not seek the recall of any of the witnesses for further cross-examination on the basis of Ms. Guissé's performance after Mr. Vercken's return.

34. As to the disparity between the Prosecution and the Defence teams during this period, the Appeals Chamber has held that "the equality of arms principle requires a judicial body to ensure that neither party is put at a disadvantage when presenting its case."[85] This principle does not require, however, material equality between the parties in terms of financial or human resources.[86] Therefore, there is no merit in Kalimanzira's submission that his rights were violated simply because the Prosecution had a larger team of lawyers during this period.

35. Finally, although Kalimanzira submits that his investigations were prejudiced by the re-allocation of resources to assist his co-counsel, he does not substantiate this claim and there is no indication that he raised this as a problem to the Trial Chamber or sought additional resources or time to compensate for any prejudice.

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[82] Kalimanzira Appeal Brief, para. 25.
[83] *See supra* paras. 28, 29.
[84] *See* T. 20 May 2008 p. 59 ("Mr. President, at this point, I have a motion. And it's almost 5 p.m. I know under what special circumstances I find myself, and I would like to make use of the break, between today and tomorrow, to forward the transcripts of the hearings to my lead counsel so that he can send his observations to me. This is a witness who is testifying to a number of facts about Mr. Kalimanzira. And given the importance of this testimony, I pray you to grant this motion. And on the second point, maybe on a humanitarian – from a humanitarian standpoint, and to consider the work that the Defence has done over the past two days, and, Mr. President, sir, to grant me this half hour that I'm asking from the Chamber, once more, in view of the exceptional circumstances in which Mr. Kalimanzira Defence team [*sic*] finds itself, and to get the observations of my lead counsel, who is the one who is heading Mr. Kalimanzira's Defence, to repeat myself.").
[85] *Nahimana et al.* Appeal Judgement, para. 173.
[86] *Nahimana et al.* Appeal Judgement, para. 220. *See also Kayishema and Ruzindana* Appeal Judgement, para. 69.

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(b) The Prosecution's Trial Strategy

36. Kalimanzira submits that he had inadequate time and resources to prepare his defence when compared with the preparation invested in the Prosecution case.[87] In this respect, he emphasizes the significant resources he devoted to investigating the large number of allegations which were not pursued, as well as the proposed Prosecution witnesses who were not called.[88] He again highlights the fact that his Defence investigators were diverted from investigations during the first trial session to assist his co-counsel during his lead counsel's absence.[89] Kalimanzira also contends that the Prosecution deployed a large team involving 35 different investigators which investigated him between 1999 and 2008. He contrasts this effort with the resources of the Defence, which he asserts was only able to deploy two investigators for about two and a half months of effective work from the conclusion of the first trial session on 22 May 2008 to the filing of the Defence Pre-Trial Brief in September 2008.[90]

37. The Appeals Chamber is not convinced that Kalimanzira's Defence team lacked sufficient resources to prepare its defence. As noted above, the principle of equality of arms does not require material equality between the parties.[91] Kalimanzira's arguments are only general in nature. They do not demonstrate that the preparation of his defence was prejudiced by the Prosecution's efforts to limit the scope of its case.

3. Late Disclosure of Material Used in Cross-Examination

38. In the Trial Judgement, the Trial Chamber considered Kalimanzira's challenge to the Prosecution's disclosure of certain material intended for use in cross-examination only after cross-examination had commenced.[92] The Trial Chamber noted that it had "encouraged" the parties to provide each other with the documents they intended to use before cross-examining a witness.[93] It also noted, however, that there was no binding rule to this effect.[94] The Trial Chamber identified at least six instances when the Prosecution provided documents to the Defence after it had already begun cross-examining the Defence witness.[95] The Trial Chamber recalled that it had warned the Prosecution on five occasions to observe its instruction to distribute the materials in advance and, in

[87] Kalimanzira Appeal Brief, paras. 35-39.
[88] Kalimanzira Appeal Brief, para. 34. *See also* Kalimanzira Reply Brief, paras. 7, 8.
[89] Kalimanzira Appeal Brief, para. 35.
[90] Kalimanzira Appeal Brief, paras. 36-39.
[91] *Nahimana et al.* Appeal Judgement, para. 220. *See also Kayishema and Ruzindana* Appeal Judgement, para. 69.
[92] Trial Judgement, paras. 37-41.
[93] Trial Judgement, para. 38.
[94] Trial Judgement, para. 38.
[95] Trial Judgement, para. 40.

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each case, considered whether the late distribution caused prejudice and found that it did not.[96] Consequently, it concluded that Kalimanzira's right to a fair trial was not violated in this respect.[97]

39. Kalimanzira submits that the Trial Chamber erred in finding no violation of his right to a fair trial.[98] He notes that the Trial Chamber was especially influenced by the delayed disclosure of cross-examination materials in its consideration of Defence Witness Sylvestre Niyonsaba, where it relied on a late-disclosed document to discredit the witness.[99]

40. The Appeals Chamber considers that the trial chamber is best placed to determine both the modalities for disclosure of material intended for use in cross-examination and also the amount of time that is sufficient for an accused to prepare his defence based on the specifics of such disclosure.[100] In this case, the Trial Chamber stated its preference for disclosure prior to cross-examination, and, when this did not occur, it assessed any possible prejudice to Kalimanzira.[101] The Appeals Chamber can identify no error in the Trial Chamber's approach. In any event, there is no indication that the Trial Chamber based its finding that Witness Niyonsaba was a possible fugitive on the impugned document since his possible criminality equally followed from Prosecution evidence describing his actions at a roadblock.[102]

4. Conclusion

41. Accordingly, the Appeals Chamber dismisses Kalimanzira's First Ground of Appeal.

[96] Trial Judgement, paras. 40, 41.
[97] Trial Judgement, para. 41.
[98] Kalimanzira Appeal Brief, paras. 43-46.
[99] Kalimanzira Appeal Brief, paras. 44, 45, *citing* Trial Judgement, para. 559; Kalimanzira Reply Brief, para. 9.
[100] *See Bagosora et al.* Appeal Decision of 25 September 2006, para. 12.
[101] Trial Judgement, paras. 38, 40, 41.
[102] Trial Judgement, paras. 538, 540, 542, 559.

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B. Alleged Errors in Assessing Authority and Influence (Ground 2)

42. In sentencing Kalimanzira, the Trial Chamber considered as an aggravating circumstance the influence he derived from his "prominence and high standing in Butare society" based on his prior positions and good works in the prefecture as well as his "important status within the Ministry of the Interior."[103] Kalimanzira submits that the Trial Chamber erred in fact and in law in assessing his authority and influence in Butare Prefecture.[104] In this section, the Appeals Chamber considers two principal questions: (1) whether Kalimanzira's influence was properly pleaded in view of the omission of *de facto* authority in the French version of the Indictment; and (2) whether the Trial Chamber erred in assessing his influence in Butare Prefecture.

1. Alleged Defects in the Form of the Indictment

43. Paragraph 2 of the Indictment alleges that Kalimanzira was "a senior civil servant" and lists a number of his previous positions, including his service as sub-prefect of Butare and Byumba Prefectures, coordinator of Agricultural Services for Kigali Prefecture, director of the Rural Development Section at the Presidency, secretary general of the Ministry of Interior, and *directeur de cabinet* of the Ministry of Interior, and his prominent role within the MRND. Sub-part (vii) of the English version of paragraph 2 of the Indictment concludes by stating:

> Consequently, [Kalimanzira] exercised in Butare *préfecture*, *de jure* and *de facto* authority over *bourgmestres*, *conseillers de secteur*, *cellule* officials, the *nyumbakumi* (head of each group of 10 houses), administrative staff, gendarmes, communal police, the *Interahamwe*, militiamen and civilians, in that he could order these persons to commit or refrain from committing unlawful acts and discipline or punish them for their unlawful acts or omission (*sic*).

44. The original French version of the same sub-part (vii) of paragraph 2 of the Indictment, however, omits any reference to *de facto* authority.[105] In view of this, the Trial Chamber concluded that the omission of *de facto* authority from the original French version of the Indictment constituted a defect.[106] The Trial Chamber, however, reasoned that the omission did not cause Kalimanzira any prejudice because the Defence Pre-Trial Brief discussed "the Prosecution's position on Kalimanzira's alleged control in Butare *préfecture* as including both *de jure* and *de facto* authority."[107] Consequently, the Trial Chamber concluded that "[t]he Defence was clearly aware long ago that Kalimanzira's alleged *de facto* authority over the people of Butare was an issue

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[103] Trial Judgement, para. 750.
[104] Kalimanzira Notice of Appeal, paras. 13-16; Kalimanzira Appeal Brief, paras. 48-57.
[105] Paragraph 2(vii) of the French version of the Indictment reads in pertinent part: "[*p*]*ar conséquent [Kalimanzira] exerçait dans la préfecture de Butare un contrôle de droit et* [*sic*] *sur les bourgmestres*, [...]."
[106] Trial Judgement, para. 13.
[107] Trial Judgement, para. 14, *citing* Defence Pre-Trial Brief, para. 10. The Appeals Chamber notes that while the Trial Chamber refers to the Pre-Trial Brief in the text, it erroneously references Kalimanzira's Final Trial Brief.

in this trial and formed part of the Prosecution's case."[108] Furthermore, it noted that "Kalimanzira's *de facto* authority [was] not in serious contention" because "Kalimanzira's defence is premised on his high-standing and good reputation throughout Butare society."[109]

45. Kalimanzira submits that the Trial Chamber erred in finding that this defect was cured based solely on its mention in the Defence Pre-Trial Brief.[110] He argues that this error resulted in prejudice since the Trial Chamber aggravated his sentence based on his influence in Butare Prefecture.[111]

46. The Appeals Chamber recalls that charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused.[112] In reaching its judgement, a trial chamber can only convict the accused of crimes that are charged in the indictment.[113] The Appeals Chamber has also held that "for sentencing purposes, a Trial Chamber may only consider in aggravation circumstances pleaded in the Indictment."[114] An indictment lacking sufficient precision in the pleading of material facts is defective; however, the defect may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charges.[115]

47. The Appeals Chamber finds that Kalimanzira has not demonstrated that any alleged error on the part of the Trial Chamber with respect to the pleading of his *de facto* authority invalidated the verdict. The allegation that Kalimanzira possessed *de facto* authority does not underpin any of his convictions for instigating or aiding and abetting genocide or for committing direct and public incitement to commit genocide.[116] It is clear that a finding of general influence is not the same as *de facto* authority,[117] even though the Trial Chamber and the Prosecution, at times, appeared to conflate these two issues.[118] In any event, the Trial Chamber's findings concerning Kalimanzira's

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[108] Trial Judgement, para. 14.
[109] Trial Judgement, para. 14.
[110] Kalimanzira Appeal Brief, para. 51.
[111] Kalimanzira Appeal Brief, para. 50, *citing* Trial Judgement, para. 750.
[112] *Muvunyi* Appeal Judgement, para. 18; *Seromba* Appeal Judgement, paras. 27, 100; *Simba* Appeal Judgement, para. 63; *Muhimana* Appeal Judgement, paras. 76, 167, 195; *Gacumbitsi* Appeal Judgement, para. 49; *Ndindabahizi* Appeal Judgement, para. 16.
[113] *Muvunyi* Appeal Judgement, para. 18; *Nahimana et al.* Appeal Judgement, para. 326; *Ntagerura et al.* Appeal Judgement, para. 28; *Kvočka et al.* Appeal Judgement, para. 33.
[114] *Simba* Appeal Judgement, para. 82.
[115] *Muvunyi* Appeal Judgement, para. 20; *Seromba* Appeal Judgement, para. 100; *Simba* Appeal Judgement, para. 64; *Muhimana* Appeal Judgement, paras. 76, 195, 217; *Gacumbitsi* Appeal Judgement, para. 49. *See also Nchamihigo* Appeal Judgement, para. 338; *Ntagerura et al.* Appeal Judgement, paras. 28, 65.
[116] Trial Judgement, paras. 292, 293, 392, 393, 473, 474, 562, 589, 613, 614, 728, 729, 739.
[117] *See, e.g., Delalić et al.* Appeal Judgement, para. 266.
[118] Trial Judgement, paras. 14 ("Kalimanzira's defence is premised on his high-standing and good reputation throughout Butare society. Kalimanzira's *de facto* authority is therefore not in serious contention [...]."), 95 ("The Prosecution further submits that Kalimanzira's *de facto* authority derived from his general stature as a prominent member of Butare

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authority in Butare Prefecture focus exclusively on his influence.[119] Likewise, the Trial Chamber found Kalimanzira's abuse of his influence to be an aggravating sentencing factor, but did not make the same finding with respect to his *de facto* authority.[120]

2. Alleged Errors in the Trial Chamber's Assessment of Evidence

48. The Trial Chamber found that it was "not disputed" that Kalimanzira was "well-liked, even loved, and highly respected" in Butare Prefecture.[121] In reaching this conclusion, it noted that Kalimanzira was "part of Butare's intelligentsia and his efforts at sustainable development in his time as an agronomist were much appreciated."[122] It further noted his prior service as a sub-prefect in Butare Prefecture as well as his "rise to a senior national governmental position."[123] The Trial Chamber concluded that these factors implied "an increased level of reverence from and influence over the population" in the prefecture.[124]

49. Kalimanzira submits that the Trial Chamber erred in fact in finding that he had any influence in Butare Prefecture in 1994.[125] He argues that this finding is unreasonable given that he had not worked there since 1988.[126] According to Kalimanzira, the fact that he was one of the few educated persons from that area also does not permit the conclusion that he was well-known.[127] In his view, since the prefecture's population was mostly made up of farmers, the only known authorities in the area would have been local officials such as bourgmestres, conseillers, and sub-

society, with his power and influence flowing from having served as *sous-préfet* and then acting *préfet* of Butare, as well as his position with the Ministry of the Interior.").

[119] Trial Judgement, para. 99 ("With respect to his influence in Butare *préfecture* in particular, it is not disputed that Kalimanzira was well-liked, even loved, and highly respected. Several witnesses, both Defence and Prosecution, affirmed this. He formed part of Butare's intelligentsia and his efforts at sustainable development in his time as an agronomist were much appreciated. His prior service as a *sous-préfet* was well-remembered and his rise to a senior national governmental position was known and admired. In a hierarchical society such as Rwanda's, Kalimanzira's high standing and good reputation, not to mention the incrementally important governmental positions he held throughout his career, would undeniably imply an increased level of reverence from and influence over the population of Butare *préfecture*.").

[120] Trial Judgement, para. 750 ("The Chamber notes Kalimanzira's prominence and high standing in Butare society as a former *sous-préfet* and the fact that he was one of only three people from his area and of his generation to have received a university education. He was loved and appreciated for his efforts at empowering his community by contributing to the agricultural development of his native region. The influence he derived from this and his important status within the Ministry of the Interior made it likely that others would follow his example, which is an aggravating factor."). The Appeals Chamber has held that this formulation indicates that the Trial Chamber implicitly considered an accused's abuse of influence. *See Simba* Appeal Judgement, para. 285. The Appeals Chamber notes that the basis of Kalimanzira's influence is clearly pleaded in paragraph 2 of the Indictment, which refers to the various senior positions he held in Rwanda.

[121] Trial Judgement, para. 99.

[122] Trial Judgement, para. 99.

[123] Trial Judgement, para. 99.

[124] Trial Judgement, para. 99.

[125] Kalimanzira Appeal Brief, paras. 53-57.

[126] Kalimanzira Appeal Brief, para. 54. *See also* Kalimanzira Reply Brief, para. 10.

[127] Kalimanzira Appeal Brief, para. 55.

prefects.[128] Kalimanzira also highlights the testimony of four Prosecution witnesses who were uncertain as to or incorrectly identified his position in 1994.[129]

50. The Appeals Chamber is not convinced that Kalimanzira has demonstrated that the Trial Chamber's findings concerning his influence in Butare Prefecture were unreasonable. His arguments are effectively limited to disagreeing with the conclusions of the Trial Chamber and advancing his own unsubstantiated interpretation of the evidence. Although he does specifically identify four Prosecution witnesses who were unfamiliar with his specific position,[130] he does not explain how this evidence undermines the reasonable conclusions that the Trial Chamber reached after considering the undisputed evidence of his various official positions and activities.[131] Furthermore, he fails to appreciate that, while these witnesses may not have known his exact position, their testimonies still generally corroborate the Trial Chamber's conclusion that he was known among the local population.

3. Conclusion

51. Accordingly, the Appeals Chamber dismisses Kalimanzira's Second Ground of Appeal.

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[128] Kalimanzira Appeal Brief, para. 55.

[129] Kalimanzira Appeal Brief, para. 56, *citing* T. 9 May 2008 p. 38 (French) (Witness BDC), T. 20 May 2008 p. 41 (French) (Witness BDC), T. 19 May 2008 p. 14 (French) (Witness BWO), T. 22 May 2008 p. 6 (French) (Witness BXG), T. 16 June 2008 p. 81 (French) (Witness AZM).

[130] T. 9 May 2008 p. 34 ("Q. And what was [Kalimanzira]? A. He was a civil servant, but I can't tell you what his occupation was, exactly.") (Witness BDC); T. 20 May 2008 p. 34 ("Q. And at the time, what was Mr. Kalimanzira's occupation? A. I did not try to know what his occupation was at the time. And I'm not in a position to tell you what it was.") (Witness BDC); T. 19 May 2008 p. 12 ("Q. Would you know the duties [Kalimanzira] held at that time? A. I simply heard that he lived in Kigali, but I don't know the post or the position he held at that time.") (Witness BWO), T. 22 May 2008 p. 6 ("Q. Witness, do you know a person called Callixte Kalimanzira? A. Yes, I know him. Q. Did you know what position he held in 1994? A. In 1994, I heard people say that Callixte Kalimanzira was a *sous-préfet*.") (Witness BXG); T. 16 June 2008 p. 64 ("Q. And what was Kalimanzira's specific position before April 1994? A. I don't know the specific position he occupied. He is someone I used to see. I never had the opportunity to sit down with him and have a chat with him. I knew he worked in the ministry that I've mentioned to you, but I did not know the specific position he had.") (Witness AZM).

[131] *See* Trial Judgement, paras. 79-99.

C. Alleged Errors in Assessing the Alibi (Ground 4)

52. The Trial Chamber convicted Kalimanzira for instigating and aiding and abetting genocide at the Butare-Gisagara roadblock around 22 April 1994, for aiding and abetting genocide at Kabuye hill on 23 April 1994, and for aiding and abetting genocide by his presence at the inauguration of Élie Ndayambaje as bourgmestre of Muganza Commune on 22 June 1994.[132] In addition, it convicted Kalimanzira for direct and public incitement to commit genocide at the Jaguar roadblock in middle to late April 1994, the Kajyanama roadblock in late April 1994, the Gisagara marketplace at the end of May 1994, and the Nyabisagara football field in late May or early June 1994.[133]

53. In respect of each of these allegations, Kalimanzira presented an alibi, placing him, for the most part, at his home in Kigali from 6 to 14 April 1994, working with the interim government in Murambi, Gitarama Prefecture, between 14 April and 30 May 1994, and at his home in Butare Prefecture from 31 May until 30 June 1994.[134] Kalimanzira submits that the Trial Chamber erred in rejecting his alibi.[135] In this section, the Appeals Chamber addresses two principal questions: (1) whether the Trial Chamber erred in taking into account the lack of his notice of alibi; and (2) whether the Trial Chamber erred in assessing the underlying alibi evidence.

1. Notice of Alibi

54. The Trial Chamber found that Kalimanzira did not provide adequate notice of his intent to rely on an alibi defence as prescribed in Rule 67(A)(ii)(a) of the Rules.[136] The Trial Chamber observed that the lack of notice "may suggest that the Defence has tailored the alibi evidence to fit the Prosecution's case."[137] It therefore decided to take this into consideration in assessing the alibi,[138] noting that this "may diminish its probative value as it raises the question of whether the alibi was recently invented to fit the [Prosecution case]."[139] In particular, the Trial Chamber ultimately concluded that the "sudden and belated introduction" of specific alibi evidence in relation to the Kabuye hill attack "strongly suggests rehearsal and tailoring to fit the Prosecution case" and the failure to disclose it "support[ed] the inference of recent fabrication."[140]

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[132] Trial Judgement, paras. 293, 393, 474, 739.
[133] Trial Judgement, paras. 562, 589, 614, 729, 739.
[134] Trial Judgement, paras. 101-111, 114, 280, 295, 459, 537, 564, 591, 718.
[135] Kalimanzira Notice of Appeal, paras. 18-20, 22; Kalimanzira Appeal Brief, paras. 59-91. Kalimanzira has abandoned his second sub-ground of appeal, which contends that the Trial Chamber failed to consider the entire Defence evidence. *See* Kalimanzira Notice of Appeal, para. 21; Kalimanzira Appeal Brief, para. 62. *See also* Trial Judgement, paras. 136, 287, 357, 464, 548, 577, 606, 723.
[136] Trial Judgement, paras. 65, 113.
[137] Trial Judgement, para. 66.
[138] Trial Judgement, para. 66.
[139] Trial Judgement, para. 113.
[140] Trial Judgement, para. 119.

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55. Kalimanzira argues that the Trial Chamber acted unreasonably in faulting him for not providing more specific notice of his alibi while at the same time acknowledging numerous defects in the Indictment, which made it difficult to do so.[141] To illustrate, he notes that the Indictment and the Prosecution Pre-Trial Brief situated the massacres at Kabuye hill between April and the beginning of June 1994.[142] Given such broad time-frames, he contends that he did not have the ability to investigate and to advance a more detailed alibi.[143]

56. Rule 67(A)(ii)(a) of the Rules requires the defence to notify the Prosecution before the commencement of trial of its intent to enter a defence of alibi. As the Trial Chamber noted, Kalimanzira intimated at his initial appearance and in his Pre-Trial Brief that he was in Gitarama Prefecture for much of the period covered by the Indictment.[144] However, as the Trial Chamber correctly determined,[145] this information did not conform to Rule 67(A)(ii)(a) of the Rules, which requires that "the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi." The Appeals Chamber has held that the manner in which an alibi is presented may impact its credibility.[146] Therefore, it was within the Trial Chamber's discretion to take this into account in assessing the alibi evidence in this case.

57. Kalimanzira does not dispute that he did not provide the notice required under the Rules. He also does not challenge the possible impact that this failure might have on the assessment of his evidence. Instead, he contests the application of the requirements to him in the circumstances of this case, noting the Trial Chamber's finding that a number of the allegations in the Indictment were defective and that the date ranges for key events were overly broad.

58. The Appeals Chamber is not convinced that Kalimanzira has shown any error in the Trial Chamber's consideration of his alibi notice. For the most part, Kalimanzira's alibi is general, namely that he spent large portions of time at his home in Kigali, at his office in Gitarama Prefecture, and at his home in Butare Prefecture. Furthermore, with respect to Kalimanzira's specific discussion of the broad time-frame provided by the Prosecution with respect to the massacre at Kabuye hill, the Appeals Chamber observes that paragraphs 9 and 10 of the Indictment provide a precise date range of "[o]n or about 23 April 1994." Therefore, the Appeals Chamber is

[141] Kalimanzira Appeal Brief, paras. 63-67. *See also* Kalimanzira Reply Brief, para. 12.
[142] Kalimanzira Appeal Brief, para. 65.
[143] Kalimanzira Appeal Brief, para. 65.
[144] Trial Judgement, para. 62.
[145] Trial Judgement, paras. 62, 64.
[146] *Rutaganda* Appeal Judgement, para. 242; *Musema* Appeal Judgement, para. 201.

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not satisfied that any vagueness in the date ranges provided in the Indictment meaningfully impacted Kalimanzira's ability to provide notice of his alibi.

2. Alleged Errors in the Assessment of Evidence

59. Kalimanzira presented evidence of an alibi that consisted of three principal phases.[147] First, Kalimanzira claimed that he was at his home in Kigali from 6 to 14 April 1994 until he relocated with the interim government to Murambi in Gitarama Prefecture, an assertion that was supported by his wife, Defence Witness Salomé Mukantwali, in her testimony.[148] Second, Kalimanzira testified that he remained in Murambi, for the most part, from 14 April to 30 May 1994, overseeing the administration functions of the Ministry of Interior, principally related to the payment of salaries for employees.[149] During this period, he acknowledged traveling to Kibungo Prefecture on 21 April 1994 to install the newly appointed prefect, Anaclet Rudakubana.[150] He claimed to have spent the night there and to have returned to Murambi on the evening of 22 April 1994.[151] This phase of the alibi was supported by testimony from a former staff member of the Ministry of Interior, Defence Witness Marc Siniyobewe.[152] Third, Kalimanzira testified that, from 31 May until 30 June 1994, he primarily remained at his home in Butare Prefecture, an assertion which was supported by Witness Mukantwali's testimony.[153]

60. The Trial Chamber accepted that Kalimanzira remained in Kigali until he relocated to Gitarama Prefecture with the interim government.[154] It also found that he attended the installation ceremony for Prefect Rudakubana in Kibungo Prefecture on 21 April 1994.[155] However, the Trial Chamber was not convinced that Kalimanzira remained in Kibungo Prefecture on the night of 21 April 1994, traveled to Murambi on 22 April, spent the night there,[156] and returned to work on the morning of 23 April.[157]

61. The Trial Chamber considered Kalimanzira and Witness Siniyobewe's accounts of his presence in Murambi on 23 April 1994 to be a "recent fabrication."[158] It expressed concern about Witness Siniyobewe's "feigned ignorance" of the extremist nature of RTLM's broadcasts,

[147] Trial Judgement, para. 114.
[148] Trial Judgement, paras. 101-103, 114-117.
[149] Trial Judgement, paras. 104-108, 114, 118-128.
[150] Trial Judgement, para. 106.
[151] Trial Judgement, para. 106.
[152] Trial Judgement, paras. 104, 106, 118.
[153] Trial Judgement, paras. 108-111, 114, 129-133.
[154] Trial Judgement, para. 134.
[155] Trial Judgement, paras. 127, 134.
[156] Trial Judgement, para. 127.
[157] Trial Judgement, paras. 106, 121, 127, 134.
[158] Trial Judgement, para. 134.

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especially given his ownership of shares in the organization.[159] The Trial Chamber ultimately found Witness Siniyobewe's testimony "unconvincing."[160]

62. The Trial Chamber did not accept that Kalimanzira remained in Gitarama Prefecture at all other times between 14 April and 30 May 1994.[161] In this respect, it noted that he "lied about attending a Butare Prefectural Security Council meeting on 16 May 1994" and that he had access to vehicles and fuel.[162] Therefore, the Trial Chamber concluded that this evidence raised no reasonable doubt in the testimony of witnesses who saw Kalimanzira at Kabuye hill and elsewhere in Butare Prefecture during this period.[163]

63. The Trial Chamber also did not accept the third phase of Kalimanzira's alibi, namely that he remained primarily at his home in Butare Prefecture after 31 May 1994.[164] In this respect, it noted that, after being shown transcripts of a Radio Rwanda broadcast, "he could no longer deny having attended a civil defence and security meeting in Gikongoro *préfecture* on 3 June 1994."[165] The Trial Chamber also recalled that Kalimanzira "admitted to the possibility that he may have forgotten about other occasions when he might have left his house during this period."[166] It considered that Witness Mukantwali's support of Kalimanzira's account had "little probative value" in view of their marital relationship and the fact that she was not always at home because she worked at a hospital during this period.[167]

64. Kalimanzira submits that the Trial Chamber erred in its assessment of his alibi evidence.[168] He first argues that the Trial Chamber shifted the burden of proof and failed to appreciate relevant circumstantial evidence in relation to his presence in Kibungo Prefecture on the night of 21 April 1994.[169] In particular, he points to the Trial Chamber's statement that it did not "believe" his version of the events as evidence that it required him to prove his alibi beyond reasonable doubt.[170] Furthermore, Kalimanzira contends that the Trial Chamber unreasonably discounted the extreme danger of traveling at night given the RPF's advance.[171]

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[159] Trial Judgement, para. 120.
[160] Trial Judgement, para. 120.
[161] Trial Judgement, para. 134.
[162] Trial Judgement, para. 134.
[163] Trial Judgement, para. 134.
[164] Trial Judgement, para. 135.
[165] Trial Judgement, para. 135.
[166] Trial Judgement, para. 135.
[167] Trial Judgement, para. 133.
[168] Kalimanzira Appeal Brief, paras. 68-91.
[169] Kalimanzira Appeal Brief, paras. 69-73.
[170] Kalimanzira Appeal Brief, para. 71, *quoting* Trial Judgement, para. 127. Kalimanzira quotes the French version of the Trial Judgement which uses the following formulation: "*La Chambre n'est pas* convaincue *que Kalimanzira ait passé la nuit du 21 avril 1994 dans la préfecture de Kibungo.*" (emphasis added).
[171] Kalimanzira Appeal Brief, paras. 72, 73.

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65. In addition, Kalimanzira argues that the Trial Chamber's consideration of his testimony is both unreasonable and biased.[172] Specifically, he points to the particular language employed by the Trial Chamber in rejecting his testimony.[173] Kalimanzira further submits that the Trial Chamber unreasonably discredited his evidence after misconstruing his testimony related to his presence at certain meetings in Butare Prefecture.[174] He also disputes the Trial Chamber's description of his testimony on his activities in Gitarama Prefecture as "evasive" and his concern with RPF infiltration as "irrational."[175] In particular, he asserts that the Trial Chamber's rejection of the explanation of his daily tasks in Gitarama Prefecture, as well as of his concern regarding the RPF, failed to sufficiently account for the difficult circumstances under which he was working at the time, the evidence which corroborated his actions, and the realities of the war.[176]

66. Finally, Kalimanzira challenges the basis for the Trial Chamber's rejection of Witness Siniyobewe's testimony.[177] In particular, he disputes the Trial Chamber's characterization of Witness Siniyobewe as a family friend, noting that the witness was simply a work colleague.[178] In addition, Kalimanzira contends that it was unreasonable to discount the witness's testimony based on his lack of knowledge about RTLM broadcasts or his ownership of shares in the organization.[179] He also challenges the Trial Chamber's observation that Witness Siniyobewe testified precisely with respect to the dates surrounding the attack on Kabuye hill and more generally about other time periods.[180] In his view, the Trial Chamber failed to appreciate the witness's explanation for this.[181]

67. The Appeals Chamber is not convinced that the Trial Chamber shifted the burden of proof in assessing Kalimanzira's alibi. The Appeals Chamber observes that the Trial Chamber correctly stated that "an accused need only produce evidence likely to raise a reasonable doubt in the Prosecution's case" and that "[t]he alibi does not carry a separate burden."[182] In addition, the Trial Chamber noted that "the burden of proving the facts charged beyond reasonable doubt [...] always remains squarely on the shoulders of the Prosecution."[183] This approach is consistent with the settled jurisprudence for assessing an alibi.[184] Moreover, the Appeals Chamber cannot identify any

[172] Kalimanzira Appeal Brief, paras. 75-82.
[173] Kalimanzira Appeal Brief, para. 76, *citing* Trial Judgement, paras. 117, 122, 125-127, 129, 130, 134.
[174] Kalimanzira Appeal Brief, paras. 77, 78.
[175] Kalimanzira Appeal Brief, paras. 79-82.
[176] Kalimanzira Appeal Brief, paras. 79-82.
[177] Kalimanzira Appeal Brief, paras. 83-89.
[178] Kalimanzira Appeal Brief, para. 84.
[179] Kalimanzira Appeal Brief, paras. 85-88.
[180] Kalimanzira Appeal Brief, para. 89.
[181] Kalimanzira Appeal Brief, para. 89.
[182] Trial Judgement, para. 112.
[183] Trial Judgement, para. 112. *See also* Trial Judgement, para. 136.
[184] *See Zigiranyirazo* Appeal Judgement, paras. 17, 18.

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error in the Trial Chamber's conclusion that it did not "believe" Kalimanzira's alibi[185] or in its use of various other formulations relating to this assessment.[186] These formulations simply underscored the Trial Chamber's conclusion that it did not find the alibi evidence sufficiently credible to raise a reasonable doubt in the Prosecution's case.

68. The Appeals Chamber is also not satisfied that Kalimanzira has demonstrated any error in the Trial Chamber's rejection of his claim that he stayed in Kibungo Prefecture on the night of 21 April 1994. After discussing the evidence that he remained in Kibungo due to security concerns related to the RPF advance,[187] the Trial Chamber found that "[h]aving been assigned two gendarmes to accompany him on this trip, it makes no sense that Kalimanzira would have waited until an already precarious situation became so dangerous that others started leaving before he or his protective escorts decided it was safe for him to leave."[188] Beyond disagreeing with this conclusion, Kalimanzira points to no evidence in the record, other than his own testimony, to substantiate his claim that it was more dangerous to travel at night than to wait until just hours before the area fell to the RPF.

69. Kalimanzira has also not demonstrated any error in the Trial Chamber's decision not to accept that he remained primarily in Murambi, Gitarama Prefecture, between 14 April and 30 May 1994 and at his home in Butare Prefecture from 31 May onwards. In particular, the Trial Chamber found Kalimanzira's description of his activities in Murambi, which primarily focused on the payment of salaries, to be vague, in contradiction with other evidence as to how civil servants were paid, and, more importantly, inconsistent with his position and attendance at prominent meetings, in particular in the context of an ongoing war.[189] This last factor was also key to the Trial Chamber's rejection of Kalimanzira's claim to have mostly stayed at home while in Butare Prefecture.[190] In this context, the Appeals Chamber finds that it was within the scope of the Trial Chamber's discretion to consider as unpersuasive both his claim to have focused entirely on payment matters while in Murambi and his claim that he stayed at home in Butare Prefecture, out of contact with local officials.[191]

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[185] Trial Judgement, para. 136.
[186] *See* Kalimanzira Appeal Brief, para. 76 ("The Chamber's vocabulary is characterized by bias. The Chamber talks of '*feigning ignorance*', '*compulsive, irrational*' fears of RPF infiltrations, '*caught having lied*', finding Kalimanzira's version repeatedly '*unbelievable* ', '*inconceivable* ', '*peculiar* '. It blamed him for '*trivializing the situation*' when he testified that he attempted to save some Tutsi as thousands of others were being '*slaughtered*' elsewhere[.] The use of these words was out of place.") (emphasis in original), *citing* Trial Judgement, paras. 117, 122, 125-127, 129, 130, 134.
[187] Trial Judgement, paras. 106, 127.
[188] Trial Judgement, para. 127.
[189] Trial Judgement, paras. 122-124.
[190] Trial Judgement, para. 132.
[191] *See* Trial Judgement, paras. 122-124, 132.

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70. Finally the Appeals Chamber is not convinced that Kalimanzira has shown that the Trial Chamber's assessment of Witness Siniyobewe's evidence was unreasonable. Even if the Trial Chamber incorrectly characterized Witness Siniyobewe as a friend rather than a former subordinate,[192] the Appeals Chamber considers that a degree of caution would still apply to Witness Siniyobewe's testimony. The Appeals Chamber notes that the Trial Chamber's analysis of Witness Siniyobewe's claimed lack of knowledge concerning the content of RTLM's broadcasts, and his ownership of shares in RTLM, fell within the bounds of its discretion. In any event, these issues do not appear to be the main reasons for discrediting Witness Siniyobewe. The Appeals Chamber recalls that the Trial Chamber found Witness Siniyobewe's account of Kalimanzira's presence in Murambi, Gitarama Prefecture, on the morning of 23 April 1994 to be unconvincing. In this respect, the Trial Chamber contrasted the "sudden and belated introduction" of Kalimanzira's specific alibi evidence for 23 April 1994, the date of the attack on Kabuye hill, with the more general evidence he gave with respect to the rest of his time in Murambi.[193]

3. Conclusion

71. Accordingly, the Appeals Chamber dismisses Kalimanzira's Fourth Ground of Appeal.

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[192] *See* T. 4 February 2009 pp. 14, 54.
[193] Trial Judgement, para. 121.

D. Alleged Errors Relating to the Inauguration of Élie Ndayambajye (Ground 5)

72. The Trial Chamber convicted Kalimanzira for aiding and abetting genocide, in part, based on his presence at the 22 June 1994 inauguration of Élie Ndayambaje as bourgmestre of Muganza Commune, Butare Prefecture, during which Ndayambaje instigated the killing of Tutsis.[194] The Trial Chamber found that, by his presence, Kalimanzira offered moral support to Ndayambaje's call to kill Tutsis during the ceremony and thereby aided and abetted subsequent killings.[195] In making these findings, the Trial Chamber relied on Witnesses BBB and BCA, who attended the ceremony, observed Kalimanzira's presence, and testified about subsequent killings.[196]

73. Kalimanzira submits that the Trial Chamber erred in convicting him in relation to this incident.[197] In this section, the Appeals Chamber will consider whether the Trial Chamber erred in the assessment of the evidence of the killings. In this respect, Kalimanzira contends that there is insufficient evidence demonstrating that killings in fact followed the ceremony.[198] The Prosecution responds generally that Kalimanzira's arguments lack merit, but does not address the sufficiency of the evidence relating to the killings.[199]

74. The Appeals Chamber recalls that "an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime."[200] The Appeals Chamber has explained that "[a]n accused can be convicted for aiding and abetting a crime when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime."[201] Where this form of aiding and abetting has been a basis of a conviction, "it has been the authority of the accused combined with his presence on (or very near to) the crime scene, especially if considered together with his prior conduct, which all together allow the conclusion that the accused's conduct amounts to official sanction of the crime and thus substantially contributes to it."[202]

75. In view of Kalimanzira's position as *directeur de cabinet* of the Ministry of Interior, it was reasonable for the Trial Chamber to determine that his silent presence during Ndayamabaje's inflammatory speech would have offered tacit approval of its message. The basis of Kalimanzira's

[194] Trial Judgement, paras. 291-293, 739.
[195] Trial Judgement, paras. 292, 293.
[196] Trial Judgement, para. 291.
[197] Kalimanzira Notice of Appeal, paras. 23-29; Kalimanzira Appeal Brief, paras. 92-161.
[198] Kalimanzira Appeal Brief, paras. 117-119, 135, 136.
[199] Prosecution Response Brief, paras. 75-90. *See also* T. 14 June 2010 pp. 32-37.
[200] *Muvunyi* Appeal Judgement, para. 79. *See also Seromba* Appeal Judgement, para. 44; *Blagojević and Jokić* Appeal Judgement, para. 127.
[201] *Brđanin* Appeal Judgement, para. 273. *See also Brđanin* Appeal Judgement, para. 277.

conviction, however, rests on the Trial Chamber's conclusion that Kalimanzira's tacit approval not only sanctioned Ndayambaje's message, but in fact substantially contributed to killings which occurred after the ceremony.[203]

76. As the Trial Chamber noted, Witnesses BBB and BCA attest to killings occurring after the meeting.[204] Their accounts regarding these crimes are vague and devoid of any detail. In particular, the extent of Witness BBB's description of the killings is that "after the speech, people went to sweep their houses, that is to say, to kill those persons."[205] Witness BCA's account is similarly brief: "As was noticed later on, it meant that [Tutsis and Hutus who opposed the government] who had been hidden had to be taken out of their hiding so that they should be killed as well."[206]

77. The Appeals Chamber, Judge Pocar dissenting, considers that it is unclear from either account whether the witnesses had first-hand knowledge of the killings or whether their evidence was hearsay. They refer to no particular incident, provide no approximate time-frame for the killings, and do not give any identifying information concerning the assailants or victims. In such circumstances, the Appeals Chamber finds, Judge Pocar dissenting, that it is impossible to determine with any reasonable certainty whether any killings in fact occurred following the meeting and, if so, the degree to which they were related to the ceremony.

78. In the *Muvunyi* case, the Appeals Chamber reversed a conviction for genocide because the evidence of the killings which underpinned the finding of guilt were based on second- or third-hand testimony that "contain[ed] no detail on any specific incident or the frequency of the attacks."[207] The Appeals Chamber, Judge Pocar dissenting, can identify no material distinction between the quality of the evidence in the *Muvunyi* case and that provided by Witnesses BBB and BCA here with respect to the occurrence of killings.

79. Consequently, the Appeals Chamber, Judge Pocar dissenting, is not persuaded that the Trial Chamber acted reasonably in relying on the evidence of Witnesses BBB and BCA about the subsequent killings. No reasonable trier of fact could have concluded that Tutsis were killed as a result of the ceremony in circumstances where it heard no evidence about even a single incident. Therefore, the Trial Chamber erred in fact in finding that the evidence showed that Kalimanzira's presence at the inauguration substantially contributed to subsequent acts of genocide. As a result, the Appeals Chamber need not address Kalimanzira's other arguments under this ground of appeal.

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[202] *Brđanin* Appeal Judgement, para. 277.
[203] Trial Judgement, para. 292.
[204] Trial Judgement, para. 291. *See also* T. 16 June 2008 p. 20; T. 18 June 2008 pp. 50, 51.
[205] T. 16 June 2008 p. 20.

80. For the forgoing reasons, the Appeals Chamber, Judge Pocar dissenting, grants Kalimanzira's Fifth Ground of Appeal and reverses his conviction for aiding and abetting genocide based on this event.

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[206] T. 18 June 2008 pp. 50, 51.
[207] *Muvunyi* Appeal Judgement, para. 69. *See also Muvunyi* Appeal Judgement, paras. 68, 70-72.

E. Alleged Errors Relating to Kabuye Hill (Grounds 3 and 6)

81. The Trial Chamber convicted Kalimanzira for aiding and abetting genocide, in part, based on his involvement in the massacre of Tutsi civilians at Kabuye hill in Butare Prefecture on 23 April 1994.[208] In particular, the Trial Chamber found that, sometime before noon on that day, Kalimanzira became angry while at the Mukabuga roadblock after learning that Tutsis at the hill had successfully defended themselves, which demonstrated his knowledge of the attack and his intention for Tutsis to be killed there.[209] The Trial Chamber further found that, later that day, Kalimanzira was present when Sub-Prefect Dominique Ntawukulilyayo instructed Tutsis at the Gisagara marketplace to seek refuge at Kabuye hill.[210] According to the Trial Chamber, Kalimanzira's presence showed tacit approval of, and gave credence to, the sub-prefect's false assurances of safety.[211] The Trial Chamber determined that, in a similar fashion, Kalimanzira stopped Tutsis on the Kabuye-Gisagara road and told them to go to Kabuye hill, promising them safety.[212] Finally, the Trial Chamber found that Kalimanzira then went to Kabuye hill along with armed soldiers and policemen who, using their firearms, massacred Tutsis there, resulting in an "enormous human tragedy."[213] The Trial Chamber concluded that "Kalimanzira's role in luring Tutsis to Kabuye hill and his subsequent assistance in providing armed reinforcements substantially contributed to the overall attack."[214] The Trial Chamber further concluded that his actions demonstrated his genocidal intent.[215]

82. Kalimanzira contests his conviction, citing a number of alleged errors.[216] In this section, the Appeals Chamber considers whether the Trial Chamber erred in: (1) determining that Kalimanzira aided and abetted genocide; (2) assessing witness credibility and identification evidence; (3) its findings relating to the Gisagara marketplace; (4) its findings relating to the Kabuye-Gisagara road; and (5) its findings relating to Kalimanzira's presence at Kabuye hill.

1. Alleged Errors in Determining Whether Kalimanzira Aided and Abetted Genocide

83. The Trial Chamber found that Kalimanzira substantially contributed to the massacre on Kabuye hill on 23 April 1994 by convincing Tutsis to seek refuge there and by providing armed

[208] Trial Judgement, paras. 392, 393, 739.
[209] Trial Judgement, paras. 376, 378, 392.
[210] Trial Judgement, paras. 367, 392.
[211] Trial Judgement, para. 392.
[212] Trial Judgement, paras. 371, 392.
[213] Trial Judgement, para. 393.
[214] Trial Judgement, para. 393.
[215] Trial Judgement, para. 393.
[216] Kalimanzira Notice of Appeal, paras. 17, 30-43; Kalimanzira Appeal Brief, paras. 162-341. In his Appeal Brief, Kalimanzira addresses his Third Ground of Appeal relating to alleged errors concerning the Trial Chamber's

reinforcements for subsequent attacks on them.[217] The Trial Chamber also explicitly concluded that Kalimanzira possessed genocidal intent based on several factors.[218] First, the Trial Chamber concluded that, on 23 April 1994, Kalimanzira became enraged on learning that the Tutsis at Kabuye hill successfully defended themselves and had not been killed and that he asked to be shown where the Tutsis were.[219] Second, it found that he demonstrated "tacit approval of [Sub-Prefect] Ntawukulilyayo's expulsion of Tutsis from the Gisagara marketplace to Kabuye hill."[220] Third, it concluded that Kalimanzira assisted the massacre on Kabuye hill by providing armed reinforcements to facilitate the killings.[221] Finally, the Trial Chamber also took into account Kalimanzira's conduct in relation to the attack along with other actions during the relevant time period and concluded that these factors demonstrated his intent to destroy the Tutsi group.[222]

84. Kalimanzira contends that the Trial Chamber erred in its assessment of whether he aided and abetted genocide. First, he asserts that no action he took could constitute a "substantial" contribution to the massacre at Kabuye hill.[223] Specifically, Kalimanzira notes that none of the Prosecution or Defence witnesses who were part of the attacking forces reported seeing him at Kabuye hill except for Prosecution Witness BBO, whose testimony the Trial Chamber did not find credible.[224] Taking his absence from Kabuye hill as a given, Kalimanzira reasons that he could not have influenced those who were attacking Tutsis there and thus that he could not have substantially contributed to the massacre.[225]

85. Kalimanzira further contends that the Trial Chamber failed to adequately justify its finding that he possessed the required *mens rea* for aiding and abetting genocide.[226] He maintains that the Trial Chamber did not adequately explain how it concluded that he knew of the genocidal intent of the principal perpetrators, or that he was aware that his acts contributed to the principal perpetrators' criminal plan.[227] Kalimanzira also asserts that the Trial Chamber erred in discussing his *mens rea* for genocide in a separate section of the Trial Judgement applicable to all relevant counts of the Indictment.[228] He asserts that this section improperly analyzes multiple separate

assessment of his genocidal intent in connection with his Sixth Ground of Appeal. *See* Kalimanzira Appeal Brief, para. 58.

[217] Trial Judgement, para. 393.
[218] Trial Judgement, para. 393. *See also* Trial Judgement, paras. 733, 734.
[219] *See* Trial Judgement, para. 733. *See also* Trial Judgment, paras. 321-324.
[220] Trial Judgement, para. 734. *See also* Trial Judgement, para. 367.
[221] Trial Judgement, para. 734. *See also* Trial Judgement, para. 393.
[222] Trial Judgement, paras. 393, 732-738.
[223] Kalimanzira Appeal Brief, para. 196.
[224] Kalimanzira Appeal Brief, paras. 197, 198. *See also* Kalimanzira Reply Brief, para. 24.
[225] Kalimanzira Appeal Brief, paras. 199-201.
[226] Kalimanzira Appeal Brief, paras. 202-221.
[227] Kalimanzira Appeal Brief, paras. 213-215.
[228] Kalimanzira Appeal Brief, paras. 204-209.

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incidents and also focuses only on genocidal intent, rather than the specific *mens rea* required for aiding and abetting.[229]

86. The Appeals Chamber has explained that an "aider and abettor commit[s] acts specifically aimed at assisting, encouraging, or lending moral support for the perpetration of a specific crime, and that this support ha[s] a substantial effect on the perpetration of the crime."[230] Whether a particular contribution qualifies as "substantial" is a "fact-based inquiry"; such assistance need not "serve as condition precedent for the commission of the crime."[231] With regard to the *mens rea* required for aiding and abetting, the Appeals Chamber has held that "[t]he requisite mental element [...] is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator."[232] Specific intent crimes such as genocide require that "the aider and abettor must know of the principal perpetrator's specific intent."[233]

87. Kalimanzira's contention that the Trial Chamber erred in finding that he made a substantial contribution to the killings at Kabuye hill is not convincing. The Trial Chamber reasonably concluded that he substantially contributed to the massacre by encouraging Tutsis to seek refuge at Kabuye hill and by providing armed reinforcements to those trying to kill the Tutsis there. Kalimanzira's assertion that he did not substantially aid the assault on Kabuye hill rests on his claim that no credible witnesses who were also principal perpetrators placed him there.[234] However, this claim does not take into account the evidence provided by Tutsi survivors of the attacks. It was on the basis of their testimonies that the Trial Chamber placed him at Kabuye hill on 23 April 1994.[235] The Appeals Chamber recalls that it is not necessary for a principal perpetrator to be aware of the aider and abettor's contribution.[236] It further recalls the Trial Chamber's finding that the attacks at Kabuye hill involved a large number of individuals over a broad terrain and long period of time.[237] In this context, it was reasonable for the Trial Chamber to conclude that Kalimanzira provided substantial assistance to the massacre at Kabuye hill even if this assistance was not known to principal perpetrators who testified before it.[238]

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[229] Kalimanzira Appeal Brief, paras. 206, 218-220.
[230] *Seromba* Appeal Judgement, para. 44. *See also Muvunyi* Appeal Judgement, para. 79; *Blagojević and Jokić* Appeal Judgement, para. 127.
[231] *Blagojević and Jokić* Appeal Judgement, para. 134.
[232] *Muvunyi* Appeal Judgement, para. 79.
[233] *Blagojević and Jokić* Appeal Judgement, para. 127.
[234] *See* Kalimanzira Appeal Brief, paras. 196-201. *See also* Kalimanzira Reply Brief, para. 24.
[235] *See* Trial Judgement, paras. 379-383, 393.
[236] *See Tadić* Appeal Judgement, para. 229.
[237] *See* Trial Judgement, paras. 386, 387.
[238] The Appeals Chamber further recalls that "the *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated, and that the location at which the *actus reus* takes place may be removed from the location of the principal crime." *Blaškić* Appeal Judgement, para. 48. *See also Blagoje Simić* Appeal Judgement, para. 85.

88. Kalimanzira is equally unconvincing insofar as he contends that the Trial Chamber erred in separating its discussion of *mens rea* from the assessment of factual issues relating to Kabuye hill. Contrary to Kalimanzira's suggestion, the Trial Chamber specifically addressed his intent with respect to the events at Kabuye hill in a separate section of the Trial Judgement and incorporated those findings into its analysis regarding Kabuye hill.[239] The Appeals Chamber can identify no error in the structure of this approach.

89. The content of the Trial Chamber's *mens rea* analysis, however, is problematic. The Trial Chamber limited its analysis to discussing *Kalimanzira's* specific intent to destroy the Tutsi group. It did not make specific findings on the *mens rea* of the principal perpetrators or of his knowledge of their intent,[240] which, as noted above, is required to sustain a conviction for aiding and abetting genocide.[241] The Appeals Chamber considers however that the evidence before the Trial Chamber was sufficient to support a finding that the principal perpetrators acted with genocidal intent in view of how the attack unfolded and the context in which it occurred.

90. The Trial Chamber's findings also support its implicit conclusion that Kalimanzira knew of the principal perpetrators' genocidal intent. Even before the massacre at Kabuye hill, the anger Kalimanzira demonstrated at the Mukabuga roadblock when informed that the Tutsis at Kabuye hill had successfully defended themselves and had not been killed strongly suggested that he was aware of the principal perpetrators' genocidal plans.[242] This conclusion is confirmed by Kalimanzira's personal observation of the siege at Kabuye hill, which involved significant numbers of armed individuals surrounding and shooting at Tutsi refugees who had been told that Kabuye hill was a place of safety.[243] These findings compel the conclusion that Kalimanzira knew that the armed reinforcements which he provided would aid in the destruction, in whole or in part, of the Tutsi ethnic group.

91. For the foregoing reasons, the Appeals Chamber is not convinced that the Trial Chamber erred in its analysis of the requirements needed to convict for aiding and abetting genocide. Accordingly, this sub-ground of appeal is dismissed.

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[239] *See* Trial Judgement, paras. 393, 733, 734.
[240] *See* Trial Judgement, paras. 733, 734. *See also* Trial Judgement, paras. 392, 393.
[241] The Appeals Chamber reiterates that in order to enter a conviction for aiding and abetting genocide it is not necessary to prove that the aider and abettor himself had genocidal intent. *See Ntakirutimana* Appeal Judgement, para. 501; *Krstić* Appeal Judgement, para. 140.
[242] Trial Judgement, paras. 376, 392.
[243] Trial Judgement, para. 734.

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2. Alleged Errors in the Trial Chamber's Consideration of Witnesses' Credibility and Provision of Identification Evidence

92. The Trial Chamber found that both Defence and Prosecution witnesses agreed on the broad outlines of the assault on Kabuye hill and on certain elements of events at the Gisagara marketplace.[244] It also noted that in the context of these two events, Defence witnesses' failure to see Kalimanzira did not preclude his presence.[245] With regard to the identification of Kalimanzira, the Trial Chamber questioned Prosecution Witness BBO's explanation of how he met Kalimanzira, and doubted his ability to identify Kalimanzira at Kabuye hill. It determined that it would not rely on his testimony without corroboration by reliable evidence.[246] The Trial Chamber also noted that Prosecution Witness BWO had met Kalimanzira on multiple occasions prior to 23 April 1994 and, partly on this basis, found that he would have been able to identify Kalimanzira.[247] The Trial Judgment did not refer to identification evidence when assessing the testimony of Prosecution Witnesses BDC, BCF, or BWK.[248]

93. Kalimanzira asserts that the Trial Chamber erred in its analysis of witnesses' testimony by focusing on the suffering of Prosecution witnesses, but not on that of Defence witnesses.[249] He suggests that this demonstrates that the Trial Chamber inappropriately excused contradictions and weaknesses in Prosecution witnesses' testimony on the basis of their past suffering.[250] He also asserts that the Trial Chamber erred in accepting Defence witnesses' testimony regarding the events in question, but not taking into account their testimony that they did not see Kalimanzira.[251]

94. Kalimanzira further asserts that the Trial Chamber's analysis of identification evidence was flawed and incomplete. He suggests in his Appeal Brief, and states in his Reply Brief, that the identifications at issue were made under difficult circumstances and thus should have been the subject of careful analysis by the Trial Chamber.[252] He submits that the Trial Chamber was unduly influenced by the Prosecution's practice of having its witnesses identify him from the witness stand and thus did not discuss identification evidence in the Trial Judgment.[253] Kalimanzira also provides specific analysis of the identification evidence provided by Witnesses BBO, BCF, BDC, BWK, and

[244] *See* Trial Judgement, paras. 365, 386.
[245] Trial Judgement, paras. 365, 387.
[246] Trial Judgement, para. 375.
[247] Trial Judgement, para. 383.
[248] *See* Trial Judgement, paras. 372-391.
[249] Kalimanzira Appeal Brief, paras. 166-168.
[250] Kalimanzira Appeal Brief, paras. 169, 170. *See also* Kalimanzira Reply Brief, para. 19.
[251] Kalimanzira Appeal Brief, para. 174.
[252] *See* Kalimanzira Appeal Brief, para. 179; Kalimanzira Reply Brief, para. 20.
[253] Kalimanzira Appeal Brief, paras. 176-178.

BWO in their testimony.[254] Kalimanzira focuses especially on Witness BWK, noting that she testified to meeting him only once prior to 23 April 1994, when he was identified by a third party. Kalimanzira also observes that she again required assistance in order to identify him on 23 April 1994.[255]

95. The Prosecution responds that the Trial Chamber gave careful consideration to the testimony of survivor witnesses for both the Prosecution and the Defence. It contends that differences in the Trial Chamber's description of these witnesses did not amount to an error.[256] It also suggests that the Trial Chamber appropriately chose to accept aspects of the Defence witnesses' testimony without finding that it undermined the testimony of Prosecution witnesses.[257] The Prosecution further contends that the Trial Chamber acted within its discretion in not specifically discussing the identification evidence of certain witnesses. The Prosecution asserts that there were no difficult circumstances with regard to identification that would require a more rigorously reasoned opinion on this issue.[258] With regard to Witness BWK, it notes that she provided "detailed evidence" regarding her first encounter with Kalimanzira, and notes that her meeting with him on 23 April 1994 "must have been clearly memorable to her."[259]

96. The Appeals Chamber recalls that in assessing witness testimony, "it falls to the Trial Chamber to take the approach it considers most appropriate for the assessment of evidence."[260] A trial chamber "is [...] not obliged in its judgement to recount and justify its findings in relation to every submission made at trial."[261] In addition, "neither the Rules nor the jurisprudence of the Tribunal oblige[] [a] Trial Chamber to require a particular type of identification evidence."[262] However, identifications made in difficult circumstances, such as darkness, obstructed view, or traumatic events,[263] require careful and cautious analysis by a trial chamber.[264] In addition, in-court identification evidence should be assigned "little or no credence" given the signals that can identify an accused aside from prior acquaintance.[265] The Appeals Chamber further recalls that "[a] Trial Chamber has the discretion to cautiously consider hearsay evidence and has the discretion to rely on

[254] Kalimanzira Appeal Brief, paras. 182-192. *See also* Kalimanzira Reply Brief, paras. 21, 22.
[255] Kalimanzira Appeal Brief, paras. 188-190.
[256] Prosecution Response Brief, paras. 93, 94.
[257] Prosecution Response Brief, para. 95.
[258] Prosecution Response Brief, paras. 97-99, 106. The Prosecution also provides specific analysis of the identification evidence provided by Witnesses BWO, BDC, BCF, BBO, and BWK, and concludes that their identifications were reliable. *See* Prosecution Response Brief, paras. 100-105.
[259] Prosecution Response Brief, para. 104.
[260] *Rutaganda* Appeal Judgement, para. 207.
[261] *Muhimana* Appeal Judgement, para. 176.
[262] *Kamuhanda* Appeal Judgement, para. 298.
[263] *See, e.g., Kupreškić* Appeal Judgement, para. 40.
[264] *See, e.g., Bagilishema* Appeal Judgement, para. 75. *See also Kupreškić* Appeal Judgement, para. 39.
[265] *Kamuhanda* Appeal Judgement, para. 243.

it."[266] However, "the weight and probative value to be afforded to that evidence will usually be less than that accorded to the evidence of a witness who has given it under oath and who has been cross-examined."[267]

97. Kalimanzira provides no relevant evidence or analysis to support his contention that the Trial Chamber inappropriately excused weaknesses in Prosecution witnesses' testimony on the basis of their past suffering. The Appeals Chamber also finds that the Trial Chamber acted within its discretion in accepting Defence witnesses' testimony regarding events at Gisagara marketplace and Kabuye hill, while also concluding that their failure to see Kalimanzira did not preclude his presence at these locations. Large numbers of individuals were involved in these two events, and the Trial Chamber's conclusions regarding Kabuye hill – that "no witness alone could amply describe everything that transpired or identify everyone who was present" – applies to the events at Gisagara marketplace with equal force.[268]

98. The Appeals Chamber notes that Kalimanzira points to no evidence and provides no analysis in relation to his assertion that identifications occurred under difficult circumstances. Therefore, this contention is summarily dismissed. The Appeals Chamber further notes that Kalimanzira appears to contradict himself by claiming that the in-court identification by Prosecution witnesses led the Trial Chamber to ignore the issue of identification evidence, while at the same time referring to Trial Chamber analysis of such identification evidence relating to Witnesses BBO and BWO.[269] In any event, the evaluation in the Trial Judgement of individual witness testimonies demonstrates that, for the most part, the Trial Chamber reasonably discussed identification evidence when this was relevant to assessing a witness's credibility. Thus, analysis of identification evidence was reasonably used both to explain the Trial Chamber's caution in accepting Witness BBO's evidence, and to help justify the finding that Witness BWO was credible. The absence of any analysis of identification evidence with respect to Witnesses BDC and BCF from the Trial Judgement is also reasonable. Both testified that they had seen Kalimanzira more than once prior to 23 April 1994, and their testimonies partially corroborated each other, lending them additional credibility.[270]

99. By contrast, the Trial Chamber's failure to discuss identification evidence with regard to Witness BWK's uncorroborated identification testimony is problematic. In her testimony, Witness BWK stated that she only saw Kalimanzira once before 23 April 1994, when she overheard a

[266] *Karera* Appeal Judgement, para. 39 (internal citations omitted).
[267] *Karera* Appeal Judgement, para. 39.
[268] Trial Judgement, para. 387. *See also Muhimana* Appeal Judgement, para. 113 (noting the limited probative value of claims by witnesses who did not see an accused during large scale attacks).
[269] *Compare* Kalimanzira Appeal Brief, para. 178, *with* Kalimanzira Appeal Brief, paras. 185, 191.

conversation about him in a bar he had entered.[271] The extent to which he was identified even in this circumstance is unclear. During the examination-in-chief, Witness BWK explained that she overheard the barman identify Kalimanzira by name to the bar owner,[272] while on cross-examination she testified that she overheard the barman identify Kalimanzira as the "gentleman from Kirarambogo".[273] Witness BWK also explained that, although she thought Kalimanzira seemed familiar when she met him on the Kabuye-Gisagara road on 23 April 1994, she only linked him to the individual from the bar when a man named Gakeri, who was escorting her and other Tutsis, identified him as Kalimanzira.[274] Consequently, it follows that the basis of Witness BWK's identification of Kalimanzira on both occasions is hearsay. While a conviction may be based on this type of evidence, caution is warranted in such circumstances.[275] In this case, given the unclear nature of Kalimanzira's identification by the barman, and Witness BWK's uncertainty over Kalimanzira's identity when she met him at the Kabuye-Gisagara road, the Trial Chamber should have explicitly explained why it accepted Witness BWK's identification evidence. The Appeals Chamber, Judge Pocar dissenting, considers that its failure to provide such justification constituted an error of law.

100. In view of the Trial Chamber's legal error, the Appeals Chamber, Judge Pocar dissenting, will proceed to consider the relevant evidence.[276] The Appeals Chamber, Judge Pocar dissenting, is particularly concerned by the uncertainty over whether and to what extent Kalimanzira was even identified by name prior to the meeting on the Kabuye-Gisagara road. The Appeals Chamber, Judge Pocar dissenting, also notes that there is no indication as to the credibility of either individual who identified Kalimanzira to Witness BWK on the record. In these circumstances, the Appeals Chamber, Judge Pocar dissenting, considers that reliance on Witness BWK's uncorroborated identification evidence is unsafe.

101. For the foregoing reasons, the Appeals Chamber, Judge Pocar dissenting, grants Kalimanzira's appeal, in part, insofar as it relates to identification evidence by Witness BWK. The impact of this finding will be considered later in this section. The Appeals Chamber dismisses Kalimanzira's remaining arguments in this sub-section.

[270] *See* T. 5 May 2008 p. 18; T. 9 May 2008 pp. 33, 34.
[271] *See* T. 9 May 2008 pp. 15, 16.
[272] T. 9 May 2008 p. 16.
[273] T. 19 May 2008 p. 56.
[274] T. 9 May 2008 p. 18.
[275] *Muvunyi* Appeal Judgement, para. 70.
[276] *See supra* para. 8.

3. Alleged Errors Relating to Events at Gisagara Marketplace (April Event)

102. The Trial Chamber based its analysis of the events at the Gisagara marketplace primarily on the evidence of Prosecution Witnesses BCF, BDC, and BWO, and Defence Witnesses AM14 and FCS.[277] It concluded that on 23 April 1994 Kalimanzira stood next to Sub-Prefect Ntawukulilyayo as the latter told Tutsis gathered at the Gisagara marketplace to travel to Kabuye hill and promised them protection there.[278] The Trial Chamber found that the expulsions of Tutsi refugees from the Gisagara marketplace took place in waves over several days.[279] The Trial Chamber reasoned that most discrepancies within and among witnesses' testimonies and their prior statements were immaterial, and in any event based on factors such as their participation in different waves of expulsion, the passage of time, misrecorded statements, caution in testifying, and the chaotic circumstances at the Gisagara marketplace.[280]

103. Kalimanzira asserts that the Trial Chamber should have, but did not, explain why it believed that during his visit to the Gisagara marketplace, he was aware that the promises of security at Kabuye hill made by Sub-Prefect Ntawukulilyayo were false.[281] Kalimanzira further asserts that the Trial Chamber erred in suggesting that there were multiple waves of expulsions from the marketplace. In particular, he notes that Witness BCF did not mention several waves of expulsions, even though he was present for several days prior to 23 April 1994 and was one of the last persons to leave the marketplace.[282] Kalimanzira concludes that the Trial Chamber was thus not justified in finding that the contradictions between Witness BWO's testimony and those of certain other witnesses were due to their describing different waves of expulsions.[283] He also notes that Witness BWO claimed to be sufficiently close to the speakers to be able to identify various officials in the marketplace, undermining the Trial Chamber's conclusion that Witness BWO's location might have prevented him from seeing Kalimanzira, if the latter was present.[284]

104. Kalimanzira further submits that the Trial Chamber failed to properly consider discrepancies between Witness BCF's testimony, his prior statements, and Defence evidence.[285] Kalimanzira also maintains that Witnesses BCF and BDC colluded with each other, basing this assertion primarily on the facts that they are from the same area of Rwanda, that their stays in Arusha overlapped, and that

[277] Trial Judgement, paras. 358-367.
[278] Trial Judgement, para. 367.
[279] Trial Judgement, paras. 364-366.
[280] *See, e.g.*, Trial Judgement, paras. 358-367.
[281] Kalimanzira Appeal Brief, paras. 224-229.
[282] Kalimanzira Appeal Brief, paras. 245-247.
[283] Kalimanzira Appeal Brief, paras. 245-247.
[284] Kalimanzira Appeal Brief, para. 244.
[285] Kalimanzira Appeal Brief, paras. 230-236, 250-253.

they presented testimonies that were more similar than their prior witness statements.[286] Kalimanzira contends that the Trial Chamber also erred in failing to accord sufficient weight to the evidence of Defence witnesses, especially to the testimony of Witnesses AM14 and FCS that they did not see him at the Gisagara marketplace on 23 April 1994.[287]

105. The Appeals Chamber is satisfied that the Trial Chamber's findings concerning Kalimanzira's actions at the Mukabuga roadblock allowed it to reasonably conclude that Kalimanzira was aware that Sub-Prefect Ntawukulilyayo's promises of safe refuge at Kabuye hill were false. The Trial Chamber also acted within its discretion in finding that discrepancies within and between the testimonies and prior statements of Witnesses BCF and BDC, and contradictions between their testimony and that of certain Defence witnesses, were not significant. In this regard, the Appeals Chamber recalls that trial chambers enjoy broad discretion in choosing which witness testimony to prefer, and in assessing the impact on witness credibility of inconsistencies within or between witnesses' testimonies and prior statements.[288] The Trial Chamber reasonably explained that the discrepancies and contradictions could be explained by factors such as the passage of time and chaotic circumstances at the Gisagara marketplace.[289] Kalimanzira is unconvincing in alleging collusion between Witnesses BCF and BDC. The facts that their testimonies converged more than their prior statements, that their stays in Arusha overlapped, and that they came from the same part of Rwanda are not alone sufficient to establish that collusion occurred.

106. By contrast, the Trial Chamber's justification for the existence of multiple waves of expulsions is not reasonable given the evidence before it. In explaining why no Prosecution witness referred to such multiple waves of expulsions, the Trial Chamber reasoned that:

> Prosecution witnesses were refugees who were instructed to move, and who testified to events as they experienced them[;] they would not conceivably have stayed at the marketplace [...] to witness an expulsion in multiple stages, nor could they be expected to know that a group of refugees had been moved from the marketplace at other times. [I]t [was] likely that thousands of refugees would not have shown up at the marketplace all at once, and that as they flowed into the marketplace, they would have been moved at various stages.[290]

107. The Appeals Chamber considers that this explanation does not fully account for the fact that Prosecution Witness BCF, who operated a store in the vicinity of the Gisagara marketplace, testified to only one wave of expulsion.[291] Witness BCF testified that he left the Gisagara

[286] Kalimanzira Appeal Brief, paras. 237-242.
[287] Kalimanzira Appeal Brief, paras. 254-262.
[288] *See Muvunyi* Appeal Judgment, para. 144; *Seromba* Appeal Judgement, para. 116; *Simba* Appeal Judgement, para. 211; *Muhimana* Appeal Judgement, para. 58; *Ntakirutimana* Appeal Judgement, para. 258.
[289] *See* Trial Judgement, paras. 360, 361, 365.
[290] Trial Judgement, para. 366.
[291] *See* T. 5 May 2008 pp. 10-13; T. 12 May 2008 pp. 11-14, 27-33.

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marketplace in the afternoon of 23 April 1994;[292] thus he was in a position to observe any additional expulsions that occurred prior to that time. It is implausible that he would not have observed or mentioned a previous wave of expulsion that included an address by Sub-Prefect Ntawukulilyayo to a large group of refugees.[293] In addition, Defence Witness AM14, who was not a refugee[294] and who lived in a house near the Gisagara marketplace, explicitly stated that there was only one wave of refugees expelled from there.[295] These testimonies undermine the assumptions on which the Trial Chamber's reasoning concerning multiple waves of expulsions is based.

108. The Trial Chamber's error regarding multiple waves of expulsions does not, however, obviate its broader conclusions regarding the Gisagara marketplace. The Trial Chamber suggested that, even if he had attended the same event as Witnesses BCF and BDC, Witness BWO might not have been able to observe Kalimanzira due to his location in the crowd of refugees.[296] Given the chaotic circumstances at the marketplace and the fact that Kalimanzira did not speak at this meeting, the Trial Chamber acted within the bounds of its discretion in reaching this conclusion. In any event, the Trial Chamber's findings relating to Kalimanzira's role were primarily based on the testimonies of Witnesses BCF and BDC, whose placement of Kalimanzira at Gisagara marketplace was also echoed by Witness BDJ.[297] It was within the Trial Chamber's discretion to find these witnesses credible even though significant aspects of their testimony diverged from the testimony of Witness BWO.

109. For the foregoing reasons, the Appeals Chamber is not convinced that the Trial Chamber materially erred in its analysis of Kalimanzira's role in the events at the Gisagara marketplace. Accordingly, the Appeals Chamber dismisses this sub-ground of appeal.

4. Alleged Errors Relating to Events at Kabuye-Gisagara Road

110. The Trial Chamber based its analysis of events at the Kabuye-Gisagara road solely on the testimony of Prosecution Witness BWK.[298] In particular, the Trial Chamber concluded that, on 23 April 1994, Kalimanzira personally encouraged a group of Tutsis to travel to Kabuye hill, telling them that they would be safe there.[299] The Trial Chamber characterized Witness BWK's evidence as credible, discounting minor inconsistencies between her testimony and her prior statement.[300] It

[292] Trial Judgement, paras. 304-306.
[293] *See* Trial Judgement, paras. 363, 364.
[294] *See* T. 19 November 2008 pp. 64, 65.
[295] *See* T. 19 November 2008 pp. 69-71.
[296] Trial Judgement, para. 363.
[297] Trial Judgement, para. 363.
[298] Trial Judgement, paras. 368, 371.
[299] Trial Judgement, para. 371.
[300] Trial Judgement, paras. 369-371.

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found her testimony partially corroborated by that of other Prosecution witnesses who placed Kalimanzira nearby, at the Gisagara marketplace, on the same day.[301] It also noted her mention of a man named Gakeri, who was ordered to escort her and other Tutsis to Kabuye hill, and observed that Witness BWO testified that an individual by that same name was instructed to accompany Tutsis to Kabuye hill.[302] The Trial Chamber concluded that Witness BWO's evidence offered additional corroboration of Witness BWK's testimony.[303]

111. In connection with these findings, Kalimanzira asserts that the Trial Chamber erred in discounting variations between Witness BWK's testimony and prior statement regarding the date of her meeting with Kalimanzira, the number of individuals in his car, and the uniform of Kalimanzira's chauffeur.[304] Kalimanzira also contends that the Trial Chamber erred in finding Witness BWK's testimony partly corroborated. He submits that the testimony of witnesses to events at the Gisagara marketplace is not appropriately cited to corroborate Witness BWK's testimony regarding the Kabuye-Gisagara road, and that, while both Witnesses BWO and BWK may have referred to a man named Gakeri, there is no proof that it was the same Gakeri.[305]

112. The Prosecution responds that Kalimanzira merely repeats assertions made at trial, without explaining how the Trial Chamber's approach was erroneous.[306]

113. The Appeals Chamber recalls its finding, Judge Pocar dissenting, that it was unsafe for the Trial Chamber to rely on Witness BWK's uncorroborated identification evidence with respect to Kalimanzira.[307] The Appeals Chamber, Judge Pocar dissenting, underscores that the partial corroboration noted by the Trial Chamber only suggests that Kalimanzira was in the general area and that a man called Gakeri escorted Tutsis to Kabuye hill, but does nothing to reliably support Witness BWK's specific identification of Kalimanzira. The Appeals Chamber, Judge Pocar dissenting, therefore is not satisfied that Witness BWK's testimony can be relied on to establish facts concerning Kalimanzira's actions at the Kabuye-Gisagara road absent additional evidence. Given that Witness BWK's testimony was the only direct evidence of the events that occurred at the Kabuye-Gisagara road on 23 April 1994, the Appeals Chamber, Judge Pocar dissenting, considers that the Trial Chamber's findings regarding Kalimanzira's actions there are unsafe.

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[301] Trial Judgement, para. 370.
[302] Trial Judgement, paras. 315, 329, 370, *citing* T. 12 May 2008 p. 65.
[303] Trial Judgement, para. 370.
[304] Kalimanzira Appeal Brief, paras. 267-278.
[305] Kalimanzira Appeal Brief, paras. 281-285.
[306] Prosecution Response Brief, paras. 115, 116.
[307] *See supra* Section III.E.2 (Alleged Errors in the Trial Chamber's Consideration of Witnesses' Credibility and Provision of Identification Evidence).

114. For the foregoing reasons, the Appeals Chamber, Judge Pocar dissenting, grants this sub-ground of Kalimanzira's appeal. The impact of this finding will be discussed below.

5. Alleged Errors Relating to Kalimanzira's Presence and Actions at Kabuye Hill

115. Although it discussed other witnesses' testimony, the Trial Chamber based its analysis of Kalimanzira's actions during the attack at Kabuye hill on the evidence of Witnesses BDC, BCF, and BWO.[308] It described the Kabuye hill massacre as involving thousands of individuals acting in a broad area over a long period of time.[309] The Trial Chamber found Witnesses BDC and BCF credible and excused certain inconsistencies between and within their testimonies and prior statements as caused by the passage of time, their trauma, and their low level of education.[310] The Trial Chamber also found Witness BWO credible, although it concluded that his testimony concerning Kalimanzira's actions at Kabuye hill related to an incident that was different from the one which Witnesses BDC and BCF described.[311] The Trial Chamber considered the assertions of Witness BBO regarding Kalimanzira's actions at Kabuye hill, but found his credibility questionable and declined to accept his testimony without corroboration.[312] By contrast, the Trial Chamber accepted that Witness BXG's testimony was "consistent with the general trend of evidence relating to Kabuye hill," even though he did not testify to seeing Kalimanzira there.[313] The Trial Chamber reviewed various accounts of witnesses, but reasoned that the fact that some of them did not see Kalimanzira at Kabuye hill was not inconsistent with his presence there.[314] Finally the Trial Chamber dismissed Kalimanzira's assertion that vehicles could not physically reach Kabuye hill.[315] In this respect, it noted that certain Defence witnesses testified that they reached the area in vehicles, found that the specifics of where vehicles stopped were a "minor detail", and reasoned that "Kabuye hill was not reached from one direction only."[316]

116. Kalimanzira asserts that the Indictment was defective concerning the specifics of the attack on Kabuye hill and that its imprecision allowed the Trial Chamber to lay a new charge against him by finding that the Prosecution witnesses' testimony related to two separate incidents at Kabuye hill.[317] He further asserts that the Trial Chamber erred in ignoring the widely varying dates given by different witnesses for the assault on Kabuye hill, as well as in not specifying an event that could

[308] Trial Judgement, paras. 372-387.
[309] Trial Judgement, para. 387.
[310] Trial Judgement, para. 381.
[311] Trial Judgement, paras. 382, 383.
[312] Trial Judgement, para. 375.
[313] Trial Judgement, para. 378.
[314] Trial Judgement, paras. 384, 387.
[315] Trial Judgement, para. 385.
[316] Trial Judgement, para. 385.
[317] Kalimanzira Appeal Brief, paras. 293-301, 317, 318.

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serve as a common point of reference for witness testimonies that provided varying date estimates.[318]

117. Kalimanzira further submits that the Trial Chamber failed to justify its acceptance of testimony by Witnesses BDC and BCF, given the significant contradictions in their evidence.[319] He also asserts that the Trial Chamber's analysis was careless, claiming that it misattributed relevant testimony of the two witnesses.[320] With regard to Witness BWO, Kalimanzira asserts that his testimony contradicts that of other Prosecution witnesses, and characterizes the Trial Chamber's analysis thereof as flawed.[321] Kalimanzira further asserts that the Trial Chamber failed to specify if it eventually relied on Witness BBO's testimony,[322] and that it did not explain how Witness BXG's evidence was corroborated by other witnesses' accounts of Kalimanzira's actions on Kabuye hill.[323] Kalimanzira also maintains that the Trial Chamber gave insufficient weight to Defence witnesses' testimony asserting that they did not see him at Kabuye hill, emphasizing that several Defence witnesses were present at Kabuye hill for multiple days.[324]

118. Finally, Kalimanzira contends that the Trial Chamber erred in not conducting a site visit or considering Defence witnesses' testimony regarding the absence of roads on Kabuye hill.[325] Kalimanzira asserts that the Trial Chamber failed to sufficiently explain its acceptance of Prosecution witnesses' testimony that his vehicle was parked on Kabuye hill near the refugees.[326] He notes that if the Trial Chamber believed the vehicle parked at a greater distance, it should have provided more reasoning to support this conclusion.[327] Kalimanzira also submits that the Trial Chamber failed to support its conclusion that Tutsis on Kabuye hill were spread over a wide area,

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[318] Kalimanzira Appeal Brief, paras. 288-292. Kalimanzira notes that he suggested in his Final Trial Brief making the heavy rainfall mentioned by nearly all witnesses that common point of reference. *See* Kalimanzira Appeal Brief, paras. 288, 289.

[319] Kalimanzira Appeal Brief, paras. 309-311, 313. Issues that Kalimanzira claims Witnesses BDC's and BCF's testimony contradict each other on include, *inter alia*: the number of vehicles he arrived at Kabuye hill with; the number and type of individuals who accompanied him; his behavior; and whether he left before or after fighting started. *See* Kalimanzira Appeal Brief, para. 310.

[320] Kalimanzira Appeal Brief, para. 312, *comparing* Trial Judgement, para. 309, *with* T. 5 May 2008 p. 19 (French version); T. 12 May 2008 pp. 32, 33, 44 (French version); T. 20 May 2008 p. 75 (French version). *See also* T. 5 May 2008 p. 14 (English version); T. 12 May 2008 p. 37 (English version); T. 20 May 2008 pp. 28, 29 (English version). Kalimanzira asserts that, while the Trial Chamber attributed the claim that Kalimanzira stayed for a short time after the start of shooting to Witness BCF, this statement was in reality made by Witness BDC. The Appeals Chamber notes that the French language transcript citation for 20 May 2008 provided by Kalimanzira is not correct.

[321] Kalimanzira Appeal Brief, paras. 314-319.

[322] Kalimanzira Appeal Brief, paras. 302, 303.

[323] Kalimanzira Appeal Brief, paras. 305-308.

[324] Kalimanzira Appeal Brief, paras. 329-338.

[325] *See* Kalimanzira Appeal Brief, paras. 320-328.

[326] Kalimanzira Appeal Brief, paras. 321-323.

[327] Kalimanzira Appeal Brief, para. 324.

and suggests that all refugees would logically have stayed in the same area of Kabuye hill rather than disperse.[328]

119. The Appeals Chamber recalls the principles of notice previously articulated in this Judgement.[329] With regard to the events at Kabuye hill, the Appeals Chamber notes that the Indictment specified the place and date of the Kabuye hill massacre, the general identity of the victims, and that Kalimanzira sought to bring military and police reinforcements in order to help with the attack.[330] The Prosecution's Pre-Trial Brief further specified that Kalimanzira encouraged Tutsis in the area of Gisagara to travel to Kabuye hill, brought armed men to Kabuye hill, provided details of the assault there, and clarified that Kalimanzira was seen at Kabuye hill more than once.[331] The Appeals Chamber finds that insofar as there was any vagueness in the Indictment, it was cured by the Prosecution's Pre-Trial Brief, and thus Kalimanzira had sufficient notice of the material facts underpinning his conviction.

120. With regard to the dating of the attack, a number of approaches was certainly open to the Trial Chamber. However, Kalimanzira does not show that it was unreasonable for the Trial Chamber to resolve diverse testimonies regarding the date of the assault on Kabuye hill, rather than to adopt the "common reference point" suggested in his Final Trial Brief. The Appeals Chamber recalls that "it falls to the Trial Chamber to take the approach it considers most appropriate for the assessment of evidence."[332]

121. The Appeals Chamber also concludes that the Trial Chamber acted within the scope of its discretion in accepting the testimony of Witnesses BDC, BCF, and BWO, and in finding that the latter's testimony related to a distinct event involving Kalimanzira. In this regard, the Appeals Chamber recalls that trial chambers enjoy broad discretion in choosing which witness testimony to prefer, as well as in assessing the impact on witness credibility of inconsistencies within or between witnesses' testimony and prior statements.[333] A trial chamber "is [...] not obliged in its judgement to recount and justify its findings in relation to every submission made at trial."[334] The discrepancies between the testimonies of Witnesses BDC, BCF, and BWO do not obscure their

[328] Kalimanzira Appeal Brief, paras. 326, 327.
[329] *See supra* Section III.B (Ground 2: Alleged Errors in Assessing Authority and Influence).
[330] *See* Indictment, para. 9.
[331] Prosecution Pre-Trial Brief, paras. 56-58.
[332] *Rutaganda* Appeal Judgement, para. 207.
[333] *See Muvunyi* Appeal Judgment, para. 144; *Seromba* Appeal Judgement, para. 116; *Simba* Appeal Judgement, para. 211; *Muhimana* Appeal Judgement, para. 58; *Ntakirutimana* Appeal Judgement, para. 258.
[334] *Muhimana* Appeal Judgement, para. 176.

fundamental similarities, and given the wide ranging scope of the fighting at Kabuye hill, it is reasonable to conclude that Kalimanzira could have been present at multiple locations.[335]

122. The Trial Chamber's assessment of Witnesses BBO and BXG was, however, more opaque. It failed to specify which parts of Witness BBO's evidence, if any, it considered corroborated. Nonetheless, none of its findings depended solely on Witness BBO's testimony, rendering any errors in this approach immaterial. The Trial Chamber's explanation that Witness BXG's evidence was "consistent with the general trend of evidence relating to Kabuye hill"[336] left unclear whether the Trial Chamber believed his evidence was corroborated by other Kabuye hill witnesses, corroborated evidence of other witnesses, or both. However, any error was again immaterial. The Trial Chamber believed Witness BXG on his own merits regarding the events at the Mukabuga roadblock, and none of the Trial Chamber's conclusions concerning events at Kabuye hill depended on corroboration from Witness BXG's testimony.

123. With regard to the evidence of Defence witnesses, the Trial Chamber acted within its discretion in finding that their failure to recall seeing Kalimanzira on Kabuye hill was not inconsistent with his presence there. The Trial Chamber found that the massacre on Kabuye hill involved thousands of individuals battling "over a large landscape and time span."[337] In this circumstance, a reasonable trial chamber could certainly conclude that some attackers and victims, even if present for several days, would not have observed visits by Kalimanzira.

124. The Appeals Chamber considers that the Trial Chamber acted within its discretion in discounting Kalimanzira's contention that vehicles could not approach Kabuye hill. Given that Prosecution and Defence witnesses both agree that vehicles were used to bring attackers to the area,[338] it was reasonable to find the specifics of their parking location to be a relatively insignificant issue. The Trial Chamber was also reasonable in finding that the battle raged over a large area, given witness testimony regarding Tutsis spreading around Kabuye hill itself, and the multiple hills and valleys where attackers and Tutsis gathered.[339]

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[335] The Appeals Chamber observes that Kalimanzira is incorrect in asserting that the Trial Chamber misattributed Witness BDC's testimony to Witness BCF. As the Trial Chamber noted, Witness BCF testified that Kalimanzira arrived at the base of Kabuye hill at dusk on 23 April 1994 and remained there after shooting began. *See* Trial Judgement, para. 309; T. 5 May 2008 p. 14; T. 12 May 2008 p. 37. *See also* Trial Judgement, paras. 304-308. By contrast, Witness BDC testified that Kalimanzira left before shooting started. Trial Judgement, paras. 300, 301; T. 20 May 2008 p. 29. The Appeals Chamber notes that there does not appear to be a basis in Witness BCF's testimony for concluding how long Kalimanzira remained at the base of Kabuye hill after shooting started, but any inaccuracy in the Trial Judgement regarding this issue is immaterial to Kalimanzira's appeal.

[336] Trial Judgement, para. 378.

[337] Trial Judgement, para. 387.

[338] *See* Trial Judgement, para. 385.

[339] *See* Trial Judgement, paras. 338, 345, 352.

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125. For the foregoing reasons, the Appeals Chamber is not convinced that the Trial Chamber materially erred in its analysis of Kalimanzira's actions at Kabuye hill. Accordingly, this sub-ground of appeal is dismissed.

6. Conclusion

126. The Appeals Chamber recalls that it has granted, Judge Pocar dissenting, Kalimanzira's appeal with regard to the Trial Chamber's findings in relation to events at the Kabuye-Gisagara road, and has upheld the Trial Chamber's other findings, including those relating to his actions at the Gisagara marketplace and Kabuye hill. The evidence regarding these latter incidents demonstrates that Kalimanzira intended to aid and abet the acts of genocide on Kabuye hill and substantially contributed to them. Therefore the Trial Chamber's error with respect to the events at Kabuye-Gisagara road did not result in a miscarriage of justice. Accordingly, the Appeals Chamber dismisses Kalimanzira's Third and Sixth Grounds of Appeal.

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F. Alleged Errors Relating to the Butare-Gisagara Roadblock (Ground 7)

127. The Trial Chamber convicted Kalimanzira for instigating and aiding and abetting genocide based, in part, on his participation in the killings at a roadblock on the Butare-Gisagara road on or around 22 April 1994.[340] Kalimanzira submits that the Trial Chamber erred in convicting him of this crime.[341] In this section, the Appeals Chamber considers whether Kalimanzira had sufficient notice of this crime to prepare his defence.

128. Paragraph 15 of the Indictment reads:

> Between mid-April and late June 1994, Callixte Kalimanzira incited the population to erect roadblocks in order to eliminate the Tutsi. He was often personally present at the roadblocks to supervise their operations. Many Tutsi were killed at the roadblocks erected on the instructions of Callixte Kalimanzira and supervised by him.[342]

129. With regard to this allegation, the Trial Chamber made a number of findings based exclusively on the testimony of Prosecution Witness BXK,[343] including:

> [...] that the Prosecution has proven beyond reasonable doubt that, in April 1994, Kalimanzira stopped at a roadblock on the Butare-Gisagara road, asked the men manning the roadblock why they did not have weapons and why they had instructed the Tutsis to sit down instead of killing them. Kalimanzira then provided a weapon to a man at the roadblock. Subsequently, Tutsis at the roadblock were deprived of their belongings and taken to a nearby pit, where they were killed.[344]

130. At trial, Kalimanzira objected to the lack of precision in paragraph 15 of the Indictment.[345] The Trial Chamber found that the Indictment was vague with regard to the Butare-Gisagara roadblock.[346] However, it was satisfied that Kalimanzira received adequate notice in a timely, clear, and consistent manner through the summary of Witness BXK's anticipated testimony annexed to the Prosecution Pre-Trial Brief, the witness's prior statement, and the Prosecution's opening statement.[347]

131. Kalimanzira submits that the defect in the Indictment was not cured, since information regarding the factual allegations concerning the killings at the events at the Butare-Gisagara road, provided through Witness BXK's summary, was not included in the body of the Prosecution Pre-

[340] Trial Judgement, paras. 473, 474, 739.
[341] Kalimanzira Notice of Appeal, paras. 44-47; Kalimanzira Appeal Brief, paras. 342-380.
[342] Emphases omitted.
[343] Trial Judgement, paras. 460-463, 465-474.
[344] Trial Judgement, para. 473.
[345] Trial Judgement, para. 428.
[346] Trial Judgement, para. 429. Specifically, the Trial Chamber noted that paragraph 15 provides no locations or specification of the roadblocks where the criminal acts were allegedly committed and offered a time range spanning two and a half months. *See* Trial Judgement, para. 429.
[347] Trial Judgement, para. 432, *citing* T. 5 May 2008 p. 4.

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Trial Brief.[348] Furthermore, he points to the Prosecution's submissions during a status conference on 30 April 2008, where it suggested that there was nothing new in the summaries annexed to the Pre-Trial Brief.[349] Secondly, he argues that the anticipated testimony of Witness BXK did not clarify the relevant factual allegations because it referred to two roadblocks located on the Kabuye-Gisagara road.[350] Thirdly, Kalimanzira contends that the Prosecution's opening statement, although discussing an incident at a roadblock on the Butare-Gisagara road, created confusion by referring to events at Kabuye hill.[351]

132. In addition, Kalimanzira submits that the notice of the charges he was facing was not provided in a timely manner and invokes the *Muhimana* Trial Judgement, where a period of four weeks between the service of the pre-trial brief and the beginning of the trial was not deemed sufficient to allow the Defence to respond to a new allegation.[352] He submits that he suffered prejudice as a result of working on the basis of imprecise documents, which prevented him from conducting an efficient investigation, and emphasizes that the Prosecution Pre-Trial Brief was served to him in English only on 16 April 2008, and in French only on the opening day of the trial, 5 May 2008.[353]

133. The Prosecution responds that Kalimanzira has failed to demonstrate any error on the part of the Trial Chamber.[354] It notes that the Prosecution Pre-Trial Brief, including the Annex containing witness summaries, comprised less than 50 pages and Kalimanzira only needed to read through 22 pages of Annex A to identify the witnesses, including Witness BXK, who would testify regarding the allegations in paragraph 15 of the Indictment.[355] The Prosecution admits that, due to an unintentional error, the annex of its Pre-Trial Brief indicated that Witness BXK would testify to events at "'two closely located roadblocks on the Kabuye-Gisagara road,'" while it should have read, in conformity with Witness BXK's prior statement, "'two closely located road-blocks on the Butare-Gisagara and Kabuye-Gisagara roads.'"[356] Nevertheless, the Prosecution submits that Witness BXK's testimony demonstrated the close proximity between the two roads.[357]

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[348] Kalimanzira Appeal Brief, para. 349. He submits, invoking the *Niyitegeka* and *Ntakirutimana* Appeal Judgements, that mentioning a fact in a witness summary does not suffice to inform the Defence of the material facts that the Prosecution intends to prove at trial. *See* Kalimanzira Appeal Brief, para. 99. *See also* Kalimanzira Reply Brief, para. 28.
[349] T. 14 June 2010 p. 10, *referring to* T. 30 April 2008 p. 8.
[350] Kalimanzira Appeal Brief, para. 351. *See also* Kalimanzira Reply Brief, para. 27.
[351] Kalimanzira Appeal Brief, para. 352.
[352] Kalimanzira Appeal Brief, para. 101, *citing Muhimana* Trial Judgement, paras. 470, 472; Kalimanzira Appeal Brief, para. 354.
[353] Kalimanzira Appeal Brief, paras. 109, 112, 355-357. *See also* Kalimanzira Reply Brief, para. 28.
[354] Prosecution Response Brief, para. 123.
[355] Prosecution Response Brief, para. 128.
[356] Prosecution Response Brief, para. 128, *citing* Defence Exhibit 7 (Statement of 31 October 2007), p. 3.
[357] Prosecution Response Brief, para. 128, *citing* T. 9 May 2008 p. 7; T. 1[9] May 2008 pp. 44-47.

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134. The Prosecution submits that, although the misstatement in the Pre-Trial Brief is unfortunate, it does not justify the reversal of Kalimanzira's conviction.[358] Additionally, the Prosecution contends that Kalimanzira has failed to demonstrate that he suffered any material prejudice. In this regard, the Prosecution first notes that Witness BXK's prior statement was disclosed to Kalimanzira on 31 October 2007 and the Pre-Trial Brief was filed on 16 April 2008.[359] Secondly, it underscores that Kalimanzira, despite enjoying a ten-day adjournment of proceedings between Witness BXK's examination-in-chief and his cross-examination, did not raise any objection based on a lack of clear and consistent notice.[360] Thirdly, the Prosecution recalls that Kalimanzira relied on an alibi defence against Witness BXK's evidence, which the Trial Chamber did not accept, and submits that Kalimanzira has not attempted to demonstrate how his defence would have been different if the Prosecution Pre-Trial Brief had not contained an erroneous reference to the location of the roadblock.[361]

135. Bearing in mind the previously articulated principles of notice,[362] the Appeals Chamber considers that Kalimanzira could not have known, on the basis of the Indictment alone, that he was being charged in connection with the killings at the Butare-Gisagara roadblock. Accordingly, the Appeals Chamber finds, as the Trial Chamber concluded, that paragraph 15 of the Indictment is defective.

136. As a preliminary issue, the Appeals Chamber notes that a review of the trial record reveals that Kalimanzira did not make a contemporaneous objection to Witness BXK's evidence concerning the Butare-Gisagara roadblock during the course of his testimony, and that he objected only to the lack of specificity in paragraph 15 of the Indictment in his Final Trial Brief.[363] The Trial Chamber observed that objections based on lack of notice should be specific and timely and that, where an objection was late, the Trial Chamber would consider whether this shifted the burden onto the Defence to demonstrate prejudice.[364] The Trial Chamber, however, did not expressly consider the objection untimely. The Appeals Chamber has held that, where a trial chamber has treated a challenge to an indictment as being adequately raised, the Appeals Chamber should not invoke the waiver doctrine.[365] Furthermore, as discussed below, the Appeals Chamber considers that Kalimanzira's apparent confusion as to what incident Witness BXK's evidence related to reasonably explains the failure to make a timely objection to this aspect of Witness BXK's

[358] Prosecution Response Brief, para. 128.
[359] Prosecution Response Brief, para. 129.
[360] Prosecution Response Brief, para. 129.
[361] Prosecution Response Brief, para. 131.
[362] *See supra* Section III.B (Ground 2: Alleged Errors in Assessing Authority and Influence).
[363] Kalimanzira Final Trial Brief, para. 1125. *See also* Trial Judgement, para. 28.
[364] *See* Trial Judgement, para. 33.
[365] *Gacumbitsi* Appeal Judgement, para. 54. *See also Ntakirutimana* Appeal Judgement, para. 23.

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testimony. Therefore, it falls on the Prosecution to demonstrate that Kalimanzira was not prejudiced by the defect in the Indictment.[366]

137. The Appeals Chamber turns to the question of whether the Trial Chamber correctly determined that the defect in the Indictment was cured and that Kalimanzira suffered no prejudice as a result. On appeal, the Prosecution does not point to any additional filings or oral submissions beyond those identified by the Trial Chamber when considering whether the defects in the Indictment were cured.

138. The description of Kalimanzira's role in the killings at the Butare-Gisagara roadblock is contained in the summary of Witness BXK's anticipated testimony annexed to the Prosecution Pre-Trial Brief.[367] The summary states that Kalimanzira distributed weapons to those persons manning "two closely located roadblocks on the Kabuye-Gisagara road" and instructed them to kill a large group of Tutsi refugees located there.[368] The summary indicates that this anticipated evidence specifically relates to paragraph 15 of the Indictment.[369]

139. The Appeals Chamber has previously held that a summary of an anticipated testimony in an annex to the Prosecution's pre-trial brief can, in certain circumstances, cure a defect in an indictment.[370] The circumstances in this particular case, however, are different. Specifically, the Appeals Chamber, Judge Pocar dissenting, finds that three factors undermine the Trial Chamber's finding that the defect was cured, especially when considered together: (1) the summary of Witness BXK's anticipated evidence inaccurately describes the location of the incident; (2) the French translation of the Prosecution Pre-Trial Brief was filed only on the first day of trial, four days before Witness BXK testified; and (3) the Prosecution indicated shortly before the translation was filed that the witness summaries annexed to the Pre-Trial Brief contained no new allegations.

140. With respect to the first factor, as Kalimanzira observes, the summary of Witness BXK's anticipated testimony contains an inaccurate description of the roadblock's location, placing it on the Kabuye-Gisagara road rather than the Butare-Gisagara road. By contrast, Witness BXK's prior witness statement accurately summarized his testimony regarding two related incidents at two nearby roadblocks on the Kabuye-Gisagara and Butare-Gisagara roads.[371] The Appeals Chamber has held that a pre-trial brief and a witness statement, read together, may provide sufficient notice to

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[366] *See Gacumbitsi* Appeal Judgement, para. 54.
[367] Prosecution Pre-Trial Brief, Annex A, p. 21.
[368] Prosecution Pre-Trial Brief, Annex A, p. 21.
[369] Prosecution Pre-Trial Brief, Annex A, p. 21.
[370] *Gacumbitsi* Appeal Judgement, paras. 57, 58. This approach is consistent with jurisprudence of the ICTY. *See Naletilić and Martinović* Appeal Judgement, para. 45.
[371] *See* Defence Exhibit 7 (Statement of 31 October 2007), p. 3.

the extent that pre-trial brief provides "unambiguous information."[372] However, in the present case, the Appeals Chamber, Judge Pocar dissenting, considers that the error in the summary of Witness BXK's anticipated testimony made the Prosecution Pre-Trial Brief unclear, and that its curative power was thus, at best, questionable.

141. Turning to the second factor, the Appeals Chamber notes that the Prosecution Pre-Trial Brief was filed in English on 16 April 2008. The Appeals Chamber recalls that Kalimanzira's lead counsel, Mr. Arthur Vercken, was hospitalized in France on 21 April 2008 due to an unforeseeable medical problem.[373] During the status conference of 30 April 2008, Kalimanzira's co-counsel, Ms. Anta Guissé, whose primary working language was French,[374] expressed concern that the Defence had not yet received the French version of the Prosecution Pre-Trial Brief in order to discuss with Kalimanzira, who does not speak English,[375] and prepare for trial.[376]

142. In response to this, the Presiding Judge noted that a translation of the Prosecution Pre-Trial Brief was expected on 2 May 2008, a Friday, which would allow the weekend to review the document before the opening of the trial.[377] He also stated that the substantive part of the Pre-Trial Brief was only 25 pages long and that "the remainder of the document" was related to information about the witnesses.[378] The reference to the "remainder of the document" appears to relate to the annex which contains the summary of the anticipated testimony of the witnesses.

143. The French translation was made available to the Defence only on 5 May 2008, just a few hours before the opening of the trial,[379] thus not providing the preparation period anticipated by the Trial Chamber. Witness BXK appeared four days later on 9 May 2008.[380] The Appeals Chamber, Judge Pocar dissenting, considers that in these circumstances, it is questionable whether the notice provided by the summary of Witness BXK's anticipated testimony in the annex of the Prosecution Pre-Trial Brief was timely, clear, or consistent.

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[372] *See Ntakirutimana* Appeal Judgement, para. 48 (holding that a witness statement, when taken together with "unambiguous information" contained in a pre-trial brief and its annexes may be sufficient to cure a defect in an indictment). The Appeals Chamber observes that notice provided by a witness statement alone is insufficient to cure the defect in an indictment. *See Niyitegeka* Appeal Judgement, para. 197.

[373] *See supra* Section III.A.2(a) (Absence of Kalimanzira's Lead Counsel during the First Trial Session).

[374] *See* ICTR, *Formulaire* IL2, Submitted by Anta Guissé, dated 6 August 2007.

[375] Decision on Callixte Kalimanzira's Motion for an Extension of Time for the Filing of His Respondent's Brief, 26 October 2009.

[376] T. 30 April 2008 pp. 7, 9.

[377] *See* T. 30 April 2008 p. 7.

[378] T. 30 April 2008 p. 7.

[379] *The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-I, *Mémoire préalable au procès du Procureur*, 5 May 2008. The Appeals Chamber observes that the time stamp of the filing was 11.07 a.m. The trial commenced at 2.17 p.m. later that day. *See The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-T, Minutes of Proceedings, 5 May 2008, p.2.

[380] *See* T. 9 May 2008.

144. As regards the third factor, it is significant that, on the eve of trial, the Prosecution stated that its factual theory was contained only in the body of its Pre-Trial Brief, which does not mention the incident at the Butare-Gisagara roadblock. More specifically, while contending that the delay in the translation of the Prosecution Pre-Trial Brief need not impact the start of the trial on 5 May 2008,[381] the Prosecution stated that:

> [...] the pre-trial brief sets out the legal theory and the factual theory of the Prosecution's case. The main text, as Your Honour has rightly noted, is not 50 pages at all. It's just over 20. Around six of those relates [*sic*] to the factual theory. *That would be what is most interesting to the Accused.* Certainly counsel is able to read those six pages and explain the factual theory to the Accused. [...] The more extended part of the pre-trial brief is the witness summaries. Those are summaries that the Prosecution has done of what the witness is excepted [*sic*] to testify to in court. *There is nothing new in those summaries.* [...] Hence, the Prosecution cannot see that the absence of a translation at this point of the pre-trial brief would prevent the proceedings from starting on 5th of May 2008.[382]

145. The "main text"[383] of the Prosecution Pre-Trial Brief refers to only one specific incident in the Gisagara area of Ndora Commune at the Jaguar roadblock, which is specifically pleaded in paragraph 21 of the Indictment.[384] This is significant because it follows from Kalimanzira's submissions at trial that he considered Witness BXK's testimony as relevant to this distinct allegation. Both the Kalimanzira Pre-Trial and Final Trial Briefs refer to Witness BXK as giving evidence related to the Jaguar roadblock but do not suggest that he gave evidence with respect to the Butare-Gisagara roadblock.[385] The approach adopted by Kalimanzira's briefs illustrates the prejudice suffered by Kalimanzira as a result of unclear notice, demonstrating that he prepared his defence against Witness BXK's claims based on the assumption that they related to an incident at the Jaguar roadblock.

146. Kalimanzira's confusion is not surprising because a review of both the evidence and witness statements related to these events reveals a certain degree of overlap. In particular, Witness BXK testified that the Butare-Gisagara roadblock was near, although not within sight of,[386] the Gisagara church near which, according to other witnesses, the Jaguar roadblock was located.[387] In both

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[381] T. 30 April 2008 p. 8.
[382] T. 30 April 2008 p. 8 (emphasis added).
[383] T. 30 April 2008 p. 8.
[384] Prosecution Pre-Trial Brief, para. 62 ("Thirdly, the accused Kalimanzira distributed weapons to the persons manning the roadblocks for the purpose of killing Tutsi. The most notorious example is the so-called 'Jaguar' roadblock in Gisagara, Ndora commune. The accused Kalimanzira provided fire arms to at least one of the persons manning the roadblock and directed that they should be used to kill Tutsi. This direction was subsequently carried out.").
[385] *See* Kalimanzira Pre-Trial Brief, Annex 1, p. 26 ("[Witness AU 37] hails from N[dora] *commune*, G[isagara] *secteur*. He knew Callixte K[alimanzira]. He was present at the roadblock called 'Jaguar' everyday and has a good knowledge of its functioning and weaponry. He specifically witnessed the handing of a gun to persons manning the roadblock and will indicate the provider and recipient. Accordingly, he will contradict the testimonies of Witnesses BXK, BCN, and BCK."); Kalimanzira Final Trial Brief, paras. 240-244, 250-253, 260-262 (describing inconsistencies between Witness BXK's testimony and other Prosecution witnesses who testified about the Jaguar roadblock).
[386] Trial Judgement, paras. 460, 465.
[387] Trial Judgement, paras. 538, 539, 542.

incidents, Kalimanzira provided a gun to a person manning the roadblock and urged the killing of Tutsis.[388] The evidence related to both events references several key individuals who manned both roadblocks.[389]

147. It is true, as the Trial Chamber noted, that Kalimanzira recognized in his Final Trial Brief that the Butare-Gisagara roadblock was at a different location than the Jaguar roadblock.[390] Nonetheless, it does not follow from Kalimanzira's submissions as a whole that he was fully aware that he was facing two separate allegations. In his Final Trial Brief the discussion of Witness BXK's evidence is focused on inconsistencies between that evidence and other Prosecution witnesses' testimony related to the Jaguar roadblock. Notably, Kalimanzira's confusion as to the Prosecution's case appears to have carried over until at least the filing of his initial Notice of Appeal, in which he continued challenging Witness BXK's evidence by comparing it to the evidence of Prosecution witnesses who testified about the events at the Jaguar roadblock.[391] The Appeals Chamber, Judge Pocar dissenting, considers that this confusion is a strong indication that Kalimanzira was prejudiced by the lack of clarity concerning the charges against him, and that he did not receive clear and consistent notice.

148. The Appeals Chamber is mindful that the Prosecution's opening statement, delivered four days before Witness BXK testified, clearly distinguished between the events at the Jaguar roadblock and the one located on the Butare-Gisagara road.[392] However, in the circumstances of this case, the Appeals Chamber, Judge Pocar dissenting, is not convinced that the opening statement alone was sufficient to eliminate the confusion described above. Considered individually, the inaccurate description of the location of the roadblock in the annex of the Pre-Trial Brief, the comments by the Trial Chamber and the Prosecution at the status conference about the Prosecution Pre-Trial Brief, the short time-period between the filing of the French translation of the Prosecution Pre-Trial Brief and Witness BXK's testimony, and the confusion exhibited by Kalimanzira's Defence team are not necessarily sufficient to undermine Kalimanzira's conviction. Considered together however, these factors demonstrate that Kalimanzira failed to receive sufficient notice that he was facing charges related to the Butare-Gisagara roadblock, rendering his conviction unsafe.

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[388] *Compare* Trial Judgement, para. 473, *with* Trial Judgement, para. 560.
[389] *Compare* Trial Judgement, para. 461, *with* Trial Judgement, paras. 538, 540, 542. *See also* Defence Exhibit 7E (Statement of 31 October 2007), p. 3.
[390] Trial Judgement, para. 465.
[391] Notice of Appeal, 21 July 2009, para. 71.
[392] T. 5 May 2008 p. 4 ("The Accused Kalimanzira also distributed weapons to people manning the roadblocks to enable them to kill Tutsi. One example is the so-called 'Jaguar' roadblock in Gisagara, Ndora *commune* where he gave a firearm to the leader of those manning the roadblock with the specific instruction that it was going to be used to kill Tutsi. He also spurred on the killing of Tutsi at the roadblock situated on the Butare-Gisagara road in Ndora *commune* in connection with the Kabuye hill massacres. Once again, the Accused Kalimanzira instructed the people manning the roadblock to kill Tutsi and distributed a firearm to facilitate such killings.").

149. In sum, the Appeals Chamber agrees with the Trial Chamber that paragraph 15 of the Indictment is defective in relation to Kalimanzira's role in the events at the Butare-Gisagara roadblock. The Appeals Chamber, Judge Pocar dissenting, finds however that the subsequent notice of this allegation was not timely, clear, or consistent, and resulted in prejudice to Kalimanzira. Accordingly, the Appeals Chamber, Judge Pocar dissenting, finds that the Trial Chamber erred in law by finding that this defect was cured and accordingly in judging Kalimanzira guilty on the basis of his actions at the Butare-Gisagara roadblock.

150. For the foregoing reasons, the Appeals Chamber, Judge Pocar dissenting, grants Kalimanzira's Seventh Ground of Appeal. Accordingly, the Appeals Chamber reverses Kalimanzira's conviction for instigating and aiding and abetting genocide on this basis. It is therefore unnecessary to address Kalimanzira's remaining arguments concerning the assessment of the evidence.

G. Alleged Errors Relating to the Jaguar and Kajyanama Roadblocks (Grounds 8 and 9)

151. The Trial Chamber convicted Kalimanzira for direct and public incitement to commit genocide based, in part, on his conduct at the Jaguar roadblock, which was located near the Gisagara Catholic Church in Butare Prefecture,[393] and the Kajyanama roadblock in Remera Sector, Muganza Commune.[394] In particular, the Trial Chamber found that, in middle to late April 1994, Kalimanzira handed a rifle to Marcel Ntirusekanwa at the Jaguar roadblock "in the presence of several others who were also manning the roadblock [... and] told everyone present that the gun was to be used to kill Tutsis."[395] The Trial Chamber further found that, in late April 1994, Kalimanzira exhorted those manning the Kajyanama roadblock to carry arms "to 'defend' themselves against 'the enemy' who might pass through" and that he "was understood to be calling for the killing of Tutsis."[396] According to the Trial Judgement, Kalimanzira underscored *this* call by slapping and forcibly taking away a person who was not carrying a weapon.[397]

152. In connection with his Eighth and Ninth Grounds of Appeal, Kalimanzira first submits that, in convicting him based on these incidents, the Trial Chamber erred in law and in fact in finding that his conduct at these sites amounted to direct and public incitement to commit genocide.[398] Kalimanzira asserts that the Tribunal's jurisprudence requires a very large number of individuals to be exposed to a call to commit genocide before it can be qualified as direct and public incitement.[399] Specifically, he refers to the Appeal Judgement in the *Nahimana et al.* case as support for his assertion that instructions given to persons manning a roadblock cannot constitute public incitement.[400] He maintains that the number of individuals present at the Jaguar and Kajyanama roadblocks when the respective acts in question allegedly took place was limited, that his words were only directed at those manning the roadblocks, and that his conviction for direct and public incitement thus constituted an error of law.[401] In addition, he raises a number of arguments

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[393] Trial Judgement, paras. 562, 739. The exact location of the Jaguar roadblock was pleaded in the Indictment and follows from the evidence. *See* Trial Judgement, paras. 536, 538, 539, 542.
[394] Trial Judgement, paras. 565, 589, 739.
[395] Trial Judgement, para. 560. *See also* Trial Judgement, paras. 561, 562.
[396] Trial Judgement, para. 589. *See also* Trial Judgement, para. 588.
[397] Trial Judgement, paras. 587, 589.
[398] Kalimanzira Notice of Appeal, paras. 50, 57; Kalimanzira Appeal Brief, paras. 382-386, 428-432. *See also* Kalimanzira Reply Brief, paras. 31-38, 41.
[399] Kalimanzira Appeal Brief, paras. 383, 384. *See also* Kalimanzira Appeal Brief, para. 429; Kalimanzira Reply Brief, paras. 32-38.
[400] Kalimanzira Appeal Brief, para. 384, *referring to Nahimana et al.* Appeal Judgement, para. 862. *See also* Kalimanzira Appeal Brief, para. 432.
[401] Kalimanzira Appeal Brief, paras. 385, 428, 430, 431. *See also* Kalimanzira Reply Brief, paras. 31, 34, 36, 38.

concerning the Trial Chamber's assessment of the evidence underpinning his conviction for these events.[402]

153. The Prosecution responds that the Trial Chamber did not err in convicting Kalimanzira based on his actions at the Jaguar and Kajyanama roadblocks.[403] It asserts that Kalimanzira raises for the first time on appeal the question of what minimum audience size is required to satisfy the public element of the crime of incitement to commit genocide, and contends that the Appeals Chamber should summarily dismiss the argument on this basis.[404] In the alternative, the Prosecution contends that "the Appeals Chamber should not make [*sic*] any general principle of international law which exempts those manning a roadblock from qualifying as the 'public' for the crime of direct and public incitement to commit genocide."[405] It submits that the Tribunal's jurisprudence provides no support for Kalimanzira's assertions, contending that Kalimanzira has misconstrued the statement in the *Nahimana et al.* Appeal Judgement and taken it out of context.[406] The Prosecution adds that the *Nahimana et al.* passage is *obiter dictum* and should not be accorded weight in the present case.[407]

154. The Appeals Chamber is not convinced by the Prosecution's submission that Kalimanzira's argument should be dismissed summarily because it was raised for the first time on appeal. To summarily dismiss the argument on procedural grounds could lead to a serious miscarriage of justice. Noting that the Prosecution responded to Kalimanzira's arguments, the Appeals Chamber finds it to be in the interests of justice to consider Kalimanzira's arguments on the merits.

155. The Appeals Chamber recalls that a person may be found guilty of direct and public incitement to commit genocide, pursuant to Article 2(3)(c) of the Statute, if he or she directly and publicly incited the commission of genocide (*actus reus*) and had the intent to directly and publicly incite others to commit genocide (*mens rea*).[408] Applying these principles to Jean-Bosco Barayagwiza's conviction in the *Nahimana et al.* case for direct and public incitement to commit genocide, the Appeals Chamber determined that supervising a specific group of individuals manning a roadblock does not constitute public incitement to commit genocide, explaining that:

> the supervision of roadblocks cannot form the basis for the Appellant's conviction for direct and public incitement to commit genocide; while such supervision could be regarded as instigation to

[402] Kalimanzira Notice of Appeal, paras. 51-54, 58-60; Kalimanzira Appeal Brief, paras. 387-424, 433-477; Kalimanzira Reply Brief, paras. 39, 40.
[403] Prosecution Response Brief, paras. 142-189, 190-212.
[404] Prosecution Response Brief, paras. 144, 145. *See also* Prosecution Response Brief, paras. 192, 193.
[405] Prosecution Response Brief, para. 150. *See also* Prosecution Response Brief, para. 193.
[406] Prosecution Response Brief, paras. 147-149. *See also* Prosecution Response Brief, para. 193.
[407] Prosecution Response Brief, para. 148.
[408] *See Nahimana et al.* Appeal Judgement, para. 677.

> commit genocide, it cannot constitute public incitement, *since only the individuals manning the roadblocks would have been the recipients of the message and not the general public.*[409]

156. Contrary to the Prosecution's suggestion, the approach adopted by the Appeals Chamber in the *Nahimana et al.* Judgement is in accordance with relevant Tribunal jurisprudence and other sources of interpretation, including World War II judgements and the *travaux préparatoires* of the Genocide Convention. More specifically, the Appeals Chamber observes that, with the exception of the *Kalimanzira* Trial Judgement, all convictions before the Tribunal for direct and public incitement to commit genocide involve speeches made to large, fully public assemblies, messages disseminated by the media, and communications made through a public address system over a broad public area.[410] These convictions involved audiences which were by definition much broader than the groups of individuals manning the Jaguar and Kajyanama roadblocks, who formed Kalimanzira's audience.

157. The Tribunal's jurisprudence is consistent with that of the International Military Tribunal at Nuremberg. The latter considered incitement to, *inter alia*, murder and extermination, involving

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[409] *Nahimana et al.* Appeal Judgement, para. 862 (emphasis added). The Appeals Chamber notes, for clarity, that the *Nahimana et al.* Appeals Judgement was originally written in French. The above-quoted excerpt, in French, reads " *En particulier, les actes de supervision des barrages ne sauraient fonder la condamnation de l'Appelant pour incitation directe et publique à commettre le génocide; si cette supervision pouvait être considerée comme une incitation à commettre le génocide, elle ne pourrait pas constituer une incitation 'publique' puisque seules les personnes tenant les barrages auraient été les destinataires du message et non le public au sens large*". Therefore, in order to reflect more faithfully Article 2(3)(c) of the Statute, a more accurate English translation of the excerpt should have read: "while such supervision could be regarded as *incitement* to commit genocide, it cannot constitute public incitement [...]."

[410] A review of the jurisprudence is illustrative of what acts have constituted public incitement at the Tribunal. In a first group of cases, inciting speeches at public meetings to "crowds" of people – ranging from "over 100" to approximately 5,000 individuals - were found to constitute public incitement. The *Akayesu* Trial Chamber found that a speech in a public place to "a crowd of over 100 people" urging the population to eliminate the "enemy" constituted direct and public incitement. *See Akayesu* Trial Judgement, paras. 672-674. The conviction was upheld on appeal. *See Akayesu* Appeal Judgement, para. 238, p. 143. The *Niyitegeka* Trial Chamber determined, *inter alia*, that by holding a public meeting attended by approximately 5,000 people at which he "urg[ed] attackers to work" – "working" serving as a synonym for killing Tutsis - Eliézer Niyitegeka incurred individual criminal responsibility for "inciting attackers to cause the death and serious bodily and mental harm of Tutsi refugees [...] as provided in Article 2(3)(c)" of the Statute. *See Niyitegeka* Trial Judgement, paras. 257, 437. *See also Niyitegeka* Trial Judgement, paras. 432-436. Niyitegeka's conviction was upheld on appeal. *See Niyitegeka* Appeal Judgement, para. 270. The *Kajelijeli* Trial Chamber found Juvénal Kajelijeli guilty of direct and public incitement because he had "incited the crowd" to exterminate the Tutsis. *See Kajelijeli* Trial Judgement, paras. 856-860. The conviction was upheld on appeal. *See Kajelijeli* Appeal Judgement, paras. 105, 133. A second group of cases reflects that the dissemination of inciting messages via the media also constituted public incitement. The *Ruggiu* Trial Chamber held that "messages [...] broadcast[ed] in a media forum and to members of the general public" constituted public incitement. *See Ruggiu* Trial Judgement, para. 17. No appeal was filed. The *Nahimana et al.* Trial Chamber determined that messages disseminated via radio or the press constituted public incitement. *See Nahimana et al.* Trial Judgement, paras. 1031-1034, 1036-1038. The findings were upheld in relevant part on appeal. *See Nahimana et al.* Appeal Judgement, paras. 758, 775. Finally, the *Bikindi* Trial Chamber held Simon Bikindi responsible for direct and public incitement based on its determination that he had used a public address system to disseminate messages inciting the commission of genocide when travelling on a public road to address the population. *Bikindi* Trial Judgement, paras. 422-424. These findings were upheld on appeal. *See Bikindi* Appeal Judgement, paras. 50, 86.

widely circulated speeches and articles, rather than speeches to relatively small and closed groups.[411]

158. Moreover, the Appeals Chamber recalls that the language of Article 2 of the Tribunal's Statute tracks the language of the Genocide Convention. A review of the *travaux préparatoires* of the Genocide Convention confirms that public incitement to genocide pertains to mass communications. The *travaux préparatoires* indicate that the Sixth Committee chose to specifically revise the definition of genocide in order to remove private incitement, understood as more subtle forms of communication such as conversations, private meetings, or messages,[412] from its ambit.[413] Instead, the crime was limited to "direct and public incitement to commit genocide," understood as incitement "in public speeches or in the press, through the radio, the cinema or other ways of reaching the public."[414]

159. Having established that the relevant holding of the *Nahimana et al.* Appeal Judgement is consistent with the Tribunal's jurisprudence and other relevant precedents, the Appeals Chamber turns to consider whether the precedent set in the *Nahimana et al.* case is applicable to Kalimanzira's convictions. A review of the former reveals that the underlying factual basis of Barayagwiza's initial conviction by Trial Chamber I of the Tribunal involved speaking to militiamen at roadblocks from his vehicle and telling them to kill Tutsis and others without certain party membership cards.[415] In addition, the key witness for this event gave evidence that Barayagwiza supervised three roadblocks in the area and heard that Barayagwiza was responsible for ensuring that Tutsis were being killed at them.[416] The facts underlying Kalimanzira's convictions are similar to those in the *Nahimana et al.* Appeal Judgement. As was the case for

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[411] JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE TRIAL OF GERMAN MAJOR WAR CRIMINALS (1946), *reprinted in* THE TRIAL OF GERMAN MAJOR WAR CRIMINALS BY THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY, pp. 101, 102 (2001) ("JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL") (finding Julius Streicher guilty of crimes against humanity for "incitement to murder and extermination" because "[i]n his speeches and articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism, and incited the German people to active persecution [...]. Twenty-three different articles [...] were produced in evidence, in which extermination 'root and branch' was preached [...]. Such was the poison Streicher injected into the minds of thousands of Germans which caused them to follow the National Socialists policy of Jewish persecution and extermination."); JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL, p. 128 (describing incitement in the context of "originating or formulating propaganda campaigns" with respect to Hans Fritzsche).

[412] 1 THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES, p. 986 (Hirad Abtahi & Philippa Webb, eds. 2008) ("GENOCIDE CONVENTION").

[413] 2 GENOCIDE CONVENTION, pp. 1549, 1552.

[414] 1 GENOCIDE CONVENTION, p. 986. The Appeals Chamber notes that the definition adopted by the Sixth Committee resembled that originally proposed by the Secretariat of the United Nations (which was altered for some time to include private incitement to genocide, until this alteration was struck by the Sixth Committee). The proposal of the Secretariat differentiated acts such as instructions from officials to subordinates or heads of organizations to members from "direct public incitement." These acts were considered as "preparatory acts" and covered by other sections of the convention. *See* 1 GENOCIDE CONVENTION, p. 238.

[415] *Nahimana et al.* Trial Judgement, paras. 718, 719. *See also The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, T. 28 August 2001 pp. 21-26; *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, T. 29 August 2001 pp. 33, 43, 44.

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Barayagwiza, Kalimanzira's actions did not involve any form of mass communication such as a public speech. Instead, the nature of his presence and exchanges with those at the roadblocks are more in line with a "conversation" which is consistent with the definition of private incitement found in the *travaux préparatoires* of the Genocide Convention. Thus it is clear that the *Nahimana et al.* Appeal Judgement is directly applicable to Kalimanzira's convictions with respect to the Jaguar and Kajyanama roadblocks.

160. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in law by not fully considering and applying the Tribunal's jurisprudence with respect to direct and public incitement to genocide. In view of this error, the Appeals Chamber will consider the relevant evidence, to determine whether Kalimanzira can be held responsible for direct and public incitement to commit genocide.[417]

161. With respect to the Jaguar roadblock, the Trial Chamber found that Kalimanzira "handed a rifle to Marcel Ntirusekanwa in the presence of several others who were also manning the roadblock," that he "told everyone present that the gun was to be used to kill Tutsis," and that "the gun and the instructions were disseminated to the group."[418] Based on these findings, it appears that Kalimanzira's instructions were intended only for those manning the roadblock, not the general public.[419] In this respect, the Appeals Chamber notes that none of the Prosecution witnesses was certain of the number of persons who were present when Kalimanzira passed through the Jaguar roadblock. There is no indication in the record that anyone other than those manning the roadblock was present. Thus, the Prosecution did not demonstrate that Kalimanzira possessed the *mens rea* for direct and public incitement to commit genocide at the Jaguar roadblock. The Appeals Chamber therefore finds that Kalimanzira's conviction for direct and public incitement to commit genocide at the Jaguar roadblock should be reversed.

162. With respect to the Kajyanama roadblock, the Trial Chamber found that Kalimanzira "exhort[ed] those manning the [...] roadblock" and that "[t]he incitement was disseminated in a public place [...] to an indeterminate group of people – those present to man [the roadblock] and anyone else watching or listening."[420] These findings are different from those at the Jaguar roadblock in that the Trial Chamber expressly found that members of the general public, other than those manning the roadblock, were present and that Kalimanzira intended to incite them as well.

[416] *Nahimana et al.* Trial Judgement, para. 718.
[417] *See supra* para. 8.
[418] Trial Judgement, paras. 560, 561.
[419] There are indications that manning a roadblock was a duty of male Hutus in the area. *See* T. 26 June 2008 p. 9; T. 19 November 2008 p. 2.
[420] Trial Judgement, para. 589.

163. The Appeals Chamber, however, is not satisfied that the evidence reasonably supports the Trial Chamber's findings concerning Kalimanzira's intent to incite anyone other than those manning the Kajyanama roadblock. First, in interpreting the meaning of Kalimanzira's statements, the Trial Chamber gave particular weight to Witness BBB's testimony, as this witness was manning the roadblock and was thus "among those whom Kalimanzira was allegedly inciting."[421] Witness BBB testified that "Kalimanzira instructed those manning [the roadblock] to prevent any Tutsis [...] from passing through, and that they should be killed."[422] The Appeals Chamber considers that this evidence suggests that Kalimanzira's exhortations were addressed to individuals manning the Kajyanama roadblock.

164. This conclusion is reinforced by the testimony of Witness BXH, a member of the general public, who was present during the incident, and watched it from a short distance.[423] It is clear from the context of Witness BXH's account of this event that he did not believe that he was included in Kalimanzira's chastisement of individuals manning the roadblock, since he was not part of that group.[424] Notably, other than Witness BXH, who was not manning the roadblock, there is no indication as to the number of other members of the general public who were present during the incident.[425] In this context, the Appeals Chamber finds that the Prosecution did not prove that Kalimanzira possessed the *mens rea* for direct and public incitement to commit genocide at the Kajyanama roadblock.

165. Accordingly, the Appeals Chamber grants Kalimanzira's Eighth and Ninth Grounds of Appeal and reverses the convictions for direct and public incitement based on the events at the Jaguar and Kajyanama roadblocks. The Appeals Chamber, therefore, need not discuss Kalimanzira's remaining arguments concerning the Trial Chamber's assessment of the underlying evidence relating to these grounds.

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[421] Trial Judgement, para. 588.
[422] Trial Judgement, para. 588.
[423] T. 22 May 2008 pp. 41, 52.
[424] *See* T. 22 May 2008 p. 45 ("A. [...] He spoke to the persons who were standing at the roadblock, and he said, 'You, who are at this roadblock and are not armed, what will you do if the enemy comes? With what will you defend yourselves?'"). *See also* T. 22 May 2008 p. 42.
[425] Witness BXH's evidence only expressly referred to the presence at the roadblock of persons who were manning it, including the man that Kalimanzira forcibly took away, although this is not properly reflected in the Trial Judgement. Witness BBB, however, testified that the man grabbed by Kalimanzira was a passer-by and referred to the presence of other persons who were looking from a distance. *See* Trial Judgement, para. 571; T. 22 May 2008 p. 42 (Witness BXH) ("A. [...] [H]e was in the company of the persons who were manning the roadblock, and amongst those persons some were armed and others were not. [...] [H]e managed to grab one of those persons who was not armed and [...] forced him to enter the vehicle and left with him."); T. 22 May 2008 pp. 48-51; T. 16 June 2008 p. 33; T. 16 June 2008 p. 35 (Witness BBB) (Q. [...] Apart from the people who were at the roadblock, those you have referred to, did any other persons come up to the roadblock? A. No, no one else came to the roadblock. Other persons were looking from a distance."); T. 16 June 2008 pp. 7, 8, 33-35; Trial Judgement, para. 568.

H. Alleged Errors Relating to the Nyabisagara Football Field (Ground 10)

166. The Trial Chamber convicted Kalimanzira of direct and public incitement to commit genocide based, in part, on a speech he gave at the Nyabisagara football field in Kibayi Commune, Butare Prefecture, in late May or early June 1994.[426] In reaching this conclusion, the Trial Chamber relied exclusively on the uncorroborated testimony of Prosecution Witness BCZ.[427] Several Defence witnesses attested to attending a similar meeting, involving Alphonse Nteziryayo and Tharcisse Muvunyi, but noted that Kalimanzira was not present.[428] The Trial Chamber concluded that Witness BCZ and the Defence witnesses were referring to different meetings.[429]

167. Kalimanzira submits that the Trial Chamber erred in law and in fact by convicting him of direct and public incitement for this event.[430] In this section, the Appeals Chamber considers whether the Trial Chamber erred in its assessment of the evidence.

168. The Trial Chamber based Kalimanzira's conviction for his role in the meeting at the Nyabisagara football field on the testimony of a single eye-witness, Witness BCZ.[431] The Trial Chamber noted that Witness BCZ was an accomplice to Kalimanzira as, following the meeting, he participated in the search for additional Tutsis to kill, and in the destruction of homes.[432] It also addressed a number of inconsistencies between Witness BCZ's testimony and prior statements to Tribunal investigators and Rwandan investigators.[433] The Trial Chamber found, however, that he was a credible and reliable witness.[434]

169. Kalimanzira called five witnesses to refute Witness BCZ's testimony.[435] Each of these witnesses testified that Kalimanzira did not attend a meeting like that described by Witness BCZ.[436] Instead, the witnesses referred to a meeting attended by Alphonse Nteziryayo and Tharcisse Muvunyi around 24 May 1994.[437] Witness BCZ also recalled this meeting, but indicated that the one involving Kalimanzira occurred around a week afterwards.[438] In assessing the Defence witnesses, the Trial Chamber concluded that in some cases their respective accounts "support[ed]

[426] Trial Judgement, paras. 613, 614, 739.
[427] Trial Judgement, paras. 592-595, 608-614.
[428] Trial Judgement, para. 609.
[429] Trial Judgement, para 610.
[430] Kalimanzira Notice of Appeal, paras. 61-66; Kalimanzira Appeal Brief, paras. 478-531.
[431] Trial Judgement, paras. 592-595, 608-614.
[432] Trial Judgement, para. 608.
[433] Trial Judgement, para. 611.
[434] Trial Judgement, para. 612.
[435] Trial Judgement, paras. 596-605.
[436] Trial Judgement, paras. 597, 599, 601, 602, 604, 609, 610.
[437] Trial Judgement, paras. 597, 599, 600, 602, 609.
[438] Trial Judgement, para. 609.

the inference that more than one meeting took place."[439] Consequently, the Trial Chamber was satisfied that the Prosecution and Defence witnesses testified to different meetings and that "the existence of one does not preclude the other."[440]

170. Kalimanzira submits that the Trial Chamber erred in its assessment of Witness BCZ's testimony.[441] In particular, he contends that, given Witness BCZ's status as an accomplice, the Trial Chamber erred in not requiring additional corroboration, especially given the witness's numerous incentives to provide false testimony, the hearsay nature of parts of his statements and testimony, his inaccurate description of Kalimanzira, and the contradictions among his testimony, prior statements, and Defence evidence.[442] Kalimanzira also contends that the Trial Chamber erred in finding that the exhortations he allegedly made at the Nyabisagara football field fit into a broader pattern, as it cited the testimony of witnesses it had deemed non-credible.[443]

171. Kalimanzira further asserts that the Trial Chamber erred in its assessment of the Defence evidence.[444] In particular, he contends that, given the formal nature of the meeting, which involved the local bourgmestre, and its location near the commune office, the Trial Chamber failed to adequately explain why it rejected the evidence of Defence Witnesses KBF, BTH, AKK, and Innocent Mukuralinda, who testified that a meeting featuring Kalimanzira did not take place.[445] In addition, Kalimanzira argues that Defence witnesses' testimony shows that there was only one public meeting in the area around the relevant time, and that this meeting featured Alphonse Nteziryayo and Tharcisse Muvunyi, but not Kalimanzira.[446] He asserts that this Defence evidence is fully consistent with Witness BCZ's initial statements to the Trial Chamber, which referred to only one meeting and did not implicate Kalimanzira, and suggests that Witness BCZ's final testimony, which did implicate Kalimanzira, is unreliable.[447] Kalimanzira also points to several flaws in the Trial Chamber's analysis of Defence evidence, and suggests that these errors underlie the Trial Chamber's conclusion that Defence evidence was consistent with more than one public meeting being held in the area.[448] Finally, Kalimanzira claims that the Trial Chamber improperly discounted

[439] Trial Judgement, para. 610.
[440] Trial Judgement, para. 610.
[441] Kalimanzira Appeal Brief, paras. 485-514.
[442] Kalimanzira Appeal Brief, paras. 485-511. *See also* Kalimanzira Reply Brief, paras. 43-45.
[443] Kalimanzira Appeal Brief, paras. 512-514.
[444] Kalimanzira Appeal Brief, paras. 515-531.
[445] Kalimanzira Appeal Brief, paras. 517, 520.
[446] Kalimanzira Appeal Brief, paras. 517, 518.
[447] Kalimanzira Appeal Brief, para. 518, *referring to* Defence Exhibit 33 (Statement of 19 October 1999), Defence Exhibit 34 (Statement of 2 February 2000).
[448] Kalimanzira Appeal Brief, paras. 520-524.

the testimony of Witness KXL, which conflicted with Witness BCZ's description of the violence following the meeting.[449]

172. The Prosecution responds that Kalimanzira merely repeats submissions made at trial.[450] In any event, the Prosecution asserts that the Trial Chamber did not err in its assessment of Witness BCZ's evidence.[451] It contends that the Trial Chamber correctly considered Witness BCZ's status as an accomplice and applied the necessary caution in assessing his credibility.[452] It further contends that the Trial Chamber properly exercised its discretion in considering and weighing alleged inconsistencies in Witness BCZ's evidence.[453] The Prosecution also maintains that Kalimanzira's challenges regarding Witness BCZ's ability to identify Kalimanzira ignore "the wealth of [...] identification evidence" before the Trial Chamber.[454] Finally, the Prosecution asserts that the Trial Chamber reasonably rejected Kalimanzira's argument that only one meeting occurred at the Nyabisagara football field, and submits that Kalimanzira has not demonstrated "any basis upon which the findings should be revisited."[455]

173. The Appeals Chamber recalls that "accomplice witnesses may have motives or incentives to implicate the accused person before the Tribunal" and that "a Chamber, when weighing the probative value of such evidence, is bound to carefully consider the totality of the circumstances in which it was tendered."[456] The Trial Chamber noted the requirement to approach accomplice witnesses with caution.[457] It also examined the circumstances surrounding Witness BCZ's testimony and his possible motives to falsely incriminate Kalimanzira.[458]

174. With respect to this latter issue, the Trial Chamber noted that, although Witness BCZ had been released at the time of his testimony, his evidence reflected statements that he gave while he was imprisoned.[459] It thus acknowledged the possibility that his evidence may have been influenced by the desire to minimize his own responsibility.[460] However, the Trial Chamber decided, "after careful consideration," that "no such motive can be demonstrated."[461] It reasoned that, "[h]ad he intended to falsely accuse Kalimanzira, his testimony and allegations would likely have been more

[449] Kalimanzira Appeal Brief, paras. 525-531.
[450] Prosecution Response Brief, paras. 224, 235.
[451] Prosecution Response Brief, paras. 225-234.
[452] Prosecution Response Brief, paras. 225-227.
[453] Prosecution Response Brief, paras. 231-233.
[454] Prosecution Response Brief, para. 230.
[455] Prosecution Response Brief, paras. 236, 237.
[456] *See Muvunyi* Appeal Judgement, para. 128.
[457] Trial Judgement, para. 72.
[458] Trial Judgement, paras. 608, 612.
[459] Trial Judgement, para. 608. It follows from Witness BCZ's evidence that he was released at the end of January 2008, which is just approximately five months prior to his testimony in this case. *See* T. 24 June 2008 p. 52.
[460] Trial Judgement, para. 608.
[461] Trial Judgement, para. 608.

accusatory."[462] It also situated Witness BCZ's account of the contents of Kalimanzira's speech within a "pattern of conduct" illustrated by the testimonies of other Prosecution witnesses who had also testified that "Kalimanzira called on people to destroy dead Tutsis' homes and plant trees and grass in their place."[463]

175. The Appeals Chamber observes that the Trial Chamber's reasoning regarding the pattern of Kalimanzira's conduct in purportedly giving similar speeches on other occasions is problematic. The Trial Chamber noted incidents described by Witnesses AZM, AZH, and AZC.[464] In other parts of the Trial Judgement, however, the Trial Chamber either found that Kalimanzira lacked notice of the underlying allegation (Witness AZM)[465] or expressly concluded that the evidence was insufficiently reliable to sustain a conviction (Witnesses AZH and AZC).[466] The Trial Chamber should have more clearly explained why it found the testimony of these witnesses sufficiently reliable to establish a pattern of conduct, but insufficient to accept in their own right. The Appeals Chamber considers, however, that it is unclear how much weight the Trial Chamber accorded to this evidence in assessing Witness BCZ's testimony.[467]

176. The Appeals Chamber further notes that while Witness BCZ could have implicated Kalimanzira in additional criminal activity or for directly participating in killings, his failure to do so does not permit any firm conclusions regarding the reliability of the witness's testimony. Nonetheless, the Appeals Chamber considers that the assessment of witness credibility is primarily a matter for the Trial Chamber. The Trial Chamber fully considered Witness BCZ's possible motives to lie, and in the context of the facts before it, acted within its discretion in determining that he had no such motives.

177. Turning to the assessment of the Defence witnesses, the Appeals Chamber notes that the Trial Chamber did not discount their credibility with regard to the Nyabisagara football field meeting.[468] Instead, the Trial Chamber found that their evidence was consonant with more than one public meeting taking place at the Nyabisagara football field.[469] The Trial Chamber explained that:

[462] Trial Judgement, para. 612.
[463] Trial Judgement, para. 612, *citing* T. 17 June 2008 p. 21 (Witness AZM), T. 25 June 2008 pp. 43, 44 (Witness AZC), T. 23 June 2008 pp. 11, 12 (Witness AZH).
[464] Trial Judgement, para. 612, *citing* T. 17 June 2008 p. 21 (Witness AZM), T. 25 June 2008 pp. 43, 44 (Witness AZC), T. 23 June 2008 pp. 11, 12 (Witness AZH).
[465] Trial Judgement, para. 221.
[466] Trial Judgement, paras. 403-405, 408, 421, 423, 445.
[467] The Appeals Chamber notes the Trial Chamber's formulation that the converging testimony of other witnesses "might suggest a pattern of conduct or mode of operation." *See* Trial Judgement, para. 612.
[468] The Appeals Chamber notes, however, that the Trial Chamber did raise concerns about the credibility of Witness Mukuralinda in connection with another incident. *See* Trial Judgement, para. 289.
[469] Trial Judgement, para. 610 (internal citations omitted).

> the evidence of Defence witnesses supports the inference that more than one meeting took place. [Witness] KBF admitted to the possibility that there may have been other meetings in Kibayi *commune*. The Defence Pre-Trial Brief indicated that [Witness] AKK was expected to testify to two meetings at the Nyabisagara football field; however, when giving her testimony on the stand, she insisted that she was only aware of one meeting. [Witness] Mukuralinda's statement that he was not aware of any other 'security' meeting in Kibayi *commune* was amended under cross-examination to include a second one, but 'restricted' in nature. No questions were put to [Witness] BTH on the possibility of other meetings. Because [Witness] KXL was in hiding for most of April and May 1994, the Chamber considers that his testimony does not cast reasonable doubt on when and how Bimenyimana and Hategekimana's homes were destroyed. [...] For these reasons, the Defence evidence does little to contradict BCZ's evidence.[470]

178. However, in reviewing the Trial Chamber's analysis of the evidence, the Appeals Chamber considers that the Trial Chamber misconstrued the testimonies of Witnesses AKK, Mukuralinda, and KXL, and failed to sufficiently explain why it did not consider it relevant that none of the Defence witnesses was informed of the second meeting involving Kalimanzira.

179. Witness AKK, who lived in close proximity to the football field and could oversee large portions of the field from her house, testified that she attended only one meeting and was firm in asserting that no other meetings could have taken place on the football field afterwards.[471] When confronted with the fact that her will-say statement, annexed to the Kalimanzira Pre-Trial Brief,[472] indicated that she would testify on two meetings at the football field, Witness AKK denied having made such a statement.[473] Nonetheless, the Trial Chamber relied on the will-say statement provided by Kalimanzira to conclude that Witness AKK's testimony did not undermine the evidence provided by Witness BCZ.[474]

180. The Appeals Chamber recalls that Rule 90(A) of the Rules provides that witnesses shall be heard by the trial chamber. Prior out-of-court witness statements are normally relevant only as necessary for the trial chamber to assess credibility.[475] Witness statements used for this purpose normally bear the witness's signature or some other indicator that their content reflects what the witness said.[476] A will-say statement, however, differs from a typical statement given by a witness. In the practice of the Tribunal, will-say statements are primarily communications from one party to another and the trial chamber concerning aspects of a witness's anticipated testimony that were not

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[470] Trial Judgement, para. 610.
[471] T. 26 November 2008 pp. 42, 43; T. 26 November 2008 pp. 52, 53, 56.
[472] The Appeals Chamber notes that the summary of Witness AKK's anticipated testimony is contained on page 18 in the annex to the Kalimanzira Pre-Trial Brief entitled "Summary of Will-Say Statements of Defence Witnesses for Callixte Kalimanzira." This page is omitted from the version of the Kalimanzira Pre-Trial Brief filed in the trial record. However, the relevant portion of the English translation of the will-say statement was quoted by the Prosecution during the cross-examination of Witness AKK. *See* T. 26 November 2008 p. 56. The original French version of the Kalimanzira Pre-Trial Brief contains the full text of the will-say statement. *See The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-I, *Mémoire préalable à la présentation des moyens de preuve à décharge, annexe*, pp. 8, 9..
[473] *See* T. 26 November 2008 pp. 56-58.
[474] *See* Trial Judgement, para. 610.
[475] *Simba* Appeal Judgement, para. 103, *quoting Akayesu* Appeal Judgement, paras. 134, 135.
[476] For example, some statements are transcriptions of interviews or are signed by a domestic judicial authority.

mentioned in previously-disclosed witness statements.[477] Will-say statements are generally communicated by counsel upon learning of new details during the preparation of a witness for examination,[478] and are not necessarily acknowledged by the witness. Therefore, will-say statements have no probative value except to the extent that the witness confirms their content. In the instant case, Witness AKK explicitly repudiated the content of the unsigned will-say statement, the contents of which were allegedly unknown to her.[479] Given the lack of any explanation for why it was nonetheless acceptable to rely on the unsigned and repudiated will-say statement, the Appeals Chamber finds that the Trial Chamber erred in law in relying on the will-say statement to discredit aspects of Witness AKK's testimony.

181. Witness Mukuralinda, who worked as an accountant in Kibayi Commune in 1994, testified that only one meeting took place in the commune, specifically on 24 May 1994.[480] He noted that he "[was] not aware of any other meeting that took place in Kibayi commune" and added that "personally, [he did] not believe that there were [...] any other such meetings held in the Kibayi commune."[481] In considering the witness's testimony, the Trial Chamber emphasized his admission under cross-examination that a second meeting – although "restricted" in nature – took place.[482] However, a review of Witness Mukuralinda's testimony shows that it cannot reasonably support the proposition that another large-scale public meeting occurred in the area, as the Trial Chamber intimated. In particular, the witness stated that:

> there are other meetings which we could [...] call "restricted". And these are meetings where you have only *a handful of people* who are working in a *commune* who meet together to discuss security matters. It is possible that I participated in one such meeting. But this was a meeting that brought together *commune* – or workers and the *bourgmestre*. *Members of the population are not invited to such meetings. This is an official meeting*. So I cannot deny that one such meeting took place. But what was important for me was talking about meetings to which the population was invited. And one such meeting was the meeting of the 24th of May.[483]

182. The Appeals Chamber recalls that Witness BCZ testified that several hundred members of the local population attended the meeting in which Kalimanzira participated.[484] This stands in stark contrast to Witness Mukuralinda's above-quoted description of other official meetings at the commune office involving "a handful of people," who worked with the bourgmestre. Accordingly, the Appeals Chamber considers that no reasonable trial chamber could have concluded that Witness Mukuralinda's admission of the existence of other restricted meetings supported the inference that

[477] *See, e.g., The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Decision on the Admissibility of Evidence of Witness KDD, 1 November 2004 ("*Simba* Admissibility of Evidence Decision"), paras. 9-11.
[478] *Simba* Admissibility of Evidence Decision, para. 9.
[479] *See* T. 26 November 2008 pp. 55-58.
[480] Trial Judgement, para. 602.
[481] T. 3 December 2008 p. 7.
[482] Trial Judgement, para. 610.
[483] T. 3 December 2008 p. 26 (emphasis added).

more than one large public meeting occurred at the Nyabisagara football field during the relevant time-period.

183. Witness KXL gave evidence about the destruction of Vincent Bimenyimana's and Charles Hategekimana's homes in April 1994.[485] Witness BCZ, however, stated that the houses were destroyed after Kalimanzira's speech at the football field in late May or early June 1994.[486] The Trial Chamber did not accept Witness KXL's testimony because the witness claimed to have been in hiding for most of April and May 1994.[487] Given the clear contradiction between the evidence of Witnesses KXL and BCZ concerning the destruction of the homes in question, the Appeals Chamber is concerned by the Trial Chamber's failure to address Witness KXL's explanation that he witnessed the destruction even though he was in hiding because he could see the houses from his place of refuge.[488] This concern is heightened when the Appeals Chamber considers that Witness KXL provided significant detail as to how the houses were destroyed.[489] Under these circumstances, the Trial Chamber erred in not sufficiently explaining why it did not accept Witness KXL's testimony regarding the destruction of the homes.[490]

184. Finally, although a trial chamber need not always articulate its reasoning in detail,[491] the Appeals Chamber, Judge Pocar dissenting, is not satisfied that the Trial Chamber sufficiently addressed Kalimanzira's arguments concerning the mode of convocation for the various alleged meetings at Nyabisagara football field.[492] Witnesses AKK, BTH, KBF, Mukuralinda, and KXL all either attended the meeting in late May 1994 in their official capacity (Witness KBF)[493] or had learned of the meeting through official channels, either directly from Bourgmestre Kajyambere (Witnesses Mukuralinda and BTH),[494] from the conseiller of their respective sectors (Witness AKK),[495] or from a policeman (Witness KXL).[496] Witness BCZ testified that the meeting in which

[484] Trial Judgement, para. 595. *See also* Trial Judgement, para. 592.
[485] Trial Judgement, para. 605.
[486] *See* Trial Judgement, paras. 592, 595.
[487] Trial Judgement, para. 610.
[488] T. 24 November 2008 pp. 42, 43.
[489] T. 24 November 2008 pp. 42, 43.
[490] The Appeals Chamber recalls that a "Trial Chamber is bound to take into account inconsistencies *and any explanations offered in respect of them* when weighing the probative value of the evidence." *Muhimana* Appeal Judgement, para. 135 (emphasis added).
[491] *Simba* Appeal Judgement, para. 152.
[492] *See* Kalimanzira Final Trial Brief, para. 1074.
[493] Trial Judgement, para. 600.
[494] Trial Judgement, paras. 599, 602; T. 25 November 2008 p. 7 (Witness BTH).
[495] Trial Judgement, para. 596.
[496] Trial Judgement, para. 604. The Appeals Chamber notes that this procedure of convocation is consistent with evidence provided by Defence Witness AM122 concerning the mechanism by which public meetings were usually convened. *See* T. 19 November 2008 p. 41 ("Q. [...] When a *bourgmestre* wanted to convene or summon members of the population to a public meeting, how did he proceed? A. When he had to convene a meeting he would send the *conseillers* of the *secteurs* to talk to the *responsables* of the *cellules*, and the *responsables* would, in turn refer, to the – talk to the *nyumbakumi*, the people in charge of ten houses – households. And, hence, the population was informed.

Kalimanzira allegedly participated was also convened by Bourgmestre Kajyambere and that the local population had been invited.[497]

185. The Defence witnesses did not hear about any meeting involving Kalimanzira. In many circumstances such evidence is properly accorded minimal probative value.[498] However, the circumstances in this case are different because many of the Defence witnesses had close ties to the local authorities or lived in close proximity to the site.[499] Therefore, these witnesses would have been well positioned to know if such a meeting occurred. The Trial Chamber did not discount their evidence on any bases other than those noted above. In this context, the Trial Chamber erred in not explaining more fully why it believed the Defence witnesses would not have heard of a second meeting, and thus why their testimony did not cast reasonable doubt on Witness BCZ's evidence.

186. The Appeals Chamber underscores that trial chambers enjoy a broad discretion in assessing evidence, to which deference is owed. However, in these specific circumstances, the Trial Chamber's analysis of Defence evidence rested on a number of legal errors and assumptions which had no reasonable basis in the record. The Appeals Chamber, Judge Pocar dissenting, finds that considered together, these legal and factual errors render Kalimanzira's conviction for the events at Nyabisagara football field unsafe. The Appeals Chamber, Judge Pocar dissenting, finds that no reasonable Trial Chamber could have relied on Witness BCZ's accomplice evidence of Kalimanzira's participation in the meeting at the Nyabisagara football field in light of the competing Defence evidence, absent further corroborative evidence or additional analysis demonstrating that the Defence witnesses were not credible.

187. For the foregoing reasons, the Appeals Chamber, Judge Pocar dissenting, grants Kalimanzira's Tenth Ground of Appeal. The Appeals Chamber accordingly reverses Kalimanzira's conviction for direct and public incitement to commit genocide at the Nyabisagara football field. The Appeals Chamber, therefore, need not discuss Kalimanzira's remaining arguments concerning the Trial Chamber's assessment of notice relating to this ground.

Also – communiqués could also be issued at the level of the *commune* office. Q. Could the *bourgmestre* convene a meeting of the population without the *conseillers* of the *secteur* or the *responsables* of *cellule* being informed? A. That was not possible because in order to convene a meeting the *bourgmestre* had to go through his assistants and aides, those helping him in his duty. Namely, the *conseillers* of *secteur* and *responsable* of *cellule*. That way the entire population will be informed and aware").

[497] Trial Judgement, para. 592.

[498] *See, e.g., Muhimana* Appeal Judgement, paras. 19, 211; *Nchamihigo* Appeal Judgement, para. 373.

[499] *See* T. 26 November 2008 pp. 42, 43 (Witness AKK); T. 26 November 2008 pp. 52, 53 (Witness AKK); Trial Judgement, para. 602 (Witness Mukuralinda); T. 17 November 2008 pp. 12, 13 (Witness KBF); T. 25 November 2008 pp. 3, 7 (Witness BTH).

I. Alleged Errors Relating to the Gisagara Marketplace (May Event) (Ground 11)

188. The Trial Chamber convicted Kalimanzira for direct and public incitement to commit genocide based, in part, on his actions during a meeting at the Gisagara marketplace at the end of May 1994.[500] In particular, the Trial Chamber found that Kalimanzira criticized members of the crowd for being unarmed and rewarded a man who was carrying a weapon.[501] It also found that he told those present that "they had not completely defeated the enemy" and "to kill young Tutsi girls who had been forced into marriages because they could cause problems."[502] Based on these statements, the Trial Chamber concluded that Kalimanzira intended to incite the crowd to carry weapons in order to kill Tutsi civilians.[503] The Trial Chamber based its findings on the uncorroborated evidence of Prosecution Witness BDK.[504]

189. Kalimanzira submits that the Trial Chamber erred in law and in fact in convicting him for direct and public incitement to commit genocide based on this incident.[505] In this section, the Appeals Chamber considers whether the Trial Chamber's findings are supported by credible evidence.

190. Witness BDK was the sole Prosecution witness to give evidence on the meeting at the Gisagara marketplace at the end of May 1994.[506] The Trial Chamber found her evidence concerning this event "reliable and credible."[507] In reaching this finding, it recalled that it had not accepted her evidence about Kalimanzira's participation in an earlier meeting in April 1994 at the home of Fidèle Uwizeye related to the attack at Kabuye hill.[508] However, the Trial Chamber considered that its doubts about the witness's testimony regarding the earlier meeting did not "reflect upon [Witness] BDK's general credibility."[509] The Trial Chamber also considered various alleged inconsistencies in Witness BDK's evidence and concluded that they were explained by the passage of time or were not in fact inconsistencies.[510]

191. Kalimanzira asserts that the Trial Chamber erred in failing to address Witness BDK's ability to identify him.[511] He maintains that Witness AX88 rebutted Witness BDK's testimony regarding the first occasion on which the latter claimed to have seen Kalimanzira prior to his speech at the

[500] Trial Judgement, paras. 728, 729, 739.
[501] Trial Judgement, para. 728.
[502] Trial Judgement, para. 728.
[503] Trial Judgement, para. 729.
[504] Trial Judgement, paras. 719-722, 724-729.
[505] Kalimanzira Notice of Appeal, paras. 67-71; Kalimanzira Appeal Brief, paras. 532-568.
[506] Trial Judgement, paras. 719-722.
[507] Trial Judgement, para. 727.
[508] Trial Judgement, para. 727, *referring to* Trial Judgement, paras. 388-391.
[509] Trial Judgement, para. 727.
[510] Trial Judgement, paras. 724-726.

Gisagara marketplace.[512] He further notes that the Trial Chamber declined to rely on Witness BDK's testimony regarding the second of these prior sightings,[513] and failed to account for her difficulties in identifying Kalimanzira in the courtroom.[514] He concludes that the Trial Chamber should have treated Witness BDK's testimony as if she had never met Kalimanzira prior to the events in question.[515] Kalimanzira also contends that as Witness BDK arrived at the Gisagara marketplace after he allegedly began speaking, she did not hear him being introduced, and thus was not in a position to identify him.[516]

192. Kalimanzira further asserts that as the Trial Chamber found Witness BDK less than fully credible in its analysis of the events leading up to the massacre at Kabuye hill, it should not have accepted her testimony regarding events at Gisagara marketplace without corroboration.[517] Kalimanzira also maintains that the Trial Chamber erred in not considering more fully the contradictions within Witness BDK's testimony, why she attended the meeting and when she left, and her role as a frequent witness in *Gacaca* trials.[518] More broadly, Kalimanzira suggests that the Trial Chamber should have explained more fully why it accepted Witness BDK's entire testimony, given its unlikely nature.[519]

193. The Prosecution responds that the Trial Chamber correctly assessed Witness BDK's identification evidence concerning Kalimanzira and the alleged inconsistencies in her evidence.[520] In particular, the Prosecution submits that Kalimanzira already raised these issues at trial and should not be permitted to merely repeat them on appeal.[521] The Prosecution recalls that a trial chamber is not required to refer to every piece of evidence in its judgement.[522] The Prosecution further contends that the Trial Chamber's acceptance of Witness BDK's evidence was reasonable since it found her credible, she had seen Kalimanzira at least three times at close range, her identification of Kalimanzira at the Gisagara marketplace was not made under difficult conditions, and she provided a physical description of him and identified him in court.[523] The Prosecution argues that the Trial Chamber only declined to rely on Witness BDK in relation to the meeting in April 1994 at Fidèle

[511] Kalimanzira Appeal Brief, paras. 538-549. *See also* Kalimanzira Reply Brief, paras. 47, 48.
[512] Kalimanzira Appeal Brief, paras. 542, 543.
[513] Kalimanzira Appeal Brief, para. 544.
[514] Kalimanzira Appeal Brief, paras. 547, 548; Kalimanzira Reply Brief, paras. 47, 48.
[515] Kalimanzira Appeal Brief, paras. 541, 545.
[516] Kalimanzira Appeal Brief, para. 546.
[517] Kalimanzira Appeal Brief, paras. 550-557.
[518] Kalimanzira Appeal Brief, paras. 559-567.
[519] Kalimanzira Appeal Brief, paras. 559-561.
[520] Prosecution Response Brief, paras. 247-263.
[521] Prosecution Response Brief, paras. 249, 250, 258, 261.
[522] Prosecution Response Brief, para. 251.
[523] Prosecution Response Brief, paras. 252-255.

Uwiyeze's home because it was directly contradicted by Witness AX88.[524] In the Prosecution's view, the same concerns do not exist with respect to the incident at the Gisagara marketplace.[525]

194. The Prosecution further submits that it was within the Trial Chamber's discretion to accept part of Witness BDK's evidence even though it questioned other parts of it.[526] Finally, the Prosecution contends that the Trial Chamber fully considered Kalimanzira's arguments related to various alleged inconsistencies at trial and correctly determined that they did not impact Witness BDK's credibility.[527]

195. The Trial Chamber did not discuss the basis on which it accepted Witness BDK's identification of Kalimanzira during the meeting at the Gisagara marketplace. Thus, it failed to analyze Witness BDK's testimony regarding her prior encounters with Kalimanzira, or the competing evidence from Witness AX88, who testified that the two occasions on which Witness BDK claimed to have seen Kalimanzira prior to the Gisagara marketplace meeting never took place.[528] The Appeals Chamber recalls that, though a trial chamber has the obligation to provide a reasoned opinion, it is not required to articulate its reasoning in detail.[529] Additionally, the fact that certain evidence has not been referred to in the Trial Judgement does not mean that it was not taken into account in the Trial Chamber's assessment.[530] The Appeals Chamber considers that "[t]here is a presumption that a Trial Chamber has 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."[531] However, this presumption may be rebutted "when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning."[532]

196. A review of Witness BDK's evidence reveals that her basis for identifying Kalimanzira at the Gisagara marketplace was of limited probative value and relied on hearsay evidence. According to her testimony, she saw him for the first time at the home of Fidèle Uwizeye in the early 1990s "long before the genocide."[533] At the time, the witness did not know Kalimanzira so her husband identified Kalimanzira to her.[534] The witness provided no significant details about this brief

[524] Prosecution Response Brief, paras. 254, 257.
[525] Prosecution Response Brief, para. 257.
[526] Prosecution Response Brief, para. 260.
[527] Prosecution Response Brief, paras. 262, 263.
[528] T. 19 November 2008 p. 22.
[529] *Simba* Appeal Judgement, para. 152.
[530] *Simba* Appeal Judgement, para. 152.
[531] *Halilović* Appeal Judgement, para. 121. *See also Kvočka et al.* Appeal Judgement, para. 23.
[532] *Kvočka et al.* Appeal Judgement, para. 23.
[533] T. 20 May 2008 p. 47. *See also* T. 21 May 2008 pp. 9, 10.
[534] T. 20 May 2008 p. 46 ("A. When I knew him for the first time, I had met him at [Fidèle Uwizeye's] house, and it was one afternoon. Since I did not know him at the time, I asked who he was, and I was told that it was a certain Callixte Kalimanzira who lived in Kigali and he had come to visit Fidèle. Q. Who told you that he was a certain Callixte

encounter,[535] and she knew nothing else about him other than that her husband said that Kalimanzira worked in Kigali.[536]

197. Witness BDK saw Kalimanzira a second time at Uwizeye's home at the end of April 1994.[537] She recognized Kalimanzira primarily based on her prior encounter with him as well as her husband's confirmation of Kalimanzira's identity.[538] The Trial Chamber observed that Witness BDK's testimony regarding this occasion was directly contradicted by Defence Witness AX88.[539] In assessing the two witnesses' evidence, the Trial Chamber observed, *inter alia*, that "their testimonies diverge so drastically on this point [...] that one of them must be lying, if not both."[540] The Trial Chamber concluded that Witness BDK's uncorroborated evidence concerning her second sighting of Kalimanzira at the end of April 1994 was "insufficiently reliable to prove the allegations [...] beyond reasonable doubt."[541]

198. Other than these two prior incidents, there appears to be no other basis in Witness BDK's testimony to support her contention that the person she saw at the Gisagara marketplace was in fact Kalimanzira.[542] In particular, there is no indication from her testimony about the meeting that Kalimanzira was introduced or referred to himself by name or that she confirmed his identity with any other person.

199. The Appeals Chamber recalls that caution is warranted before basing convictions on hearsay evidence.[543] It is unclear from the Trial Judgement to what extent such caution was applied.

Kalimanzira that lived in Kigali? Who gave you that information? A. It was my husband."). *See also* T. 21 May 2008 p. 10.

[535] T. 21 May 2008 p. 10 ("Q. When he came to Fidèle Uwizeye's house, were you present in Fidèle Uwizeye's house? A. When I got to Fidèle Uwizeye's house, I found Mr. Callixte Kalimanzira there. Q. Was there anybody accompanying him on that day? A. No, there was no one accompanying him. Q. Did you find him sitting in the living room, and did you join the group? How did it go? A. I got into the living room, I greeted him as a visitor. I did not stay in the living room. I spoke to Fidèle Uwizeye's wife. I wanted something from that family. She told me where I could get what I wanted. She showed me the spot and I went and got what I wanted. Q. And was your husband present in the living room on that day? A. Yes, he was there with him.").

[536] T. 20 May 2008 p. 47 ("Q. What else did you know about Kalimanzira other than he worked in Kigali? A. I knew nothing else about Mr. Kalimanzira.").

[537] T. 20 May 2008 pp. 47, 49-53; T. 21 May 2008 pp. 10, 14. *See also* Trial Judgement, para. 332.

[538] T. 20 May 2008 pp. 52, 53; T. 21 May 2008 p. 14.

[539] Trial Judgement, para. 388.

[540] Trial Judgement, para. 389.

[541] Trial Judgement, para. 391.

[542] The Appeals Chamber notes Kalimanzira's submission that Witness BDK could not initially identify Kalimanzira in court when asked to do so by the Prosecutor, but only recognized him shortly after the close of her examination-in-chief when the Presiding Judge stated that she would be cross-examined by Kalimanzira's co-counsel. At that point, the witness correctly identified Kalimanzira as seated next to his co-counsel. *See* Kalimanzira Appeal Brief, para. 547; T. 20 May 2008 pp. 59, 60. The Prosecution responds that Witness BDK gave a reasonable explanation of her initial failure to identify Kalimanzira, claiming that his face had been hidden from her. *See* Prosecution Response Brief, para. 255. The Appeals Chamber recalls that in-court identifications carry very limited probative value. *See Kamuhanda* Appeal Judgement, para. 243.

[543] *See supra* Section III.E.2 (Alleged Errors in the Trial Chamber's Consideration of Witnesses' Credibility and Provision of Identification Evidence).

Moreover, the Appeals Chamber notes the Trial Chamber's uncertainty as to Witness BDK's veracity with respect to one of two occasions where she claimed to have identified Kalimanzira. Under these circumstances, the Appeals Chamber, Judge Pocar dissenting, considers that the Trial Chamber should have provided a clearer explanation of its reasons for accepting portions of Witness BDK's testimony addressing identification. The Appeals Chamber, Judge Pocar dissenting, finds that its failure to do so constituted an error of law.

200. In view of the Trial Chamber's legal error, the Appeals Chamber, Judge Pocar dissenting, will consider the relevant evidence to determine whether Kalimanzira can be held responsible for direct and public incitement based on Witness BDK's testimony.[544] Taking into account all relevant factual findings of the Trial Chamber as well as the trial record, the Appeals Chamber is especially concerned by the finding that Witness BDK may have been lying about one of the occasions when she claims to have seen Kalimanzira prior to the May meeting in the Gisagara marketplace. The latter finding also creates doubt as to the reliability of Witness BDK's testimony with regard to the other occasion where she identified Kalimanzira,[545] which involved very similar circumstances.[546] Given the uncertainty regarding the reliability of Witness BDK's identification evidence, the Appeals Chamber considers that Witness BDK's identification of Kalimanzira has not been established beyond a reasonable doubt.

201. In sum, the Appeals Chamber, Judge Pocar dissenting, considers that given Witness BDK's reliance on hearsay evidence to identify Kalimanzira, the Trial Chamber erred in law by not providing additional explanation before relying on her uncorroborated testimony. Assessing the relevant factual findings on their face, the Appeals Chamber, Judge Pocar dissenting, is not convinced beyond a reasonable doubt that Witness BDK was in a position to identify Kalimanzira, and thus holds that his conviction with respect to the May meeting at the Gisagara marketplace is unsafe.

202. For the foregoing reasons, the Appeals Chamber, Judge Pocar dissenting, grants Kalimanzira's Eleventh Ground of Appeal and reverses his conviction for direct and public incitement to commit genocide based on the meeting at the Gisagara marketplace. As a result, the Appeals Chamber does not address any of Kalimanzira's remaining arguments under this ground of appeal.

[544] *See supra* para. 8.
[545] T. 19 November 2008 p. 22.
[546] *Cf. Muvunyi* Appeal Judgement, paras. 130, 131 (finding that the Trial Chamber erred in not applying a similar degree of caution to one aspect of a witness's evidence where it had previously rejected his testimony based on generally applicable concerns).

IV. APPEAL OF THE PROSECUTION

A. Alleged Errors Relating to the Form of Criminal Responsibility (Ground 1)

203. The Trial Chamber convicted Kalimanzira for instigating and aiding and abetting genocide based on his participation in the killings at the Butare-Gisagara roadblock on or around 22 April 1994 and for aiding and abetting the crime of genocide based on his participation in the massacres of Tutsi refugees on Kabuye hill on 23 April 1994.[547] The Prosecution submits that the Trial Chamber erred by not concluding, based on the evidence it accepted, that with respect to both events, Kalimanzira ordered and committed the crime of genocide.[548] The Prosecution requests that the Appeals Chamber enter a conviction on this basis and increase Kalimanzira's sentence to life imprisonment.[549] Kalimanzira responds that the Prosecution's appeal should be dismissed.[550]

204. In connection with Kalimanzira's Seventh Ground of Appeal, the Appeals Chamber, Judge Pocar dissenting, reversed his conviction based on the events at the Butare-Gisagara roadblock.[551] Consequently, the Appeals Chamber need not address this aspect of the Prosecution's appeal. In this section, the Appeals Chamber considers two principal questions relating to Kalimanzira's conviction based on events at Kabuye hill: (1) whether the Trial Chamber failed to assess Kalimanzira's conduct based on ordering and committing; and (2) whether the Trial Chamber erred by not convicting Kalimanzira on the basis of these forms of responsibility with respect to his actions at Kabuye hill.

1. Alleged Failure to Make Findings on Modes of Liability Other Than Aiding and Abetting

205. The Prosecution submits that the Trial Chamber "ignored" ordering or committing in making its findings on Kalimanzira's responsibility even though these forms of responsibility were clearly pleaded under Count 1 (genocide) in the Indictment.[552]

206. A review of the Trial Judgement reflects that the Trial Chamber was expressly aware that Count 1 (genocide) pleaded all modes of participation under Article 6(1) of the Statute, including ordering and committing.[553] The Trial Chamber also highlighted the specific allegation that Kalimanzira used his position of authority to incite and order persons under his authority to commit

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[547] Trial Judgement, paras. 392, 393, 474, 739.
[548] Prosecution Notice of Appeal, paras. 1-11; Prosecution Appeal Brief, paras. 4, 28-73.
[549] Prosecution Notice of Appeal, paras. 12-14; Prosecution Appeal Brief, paras. 74-76
[550] Kalimanzira's Response Brief, paras. 8, 10, 11, 16.
[551] *See supra* Section III.F (Ground 7: Alleged Errors Relating to the Butare-Gisagara Roadblock).
[552] Prosecution Appeal Brief, paras. 30, 37. *See also* Prosecution Appeal Brief, paras. 38, 58.
[553] Trial Judgement, para. 160.

genocide.[554] In addition, the Trial Chamber explained the legal elements of each form of responsibility in detail.[555]

207. Bearing this in mind, the Appeals Chamber is satisfied that, in determining Kalimanzira's form of responsibility, the Trial Chamber implicitly considered all forms of liability pleaded in the Indictment. The Appeals Chamber can identify no error in the Trial Chamber's decision to only explicitly discuss the form of responsibility it concluded was most appropriate. Accordingly, the Prosecution has not shown that the Trial Chamber erred in this respect.

2. Alleged Errors Relating to Kalimanzira's Conviction for Aiding and Abetting Genocide at Kabuye Hill

208. In relation to Kalimanzira's conviction for aiding and abetting genocide at Kabuye hill,[556] the Trial Chamber found that, on 23 April 1994, he was present at the Gisagara marketplace when Sub-Prefect Dominique Ntawukulilyayo instructed Tutsis there to seek refuge at Kabuye hill.[557] According to the Trial Chamber, this offered tacit approval of and gave credence to the sub-prefect's false assurances of safety.[558] That same day, Kalimanzira was found to have told Tutsis on the Kabuye-Gisagara road to go to Kabuye hill, promising them safety.[559] The Trial Chamber also found that Kalimanzira then travelled to Kabuye hill along with armed soldiers and policemen who, using their firearms, participated in the killing of a large number of Tutsis.[560] The Trial Chamber concluded that "Kalimanzira's role in luring Tutsis to Kabuye hill and his subsequent assistance in providing armed reinforcements substantially contributed to the overall attack."[561]

209. The Prosecution does not dispute the Trial Chamber's assessment of the evidence.[562] Instead, it argues that, on the basis of these findings, the Trial Chamber erred in failing to conclude that Kalimanzira ordered and committed genocide in relation to the attack.[563] The Prosecution argues that "[c]onsidering [Kalimanzira's] direct involvement and active participation in the targeting and killings of members of the Tutsi ethnic group, his specific intent to destroy the Tutsi ethnic group as such, his position of authority, and the overall genocidal context within which he

[554] Trial Judgement, para. 160, *citing* Indictment, paras. 2, 6.
[555] Trial Judgement, para. 161.
[556] Trial Judgement, paras. 392, 393, 739.
[557] Trial Judgement, paras. 367, 392.
[558] Trial Judgement, para. 392.
[559] Trial Judgement, paras. 371, 392. In connection with Kalimanzira's Third and Sixth Grounds of Appeal, the Appeals Chamber overturned this finding. *See supra* Sections III.E.2, III.E.4 (Grounds 3 and 6: Alleged Errors Relating to Kabuye Hill).
[560] Trial Judgement, para. 393.
[561] Trial Judgement, para. 393.
[562] *See* Prosecution Appeal Brief, paras. 31, 48, 68.
[563] Prosecution Appeal Brief, paras. 28-32, 47-52, 68-76.

acted, no reasonable trier of fact could have held otherwise [than] that his acts and conduct more appropriately amounted to participation through *ordering* and *committing* [...]."[564]

210. The Appeals Chamber considers, in turn, whether the Trial Chamber erred in not finding that Kalimanzira either ordered or committed the crime of genocide in relation to the events at Kabuye hill.

(a) Ordering

211. The Prosecution contends that the Trial Chamber erred in failing to find that "the acts and utterances of [Kalimanzira], the resulting killings[,] and the overall context of the events" demonstrated that he ordered genocide at Kabuye hill.[565] In this respect, the Prosecution submits that, based on the Trial Chamber's findings, Kalimanzira had authority over the attackers and was perceived by the attackers as an authority.[566] It also underscores that, based on the evidence presented at trial, Kalimanzira was the highest authority present at the Kabuye hill massacre.[567]

212. In addition, the Prosecution points to an event recounted by Prosecution Witness BWO, namely, the killing of a group of refugees by civilians allegedly acting on Kalimanzira's instructions.[568] The Prosecution states that, according to Witness BWO, Kalimanzira promised a leader of a group of Tutsi refugees protection, but then told a group of assailants that they should kill the refugees.[569] The Prosecution submits that this "order was immediately obeyed."[570] In sum, the Prosecution submits that "[b]y telling the attackers to kill the Tutsi refugees immediately and by bringing as reinforcements persons under his authority, directed to participate in the attacks, [Kalimanzira] therefore gave direct orders and completed the *actus reus* of ordering genocide [...]."[571]

213. The Appeals Chamber recalls that ordering requires that a person in a position of authority instruct another person to commit an offence.[572] It is clear that the Trial Chamber found that Kalimanzira was in a position of authority.[573] The Trial Chamber, however, made no findings that he instructed anyone at Kabuye hill to commit a crime. Instead, it follows from the Trial Judgment that Kalimanzira's role during his time at Kabuye hill involved "providing armed

[564] Prosecution Appeal Brief, para. 29 (emphasis in original) (internal citations omitted).
[565] Prosecution Appeal Brief, para. 47 (internal citations omitted). *See also* Prosecution Appeal Brief, paras. 48-52.
[566] Prosecution Appeal Brief, paras. 48-51.
[567] Prosecution Appeal Brief, para. 50.
[568] Prosecution Appeal Brief, para. 49.
[569] Prosecution Appeal Brief, para. 49.
[570] Prosecution Appeal Brief, para. 49.
[571] Prosecution Appeal Brief, para. 51.
[572] *Semanza* Appeal Judgement, paras. 361, 363.

reinforcements."[574] While it is possible that an order to attack could have been inferred from the surrounding circumstances, the Appeals Chamber is not satisfied that the Prosecution has demonstrated that this is the only reasonable inference from the evidence.

214. The Prosecution's argument relies heavily on Witness BWO's account of Kalimanzira telling a group of assailants at Kabuye hill to kill a group of Tutsi refugees. The Trial Chamber found the witness credible and accepted his evidence about this incident even though it was "substantially uncorroborated."[575] In reviewing Witness BWO's evidence, however, the Appeals Chamber is satisfied that it was reasonable for the Trial Chamber not to convict Kalimanzira for ordering based on Witness BWO's testimony.

215. More specifically, it follows from Witness BWO's evidence that the group of assailants arrived at the hill after Kalimanzira.[576] Although the leader of a group of Tutsi refugees recognized Kalimanzira,[577] it is not clear from the evidence that the civilian assailants did so as well, or that they knew that he was an authority. More significantly, it is not entirely clear from the witness's testimony whether the civilian assailants attacked the group of refugees immediately after Kalimanzira spoke to them,[578] or attacked the refugees only upon the arrival of soldiers some time after his departure.[579] Given these ambiguities, the Trial Chamber acted within its discretion in

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[573] Trial Judgement, paras. 97-99.
[574] Trial Judgement, para. 393.
[575] Trial Judgement, para. 383.
[576] T. 5 May 2008 pp. 30, 31; T. 19 May 2008 p. 8.
[577] Trial Judgement, para. 317.
[578] *See* T. 5 May 2008 p. 30 ("When he was talking to the people who arrived and who were behind him – I can try to repeat what he said. After Boniface spoke to him, Callixte turned to the newcomers and said, 'You should kill them immediately because the others have already finished.' And that was when we fled and we joined the other refugees. But, Kalimanzira had already uttered those words, and some of the refugees were killed on the spot."); T. 19 May 2008 p. 9 ("Q. And this group of persons, who included the two individuals whose names you mentioned, that group was only composed of civilians, or were there also soldiers in the group? A. They were civilians and *Interahamwe*. When they started attacking us, I personally escaped. I left the scene. But let me point out that there were many of them. There were *Interahamwe*, civilians, and later on soldiers also arrived at the scene. And the attack lasted the entire day. So let me point out that there were also soldiers. Q. At the time you fled, Mr. Witness, there was only that group of civilians. Do you agree with me? A. Yes, there was that group of people who had come almost at the same time as Kalimanzira, and it was at about 11. Between 1 p.m. and 2 p.m. soldiers came to the scene and started firing at the refugees and killing them."). However, the Appeals Chamber observes that, if Witness BWO fled when the civilian assailants attacked shortly after Kalimanzira left, it is not clear how he would have been in a position to observe the arrival of the soldiers two hours later.
[579] *See* T. 5 May 2008 pp. 31, 32 ("Q. What happened following Kalimanzira speaking to these civilians from Dahwe? A. Soldiers and *Interahamwe* arrived. [...] Q. After Kalimanzira got into his vehicle and left, what did you and the other refugees do? A. We stayed where we were; there was nothing else we could do. And it was during that time that the *Interahamwe* and the soldiers arrived. [...] Q. How did the soldiers and the *Interahamwe* get to where they were to attack you? A. They arrived and they started shooting immediately. When we heard the gunshots, we were hopeless and we ran helter-skelter. The other attackers started attacking us with machetes and bladed weapons. Q. Do you know how the soldiers and *Interahamwe* reached where you were, by foot or in a vehicle? A. The vehicle dropped the soldiers at Gisagara, and they joined the *Interahamwe* and came to the place where we were on foot. Q. You told us that Kalimanzira spoke to some civilians from Dahwe. Did you see those civilians again after that incident? A. Yes, the civilians would come along with the attackers. They were part of the groups of attackers. I was able to see them."). *See also* T. 19 May 2008 pp. 8-10.

concluding that aiding and abetting rather than ordering was the most appropriate mode by which to characterize Kalimanzira's conduct.

(b) Committing

216. The Prosecution submits that the Trial Chamber erred in failing to qualify Kalimanzira's actions in relation to Kabuye hill as "committing" genocide.[580] In particular, the Prosecution argues that the Trial Chamber erred in law in formulating the legal test for committing by adopting an incomplete definition for this form of responsibility and limiting its consideration to the question of whether Kalimanzira had killed anyone with his own hands.[581] To illustrate the Trial Chamber's alleged error, the Prosecution points to the *Gacumbitsi* and *Seromba* Appeal Judgements, which held that committing genocide can encompass acts beyond physical killing.[582]

217. The Prosecution contends that, had the test for committing been properly applied, a reasonable trier of fact would have concluded that Kalimanzira committed genocide at Kabuye hill.[583] Specifically, the Prosecution underscores Kalimanzira's efforts to gather Tutsi refugees at Kabuye hill, his provision of armed reinforcement for the attacks, and his genocidal intent, which illustrate his integral role in organizing and supervising the subsequent killings.[584] In the Prosecution's view, Kalimanzira's conduct is comparable to that found to constitute committing in the *Gacumbitsi* and *Seromba* cases.[585]

218. In discussing the forms of responsibility under Article 6(1) of the Statute, the Trial Chamber stated that "'[c]ommitting' implies, primarily, physically perpetrating a crime."[586] The Appeals Chamber can identify no error in this definition. The formulation is similar to the one articulated in the *Nahimana et al.* Appeal Judgement.[587] Indeed, the Trial Chamber's use of the term "primarily" to qualify its definition of committing as physical perpetration illustrates that it did not limit the scope of its inquiry.[588] This stands in contrast to the definition used by the trial chamber in the

[580] Prosecution Notice of Appeal, paras. 5, 6; Prosecution Appeal Brief, paras. 53-57, 68-73.
[581] Prosecution Notice of Appeal, paras. 5, 6; Prosecution Appeal Brief, paras. 53-57.
[582] Prosecution Appeal Brief, para. 53, *citing Gacumbitsi* Appeal Judgement, para. 60, *Seromba* Appeal Judgement, para. 161.
[583] Prosecution Appeal Brief, paras. 54, 68-73.
[584] Prosecution Appeal Brief, paras. 69-71, 73.
[585] Prosecution Appeal Brief, para. 72.
[586] Trial Judgement, para. 161.
[587] *Nahimana et al.* Appeal Judgement, para. 478 ("The Appeals Chamber recalls that commission covers, primarily, the physical perpetration of a crime (with criminal intent) or a culpable omission of an act that is mandated by a rule of criminal law, but also participation in a joint criminal enterprise.").
[588] Trial Judgement, para. 161.

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Seromba case, which the Appeals Chamber found too restrictive.[589] The fact that the Trial Chamber did not explicitly recall the additional clarification of this well-settled principle provided by the *Gacumbitsi* and *Seromba* Appeal Judgements does not mean that these clarifications were not considered.

219. It follows from the *Gacumbitsi* and *Seromba* Appeal Judgements that physical perpetration need not only mean physical killing and that other acts can constitute direct participation in the *actus reus* of the crime.[590] The question is whether an accused's conduct "was as much an integral part of the genocide as were the killings which it enabled."[591] Bearing this in mind, the Appeals Chamber is not convinced that the Trial Chamber's conclusion that Kalimanzira's conduct was best characterized as aiding and abetting was unreasonable. The Trial Chamber did not find that he supervised or directed the attack at Kabuye hill. Instead, it concluded that he lured Tutsis to Kabuye hill and brought armed reinforcements.[592]

220. In other cases, trial chambers have qualified bringing assailants to a killing site as aiding and abetting.[593] In the circumstances of this case, the Appeals Chamber is not convinced that Kalimanzira's tacit approval of Sub-Prefect Ntawukulilyayo's call for Tutsis to go to Kabuye hill, and his leading assailants to Kabuye hill,[594] are sufficient to require that the legal qualification of his overall conduct be elevated to "committing". Furthermore, the fact that the Trial Chamber found that Kalimanzira possessed genocidal intent,[595] rather than simply knowledge of the principal perpetrators' *mens rea*,[596] does not in itself compel the conclusion that the Trial Chamber erred in finding that aiding and abetting most accurately described Kalimanzira's conduct. The Appeals Chamber recalls that it is not unusual for a trial chamber to find that an individual convicted only of aiding and abetting possesses genocidal intent.[597]

221. Consequently, the Prosecution has not identified any error in the Trial Chamber's decision not to hold Kalimanzira responsible for committing genocide at Kabuye hill.

[589] *See Seromba* Appeal Judgement, para. 155 ("'committing' means [...] direct physical or personal perpetration"), *quoting Seromba* Trial Judgement, para. 302. *See also Seromba* Appeal Judgement, para. 161 ("[T]he Trial Chamber erred in law by holding that 'committing' requires direct and physical perpetration of the crime by the offender.").
[590] *Gacumbitsi* Appeal Judgement, para. 60; *Seromba* Appeal Judgement, para. 161.
[591] *Gacumbitsi* Appeal Judgement, para. 60. *See also Seromba* Appeal Judgement, para. 161.
[592] Trial Judgement, para. 393.
[593] *See, e.g., Semanza* Trial Judgement, paras. 431-433; *Ntakirutimana* Trial Judgement, paras. 827-831.
[594] *See* Trial Judgement, paras. 392, 393.
[595] Trial Judgement, para. 393.
[596] *See Blagojević and Jokić* Appeal Judgement, para. 127.
[597] *See Ntakirutimana* Trial Judgement, paras. 827-831. *Cf. Semanza* Trial Judgement, paras. 431-433.

3. Conclusion

222. Accordingly, the Appeals Chamber dismisses the Prosecution's First Ground of Appeal.

B. Alleged Errors Relating to the Sentence (Ground 2)

223. The Trial Chamber sentenced Kalimanzira to a single sentence of 30 years of imprisonment.[598] The Prosecution submits that the Trial Chamber erred in imposing this sentence and requests that the Appeals Chamber increase Kalimanzira's sentence to imprisonment for the remainder of his life.[599] Kalimanzira responds that the Trial Chamber "wrongly convicted [him] of all the counts on which he was found guilty," and that he should accordingly be acquitted.[600]

224. In addressing this ground of appeal, the Appeals Chamber bears in mind that trial chambers are vested with broad discretion in determining an appropriate sentence due to their obligation to individualize penalties to fit the circumstances of the accused and the gravity of the crime.[601] As a rule, the Appeals Chamber will revise a sentence only if the appealing party demonstrates that the trial chamber committed a discernible error in exercising its sentencing discretion or that it failed to follow the applicable law.[602]

225. In this section the Appeals Chamber considers three principal questions: (1) whether the Trial Chamber failed to give sufficient weight to the gravity of Kalimanzira's crimes; (2) whether it gave undue weight to irrelevant considerations; and (3) whether it failed to follow the applicable law.

1. Alleged Error in Assessing the Gravity of the Crimes

226. The Prosecution submits that the Trial Chamber erred in its assessment of the gravity of Kalimanzira's crimes by failing to give proper weight to: the form and degree of his participation in their commission, their scale and brutality, the vulnerability of the victims, and the timing of his offences.[603] The Prosecution contends that Kalimanzira's crimes were of the "utmost gravity and amount to conduct so egregious and inhumane as to warrant the highest possible penalty."[604] In this respect, the Prosecution recalls that the specific aspects of Kalimanzira's crimes suggest the brutal treatment of innocent victims, and observes that in each instance he exhibited genocidal intent and played a leadership role.[605] The Prosecution also emphasizes that Kalimanzira perpetrated multiple

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[598] Trial Judgement, para. 756.
[599] Prosecution Notice of Appeal, paras. 15-25; Prosecution Appeal Brief, paras. 4, 77-128.
[600] Kalimanzira Response Brief, para. 14.
[601] *See Karera* Appeal Judgement, para. 385; *Nahimana et al.* Appeal Judgement, para. 1037; *Simba* Appeal Judgement, para. 306; *Ntagerura et al.* Appeal Judgement, para. 429.
[602] *See Bikindi* Appeal Judgement, para. 141; *Nchamihigo* Appeal Judgement, para. 384; *Karera* Appeal Judgement, para. 385; *Nahimana et al.* Appeal Judgement, para. 1037; *Simba* Appeal Judgement, para. 306; *Blagojević and Jokić* Appeal Judgement, paras. 137, 321; *Ntagerura et al.* Appeal Judgement, para. 429; *Semanza* Appeal Judgement, para. 312; *Blaškić* Appeal Judgement, para. 680.
[603] Prosecution Appeal Brief, paras. 85-110.
[604] Prosecution Appeal Brief, para. 92.
[605] Prosecution Appeal Brief, paras. 92-106.

crimes within a narrow time-frame, that his actions were immediately proximate to killings, and that his actions "served to re-ignite killings after they had slowed or ceased."[606]

227. The Trial Chamber briefly recalled the factual and legal basis of each of Kalimanzira's crimes and provided a cross-reference to the relevant section of the Trial Judgement, where the incidents were discussed in greater detail.[607] The Trial Chamber also "[took] due notice of the intrinsic gravity of Kalimanzira's crimes."[608] Furthermore, it considered that genocide "shocks the conscience of humanity" and that direct and public incitement to commit genocide was of a similar gravity.[609] Therefore, the Trial Chamber was manifestly aware of all the factual and legal circumstances surrounding the offences referred to by the Prosecution in its submissions. Accordingly, the Appeals Chamber is not convinced that the Trial Chamber erred in its consideration of the gravity of Kalimanzira's offences.

2. Alleged Error in Giving Undue Weight to Irrelevant Considerations

228. The Prosecution submits that the Trial Chamber erred in its assessment of the sentence by giving weight to two irrelevant considerations.[610] First, the Prosecution refers to the Trial Chamber's statement that the crimes occurred in Kalimanzira's own prefecture and not at the national level.[611] The Prosecution argues that this conclusion has no relevance and does not diminish the gravity of the offences so as to justify a lesser sentence.[612] Second, the Prosecution argues that the Trial Chamber's consideration that Kalimanzira's crimes were essentially unrelated to his official duties and powers at the national level is erroneous and irrelevant.[613] According to the Prosecution, there is no evidence to support such an inference.[614] In addition, the Prosecution contends that the Trial Chamber expressly found that Kalimanzira's authority derived from both his local influence and national authority.[615]

229. The Appeals Chamber agrees that the crimes' commission in Kalimanzira's own prefecture and not at the national level is not a relevant fact for the purpose of assessing their gravity. The genocide that was committed in Rwanda between 6 April 1994 and 17 July 1994, which resulted in the killings of hundreds of thousands of Tutsis, is indivisible.[616] The Appeals Chamber, however, is

[606] Prosecution Appeal Brief, para. 108. *See also* Prosecution Appeal Brief, paras. 107, 109, 110.
[607] Trial Judgement, paras. 745, 746.
[608] Trial Judgement, para. 746.
[609] Trial Judgement, para. 746.
[610] Prosecution Appeal Brief, paras. 111-115.
[611] Prosecution Appeal Brief, para. 112, *citing* Trial Judgement, para. 747.
[612] Prosecution Appeal Brief, para. 112.
[613] Prosecution Appeal Brief, paras. 114, 115, *citing* Trial Judgement, para. 747.
[614] Prosecution Appeal Brief, para. 114.
[615] Prosecution Appeal Brief, para. 115, *citing* Trial Judgement, paras. 95-99.
[616] *See Ndindabahizi* Appeal Judgement, para. 138.

not convinced that this error invalidated the sentence since it is not clear how much weight the Trial Chamber attributed to this consideration. As explained above, the Trial Chamber correctly noted the serious gravity of Kalimanzira's crimes.

230. As for the Prosecution's contention that the Trial Chamber erred in finding that Kalimanzira's crimes were "essentially unrelated to [Kalimanzira's] official duties and powers at the national level,"[617] the Appeals Chamber agrees that this appears inconsistent with many of the findings in the Trial Judgement. Indeed, the Trial Chamber found that Kalimanzira attended many meetings, such as the inauguration of Élie Ndayambaje, in his capacity as an official of the Ministry of Interior.[618] Kalimanzira's position was also a key consideration in assessing the impact of his presence on the commission of crimes.[619]

231. Nonetheless, after noting that the crimes were "essentially unrelated" to Kalimanzira's duties, the Trial Chamber expressly considered that his position as *directeur de cabinet* of the Ministry of Interior "lent him the credibility and influence required for some of his criminal acts."[620] It also took the abuse of this influence into account as an aggravating circumstance.[621] Consequently, it is clear that the Trial Chamber took his position into account in sentencing. Therefore, the Appeals Chamber cannot identify any error on the part of the Trial Chamber in this respect that would invalidate the sentence.

3. Alleged Error in "Reserving" Life Imprisonment for a Certain Class of Offenders

232. The Prosecution submits that the Trial Chamber erred in law by reserving life imprisonment to a certain class of offenders.[622] To illustrate this claim, the Prosecution quotes the following excerpt from the Trial Judgement:

> At this Tribunal, a sentence of life imprisonment is generally reserved [for] those who planned or ordered atrocities and those who participate in the crimes with particular zeal or sadism. Offenders receiving the most severe sentences tend to be senior authorities.[623]

233. For the Prosecution, this analysis demonstrates that the Trial Chamber incorrectly reserved the imposition of a sentence of life imprisonment for only a certain category of offenders or mode of participation, thereby failing to follow the Tribunal's jurisprudence and wrongly limiting its own

[617] Trial Judgement, para. 747.
[618] *See, e.g.*, Trial Judgement, para. 291.
[619] *See, e.g.*, Trial Judgement, paras. 362, 392.
[620] Trial Judgement, para. 747.
[621] Trial Judgement, para. 750.
[622] Prosecution Appeal Brief, paras. 116-125.
[623] Trial Judgement, para. 744 (internal citations omitted).

discretion.[624] The Prosecution submits that a correct reading of the *Musema* Appeal Judgement, to which the Trial Chamber refers,[625] indicates that a sentence of life imprisonment is not necessarily limited to any particular group of offenders or mode of participation.[626]

234. Moreover, the Prosecution argues that, by correctly focusing on the circumstances surrounding the case and not on a categorization of offenders, the Appeals Chamber in the *Gacumbitsi* case held that where a person convicted of genocide is a primary actor or leader, life imprisonment is the appropriate sentence in the absence of significant mitigating circumstances.[627] Finally, the Prosecution emphasizes that Kalimanzira, as one of the most influential persons in Butare Prefecture, played a critical role in the crimes committed by influencing others to commit crimes, distributing arms, transporting attackers to massacres sites, and inciting Hutus to commit the most heinous crimes, and further contends that Kalimanzira's involvement as a leader and principal player was continuous between April and June 1994.[628]

235. The Trial Chamber correctly noted that, pursuant to Article 23 of the Statute and Rule 101 of the Rules, in determining the sentence, consideration must be given, among other factors, to the gravity of the offences or totality of the conduct.[629] As a result, the Appeals Chamber is not persuaded that the Prosecution's selective quotation of the Trial Judgement demonstrates that the Trial Chamber inappropriately imposed a legal threshold on the imposition of a sentence of life imprisonment.

236. The portion of the Trial Judgement quoted by the Prosecution is no more than a reformulation of the well-established principle of gradation in sentencing, which holds that leaders and planners should bear heavier criminal responsibility than those further down the scale. This general principle is, of course, subject to the proviso that the gravity of the offence is the primary consideration for a trial chamber in imposing a sentence. The Trial Chamber, referring to the *Musema* Appeal Judgement, expressly acknowledged both of these propositions.[630]

237. In addition, as the Prosecution concedes, the Trial Chamber correctly noted that life sentences have also been imposed on lower level officials and individuals who did not hold government positions.[631] Further, nothing in the language used by the Trial Chamber prevented in a *per se* fashion the imposition of a sentence of life imprisonment; instead, the Trial Chamber's

[624] Prosecution Appeal Brief, paras. 121, 125.
[625] Trial Judgement, para. 744, n. 776.
[626] Prosecution Appeal Brief, paras. 119-121.
[627] Prosecution Appeal Brief, para. 122, *citing Gacumbitsi* Appeal Judgement, paras. 204-206.
[628] Prosecution Appeal Brief, para. 124.
[629] Trial Judgement, para. 741.
[630] Trial Judgement, para. 744, n. 776.
[631] Trial Judgement, para. 744, n. 777. *See* Prosecution Appeal Brief, para. 118.

approach focused on a case-specific examination of the facts and circumstances surrounding Kalimanzira's convictions.

238. Finally, the Appeals Chamber is not persuaded by the Prosecution's reading of the *Gacumbitsi* Appeal Judgement and its relevance to this case. Just as there is no category of cases within the jurisdiction of the Tribunal where the imposition of a sentence of life imprisonment is *per se* barred, there is also no category of cases where it is *per se* mandated. Each case remains to be examined on its own individual facts.[632]

239. With respect to the Prosecution's submission emphasizing the specific role played by Kalimanzira in relation to the crimes committed, the Trial Chamber clearly considered his prominence and influence in Butare society. It addressed this prominence in the body of the Trial Judgement as well as in the sentencing section,[633] where it found that the influence he derived from his stature made it likely that others would follow his example and that this was an aggravating factor.[634]

240. For the foregoing reasons, the Appeals Chamber finds that the Prosecution has not identified any error of law on the part of the Trial Chamber in this respect.

4. Conclusion

241. Accordingly, the Appeals Chamber dismisses the Prosecution's Second Ground of Appeal.

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[632] *Gacumbitsi* Trial Judgement, paras. 224, 325. The Trial Chamber found that Gacumbitsi had exhibited particular sadism and that there were no significant mitigating circumstances. He was found to be a "primary player" and "a leader in the commune who used his power to commit the brutal massacre and rape of thousands." *See Gacumbitsi* Appeal Judgement, para. 204. The Appeals Chamber noted that, although not every individual convicted of genocide or extermination has been sentenced to life imprisonment, Gacumbitsi's case was not comparable to the cases where a fixed term of imprisonment has been imposed. *See Gacumbitsi* Appeal Judgement, paras. 204, 205, n. 446.

[633] Trial Judgement, paras. 99, 750.

[634] Trial Judgement, paras. 747, 750.

V. IMPACT OF THE APPEALS CHAMBER'S FINDINGS ON KALIMANZIRA'S SENTENCE

242. The Appeals Chamber recalls that it has reversed, Judge Pocar dissenting, Kalimanzira's conviction for aiding and abetting genocide in relation to his presence at the inauguration of Élie Ndayambaje and for instigating and aiding and abetting genocide in relation to killings at the Butare-Gisagara roadblock. In addition, the Appeals Chamber, Judge Pocar dissenting in part, has reversed Kalimanzira's conviction for direct and public incitement. The Appeals Chamber considers that the reversal of almost all Kalimanzira's convictions represents a significant reduction in his culpability and calls for a revision of his sentence. The Appeals Chamber notes, however, that it has affirmed Kalimanzira's conviction for aiding and abetting the genocide of Tutsis at Kabuye hill. Thus, he remains convicted of an extremely serious crime. In the circumstances of this case, the Appeals Chamber, Judge Pocar dissenting, reduces Kalimanira's sentence of 30 years of imprisonment to 25 years of imprisonment.

VI. DISPOSITION

243. 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 14 June 2010;

SITTING in open session;

GRANTS, Judge Pocar dissenting, Kalimanzira's Fifth Ground of Appeal and **REVERSES** his conviction for aiding and abetting genocide in relation to his presence at the inauguration of Élie Ndayambaje;

GRANTS, Judge Pocar dissenting, Kalimanzira's Seventh Ground of Appeal and **REVERSES** his conviction for instigating and aiding and abetting genocide in relation to killings at the Butare-Gisagara roadblock;

GRANTS Kalimanzira's Eighth and Ninth Grounds of Appeal and **REVERSES** his conviction for direct and public incitement to commit genocide in relation to the events at the Jaguar and Kajyanama roadblocks;

GRANTS, Judge Pocar dissenting, Kalimanzira's Tenth and Eleventh Grounds of Appeal and **REVERSES** his conviction for direct and public incitement to commit genocide in relation to the events at the Nyabisagara football field and the Gisagara marketplace;

DISMISSES Kalimanzira's Appeal in all other respects;

DISMISSES the Prosecution's Appeal in all respects;

AFFIRMS Kalimanzira's conviction for aiding and abetting genocide in relation to the massacre at Kabuye hill;

REDUCES, Judge Pocar dissenting, the sentence of 30 years of imprisonment imposed on Kalimanzira by the Trial Chamber to 25 years of imprisonment to run as of this day, subject to credit being given under Rules 101(C) and 107 of the Rules for the period he has already spent in detention since his arrest on 8 November 2005;

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

ORDERS that, in accordance with Rule 103(C) and Rule 107 of the Rules, Kalimanzira is to remain in the custody of the Tribunal pending the finalization of arrangements for his transfer to the State where his sentence will be served.

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

Theodor Meron
Presiding Judge

Mehmet Güney
Judge

Fausto Pocar
Judge

Andrésia Vaz
Judge

Carmel Agius
Judge

Judge Pocar appends partially dissenting and separate opinions.

Done this 20th day of October 2010 at Arusha, Tanzania.

[Seal of the Tribunal]

VII. PARTIALLY DISSENTING AND SEPARATE OPINIONS OF JUDGE POCAR

A. Partially Dissenting Opinion

1. In this Judgement, the Appeals Chamber allows Kalimanzira's appeal, in part, with regard to the Trial Chamber's findings in relation to the events at the Kabuye-Gisagara road (Kalimanzira's third and sixth grounds of appeal in part).[1] The Appeals Chamber also allows Kalimanzira's fifth, seventh, tenth and eleventh grounds of appeal, reversing the Appellant's conviction for: (i) genocide for aiding and abetting the killings of Tutsis based on his presence at the inauguration of Élie Ndayambaje as bourgmestre of Muganza Commune on or about 22 June 1994;[2] (ii) genocide for instigating and aiding and abetting the killings of Tutsis at a roadblock on the Butare-Gisagara road on or around 22 April 1994;[3] (iii) direct and public incitement to commit genocide based on his speech at the Nyabisagara football field in Kibayi Commune, Butare Prefecture, in late May or early June 1994;[4] and (iv) direct and public incitement to commit genocide based on his actions during a meeting at the Gisagara marketplace at the end of May 1994.[5] To my regret, for the detailed reasons expressed below, I respectfully disagree with both the reasoning and the conclusions of the Majority and the consequent reversal of Kalimanzira's convictions for these events.

2. As a preliminary matter, the applicable standard of appellate review warrants careful consideration. Its application by the Majority in this case is of considerable concern. In particular, I note that the Majority has systematically reviewed evidence, effectively conducting a trial *de novo*, rather than according deference to the Trial Chamber's assessment of witness' evidence. In this respect, I believe the Appeals Chamber exceeds its jurisdiction and undermines the strict standard of appellate review.

3. Pursuant to Article 24 of the Statute, the Appeals Chamber shall only review errors of law which invalidate the decision of the Trial Chamber and errors of fact which have occasioned a miscarriage of justice.[6] However, in allowing most of the above-mentioned grounds of appeal and overturning Kalimanzira's convictions for the relevant crimes, the Majority proceeds to reconsider

[1] Appeal Judgement, paras. 101, 114, 126. *See also* Appeal Judgement, paras. 94-96, 99-101, 110-114.
[2] Appeal Judgement, paras. 79, 80, 243. *See also* Appeal Judgement, paras. 72-80.
[3] Appeal Judgement, paras. 150, 243. *See also* Appeal Judgement, paras. 127-150.
[4] Appeal Judgement, paras. 187, 243. *See also* Appeal Judgement, paras. 166-187.
[5] Appeal Judgement, paras. 202, 243. *See also* Appeal Judgement, paras. 188-202.
[6] *Nchamihigo* Appeal Judgement, para. 7; *Bikindi* Appeal Judgement, para. 9; *Zigiranyirazo* Appeal Judgement, para. 8. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 9.

the evidence itself absent a demonstrated error of law, fact, or abuse of discretion. Such an approach contradicts consistent case law, which states that appeals from judgement are not trials *de novo*.[7]

4. Without having heard a single witness, the Majority re-evaluates the evidence purely "on paper", based entirely on the transcript of the witnesses' testimony. In my view, this is an imprudent and even dangerous way of proceeding, which effectively results in the Appeals Chamber substituting its own judgement for that of the Trial Chamber. In assessing the appropriate weight and credibility to be accorded to the testimony of a witness, a Trial Chamber will consider "relevant factors on a case-by-case basis, including the witness's demeanour in court; his role in the events in question; the plausibility and clarity of his testimony; whether there are contradictions or inconsistencies in his successive statements or between his testimony and other evidence; any prior examples of false testimony; any motivation to lie; and the witness's responses during cross-examination."[8] Crucially, "the trial Judges are in the best position to assess the credibility of a witness and the reliability of the evidence adduced"[9] and, consequently, "a Trial Chamber has full discretion to assess the appropriate weight and credibility to be accorded to the testimony of a witness."[10]

5. The approach adopted by the Majority is, in my view, illustrative of a problematic trend in the Appeals Chamber, which calls into question the distinction between trial and appellate functions. When the Appeals Chamber acts as a second, more remote, Trial Chamber, as I respectfully submit it has in this case, the relationship between the two functions is gravely compromised, leaving little or no discretion to the Trial Chamber's assessment of the evidence.

6. In the interest of completeness, I explain below the specific reasons for my dissent under the relevant grounds of appeal.

1. Alleged Errors Relating to the Inauguration of Élie Ndayambajye

7. Kalimanzira's conviction for aiding and abetting genocide for the killings of Tutsis based on his presence at the inauguration of Élie Ndayambaje as bourgmestre of Muganza Commune on or about 22 June 1994 was based by the Trial Chamber on the evidence of Witnesses BBB and BCA. According to the Majority, these witnesses "refer to no particular incident, provide no approximate time-frame for the killings, and do not give any identifying information concerning the assailants or

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[7] *See, e.g., Mrkšić and Šljivančanin* Appeal Judgement, para. 352; *Hadžihasanović and Kubura* Appeal Judgement, para. 302; *Limaj et al.* Appeal Judgement, para. 127.

[8] *Nchamihigo* Appeal Judgement, para. 47. *See also Nahimana et al.* Appeal Judgement, para. 194.

[9] *Nahimana et al.* Appeal Judgement, para. 949; *Rutaganda* Appeal Judgement, para. 188; *Akayesu* Appeal Judgement, para. 132; *Furundžija* Appeal Judgement, para. 37; *Aleksovski* Appeal Judgement, para. 63; *Tadić* Appeal Judgement, para. 64.

victims."[11] The Majority then concludes that "[n]o reasonable trier of fact could have concluded that Tutsi were killed as a result of the ceremony".[12]

8. I respectfully disagree with the Majority in affirming that the witnesses provided no approximate time-frame for the killings. Witness BBB explained that the killings happened "after the speech"[13] given at the inauguration of Élie Ndayambaje as a new bourgmestre. Similarly, I also disagree that the witnesses provided no identifying information concerning the assailants or the victims. Witness BBB identified the assailants as the people present at the meeting – between 200 and 300 Hutus – and the victims as being "Tutsi grandchildren" and "Tutsi women".[14] Witness BCA identified the victims who were killed as "Tutsis and Hutus who opposed the government".[15]

9. In addition, I recall our well-established jurisprudence that "[w]here the Prosecution alleges that an accused personally committed the criminal acts in question, it must, so far as possible, plead the identity of the victim, the place and approximate date of the alleged criminal acts, and the means by which they were committed 'with the greatest precision.'"[16] However, "[w]here it is alleged that the accused [...] aided and abetted the alleged crimes, the Prosecution is [only] required to identify the 'particular acts' or 'the particular course of conduct' on the part of the accused which forms the basis for the charges in question."[17] Kalimanzira was charged and convicted for aiding and abetting genocide in offering moral support to Élie Ndayambaje's call to kill Tutsis during the ceremony. Therefore, contrary to the Majority's statement in paragraph 77 of the Appeal Judgement, it was not necessary to give identifying information with respect to the victims.

10. In the present case, after "[h]aving carefully considered [the] evidence" of Witnesses BBB and BCA, the Trial Chamber found them reliable.[18] In addition, the Trial Chamber also believed Witnesses BBB and BCA's evidence that Tutsis were killed following the inauguration ceremony

[10] *Nchamihigo* Appeal Judgement, para. 47; *Nahimana et al.* Appeal Judgement, para. 194.
[11] Appeal Judgement, para. 77.
[12] Appeal Judgement, para. 79.
[13] T. 16 June 2008 p. 20. *Cf.* Trial Judgement, para. 283.
[14] T. 16 June 2008 pp. 19, 20. *Cf.* Trial Judgement, paras. 282, 283.
[15] T. 18 June 2008 pp. 50, 51. *Cf.* Trial Judgement, para. 281.
[16] *Naletilić and Martinović* Appeal Judgement, para. 24, *citing Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Defence Motion on the Form of the Indictment, 14 November 1995, paras. 11-13. *See also Blaškić* Appeal Judgement, para. 213; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000 ("*Krnojelac* 11 February 2000 Decision"), para. 18; *Kupreškić et al.* Appeal Judgement, para. 89. The Appeals Chamber in *Ntakirutimana* pointed out that "the inability to identify victims is reconcilable with the right of the accused to know the material facts of the charges against him because, in such circumstances, the accused's ability to prepare an effective defence to the charges does not depend on knowing the identity of every single alleged victim." *See Ntakirutimana* Appeal Judgement, paras. 73, 74.
[17] *Blaškić* Appeal Judgement, para. 213. *See also Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 13; *Krnojelac* 11 February 2000 Decision, para. 18; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001, para. 20.
[18] Trial Judgement, para. 291.

of Élie Ndayambaje as a new bourgmestre.[19] Accordingly, the Trial Chamber found Kalimanzira guilty of aiding and abetting genocide by his presence at the inauguration of Élie Ndayambaje on or around 22 June 1994.[20] I find no error in this approach.

11. In its assessment of the evidence, the Majority equates the present case with the *Muvunyi* case. It stresses that "[i]n the *Muvunyi* case, the Appeals Chamber reversed a conviction for genocide because the evidence of the killings which underpinned the finding of guilt were based on second- or third-hand testimony that 'contain[ed] no detail on any specific incident or the frequency of the attacks.'"[21] I respectfully cannot discern any similarity with the *Muvunyi* case, in which the testimony from one of the two witnesses confirmed that his knowledge was second-hand and the Appeals Chamber specifically found that neither witness personally observed the events.[22] By contrast, in the present case, the evidence of witnesses BBB and BCA was not hearsay. As recalled, Witnesses BBB and BCA – who both attended the inauguration of Élie Ndayambaje as a new bourgmestre – testified that killings followed the inauguration. Thus, paragraph 78 of the Appeal Judgement places undue emphasis on the role of hearsay in the present case. Furthermore, the Majority fails to identify any material distinction between the quality of the evidence in the *Muvunyi* case and that provided by Witnesses BBB and BCA with respect to the occurrence of the killings. In my view, the *Muvunyi* case simply cannot be equated to the present case.

12. Thus, I consider that Kalimanzira has not demonstrated that a reasonable Trial Chamber could not have concluded beyond reasonable doubt that killings followed the inauguration of Élie Ndayambaje as a new bourgmestre. Having found no error in the Trial Chamber's approach and in its assessment of the evidence of Witnesses BBB and BCA, I am convinced that killings of Tutsis occurred following Élie Ndayambaje's inauguration ceremony as a new bourgmestre. Given our deferential standard of review on appeal, I find the Majority unreasonable in concluding that "[n]o reasonable trier of fact could have concluded that Tutsis were killed as a result of the ceremony".[23]

2. Alleged Errors Relating to the Events at the Gisagara-Kabuye Road

13. In the present case, the Majority finds that the extent to which Kalimanzira was identified by Witness BWK is "unclear" and, therefore, that "the Trial Chamber should have explicitly explained why it accepted Witness BWK's identification evidence".[24] As a result, the Majority concludes that

[19] Trial Judgement, para. 291.
[20] Trial Judgement, para. 293.
[21] Appeal Judgement, para. 78, *citing Muvunyi* Appeal Judgement, para. 69.
[22] Moreover, I believe it is not clear that the reference in the first sentence of paragraph 78 of the Appeal Judgement to the presence of third-hand hearsay evidence in the *Muvunyi* case is substantiated.
[23] Appeal Judgement, para. 79.
[24] Appeal Judgement, para. 99.

the Trial Chamber committed an error of law and proceeds to re-consider the evidence itself.[25] Further to expressing its concerns on the uncertainty as to whether and to what extent Kalimanzira was identified by name prior to the meeting on the Gisagara-Kabuye road, the Majority considers that "reliance on Witness BWK's uncorroborated identification evidence is unsafe" and that "there is no indication as to the credibility of either individual who identified Kalimanzira to Witness BWK on the record."[26] The Majority, therefore, grants Kalimanzira's appeal, in part, insofar as it relates to the events at the Kabuye-Gisagara Road.[27]

14. I respectfully disagree with both the reasoning and the conclusion of the Majority with respect to the events at the Kabuye-Gisagara Road.

15. I recall that the Trial Chamber has the discretion to assess the appropriate weight and credibility to be accorded to the testimony of a witness.[28] Furthermore, a Trial Chamber also has the discretion to rely on uncorroborated, but otherwise credible witness testimony, provided it assesses such testimony with caution. In the Trial Judgement, the Trial Chamber correctly stated that:

> The Appeals Chamber has consistently held that a Trial Chamber is in the best position to evaluate the probative value of evidence and that it may, depending on its assessment, rely on a single witness's testimony for proof of a material fact. Accordingly, the Chamber does not necessarily require evidence to be corroborated in order to make a finding of fact on it. Though a Trial Chamber may prefer that a witness' testimony be corroborated, it is not a requirement or an obligation in the practice of this Tribunal.[29]

It further stressed that:

> While direct evidence is preferred, hearsay evidence is not *per se* inadmissible before the Trial Chamber. The Trial Chamber has the discretion to treat such hearsay evidence with caution, depending on the circumstances of the case. In certain circumstances, hearsay evidence may require other credible or reliable evidence adduced by the Prosecution in order to support a finding of fact beyond reasonable doubt.[30]

It is in light of these standards that the Trial Chamber's assessment of the evidence has to be considered.

16. In the present case, the Trial Chamber examined Witness BWK very cautiously. I recall that the Trial Chamber gave careful consideration to Kalimanzira's argument that Witness BWK's

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[25] Appeal Judgement, paras. 99, 100.
[26] Appeal Judgement, para. 100.
[27] Appeal Judgement, paras. 101, 113, 114, 126.
[28] *Nahimana et al.* Appeal Judgement, para. 194; *Ntagerura et al.* Appeal Judgement, para. 388.
[29] Trial Judgement, para. 71, *referring to Karera* Appeal Judgement, para. 45; *Niyitegeka* Appeal Judgement, para. 92; *Rutaganda* Appeal Judgment, para. 29; *Musema* Appeal Judgment, paras. 36-38; *Ntakirutimana* Appeal Judgement, para. 132; *Kayishema and Ruzindana* Appeal Judgement, paras. 154, 187, 320, 322; *Delalić et al.* Appeal Judgment, para. 506; *Aleksovski* Appeal Judgment, paras. 62-63; *Tadić* Appeal Judgment, para. 65; *Kupreškić et al.* Appeal Judgement, para. 33.
[30] Trial Judgement, para. 75, *referring to Rukundo* Trial Judgement, para. 39; *Muvunyi* Trial Judgement, para. 13; *Rutaganda* Appeal Judgement, para. 34; Rule 89 of the Rules.

testimony contained three inconsistencies with her statement given to ICTR investigators eight months before.[31] I note that the Trial Chamber considered this evidence, provided thoughtful reasoning, and found that it does not cast reasonable doubts on Witness BWK's testimony.[32] It is correct that the Trial Chamber did not discuss identification evidence with regard to Witness BWK's testimony. However, it acted within its discretion in not specifically discussing the identification evidence of certain witnesses. I find no error in this approach. Thus, I consider that Kalimanzira has not demonstrated that the Trial Chamber committed an error of law. In these circumstances, deference must be accorded to the Trial Chamber's assessment of Witness BWK's testimony. Moreover, I consider that Kalimanzira is attempting to relitigate a matter that was raised at trial.

17. In paragraph 100 of the Appeal Judgement, the Majority "proceed to consider the relevant evidence" itself and, in a few lines, arrives at the conclusion that "reliance on Witness BWK's uncorroborated identification evidence is unsafe." A Trial Chamber, as the primary trier of fact, is better placed than the Appeals Chamber to evaluate the probative value of witness' testimony. In my view, the Appeals Chamber should not overturn or reassess a Trial Chamber's findings regarding witness' testimony unless the Trial Chamber fails to treat such evidence with caution. In the present case, the Trial Chamber duly exercised caution in relying on Witness BWK's evidence and, therefore, correctly applied the legal standard. By contrast, the Majority conducts a *de novo* assessment of Witness BWK's testimony without having heard her testimony and partly bases its reasoning on small discrepancies in Witness BWK's testimony. This is an unwarranted intrusion in the assessment correctly made by the Trial Chamber and is in violation of the appellate standard of review. I am convinced that we cannot conclude that the Trial Chamber acted unreasonably in assessing Witness BWK's testimony.

3. Alleged Errors Relating to the Butare-Gisagara Roadblock

18. With respect to Kalimanzira's conviction for instigating and aiding and abetting genocide based on his participation in the killings of Tutsis at a roadblock on the Butare-Gisagara road on or around 22 April 1994, the Majority finds that paragraph 15 of the Indictment, which was found defective by the Trial Chamber, was not cured by subsequent timely, clear or consistent notice and resulted in prejudice to Kalimanzira. The Majority finds the Trial Chamber committed an error of law in this respect and, therefore, overturns Kalimanzira's conviction.[33]

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[31] Trial Judgement, para. 369.
[32] Trial Judgement, para. 369. *See also* Trial Judgement, para. 371 where the Trial Chamber "believes BWK beyond reasonable doubt and finds her evidence to be reliable".
[33] Appeal Judgement, paras. 149, 150. *See also* Appeal Judgement, paras. 137-150.

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19. I respectfully disagree with both the reasoning and the conclusion of the Majority. I note that the Trial Chamber found that the Indictment was vague with regard to the Butare-Gisagara roadblock.[34] However, it was satisfied that Kalimanzira received adequate notice in a timely, clear, and consistent manner through the summary of Witness BXK's anticipated testimony annexed to the Prosecution Pre-Trial Brief, Witness BXK's prior statement, and the Prosecution's opening statement.[35]

20. The Appeals Chamber has previously held that a summary of an anticipated testimony in an annex to the Prosecution's pre-trial brief can, in certain circumstances, cure a defect in an indictment.[36] I recall that the Prosecution Pre-Trial Brief was filed in English on 16 April 2008, several weeks before Witness BXK testified about this incident on 9 May 2008. The French translation of the Prosecution Pre-Trial Brief was filed only on 5 May 2008. Nonetheless, Kalimanzira's Lead Counsel is bilingual and would have been able to communicate this information to him.[37] Although it is true that he was absent during the first trial session and was hospitalized on 21 April 2008, the record reflects that he was in contact with the rest of his team.[38] I further recall that Kalimanzira's Co-Counsel stated that she did not want to delay the trial simply because of the delay in the delivery of the translation.[39] Given the importance of a Prosecution Pre-Trial Brief, the lack of objection by Kalimanzira to this delay strongly indicates, in my view, that he was already aware of the factual allegations against him.

21. In addition to the Prosecution Pre-Trial Brief, I note that this incident was clearly mentioned during the Prosecution's opening statement and identified as occurring on the Butare-Gisagara road.[40] Notably, again, Kalimanzira did not object or seek clarification. Therefore, I consider that this would have eliminated any latent ambiguity arising from the description of the location in the summary of Witness BXK's anticipated testimony. Similarly, I find no merit in Kalimanzira's suggestion that he was prejudiced because he assumed that Witness BXK was testifying about the Jaguar roadblock, which was located nearby. The summary of Witness BXK's testimony does not

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[34] Trial Judgement, para. 429.
[35] Trial Judgement, paras. 432, 434, 435.
[36] *Gacumbitsi* Appeal Judgement, paras. 57, 58. This approach is consistent with jurisprudence of the ICTY. *See Naletilić and Martinović* Appeal Judgement, para. 45.
[37] *See* Decision on Callixte Kalimanzira's Motion for an Extension of Time for the Filing of Notice of Appeal, 20 July 2009, paras. 3, 6.
[38] T. 20 May 2008 p. 59. *See also* Appeal Judgement, para. 33.
[39] T. 30 April 2008 p. 9 ("Yes, Mr. President, I do not intend to delay the proceedings, especially with regard to the pre-trial brief. I told you what I had to say on this matter. We have a way of proceeding in the Defence team in that we put Mr. Kalimanzira, who is the Accused person, at the heart of his defence. He is entitled to all the facts of law and of this case in order to have all the necessary clarifications with regard to the strategy we are going to adopt, and that is the reason for which I gave the indications I gave regarding the time necessary to look into the pre-trial brief with you. But, of course, all this is a matter that is left to your discretion, Mr. President.").
[40] T. 5 May 2008 p. 4 ("[Kalimanzira] also spurred on the killing of Tutsi at the roadblock situated on the Butare-Gisagara road in Ndora *commune* in connection with the Kabuye hill massacres.")

refer to paragraph 21 of the Indictment, which contains this allegation.[41] Furthermore, the Prosecution's opening statement clearly distinguished between these two incidents.[42] Therefore, any possible confusion on the part of the Defence was not reasonable. Consequently, I am satisfied that, in these particular circumstances, the defect in paragraph 15 of the Indictment was cured, as correctly noted by the Trial Chamber, and that Kalimanzira did not suffer prejudice in the preparation of his defence.

22. In paragraphs 146 and subsequent of the Appeal Judgement, the Majority proceeds to re-examine the facts in order to justify Kalimanzira's confusion rather than to identify any concrete error made by the Trial Chamber, which would indicate that the Trial Chamber abused its discretion when it determined that the confusion was dispelled by Kalimanzira's recognition in his Final Trial Brief that the Butare-Gisagara roadblock was at a different location to the Jaguar roadblock[43] and by the fact that the Opening Statement distinguished between the two roadblocks. The Majority strangely concludes that Kalimanzira's "confusion is a strong indication that Kalimanzira was prejudiced by the lack of clarity concerning the charges against him, and that he did not receive clear and consistent notice."[44] I believe this conclusion is illustrative of the Appeals Chamber's new trend to engage in a trial *de novo* by reassessing the evidence in a situation where it is unnecessary and inappropriate to the requisite and strict standard of review on appeal. In paragraph 149 of the Appeal Judgement, the Majority finds that "the Trial Chamber erred in law by finding that this defect was cured and accordingly in judging Kalimanzira guilty on the basis of his actions at the Butare-Gisagara roadblock." This terminology exemplifies this point particularly well, as it fails to identify how the Trial Chamber applied an incorrect standard in deciding, within the parameters of its discretion, that the defect in the Indictment was cured. Indeed, the Majority seems to suggest that no reasonable Trial Chamber could have found that the defect was cured, but, in my view, this is distinct from an error of law as the Trial Chamber did apply the correct legal standard.

23. Finally, Kalimanzira is attempting to re-litigate a matter that was raised at trial. Indeed, Kalimanzira already argued at trial that there were inconsistencies between Witness BXK's testimony and his prior statement. However, the Trial Chamber examined these inconsistencies carefully,[45] and found Witness BXK to be credible.[46] I find no error in this approach. Thus, I

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[41] Prosecution Pre-Trial Brief, Annex A, p. 21.
[42] T. 5 May 2008 p. 4 ("The Accused Kalimanzira also distributed weapons to people manning the roadblocks to enable them to kill Tutsi. *One example* is the so-called 'Jaguar' roadblock in Gisagara, Ndora *commune* where he gave a firearm to the leader of those manning the roadblock with the specific instruction that it was going to be used to kill Tutsi. He *also* spurred on the killing of Tutsi at the roadblock situated on the Butare-Gisagara road in Ndora *commune* in connection with the Kabuye hill massacres. *Once again*, the Accused Kalimanzira instructed the people manning the roadblock to kill Tutsi and distributed a firearm to facilitate such killings.") (emphasis added).
[43] Trial Judgement, para. 465.
[44] Appeal Judgement, para. 147.
[45] Trial Judgement, paras. 466-469.

consider that Kalimanzira has not demonstrated that the Trial Chamber committed an error or that it abused its discretion. In these circumstances, deference must be accorded to the Trial Chamber.

4. Alleged Errors Relating to the Nyabisagara Football Field

24. In the present case, the Majority finds that "the Trial Chamber erred in not explaining more fully why it believed the Defence witnesses would not have heard of a second meeting, and thus why their testimony did not cast reasonable doubt on Witness BCZ's evidence."[47] In reaching this conclusion, the Majority states:

> The Defence witnesses did not hear about any meeting involving Kalimanzira. In many circumstances such evidence is properly accorded minimal probative value. However, the circumstances in this case are different because many of the Defence witnesses had close ties to the local authorities or lived in close proximity to the site. Therefore, these witnesses would have been well positioned to know if such a meeting occurred. The Trial Chamber did not discount their evidence on any bases other than those noted above.[48]

It further finds that "no reasonable Trial Chamber could have relied on Witness BCZ's accomplice evidence of Kalimanzira's participation in the meeting at the Nyabisagara football field in light of the competing Defence evidence, absent further corroborative evidence or additional analysis demonstrating that the Defence witnesses were not credible."[49]

25. I find the reasoning and the conclusion of the Majority problematic for various reasons. First, from a strictly legal point of view, the Trial Chamber carefully assessed Witness BCZ's testimony and found him to be credible and reliable.[50] I find no error in this approach.[51] I recall that the Trial Chamber has the discretion to assess and accord the appropriate weight and credibility to

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[46] Trial Judgement, para. 470.
[47] Appeal Judgement, para. 185.
[48] Appeal Judgement, para. 185 (internal citations omitted).
[49] Appeal Judgement, para. 186.
[50] I find unpersuasive Kalimanzira's assertion that the Trial Chamber erred in assessing Witness BCZ's credibility. Nothing in the Statute or the Rules prohibits a Trial Chamber from relying upon the testimony of uncorroborated accomplice witnesses, provided appropriate caution is applied. *See Nchamihigo* Appeal Judgement, para. 48. In the present case, the Trial Chamber was clearly aware that Witness BCZ was an accomplice witness and that he may have had a motive to falsely incriminate Kalimanzira. *See* Trial Judgement, paras. 608, 612. In my view, the Trial Chamber displayed the necessary caution in assessing Witness BCZ's testimony. Kalimanzira has thus not established that the Trial Chamber erred in this regard. Kalimanzira has also not established any error in the Trial Chamber's approach to alleged contradictions in Witness BCZ's testimony. Indeed, I am not convinced that the Trial Chamber displayed bias in holding that "[i]t is likely that [Witness] BCZ omitted to mention Kalimanzira before his October 2001 statement to ICTR investigators because they did not specifically ask him about Kalimanzira before that time" and that "[i]t is also likely that BCZ omitted to mention this [second] meeting before October 2001 because its content and effect (no killings followed because no Tutsis could be found) might have seemed less important to him compared to the events he did mention." Trial Judgement, para. 611. It was certainly open to the Trial Chamber to assess Witness BCZ's testimony in this way and Kalimanzira has not rebutted the presumption of impartiality. *See also Semanza* Appeal Judgement, para. 13. The Trial Chamber sufficiently analyzed the alleged contradictions and reasonably accepted the explanations for them offered by the witness.
[51] Trial Judgement, para. 612.

the testimony of witnesses.[52] Indeed, the call for additional analysis challenges the Trial Chamber's firmly established discretionary power to assess the appropriate weight and credibility to be accorded to witness testimony, to which deference is owed.[53] Furthermore, I recall that, according to our well-established jurisprudence, "it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points."[54]

26. Second, I note that the Defence witnesses were not aware of any meeting involving Kalimanzira. In my view, this does not mean than other meetings involving Kalimanzira did not take place. However, after reassessing the evidence, the Majority comes to a speculative conclusion that "[the Defence] witnesses *would have been* well positioned to know if such meeting occurred."[55] In my view, the Majority is exceeding its jurisdiction here.

27. Third, I believe the Majority misses an important point when it concludes that "[t]he Trial Chamber did not discount [the Defence witness] evidence on any bases other than those noted above. In this context, the Trial Chamber erred in not explaining more fully why it believed the Defence witnesses would not have heard of a second meeting, and thus why their testimony did not cast reasonable doubt on Witness BCZ's evidence."[56] I recall, as noted by the Trial Chamber, that some of the Defence witnesses testified that they did not see – or were not aware of – Kalimanzira between April and July 1994.[57] As correctly noted by the Trial Chamber, this contradicts Kalimazira's own testimony that "he stopped by Hatagekimana's house in the end of the first week of June on his way to see his family in Kirarambogo[, which] lends additional support to is presence in Kibayi *commune* around the time of this alleged meeting."[58] I recall that the Appeals Chamber previously held that:

> If the Defence adduced the evidence of several other witnesses, who were unable to make any meaningful contribution to the facts of the case, even if the conviction of the accused rested on the

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[52] *Nchamihigo* Appeal Judgement, para. 285; *Nahimana et al.* Appeal Judgement, para. 194; *Ntagerura et al.* Appeal Judgement, para. 388.

[53] *See e.g. Nahimana et al.* Appeal Judgement, para. 194 ("[T]he Trial Chamber has full discretionary power in assessing the appropriate weight and credibility to be accorded to the testimony of a witness"); *Ntagerura et al.* Appeal Judgement, para. 388 (The decision to admit [witness testimony] does not in any way prejudice the weight and credibility that the Trial Chamber will, in its own discretionary assessment, accord to the evidence"); *Simba* Appeal Judgement, para 211 ("[T]he Appeals Chamber recalls that it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness testimony to prefer"); *Rutaganda* Appeal Judgement, para. 253 ("It therefore falls to the Trial Chamber to assess the contradictions pointed out and determine whether the witness – in light of his entire testimony – was reliable, and his testimony credible.").

[54] *Bagilishema* Appeal Judgement, para. 12, *citing Kupreškić et al.* Appeal Judgement, para. 32.

[55] Appeal Judgement, para. 185 (emphasis added).

[56] Appeal Judgement, para. 185.

[57] T. 25 November 2008 pp. 7-9 (Witness BTH); T. 17 November 2008 pp. 14-15 (Witness KBF); T. 24 November 2008 pp.29-30 (Witness KXL). *See also* Trial Judgement, paras. 599, 601, 604.

[58] Trial Judgement, para. 612. *See also* Trial Judgement, para. 654; T. 10 February 2009 pp. 50-51 (Callixte Kalimanzira).

> testimony of only one witness, the Trial Chamber is not required to state that it found the evidence of each Defence witness irrelevant. On the contrary, it is to be presumed that the Trial Chamber took notice of this evidence and duly disregarded it because of its irrelevance.[59]

Accordingly, it was within the Trial Chamber's discretion to find that "the Defence evidence does little to contradict BCZ's evidence."[60] Consequently, contrary to the Majority's finding, the Trial Chamber did not abuse its discretion in finding that two meetings took place, that the Defence witnesses testified to different meetings, and that the existence of one does not preclude the other.

28. Thus, I do not believe that the Trial Chamber has abused its discretion in reaching its conclusion in the present case. In this circumstances, deference must be accorded to the Trial Chamber's assessment of witnesses' testimony.

5. Alleged Errors Relating to the Gisagara Marketplace (May Event)

29. With respect to the events at Gisagara market place at the end of May 1994, I agree with the Majority that the Trial Chamber did not discuss the basis on which it accepted Witness BDK's identification of Kalimanzira.[61] Although it would have been preferable for the Trial Chamber to discuss the issue of Witness BDK's identification of Kalimanzira, I disagree with the Majority that the Trial Chamber erred in not doing so.[62] According to Witness BDK's testimony, she met Kalimanzira for the first time at the home of Fidèle Uwizeye in the early 1990s.[63] At the time, Witness BDK did not know Kalimanzira so her husband identified him to her.[64] Beyond describing this evidence as hearsay, the Majority has not demonstrated why it would be unreasonable for the Trial Chamber to accept this as a basis of identification.

30. Similarly, I am not persuaded that the Trial Chamber erred in accepting Witness BDK's evidence even though her first sighting of Kalimanzira was contradicted by the testimony of Witness AX88. Although the Trial Chamber did not expressly assess this contradiction between their testimonies on this point, it carefully weighed their respective accounts in discussing Witness BDK's testimony on Kalimanzira's presence at Uwizeye's home in April 1994.[65] Thus, it was clearly mindful of their conflicting versions of the relevant events. In its consideration of the evidence, the Trial Chamber found portions of Witness AX88's testimony "not at all convinc[ing]", and described it as "convoluted and often contradictory."[66] This clearly suggests that the Trial

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[59] *Kvočka et al.* Appeal Judgement, para. 24.
[60] Trial Judgement, para. 610.
[61] *See* Appeal Judgement, para. 195.
[62] Appeal Judgement, para. 199.
[63] T. 20 May 2008 pp. 46, 47.
[64] T. 20 May 2008 p. 46. *See also* T. 21 May 2008 p. 14.
[65] Trial Judgement, paras. 388-391.
[66] Trial Judgement, para. 390.

Chamber had significant concerns with Witness AX88. However, the Majority is misleadingly silent on this point when reassessing the evidence and only mentions that "[t]he Trial Chamber observed that Witness BDK's testimony regarding this occasion was directly contradicted by Defence Witness AX88."[67] Consequently, in my view, it has not demonstrated that no reasonable Trial Chamber could have relied on Witness BDK's identification of Kalimanzira in light of Witness AX88's evidence.

31. While the Trial Chamber also raised concerns with respect to Witness BDK's evidence about the meeting at Uwizeye's home in 1994, it considered significant the fact that Witness BDK's testimony on that point was hearsay and stated that this did not impact her overall credibility.[68] I recall that "it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony."[69] Furthermore, "[a] Trial Chamber is entitled to rely on any evidence it deems to have probative value and it may accept a witness's testimony only in part if it considers other parts of his or her evidence not reliable or credible."[70] In the present case, the Trial Chamber reasonably explained that its prior rejection of Witness BDK's evidence did not "reflect upon [her] general credibility."[71] It has not been demonstrated that this assessment was outside the bounds of the Trial Chamber's discretion.

32. I am not satisfied that the Trial Chamber should have rejected Witness BDK's evidence because of various alleged internal inconsistencies. I reiterate our well-established jurisprudence that "it falls to the trier of fact to assess the inconsistencies highlighted in testimony and determine whether they impugn the entire testimony."[72] In the present case, the Trial Chamber expressly considered inconsistencies within Witness BDK's evidence and reasonably determined that they were either immaterial or nonexistent.[73] I find no error in this approach. In addition, contrary to Kalimanzira's arguments, I consider that Witness BDK's testimony in various *Gacaca* proceedings did not render the Trial Chamber's reliance on her testimony unreasonable. Kalimanzira has not substantiated his assertion that the participation in such proceedings, albeit frequent, undermines the witness's credibility.

33. Finally, I find unpersuasive the contention that the Trial Chamber failed to explain why it accepted Witness BDK's testimony even though that testimony was in Kalimanzira's view

[67] Appeal Judgement, para. 197.
[68] Trial Judgement, paras. 391, 727.
[69] *Muvunyi* Appeal Judgement, para. 128.
[70] *Kajelijeli* Appeal Judgement, para. 167.
[71] Trial Judgement, para. 727.
[72] *Rutaganda* Appeal Judgement, para. 443.
[73] Trial Judgement, paras. 724-726.

"unlikely."[74] The Trial Chamber addressed Kalimanzira's assertion – though not in detail – and found that the witness convincingly explained her behavior, in particular why she attended the meeting and when she left.[75] It is necessary to reiterate that the Trial Chamber has full discretion in the assessment of a witness's credibility.[76] In my view, it was therefore reasonable for the Trial Chamber to accept Witness BDK's explanations of her behavior. For the foregoing reasons, the Trial Chamber did not err in its assessment of Witness BDK's testimony.

34. The Majority's reasoning, on the other hand, is problematic for numerous reasons. First, the Majority states:[77]

> The Appeals Chamber considers that "[t]here is a presumption that a Trial Chamber has 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."[78] However, this presumption may be rebutted "when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning."[79]

35. However, the Majority omits the remainder of the quoted reference to *Kvočka et al.* Appeal Judgement, which states:

> 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. There may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning, but not every inconsistency which the Trial Chamber failed to discuss renders its opinion defective. Considering the fact that minor inconsistencies commonly occur in witness testimony without rendering it unreliable, it is within the discretion of the Trial Chamber to evaluate it and to consider whether the evidence as a whole is credible, without explaining its decision in every detail. 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.[80]

In my view, without this addition, the quotation is an inaccurate representation of the legal reasoning established in *Kvočka et al.* Appeal Judgement. The Majority thus misrepresents the standard established.

36. Second, in the third sentence of paragraph 197 of the Appeal Judgement, the Majority misrepresents reality by stating that "[t]he Trial Chamber observed that Witness BDK's testimony

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[74] Trial Judgement, para. 724 reads as follows: "The Defence contends that BDK's testimony was fraught with inconsistencies. It suggests that her descriptions of the timing of her departure from the meeting was inconsistent; that it was unlikely that her brother-in-law would have forced her, a Tutsi, to attend the meeting; that if she had been forced to attend, it was unlikely that she would leave and draw attention to herself, especially when she had been married before the war and was not among the group who was threatened. None of the Defence's arguments were persuasive. The passage of time since 1994 would explain difficulty in recalling time exactly; further, BDK gave convincing explanations for her behaviour." (internal citation omitted).

[75] *See* Trial Judgement, para. 724.

[76] *See Nahimana et al.* Appeal Judgement, para. 194.

[77] Appeal Judgement, para. 195.

[78] *Halilović* Appeal Judgement, para. 121. *See also Kvočka et al.* Appeal Judgement, para. 23.

[79] *Kvočka et al.* Appeal Judgement, para. 23.

regarding this occasion was directly contradicted by Defence Witness AX88."[81] In my view, this sentence is incomplete and misleading because it submits that the testimony of Witness AX88 contradicts that of Witness BDK without mentioning the fact that the Trial Chamber found portions of Witness AX88's testimony "not at all convinc[ing]" and described it as "convoluted and often contradictory",[82] as already mentioned above.

37. Third, the Majority "notes the Trial Chamber's uncertainty as to Witness BDK's veracity with respect to one of two occasions where she claimed to have identified Kalimanzira. Under these circumstances, the Appeals Chamber [...] considers that the Trial Chamber should have provided a clearer explanation of its reasons for accepting portions of Witness BDK's testimony addressing identification."[83] Here again, the focus of the Majority on the Trial Chamber's uncertainty is highly misleading, as it fails to note that the Trial Chamber explicitly explained that its reasons for not relying on Witness BDK's evidence in the prior occasion "do not apply to her evidence here, nor do they reflect upon [Witness] BDK's general credibility."[84]

38. Fourth, in finding an "error of law" based on the fact that "[i]t is unclear from the Trial Judgement [*how much*] caution was applied"[85] in its assessment of Witness BDK's evidence, the Majority simply employs a loose criterion to an already nondescript standard of caution. To suggest that this is the appropriate appellate standard of review with respect to caution appears particularly questionable. Finally, having found an error of law, the Majority also neglects to articulate the correct legal standard with respect to the degree of caution which in its view is necessary in the context of identification evidence before reviewing the relevant findings of the Trial Chamber accordingly as required by our strict standard of appellate review.

6. Conclusion

39. For the foregoing reasons, I disagree with the reasons and conclusions of the Majority with respect to the relevant portions of Kalimanzira's third, fifth, sixth, seventh, tenth and eleventh grounds of appeal.

40. In light of the above, I also dissent on the reduction in the sentence decided by the Appeals Chamber. I would leave the sentence imposed by the Trial Chamber undisturbed.

[80] *Kvočka et al.* Appeal Judgement, para. 23.
[81] Appeal Judgement, para. 197, *referring to* Trial Judgement, para. 388.
[82] Trial Judgement, para. 390.
[83] Appeal Judgement, para. 199.
[84] Trial Judgement, para. 727.
[85] Appeal Judgement, para. 199.

B. Separate Opinion

41. While I am in general agreement with the Appeal Judgement with respect to Kalimanzira's conviction for direct and public incitement to commit genocide based on his conduct at the Jaguar roadblock and the Kajyanama roadblock, in particular its conclusion, I feel compelled to write separately in order to clarify a number of points of the Appeals Chamber's reasoning with which I feel uncomfortable.

42. First, in paragraphs 156 to 158 of the Appeal Judgement, the Appeals Chamber relies mostly on the *travaux préparatoires* of the Genocide convention to interpret the definition and scope of the crime of direct and public incitement to commit genocide. I am slightly uncomfortable with this approach, as I believe the *travaux préparatoires* of the Genocide convention provide little guidance as to the scope of the words "direct and public",[86] which are at the core of the present issue. In my opinion, one must look to other sources for a comprehensive definition and scope of the term "public", such as the work of the International Law Commission or the *Akayesu* Trial Judgement.

43. Second, the Appeals Chamber limits itself to the application of the *Nahimana et al.* Appeal Judgement to Kalimanzira's convictions, but does not break down the crime into its elements, nor does it reveal how the term "public" is defined.

44. In setting out the elements of the offence, the *Akayesu* Trial Chamber elaborated on the requirement of "public incitement" as follows:

> [t]he public element of incitement to commit genocide may be better appreciated in light of two factors: the place where the incitement occurred and whether or not assistance was selective or limited. A line of authority commonly followed in Civil law [*sic*] systems would regard words as being public where they were spoken aloud in a place that were [*sic*] public by definition. According to the International Law Commission, public incitement is characterized by a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television. It should be noted in this respect that at the time [the] Convention on Genocide was adopted, the delegates specifically agreed to rule out the possibility of including private incitement to commit genocide as a crime, thereby underscoring their commitment to set aside for punishment only the truly public forms of incitement.[87]

The *Kajelijeli* Trial Chamber emphasized that "[t]he 'public' element of incitement to commit genocide is appreciated by looking at the circumstances of the incitement—such as where the incitement occurred and whether or not the audience was select or limited."[88]

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[86] This point has been recognized by legal experts on the issue. *See, e.g.*, Schabas, William A., *Genocide in International Law: the Crime of Crimes*, Cambridge University Press, Cambridge, 2009 (2nd edition), p. 329.
[87] *Akayesu* Trial Judgement, para. 556 (internal citations omitted).
[88] *Kajelijeli* Trial Judgement, para. 851.

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45. However, in paragraphs 156 of the Appeal Judgement for example,[89] the Appeals Chamber emphasizes, and make comparison with other cases, on the size of the audience required to satisfy the public element of the crime of incitement to commit genocide. Indeed, the Appeals Chamber for example states that "[t]hese convictions involved audiences which were by definition *much broader* than the groups of individuals manning the Jaguar and Kajyanama roadblocks, who formed Kalimanzira's audience."[90] In my view, this establishes a dangerous and incorrect precedent linked with the question of what minimum audience size is required to satisfy the "public" element of the crime of direct and public incitement to commit genocide. I believe, no threshold exists and none should be established. There is no clear indication in the jurisprudence of the Tribunal that a speech must be made to a large group of people in order to qualify as public incitement. For the purpose of the law, it suffices that the speech was directed at a number of individuals at a public place or at members of the general public, as the International Law Commission confirmed.[91] In its report, the International Law Commission added that "[t]his public appeal for criminal action increases the likelihood that at least one individual will respond to the appeal and, moreover, encourages the kind of 'mob violence' in which a number of individuals engage in criminal conduct."[92]

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[89] *See also* Appeal Judgement, footnote 410.
[90] Appeal Judgement, para. 156 (emphasis added).
[91] *See* Article 2(3)(f) of the Draft Code of Crimes Against the Peace and Security of Mankind, *in* Report of the International Law Commission to the General Assembly, UN doc. A/51/10 (1996), p. 26: "The equally indispensable element of public incitement requires communicating the call for criminal action to a number of individuals in a public place or to members of the general public at large. Thus, an individual may communicate the call for criminal action in person in a public place or by technical means of mass communication, such as by radio or television."
[92] *See* Article 2(3)(f) of the Draft Code of Crimes Against the Peace and Security of Mankind, *in* Report of the International Law Commission to the General Assembly, UN doc. A/51/10 (1996), p. 27.

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Done in English and French, the English text being authoritative

Judge Fausto Pocar

Done this 20th day of October 2010,
At Arusha,
Tanzania.

[Seal of the Tribunal]

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VIII. ANNEX A – PROCEDURAL HISTORY

1. The main aspects of the appeal proceedings are summarized below.

A. Notices of Appeal and Briefs

2. Trial Chamber III rendered the judgement in this case on 22 June 2009.

1. Kalimanzira's Appeal

3. On 20 July 2009, the Pre-Appeal Judge denied Kalimanzira's request for an extension of time to file his notice of appeal from the translation of the Trial Judgement into French.[1] Kalimanzira filed his Notice of Appeal on 21 July 2009.[2] On 31 August 2009, the Pre-Appeal Judge granted Kalimanzira's request for a 75 day extension of time for the filing of his Appellant's brief from the filing of the French translation of the Trial Judgement.[3] He filed his Appellant's brief on 1 February 2010.[4]

4. On 5 March 2010, the Appeals Chamber granted Kalimanzira's request to file an Amended Notice of Appeal and granted the Prosecution a 15-day extension of time to file its Respondent's brief.[5] Kalimanzira filed his Amended Notice of Appeal on 8 March 2010.[6] The Prosecution filed its Respondent's brief on 29 March 2010.[7] On 6 April 2010, the Pre-Appeal Judge denied Kalimanzira's request for an extension of time to file his Reply brief following the translation of the Prosecution's Respondent's brief into French.[8] Kalimanzira filed his Reply brief on 13 April 2010.[9]

2. Prosecution's Appeal

5. The Prosecution filed its Notice of Appeal on 22 July 2009[10] and its Appellant's brief on 5 October 2009.[11] On 26 October 2009, the Pre-Appeal Judge granted Kalimanzira's request for a

[1] Decision on Callixte Kalimanzira's Motion for an Extension of Time for the Filing of Notice of Appeal, 20 July 2009.
[2] Notice of Appeal, 21 July 2009.
[3] Decision on Callixte Kalimanzira's Motion for Leave to File an Amended Notice of Appeal and for an Extension of Time for the Filing of his Appellant's Brief, 31 August 2009. In this same decision, the Pre-Appeal Judge denied Kalimanzira's request to file an amended notice of appeal within 30 days of the filing of the French translation of the Trial Judgement.
[4] Callixte Kalimanzira's Appeal Brief, 1 February 2010. Kalimanzira filed his brief confidentially. On 5 March 2010, the Pre-Appeal Judge granted the Prosecution request to order him to file a public version. *See* Decision on the Prosecution's Motion Requesting a Public Filing of Callixte Kalimanzira's Appellant's Brief, 5 March 2010. The public version was filed on 30 March 2010.
[5] Decision on Callixte Kalimanzira's Motion for Leave to Amend His Notice of Appeal, 5 March 2010.
[6] Amended Notice of Appeal, 8 March 2010.
[7] Prosecutor's Respondent Brief, 29 March 2010.
[8] Decision on Callixte Kalimanzira's Motion for an Extension of Time for the Filing of His Reply Brief, 6 April 2010.
[9] Callixte Kalimanzira's Brief in Reply, 13 April 2010.
[10] Prosecutor's Notice of Appeal, 22 July 2009.
[11] Prosecutor's Appellant's Brief, 5 October 2009.

40-day extension of time for the filing of his Respondent's brief from the filing of the French translations of the Prosecution's Appellant's Brief and the Trial Judgement.[12] On 19 January 2010, Kalimanzira filed his Respondent's brief.[13] The Prosecution filed its Reply brief on 25 January 2010.[14]

B. Assignment of Judges

6. On 10 July 2009, the Presiding Judge of the Appeals Chamber assigned the following Judges to hear the appeal: Judge Patrick Robinson, presiding, Judge Mehmet Güney, Judge Fausto Pocar, Judge Andrésia Vaz, and Judge Carmel Agius.[15] On 20 July 2009, the Presiding Judge designated Judge Vaz as the Pre-Appeal Judge.[16] On 5 February 2010, the Presiding Judge of the Appeals Chamber replaced himself with Judge Theodor Meron.[17] The Bench then elected Judge Meron as the Presiding Judge in this case.[18] On 4 March 2010, Judge Meron designated himself as the Pre-Appeal Judge.[19]

C. Motion Related to the Admission of Additional Evidence

7. On 12 March 2010, Kalimanzira filed a motion for the admission of additional evidence.[20] The Prosecution responded on 12 April 2010.[21] Kalimanzira did not file a reply. On 11 June 2010, the Pre-Appeal Judge, after consulting with the Bench, decided to defer consideration of the motion until after the appeal hearing.[22] On 21 September 2010, the Appeals Chamber denied Kalimanzira's motion in a confidential decision.[23]

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[12] Decision on Callixte Kalimanzira's Motion for an Extension of Time for the Filing of His Respondent's Brief, 26 October 2009.
[13] Observations on the Prosecutor's Appellant's Brief Dated 5 October 2009, 19 January 2010. The Prosecution challenged this submission because it was filed one day late and allegedly did not correspond to the requirements for a Respondent's brief. It also sought sanctions. The Appeals Chamber accepted the filing of the submission and considered it as the Respondent's brief. It denied the request for sanctions. *See* Decision on the Prosecution's Requests Made in Relation to Kalimanzira's "Observations on the Prosecutor's Appellant's Brief Dated 5 October 2009", 5 March 2010.
[14] The Prosecutor's Response to Respondent Callixte Kalimanzira's "Observations on the Prosecutor's Appellant's Brief Dated 5 October 2009", 25 January 2010.
[15] Order Assigning Judges to a Case Before the Appeals Chamber, 10 July 2009.
[16] Order Designating a Pre-Appeal Judge, 20 July 2009.
[17] Order Replacing a Judge in a Case Before the Appeals Chamber, 5 February 2010.
[18] Order Designating a Pre-Appeal Judge, 4 March 2010.
[19] Order Designating a Pre-Appeal Judge, 4 March 2010.
[20] Motion to Admit Additional Evidence, 12 March 2010 ("Motion").
[21] Prosecutor's Response to "Motion to Admit Additional Evidence", 12 April 2010 ("Response").
[22] Decision Deferring Consideration of Kalimanzira's Motion for the Admission of Additional Evidence on Appeal, 11 June 2010.
[23] Decision on Kalimanzira's Motion for the Admission of Additional Evidence on Appeal, 21 September 2010.

D. Hearing of the Appeals

8. On 2 June 2010, the Pre-Appeal Judge denied Kalimanzira's motion to postpone the hearing in light of the arrest of a counsel for appellant in another case before the Tribunal by Rwandan authorities.[24] On 11 June 2010, the Pre-Appeal Judge denied a second motion to postpone the hearing on the same basis.[25] On 14 June 2010, the parties presented their oral arguments at a hearing held in Arusha, Tanzania, in accordance with the Scheduling Order of 20 May 2010.[26]

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[24] Decision on Kalimanzira's Request to Postpone the Appeal Hearing, 2 June 2010.
[25] Decision on Kalimanzira's Second Request to Postpone the Appeal Hearing, 11 June 2010.
[26] Scheduling Order, 20 May 2010.

IX. ANNEX B – CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. ICTR

AKAYESU

The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgement, 2 September 1998 ("*Akayesu* Trial Judgement").

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

BAGILISHEMA

The Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-A, Judgement (Reasons), 3 July 2002 ("*Bagilishema* Appeal Judgement").

BIKINDI

The Prosecutor v. Simon Bikindi, Case No. ICTR-01-72-T, Judgement, 2 December 2008 ("*Bikindi* Trial Judgement").

Simon Bikindi v. The Prosecutor, Case No. ICTR-01-72-A, Judgement, 18 March 2010 ("*Bikindi* Appeal Judgement").

GACUMBITSI

Sylvestre Gacumbitsi v. The Prosecutor, Case No. ICTR-2001-64-A, Judgement, 7 July 2006 ("*Gacumbitsi* Appeal Judgement").

KAJELIJELI

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

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

KAMUHANDA

Jean de Dieu Kamuhanda v. The Prosecutor, Case No. ICTR-99-54A-A, Judgement, 19 September 2005 ("*Kamuhanda* Appeal Judgement").

KARERA

François Karera v. The Prosecutor, Case No. ICTR-01-74-A, Judgement, 2 February 2009 ("*Karera* Appeal Judgement").

KAYISHEMA and RUZINDANA

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

MUHIMANA

Mikaeli Muhimana v. The Prosecutor, Case No. ICTR-95-1B-A, Judgement, 21 May 2007 ("*Muhimana* Appeal Judgement").

MUSEMA

Alfred Musema v. The Prosecutor, Case No. ICTR-96-13-A, Judgement, 6 November 2001 ("*Musema* Appeal Judgement").

MUVUNYI

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-2000-55A-T, Judgement and Sentence, 12 September 2006 ("*Muvunyi* Trial Judgement").

Tharcisse Muvunyi v. The Prosecutor, Case No. ICTR-2000-55A-A, Judgement, 29 August 2008 ("*Muvunyi* Appeal Judgement").

NAHIMANA et al.

Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana et al.* Appeal Judgement").

NCHAMIHIGO

Siméon Nchamihigo v. The Prosecutor, Case No. ICTR-2001-63-A, Judgement, 18 March 2010 ("*Nchamihigo* Appeal Judgement").

NDINDABAHIZI

Emmanuel Ndindabahizi v. The Prosecutor, Case No. ICTR-01-71-A, Judgement, 16 January 2007 ("*Ndindabahizi* Appeal Judgement").

NIYITEGEKA

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

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

NTAGERURA et al.

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

NTAKIRUTIMANA

The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Case Nos. ICTR-96-10-T and ICTR-96-17-T, Judgement and Sentence, 21 February 2003 ("*Ntakirutimana* Trial Judgement").

The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004 ("*Ntakirutimana* Appeal Judgement").

RUGGIU

The Prosecutor v. Georges Ruggiu, Case No. ICTR-97-32-I, Judgement and Sentence, 1 June 2000 ("*Ruggiu* Trial Judgement").

RUKUNDO

The Prosecutor v. Emmanuel Rukundo, Case No. ICTR-2001-70-T, Judgement, 27 February 2009 ("*Rukundo* Trial Judgement").

RUTAGANDA

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

SEMANZA

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

Laurent Semanza v. The Prosecutor, Case No. ICTR-97-20-A, Judgement, 20 May 2005 ("*Semanza* Appeal Judgement").

SEROMBA

The Prosecutor v. Athanase Seromba, Case No. ICTR-2001-66-A, Judgement, 12 March 2008 ("*Seromba* Appeal Judgement").

SIMBA

Aloys Simba v. The Prosecutor, Case No. ICTR-01-76-A, Judgement, 27 November 2007 ("*Simba* Appeal Judgement").

ZIGIRANYIRAZO

Protais Zigiranyirazo v. The Prosector, Case No. ICTR-01-73-A, Judgement, 16 November 2009 ("*Zigiranyirazo* Appeal Judgement").

2. ICTY

ALEKSOVSKI

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

BLAGOJEVIĆ

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-06-A, Judgement, 9 May 2007 ("*Blagojević and Jokić* Appeal Judgement").

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BLAŠKIĆ

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

BOŠKOSKI

Prosecutor v. Ljube Boškoski and Johan Tarčulovski, Case No. IT-04-82-A, Judgement, 19 May 2010 ("*Boškoski and Tarčulovski* Appeal Judgement").

BRĐANIN

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement").

DELALIĆ *et al.*

Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka "Pavo"), Hazim Delić and Esad Landžo (aka "Zenga"), Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Delalić et al.* Appeal Judgement").

FURUNDŽIJA

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

HADŽIHASANOVIĆ and KUBURA

Prosecutor v. Enver Hadžihasanović and Amir Kubura, Case No. IT-01-47-A, Judgement, 22 April 2008 ("*Hadžihasanović and Kubura* Appeal Judgement").

HALILOVIĆ

Prosecutor v. Sefer Halilović, Case No. IT-01-48-A, Judgement, 16 October 2007 ("*Halilović* Appeal Judgement").

KORDIĆ and ČERKEZ

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement").

KRSTIĆ

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

KUPREŠKIĆ et al.

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Šantić, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement").

KVOČKA et al.

Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić and Dragoljub Prcać, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement").

LIMAJ et al.

Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu, Case No. IT-03-66-A, Judgement, 27 September 2007 ("*Limaj et al.* Appeal Judgement").

MRKŠIĆ and ŠLJIVANČANIN

Prosecutor v. Mile Mrkšič and Veselin Šljivančanin, Case No. IT-95-13/1-A, Judgement, 5 May 2009 ("*Mrkšić and Šljivančanin* Appeal Judgement").

NALETILIĆ and MARTINOVIĆ

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta" and Vinko Martinović, a.k.a. "Štela", Case No. IT-98-34-A, Judgement, 3 May 2006 ("*Naletilić and Martinović* Appeal Judgement").

BLAGOJE SIMIĆ

Prosecutor v. Blagoje Simić, Case No. IT-95-9-A, Judgement, 28 November 2006 ("*Blagoje Simić* Appeal Judgement").

TADIĆ

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

B. Defined Terms and Abbreviations

Defence

Callixte Kalimanzira or his defence team, as appropriate

Genocide Convention

Convention for the Prevention and Punishment of the Crime of Genocide, *adopted* 9 December 1948, 78 U.N.T.S. 277 (entered into force 12 January 1951)

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

The Prosecutor v. Callixte Kalimanzira, Case No. ICTR-2005-88-I, Indictment Filed on 21 July 2005, 21 July 2005

Kalimanzira Appeal Brief

Callixte Kalimanzira's Appellant's Brief, 1 February 2010

Kalimanzira Final Trial Brief

The Prosecutor v. Callixte Kalimanzira, Case No. ICTR-05-88-T, Closing Brief, 2 April 2009

Kalimanzira Notice of Appeal

Amended Notice of Appeal, 8 March 2010

Kalimanzira Pre-Trial Brief

The Prosecutor v. Callixte Kalimanzira, Case No. ICTR-05-88-T, Defence Pre-Trial Brief, 17 September 2008

Kalimanzira Reply Brief

Callixte Kalimanzira's Brief in Reply, 13 April 2010

Kalimanzira Response Brief

Observations on the Prosecutor's Appellant's Brief Dated 5 October 2009, 19 January 2010

MRND

Mouvement Révolutionnaire National pour la Démocratie et le Développement

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paragraph (paragraphs)

Prosecution Appeal Brief

Prosecutor's Appellant's Brief, 5 October 2009

Prosecution Notice of Appeal

Prosecutor's Notice of Appeal, 22 July 2009

Prosecution Pre-Trial Brief

The Prosecutor v. Callixte Kalimanzira, Case No. ICTR-2005-88-PT, Prosecutor's Pre-Trial Brief, 16 April 2008

Prosecution Reply Brief

The Prosecutor's Response to Respondent Callixte Kalimanzira's "Observations on the Prosecutor's Appellant's Brief Dated 5 October 2009", 25 January 2010

Prosecution Response Brief

Prosecutor's Respondent Brief, 29 March 2010

RPF

Rwandan Patriotic Front

Rules

Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda

RTLM

Radio Télévision Libre des Milles Collines

Sixth Committee

The Sixth Committee is one of the six main committees in the United Nations General Assembly and its primary forum for the consideration of legal questions.

Statute

Statute of the International Criminal Tribunal for Rwanda established by Security Council Resolution 955

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Transcript

Trial Judgement

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The Prosecutor v. Callixte Kalimanzira, Case No. ICTR-05-88-T, Judgement, 22 June 2009