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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-98-41A-A
8th May 2012
{300/H – 174/H}

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Arlette Ramaroson

Registrar: **Mr. Adama Dieng**

Judgement of: **8 May 2012**

ICTR Appeals Chamber
Date: 8th May 2012
Action: R. Yuma
Copied To: Concerned Judges, Parties, JPV, LOs

Aloys NTABAKUZE
v.
THE PROSECUTOR

Case No. ICTR-98-41A-A

JUDGEMENT

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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 seised of the appeal of Aloys Ntabakuze ("Ntabakuze") against the judgement rendered on 18 December 2008 by Trial Chamber I of the Tribunal ("Trial Chamber") in the case of *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, and Anatole Nsengiyumva.*[1]

I. INTRODUCTION

A. Background

2. Ntabakuze was born on 20 August 1954 in Karago commune, Gisenyi prefecture, Rwanda.[2] In 1978, he graduated from the *École supérieure militaire* with the rank of Second Lieutenant, and he rose to the rank of Major in April 1991.[3] From June 1988 to July 1994, Ntabakuze served as the Commander of the Para-Commando Battalion of the Rwandan army at Camp Kanombe, Kigali.[4] Ntabakuze was arrested on 18 July 1997 in Nairobi, Kenya, and was subsequently transferred to the Tribunal's detention facility in Arusha, Tanzania.[5]

3. Ntabakuze's case was initially joined to that of Gratien Kabiligi ("Kabiligi"), the head of the Operations Bureau (G-3) of the Rwandan army General Staff from September 1993 to 17 July 1994.[6] On 29 June 2000, Trial Chamber III of the Tribunal granted the Prosecution's request to join the case of Ntabakuze and Kabiligi to the cases of Théoneste Bagosora ("Bagosora") and Anatole Nsengiyumva ("Nsengiyumva").[7] Bagosora was *Directeur de cabinet* for the Rwandan Ministry of Defence, and Nsengiyumva was Commander of the Gisenyi Operational Sector in April 1994.[8] The joint case was then re-assigned to Trial Chamber I of the Tribunal.[9]

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[1] *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, and Anatole Nsengiyumva*, Case No. ICTR-98-41-T, Judgement and Sentence, delivered in public and signed 18 December 2008, filed 9 February 2009 ("Trial Judgement").
[2] Trial Judgement, para. 58.
[3] Trial Judgement, paras. 58, 59.
[4] Trial Judgement, para. 61.
[5] Trial Judgement, paras. 63, 2294.
[6] Trial Judgement, paras. 56, 2295.
[7] *See* Trial Judgement, para. 2312.
[8] Trial Judgement, paras. 49, 70.
[9] *See* Trial Judgement, paras. 2312, 2321.

4. The Trial Judgement was rendered in the joint case against Bagosora, Kabiligi, Ntabakuze, and Nsengiyumva (together, "co-Accused") on the basis of three separate indictments.[10]

5. The Trial Chamber found Ntabakuze guilty of genocide, crimes against humanity (murder, extermination, persecution, and other inhumane acts), and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (violence to life) pursuant to Article 6(3) of the Statute of the Tribunal ("Statute").[11] It held him responsible for the killings of Tutsi civilians perpetrated by his subordinates in the Kabeza area of Kigali on 7 and 8 April 1994, at Nyanza hill on 11 April 1994, and at the *Institut africain et mauricien de statistiques et d'économie* ("IAMSEA") in the Remera area of Kigali around 15 April 1994.[12] The Trial Chamber also found him responsible for his subordinates' preventing the refugees killed at Nyanza hill from seeking sanctuary.[13] The Trial Chamber sentenced Ntabakuze to life imprisonment.[14]

6. The Trial Chamber found Bagosora guilty of genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Articles 6(1) and 6(3) of the Statute.[15] It found Nsengiyumva guilty of genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute.[16] The Trial Chamber sentenced Nsengiyumva and Bagosora to life imprisonment.[17] Kabiligi was acquitted on all counts.[18]

B. Severance on Appeal

7. Bagosora, Ntabakuze, and Nsengiyumva appealed against the Trial Judgement. Ntabakuze's case was severed from that of Bagosora and Nsengiyumva in the course of the appeal proceedings due to the unavailability of Ntabakuze's former Counsel to present his appeal at the time scheduled for the hearing of the three appeals.[19] The Appeals Chamber delivered its judgement in the case of Bagosora and Nsengiyumva on 14 December 2011.[20]

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[10] *The Prosecutor v. Théoneste Bagosora*, Case No. ICTR-96-7-I, Amended Indictment, 12 August 1999; *The Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze*, Cases Nos. ICTR-97-34-I & ICTR-97-30-I, Amended Indictment, 13 August 1999 ("Indictment"); *The Prosecutor v. Anatole Nsengiyumva*, Case No. ICTR-96-12-I, Amended Indictment, 12 August 1999.
[11] Trial Judgement, paras. 2160, 2188, 2196, 2215, 2226, 2247, 2258.
[12] Trial Judgement, paras. 926, 927, 1354-1356, 1358, 1427-1429, 2062-2067, 2137, 2268.
[13] Trial Judgement, paras. 1343-1346, 2226, 2258.
[14] Trial Judgement, para. 2278.
[15] Trial Judgement, paras. 2158, 2186, 2194, 2203, 2213, 2224, 2245, 2254, 2258.
[16] Trial Judgement, paras. 2161, 2189, 2197, 2216, 2227, 2248, 2258.
[17] Trial Judgement, paras. 2277, 2279.
[18] Trial Judgement, para. 2258.
[19] *See infra* Annex A: Procedural History.
[20] *See Bagosora and Nsengiyumva* Appeal Judgement.

C. The Appeal

8. Ntabakuze presents 37 grounds of appeal challenging his convictions and his sentence.[21] He requests that the Appeals Chamber overturn his convictions, order his release, and issue an order for compensation for unlawful incarceration or, in the alternative, reduce his sentence.[22] The Prosecution responds that Ntabakuze's appeal should be dismissed.[23]

9. The Appeals Chamber heard oral submissions regarding Ntabakuze's appeal on 27 September 2011.

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[21] Ntabakuze initially presented 38 grounds of appeal. *See* Notice of Appeal, paras. 14-152; Appeal Brief, paras. 13-331. However, he subsequently withdrew Ground 16 of his appeal alleging errors relating to cumulative convictions. *See* Reply Brief, para. 118.
[22] Notice of Appeal, p. 48; Appeal Brief, paras. 335-339. Ntabakuze initially requested as a further alternative that the Appeals Chamber order a new trial. *See* Notice of Appeal, p. 48; Appeal Brief, para. 340. Ntabakuze withdrew this request at the appeal hearing. *See* AT. 27 September 2011 p. 72.
[23] Prosecution Response Brief, paras. 5, 235.

II. STANDARDS OF APPELLATE REVIEW

10. 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 have the potential to invalidate the decision of the Trial Chamber and errors of fact which have occasioned a miscarriage of justice.[24]

11. 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.[25]

12. 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.[26] 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.[27]

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

> [...] 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.[28]

14. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the Trial Chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.[29] Arguments which do not have the potential to cause the

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[24] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 15; *Ntawukulilyayo* Appeal Judgement, para. 7; *Munyakazi* Appeal Judgement, para. 5.
[25] *Ntakirutimana* Appeal Judgement, para. 11 (internal reference omitted). *See also, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 16; *Ntawukulilyayo* Appeal Judgement, para. 8; *Munyakazi* Appeal Judgement, para. 6.
[26] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 17; *Ntawukulilyayo* Appeal Judgement, para. 9; *Munyakazi* Appeal Judgement, para. 7.
[27] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 17; *Ntawukulilyayo* Appeal Judgement, para. 9; *Munyakazi* Appeal Judgement, para. 7.
[28] *Krstić* Appeal Judgement, para. 40 (internal references omitted). *See also, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 18; *Ntawukulilyayo* Appeal Judgement, para. 10; *Munyakazi* Appeal Judgement, para. 8.
[29] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 19; *Ntawukulilyayo* Appeal Judgement, para. 11; *Munyakazi* Appeal Judgement, para. 9.

impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[30]

15. 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.[31] 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.[32] 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.[33]

[30] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 19; *Ntawukulilyayo* Appeal Judgement, para. 11; *Munyakazi* Appeal Judgement, para. 9.
[31] Practice Direction on Formal Requirements for Appeals from Judgement, 15 June 2007, para. 4(b). *See also, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 20; *Ntawukulilyayo* Appeal Judgement, para. 12; *Munyakazi* Appeal Judgement, para. 10.
[32] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 20; *Ntawukulilyayo* Appeal Judgement, para. 12; *Munyakazi* Appeal Judgement, para. 10.
[33] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 20; *Ntawukulilyayo* Appeal Judgement, para. 12; *Munyakazi* Appeal Judgement, para. 10.

III. ALLEGED PREJUDICE RELATING TO THE FAIRNESS OF THE PROCEEDINGS (GROUND 34)

16. Ntabakuze submits that he was prejudiced by the "constant violation of his rights during the entire process of the prosecution, trial and conviction".[34] Specifically, Ntabakuze contends that: (i) following his arrest, he was detained for three months without an indictment, in violation of Rule 47(C) of the Rules of Procedure and Evidence of the Tribunal ("Rules");[35] (ii) he "never exactly knew the charges against him until the end of the trial"[36] and the Prosecution presented evidence falling outside the scope of his Indictment;[37] (iii) his right to be tried without undue delay was violated;[38] (iv) he was prejudiced by the Prosecution's violations of its disclosure obligations under Rule 68 of the Rules;[39] and (v) the Trial Chamber relied "solely on unreasonable and hypothetical inferences in violation of the principle of presumption of innocence as well as of reasonable doubt" in order to "compensate the insufficiency or failure of the Prosecution to prove its case".[40] Ntabakuze also complains that during his 12 years of detention, he has not received any proposal for remunerated employment, as provided for by Rule 71 of the Rules of Detention of the Tribunal.[41] He requests that the Appeals Chamber grant the relief it deems "just and proper" for the serious prejudice he suffered from the "procedural history".[42]

17. The Prosecution responds that Ntabakuze's rights were not violated, and that he has not demonstrated any prejudice.[43]

18. The Appeals Chamber notes that, on 25 September 1998, Trial Chamber II of the Tribunal, which was seised of Ntabakuze's case at the time, determined that Ntabakuze's "arrest, detention and continued detention [...] were authorized by judicial orders".[44] Ntabakuze merely repeats his previous challenges to the validity of his arrest and detention, without attempting to demonstrate that Trial Chamber II's rejection thereof constitutes an error warranting the intervention of the Appeals Chamber.

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[34] Notice of Appeal, heading "Ground 34" at p. 42; Appeal Brief, heading "Ground 34" at p. 90.
[35] Notice of Appeal, para. 134; Appeal Brief, para. 323.
[36] Notice of Appeal, para. 135; Appeal Brief, para. 324. *See also* Appeal Brief, paras. 326, 328.
[37] Notice of Appeal, para. 134; Appeal Brief, para. 323.
[38] Notice of Appeal, para. 136; Appeal Brief, para. 329.
[39] Appeal Brief, para. 325.
[40] Appeal Brief, para. 326. *See also ibid.*, para. 328.
[41] Notice of Appeal, para. 137; Appeal Brief, para. 330, *referring to* Rule 71 of the Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, adopted on 5 June 1998 ("Rules of Detention").
[42] Notice of Appeal, para. 138; Appeal Brief, para. 331.
[43] Prosecution Response Brief, paras. 5, 229-234.
[44] *The Prosecutor v. Aloys Ntabakuze,* Case No. ICTR-97-34-T, Decision on the Defence Motion for Annulment of Proceedings, Release and Return of Personal Items and Documents, 25 September 1998, p. 8. *See also ibid.*, p. 6; Trial Judgement, para. 2296.

19. Likewise, Ntabakuze does not demonstrate under this ground of appeal that his right to be informed of the charges against him was violated. He does not present any argument to substantiate this general claim,[45] nor does he address the Trial Chamber's conclusion that "the trial has not been rendered unfair due to the number of defects in the Indictments which have been cured".[46] His contentions in these respects are therefore dismissed.

20. The Appeals Chamber notes that the Trial Chamber examined whether Ntabakuze's right to be tried without undue delay as provided for by Article 20(4)(c) of the Statute had been violated.[47] The Trial Chamber acknowledged that the proceedings had been lengthy, but concluded that, in view of the size and complexity of the trial, there had been no undue delay in their conduct.[48] The Appeals Chamber recognises the substantial length of the proceedings in this case, resulting in a long period of pre-judgement detention for Ntabakuze.[49] However, the length of an accused's detention does not in itself constitute undue delay, and the fact that Ntabakuze had been detained for 12 years at the time of filing his Notice of Appeal[50] is insufficient, in itself, to show that the Trial Chamber erred in its conclusion that there was no undue delay in the proceedings.

21. The Trial Chamber's duty to ensure the fairness and expeditiousness of trial proceedings entails a delicate balancing of interests, particularly in cases, like the present one, where there were four accused. The Trial Chamber in this case considered numerous factors in deciding that Ntabakuze's right to a fair trial had not been impaired. These factors included: the number of accused; the number of indictments; the scope, number, and gravity of the crimes charged; the vast amount of evidence; the "massive amounts" of disclosure and the subsequent need for intervals between trial segments to allow the parties time to prepare; the need for translation; the securing of witnesses and documents located around the world; and the complexity of the case.[51] Except for acknowledging that the proceedings in this case were complex,[52] Ntabakuze fails to discuss any of these factors or challenge their assessment by the Trial Chamber. The Appeals Chamber therefore considers that Ntabakuze has failed to demonstrate that the Trial Chamber erred in finding that the proceedings had not been unduly delayed.

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[45] The Appeals Chamber will consider the specific arguments related to the form of the Indictment raised by Ntabakuze under Grounds 1 through 14 and 17 in another section of this Judgement. *See infra*, Section IV.
[46] Trial Judgement, para. 127. *See also ibid.*, para. 107 (regarding notification of the charges during the period of provisional detention: "In the Chamber's view, the orders for the transfer of Kabiligi and Ntabakuze adequately informed them of the substance of the provisional charges against them.").
[47] Trial Judgement, paras. 73-84.
[48] Trial Judgement, paras. 78, 82, 84.
[49] The Appeals Chamber recalls that Ntabakuze was arrested in Kenya and transferred to the Tribunal's detention facility on 18 July 1997. *See supra*, para. 2.
[50] *See* Notice of Appeal, para. 136; Appeal Brief, para. 329.
[51] *See* Trial Judgement, paras. 78-84.
[52] Appeal Brief, para. 329.

22. The Appeals Chamber further notes that Ntabakuze's submissions with respect to alleged disclosure violations are devoid of any substantiation and, as such, fail to demonstrate any error warranting the intervention of the Appeals Chamber. The Appeals Chamber considers Ntabakuze's contentions with respect to alleged violations of the presumption of innocence and reasonable doubt to be equally unsubstantiated. These submissions are therefore dismissed.

23. Turning to Ntabakuze's submission regarding the opportunity to enroll in a work programme, the Appeals Chamber stresses that such a complaint must first be made to the Commanding Officer of the Tribunal's Detention Unit, who has responsibility for all aspects of the daily management of the Detention Unit.[53] If the detainee is not satisfied with the response of the Commanding Officer, he may then make a written complaint to the Registrar of the Tribunal, who shall then forward it to the President of the Tribunal.[54] In the present case, Ntabakuze has failed to show that the matter is properly brought before the Appeals Chamber after the exhaustion of all available remedies. His complaint is accordingly dismissed.

24. In light of the foregoing, the Appeals Chamber considers that Ntabakuze has failed to demonstrate under this ground of appeal that his rights were violated and that he suffered any prejudice as a result. Ground 34 of Ntabakuze's appeal is accordingly dismissed.

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[53] *See* Rules 3 and 82 of the Rules of Detention.
[54] *See* Rule 83 of the Rules of Detention.

IV. ALLEGED ERRORS RELATING TO THE INDICTMENT (GROUNDS 1-14, 17)

25. The Trial Chamber found that Ntabakuze was responsible as a superior under Article 6(3) of the Statute for killings perpetrated by members of the Para-Commando Battalion and *Interahamwe* militiamen found to be his subordinates in April 1994 at Kabeza, Nyanza hill, and IAMSEA in Kigali, as well as for preventing refugees killed at Nyanza hill from seeking sanctuary.[55]

26. Ntabakuze submits that the Trial Chamber erred in law in finding him responsible as a superior for these incidents on the ground that the relevant material facts and the mode of liability were not pleaded in his Indictment. He further contends that the Trial Chamber erred in finding that he was put on notice of these charges by subsequent pre-trial communications and in failing to properly assess the prejudice arising from his lack of notice.[56] As part of his challenges relating to the Indictment, Ntabakuze also submits that the Trial Chamber erred in law in failing to require the Prosecution to comply with a decision concerning the Prosecution's Pre-Trial Brief.[57]

27. The Prosecution responds that the Trial Chamber did not convict Ntabakuze based on charges, material facts, or a mode of liability not pleaded in the Indictment and that it correctly applied the principle of notice.[58] The Prosecution asserts that, in any event, Ntabakuze suffered no material prejudice.[59]

A. Preliminary Considerations and Applicable Law

28. Ntabakuze submits that the Trial Chamber failed to exclude evidence that fell outside the scope of the Indictment.[60] However, Ntabakuze fails to support his submission with references to the Trial Judgement or any decision of the Trial Chamber, or to identify the evidence which, in his view, should have been excluded. This deficient submission is therefore dismissed. The Appeals Chamber will accordingly limit its consideration to whether Ntabakuze was properly charged with the allegations on the basis of which he was convicted, without regard to issues pertaining to the admission of evidence.

[55] Trial Judgement, paras. 38, 2062-2067, 2160, 2188, 2196, 2215, 2226, 2247, 2258.
[56] Notice of Appeal, paras. 14-50, 53-56; Appeal Brief, paras. 13-103. *See also* AT. 27 September 2011 pp. 5-20.
[57] Notice of Appeal, heading "Ground 3" at p. 10, para. 20, *referring to The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Defence Motions of Nsengiyumva, Kabiligi, and Ntabakuze Challenging the Prosecutor's Pre-Trial Brief and on the Prosecutor's Counter-Motion, 23 May 2002 ("Decision Relating to the Prosecution Pre-Trial Brief"). *See also* AT. 27 September 2011 pp. 19-31.
[58] Prosecution Response Brief, paras. 5, 13-86. *See also* AT. 27 September 2011 pp. 37-63.
[59] Prosecution Response Brief, paras. 5, 13, 83, 84.
[60] Notice of Appeal, para. 18; Appeal Brief, para. 29.

29. Ntabakuze also submits that the Trial Chamber erred in law in convicting him of charges that were neither pleaded in the Indictment, nor in any subsequent pre-trial communications.[61] He contends that the Trial Chamber disregarded the relevant applicable principles mandating that new material facts or charges can only be added to the indictment through formal amendment pursuant to Rule 50 of the Rules.[62] Arguing that curing a defective indictment cannot lead to a radical transformation of the Prosecution's case, Ntabakuze submits that the Trial Chamber engaged in an impermissible *de facto* amendment of the Indictment in convicting him as a superior for the crimes allegedly committed at Kabeza, Nyanza hill, the Sonatube junction, and IAMSEA.[63] The Appeals Chamber will address these general contentions together with Ntabakuze's specific arguments in relation to each incident for which he was convicted.

30. Before doing so, the Appeals Chamber recalls that the 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.[64] Whether a fact is "material" depends on the nature of the Prosecution's case.[65] An indictment which fails to set forth the specific material facts underpinning the charges against the accused is defective.[66] The defect may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charge.[67] However, a clear distinction has to be drawn between vagueness in an indictment and an indictment omitting certain charges altogether.[68] While it is possible to remedy the vagueness of an indictment, omitted charges can be incorporated into the indictment only by a formal amendment pursuant to Rule 50 of the Rules.[69] The Appeals Chamber will address Ntabakuze's specific arguments with these principles in mind.

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[61] Notice of Appeal, paras. 16-18, 49, 50; Appeal Brief, paras. 28, 100-103. *See also* Notice of Appeal, para. 22.
[62] Notice of Appeal, para. 18; Appeal Brief, para. 29. *See also* Notice of Appeal, paras. 15, 19.
[63] Notice of Appeal, paras. 17, 18, 50; Appeal Brief, paras. 100, 101.
[64] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 96; *Ntawukulilyayo* Appeal Judgement, para. 188; *Munyakazi* Appeal Judgement, para. 36.
[65] *See, e.g., Renzaho* Appeal Judgement, para. 53; *Karera* Appeal Judgement, para. 292; *Ntagerura et al.* Appeal Judgement, para. 23.
[66] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 96; *Ntawukulilyayo* Appeal Judgement, para. 189; *Kupreškić et al.* Appeal Judgement, para. 114.
[67] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 96; *Ntawukulilyayo* Appeal Judgement, para. 189; *Kupreškić et al.* Appeal Judgement, para. 114.
[68] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 96; *Ntawukulilyayo* Appeal Judgement, para. 189; *Ntagerura et al.* Appeal Judgement, para. 32.
[69] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 96; *Ntawukulilyayo* Appeal Judgement, para. 189; *Ntagerura et al.* Appeal Judgement, para. 32.

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B. Alleged Failure to Require Compliance with the Decision Relating to the Prosecution Pre-Trial Brief

31. The Prosecution filed its Pre-Trial Brief pursuant to Rule 73*bis* of the Rules on 21 January 2002,[70] to which it attached summaries of the anticipated testimony of the witnesses it intended to call and a list of its intended exhibits.[71] Ntabakuze, as well as Nsengiyumva and Kabiligi, objected to the Prosecution Pre-Trial Brief and moved to have it rejected.[72] On 23 May 2002, the Trial Chamber granted the Defence motions in part and ordered the Prosecution "to indicate [...] the points in the concise statement of facts in each of the three Indictments relating to all four Accused to which each witness will testify".[73]

32. On 7 June 2002, the Prosecution supplemented its Pre-Trial Brief by filing a list of the paragraphs in the concise statement of facts of each indictment to which each witness might testify.[74] In a motion filed on 13 August 2002, Ntabakuze complained, *inter alia*, that the Supplement to the Prosecution Pre-Trial Brief did not comply with the Decision Relating to the Prosecution Pre-Trial Brief.[75] On 4 November 2002, the Trial Chamber found that, although its order "was not strictly executed, so to speak, in purely technical terms", the "fact remain[ed] that all the information that the Defence needed to adequately prepare the defence of their respective clients was provided".[76] The Trial Chamber found that, "[i]n the circumstances, the Accused suffered no prejudice" and accordingly overruled Ntabakuze's objection.[77]

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[70] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-I, Prosecutor's Pre-Trial Brief, 21 January 2002 ("Prosecution Pre-Trial Brief").

[71] Prosecution Pre-Trial Brief, Appendix A [Summaries of the Anticipated Testimony of Witnesses] *and* Appendix B [List of Exhibits].

[72] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, [Nsengiyumva's] Preliminary Objection to Prosecutor's Pre-Trial Brief and Annexes, and Motion to Reject the Brief and Annexes, 2 April 2002; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, *Requête de la Défense de Aloys Ntabakuze en vue de faire rejeter le mémoire du Procureur daté du 21 janvier 2002, parce que non conforme à la loi et à l'acte d'accusation*, 3 May 2002; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, *Requête de la Défense de Gratien Kabiligi aux fins de rejet du mémoire préalable du Procureur en date du 21 janvier 2002*, 6 May 2002.

[73] Decision Relating to the Prosecution Pre-Trial Brief, para. 19(a). *See also ibid.*, para. 12 ("[...] the Chamber is of the view that the Prosecution should indicate to which events, circumstances, or paragraphs in the concise statement of facts in the Indictments each of the witnesses will testify.").

[74] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-I, The Prosecutor's Pre-Trial Brief Revision in Compliance with the Decision on Prosecutor's Request for an Extension of the Time Limit in the Order of 23 May, 2002, and with the Decision on the Defence Motion Challenging the Pre-Trial Brief, Dated 23 May, 2002, 7 June 2002 ("Supplement to the Prosecution Pre-Trial Brief" or "Supplement").

[75] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Motion by Aloys Ntabakuze's Defence for Execution of the Trial Chamber's 23 May 2002 Decision on the Prosecutor's Pre-Trial Brief, Dated 21 January 2002, and Another Motion on a Related Matter, originally filed in French on 13 August 2002, English translation filed on 2 September 2002, para. 7. *See also The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Addendum to Aloys Ntabakuze's Defence Motion for Execution of Trial Chamber's 23 May 2002 Decision on the Prosecutor's Pre-Trial Brief Dated 21 January 2000 [*sic*], and a Request on a Related Matter, originally filed in French on 2 September 2002, English translation filed on 19 September 2002.

[76] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision (Motion by Aloys Ntabakuze's Defence for Execution of the Trial Chamber's Decision of 23 May 2002 on the Prosecutor's Pre-Trial Brief, Dated

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33. Ntabakuze submits that the Trial Chamber erred in law in failing to require the Prosecution to comply with its Decision Relating to the Prosecution Pre-Trial Brief.[78] He argues that the Prosecution's failure to comply with the Trial Chamber's decision was a source of "error, confusion, prejudice and injustice".[79] The Prosecution responds that it complied with the Trial Chamber's order by providing all necessary information in the Supplement to the Prosecution Pre-Trial Brief, which the Trial Chamber confirmed.[80]

34. The Appeals Chamber notes that Ntabakuze argues on appeal that the Prosecution failed to comply with the Decision Relating to the Prosecution Pre-Trial Brief without pointing to any error allegedly committed by the Trial Chamber in its Second Decision Relating to the Prosecution Pre-Trial Brief. Ntabakuze thus merely repeats an argument that did not succeed at trial without demonstrating that the Trial Chamber's rejection of it constituted an error warranting the intervention of the Appeals Chamber. The Appeals Chamber therefore dismisses Ground 3 of Ntabakuze's appeal without further examination.

C. Alleged Lack of Notice Concerning Kabeza

35. The Trial Chamber found that, on 7 and 8 April 1994, members of the Para-Commando Battalion, the Presidential Guard, and *Interahamwe* killed civilians in the Kabeza area of Kigali.[81] The Trial Chamber convicted Ntabakuze as a superior pursuant to Article 6(3) of the Statute of genocide (Count 2), murder, extermination, and persecution as crimes against humanity (Counts 4, 5, and 7, respectively), as well as violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 9) for these killings.[82] These convictions were entered on the basis of paragraph 6.36 of the Indictment,[83] which reads as follows:

> 6.36 Starting on 7 April, in Kigali, elements of the Rwandan Army, Gendarmerie and *Interahamwe* perpetrated massacres of the civilian Tutsi population. Concurrently, elements of the Presidential Guard, Para-Commando Battalion and Reconnaissance Battalion murdered political opponents. Numerous massacres of the civilian Tutsi population took place in places where they had seek [*sic*] refuge for their safety.

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21 January 2002, and Another Motion on a Related Matter), originally filed in French on 5 November 2002, English translation filed on 20 November 2002 ("Second Decision Relating to the Prosecution Pre-Trial Brief"), para. 12.
[77] Second Decision Relating to the Prosecution Pre-Trial Brief, para. 12, p. 8.
[78] Notice of Appeal, heading "Ground 3" at p. 10, para. 20; Appeal Brief, paras. 34-36. *See also* Reply Brief, para. 40.
[79] Notice of Appeal, para. 21.
[80] Prosecution Response Brief, para. 55, *referring to* Second Decision Relating to the Prosecution Pre-Trial Brief.
[81] Trial Judgement, paras. 926, 2128.
[82] Trial Judgement, paras. 2135, 2160, 2188, 2196, 2215, 2247, 2258.
[83] Trial Judgement, para. 907, fn. 1028. *See also ibid.*, para. 928.

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The Indictment indicates in relevant part that these allegations were being pursued under Counts 2, 4, 5, 7, and 9 pursuant to Article 6(3) of the Statute.[84]

36. The Trial Chamber found that although paragraph 6.36 of the Indictment was vague in relation to the specific allegation concerning Kabeza, this defect was cured by timely, clear, and consistent information provided in the Prosecution Pre-Trial Brief and its Supplement.[85]

37. Ntabakuze submits that the killings perpetrated in Kabeza and his responsibility for those killings were not pleaded in the Indictment, and that such defect was neither curable nor cured.[86] The Prosecution responds that a holistic reading of the Indictment together with post-indictment communications sufficiently informed Ntabakuze that his subordinates from the Para-Commando Battalion were allegedly involved in the massacres committed in Kabeza on 7 and 8 April 1994, and that he was charged for these incidents under Article 6(3) of the Statute.[87]

38. The Appeals Chamber concurs with the Trial Chamber that paragraph 6.36 of the Indictment is manifestly defective in relation to the allegation concerning Kabeza; it fails to specify the location, circumstances, and date of the alleged incident.[88] The question before the Appeals Chamber is therefore whether the Trial Chamber erred in finding that the defect was curable, and if not, whether it erred in finding that the defect was cured.

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[84] Indictment, pp. 46, 48-53. These allegations were not pursued under Article 6(1) of the Statute.

[85] Trial Judgement, para. 928, *referring to The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Ntabakuze Motion for Exclusion of Evidence, 29 June 2006 ("Decision on Exclusion of Evidence"), paras. 32-35, Prosecution Pre-Trial Brief, Appendix A, Witness AH, p. 4, *and* Supplement to the Prosecution Pre-Trial Brief, p. 13.

[86] Notice of Appeal, paras. 23, 32-34, 49; Appeal Brief, paras. 51-53, 70-75, 78; AT. 27 September 2011 pp. 13-16, 19-22.

[87] Prosecution Response Brief, paras. 24, 25. *See also* AT. 27 September 2011 pp. 39, 40, 42-48, 55-60.

[88] The Appeals Chamber notes that the Prosecution appears to submit that, given the widespread nature of the massacres, and the involvement of virtually every unit of the army in perpetrating them in multiple locations throughout Kigali and other prefectures, it was "legitimate" for the Indictment to only provide examples of some locations where massacres occurred. *See* Prosecution Response Brief, para. 31. *See also* AT. 27 September 2011 p. 39. The Appeals Chamber considers this argument to be ill-founded. The Appeals Chamber has previously stated that "the facts relevant to the acts of those others for whose acts the accused is alleged to be responsible as a superior [...] will usually be stated with less precision because the detail[s] of those acts are often unknown, and because the acts themselves are often not very much in issue". *See Muvunyi* Appeal Judgement of 29 August 2008, para. 58, *citing Ntagerura et al.* Appeal Judgement, para. 26, fn. 82, *quoting Blaškić* Appeal Judgement, para. 218. However, the indictment must plead the criminal conduct of the subordinates for whom the accused is alleged to be responsible. *See infra*, para. 100. At a minimum, this includes pleading the location and approximate date of the alleged criminal acts and the means by which they were committed when this information is in possession of the Prosecution.

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1. Whether the Defect was Curable

39. Ntabakuze contends that he could not have known on the basis of the Indictment that he was being charged with superior responsibility for crimes committed by Para-Commando soldiers in Kabeza.[89] He argues that the vagueness of paragraph 6.36 of the Indictment was not a defect "that could be 'cured' by anything other than a formal amendment of the Indictment, because [the] new material facts regarding Kabeza were such that they could, on their own, support separate charges".[90] In Ntabakuze's view, the Trial Chamber erroneously "expand[ed] the meaning of paragraph 6.36 to cover crimes committed at other locations and by other entities, thereby incorporating new, separate, charges".[91] He submits that, in convicting him for the incident in Kabeza, the Trial Chamber engaged in an impermissible *de facto* amendment of his Indictment.[92]

40. The Prosecution responds that the involvement of Para-Commando soldiers in killings of civilians in Kabeza did not constitute a new charge but was a material allegation that supported an existing charge as alleged in the more generally worded paragraph 6.36 of the Indictment.[93]

41. Paragraph 6.36 of the Indictment clearly pleads, *inter alia*, "Kigali" as the location and "elements of the Rwandan Army" as among the perpetrators of "massacres of the civilian Tutsi population". Given that Kabeza is located within Kigali and the Para-Commando Battalion is an element of the Rwandan army,[94] the Appeals Chamber rejects Ntabakuze's contention that the killings in Kabeza by Para-Commando soldiers constitute "crimes committed at *other* locations and by *other* entities" than those pleaded at paragraph 6.36.[95] Rather, the Kabeza killings by Para-Commando soldiers constitute crimes committed *within* the location and by entities *within* those pleaded at paragraph 6.36 of the Indictment.

42. Furthermore, the Appeals Chamber is not persuaded by Ntabakuze's argument that the specific reference to the involvement of elements of the Para-Commando Battalion in the murder of political opponents in paragraph 6.36 "necessarily excludes the charge that [they] were involved in killing Tutsi civilians in other places".[96] Nothing in paragraph 6.36 supports Ntabakuze's interpretation. Rather, the broad reference in paragraph 6.36 to "elements of the Rwandan Army,

[89] Notice of Appeal, para. 23; Appeal Brief, para. 52. *See also* Notice of Appeal, para. 33; Appeal Brief, para. 72; AT. 27 September 2011 pp. 13-16, 19-22. The Appeals Chamber notes that Ntabakuze does not raise specific arguments regarding notice of the involvement of *Interahamwe* in the Kabeza killings. The Appeals Chamber refers to its discussion regarding notice of Ntabakuze's alleged superior responsibility over the *Interahamwe* in the sub-section dedicated to superior responsibility. *See infra*, Section IV.G.1.
[90] Appeal Brief, para. 53. *See also ibid.*, para. 73; AT. 27 September 2011 pp. 13-16, 19.
[91] Appeal Brief, para. 71 (emphasis omitted).
[92] Notice of Appeal, paras. 23, 24.
[93] Prosecution Response Brief, paras. 24, 26-30, 71-73.
[94] *See* Indictment, paras. 1.27 (*referring to* the "FAR military"), 3.3, 4.8, 6.8.
[95] Appeal Brief, para. 71 (emphasis in the original).

Gendarmerie and *Interahamwe*" in relation to the massacres of the Tutsi civilian population, in contrast with the specific reference to "elements of the Presidential Guard, Para-Commando Battalion and Reconnaissance Battalion" in relation to the murder of political opponents, merely suggests that only specific units of the Rwandan army were alleged to have been implicated in the murder of political opponents.[97]

43. In the same vein, the Appeals Chamber does not consider that, as submitted by Ntabakuze, paragraphs 6.37 through 6.39 of the Indictment purported to limit the broad allegation of paragraph 6.36 by making specific allegations regarding particular places in Kigali.[98] Even if the specific allegations described at paragraphs 6.37 through 6.39 were intended to give substance to the vague allegation framed in paragraph 6.36, nothing in the Indictment suggests that paragraph 6.36 was *limited* to the allegations contained at paragraphs 6.37 through 6.39. As a result, the fact that none of the specific incidents alleged in paragraphs 6.37 through 6.39 expressly implicates the Para-Commando Battalion is immaterial.[99]

44. The Appeals Chamber therefore finds that the allegation regarding Kabeza did not constitute a new charge but fell within the broader allegation relating to the massacre of the civilian Tutsi population in Kigali by elements of the Rwandan army pleaded in paragraph 6.36 of the Indictment. The material facts on the basis of which the Trial Chamber entered its convictions did not lead to a radical transformation of the Prosecution's case against Ntabakuze, nor could these facts, on their own, have supported a separate charge.[100] As vague as the charge set out in paragraph 6.36 was, it nonetheless clearly pleaded the involvement of elements of the Rwandan army in massacres of Tutsi civilians in Kigali starting on 7 April 1994.

45. Accordingly, the Appeals Chamber considers that the defect in the Indictment regarding the Kabeza killings could be remedied by the provision of timely, clear, and consistent information. The Appeals Chamber now turns to consider whether the Trial Chamber erred in finding that the defect was cured.

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[96] Appeal Brief, para. 73 (emphasis omitted). *See also* Reply Brief, para. 55.
[97] Contrary to Ntabakuze's submission, the Appeals Chamber considers that the use of the word "concurrently" in the second sentence of paragraph 6.36 of the Indictment and the reference to "elements" of the Rwandan army and "elements" of the Para-Commando Battalion suggest that paragraph 6.36 contains two distinct allegations: massacres of the Tutsi civilian population on the one hand, and murder of political opponents on the other hand. *See* AT. 27 September 2011 p. 14.
[98] Appeal Brief, para. 72; Reply Brief, para. 10.
[99] *See* Appeal Brief, para. 72.
[100] *See The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006 ("Appeal Decision on Exclusion of Evidence"), para. 30.

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2. Whether the Defect was Cured

46. The Trial Chamber found that the summary of Prosecution Witness AH's anticipated testimony appended to the Prosecution Pre-Trial Brief, together with the Supplement to the Prosecution Pre-Trial Brief, put Ntabakuze on notice that the Prosecution intended to prove that he was criminally responsible for the killing of civilians in Kabeza.[101]

47. Ntabakuze submits that the Trial Chamber erred in so finding.[102] The Prosecution responds that it provided timely, clear, and consistent information notifying Ntabakuze that he was being charged as a superior for massacres committed by his subordinates in Kabeza.[103]

48. The summary of Witness AH's anticipated testimony indicates in relevant part that "[o]n the night of 7th to 8th April 1994 in the Kabeza area, military elements belonging to the Para-Commando Battalion and Presidential Guard Battalion went from family to family to kill civilians".[104] It also refers to Ntabakuze's presence in the afternoon of 8 April 1994 "at the crossing between Kanombe and Kabeza where his troops were searching for and killing civilians and erecting roadblocks".[105] The Prosecution specified that this summary concerned Ntabakuze.[106] In the Supplement to the Prosecution Pre-Trial Brief, the Prosecution further specified that Witness AH's evidence was relevant to paragraph 6.36 of the Indictment.[107]

49. Ntabakuze was therefore put on clear notice several months before the appearance of the first Prosecution witness that Witness AH would testify that Para-Commando soldiers were involved in the killings of Tutsi civilians in Kabeza on 7 and 8 April 1994.[108] It was also made clear to Ntabakuze through the Supplement to the Prosecution Pre-Trial Brief that the Prosecution intended to rely on Witness AH's evidence in support of paragraph 6.36 of the Indictment. In the Appeals Chamber's view, the fact that the summary of Witness AH's anticipated testimony did not state that the witness was expected to testify about incidents relating to the *morning* of 8 April 1994, as pointed out by Ntabakuze, is of little importance.[109] The question before the

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[101] Trial Judgement, para. 928, *referring to* Decision on Exclusion of Evidence, paras. 32-35.
[102] Notice of Appeal, paras. 32, 34; Appeal Brief, paras. 74, 75, 78. *See also* Notice of Appeal, para. 50; AT. 27 September 2011 pp. 19-22.
[103] Prosecution Response Brief, paras. 25, 29, 32. The Prosecution submits that the Prosecution Pre-Trial Brief and its Supplement mentioned many witnesses who would testify that Ntabakuze's subordinates were involved in massacres in Kabeza. *See ibid.*, paras. 32 (*mentioning* Prosecution Witnesses AH, BL, DAT, and DBQ), 74.
[104] Prosecution Pre-Trial Brief, Appendix A, Witness AH, p. 4 (emphasis omitted).
[105] Prosecution Pre-Trial Brief, Appendix A, Witness AH, p. 4 (emphasis omitted).
[106] Prosecution Pre-Trial Brief, Appendix A, Witness AH, p. 4.
[107] Supplement to the Prosecution Pre-Trial Brief, p. 13.
[108] While the trial started on 2 April 2002 with the Prosecution's opening statement, the first Prosecution witness was only called to testify on 2 September 2002. After the hearing of two witnesses, the trial was adjourned on 5 December 2002 and recommenced with the Prosecution case on 16 June 2003. *See* Trial Judgement, paras. 2314-2321.
[109] *See* Appeal Brief, para. 74.

Appeals Chamber is whether Ntabakuze had sufficient notice of the charge against him so as to prepare his defence. In this respect, the Appeals Chamber considers that the information provided in Witness AH's summary, when read in conjunction with paragraph 6.36, was sufficiently precise as to the location, circumstances, and date of the alleged incident to enable the preparation of a meaningful defence.

50. The Appeals Chamber also considers that the summary of Prosecution Witness BL's anticipated testimony provided further notice to Ntabakuze. Although lacking precision as to the location,[110] this summary states that "[o]n the 7th April 1994 [the] witness saw Para-Commando soldiers in her neighbourhood" and that "[t]here was a Captain from the Para-Commandos who came to the neighbourhood and was supervising the killings by the *Interahamwe*".[111] The Appeals Chamber finds Ntabakuze's argument that this "[is] not at all" what Witness BL stated in court to be irrelevant.[112] The question at issue here is whether the summary provided Ntabakuze with the necessary information to enable him to prepare his defence, not whether the witness eventually testified as anticipated.

51. The Prosecution refers, in addition, to the summaries of the anticipated testimonies of Prosecution Witnesses DAT and DBQ in support of its assertion that the defect was cured.[113] While these summaries provided notice to Ntabakuze that it was alleged that members of the Para-Commando Battalion participated in killings in Kigali on 7 April 1994, they did not inform him that these killings were alleged to have taken place in Kabeza.[114] Nonetheless, the Appeals Chamber does not agree with Ntabakuze's contention that the information provided in the summaries of Witnesses DBQ's and DAT's anticipated testimonies was inconsistent with the summary concerning Witness AH's testimony.[115] The fact that Witnesses DAT and DBQ were expected to testify that Para-Commando soldiers participated in killings in Kigali on 7 April 1994 is

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[110] The Appeals Chamber notes that the information that Witness BL lived in Kabeza at the time was provided in the French version of the witness's redacted statement dated 2 October 1997, which was disclosed to the Ntabakuze Defence on 30 July 2002. *See The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Interoffice Memorandum, Subject: "Translated Statements", 30 July 2002.

[111] Prosecution Pre-Trial Brief, Appendix A, Witness BL, pp. 18, 19. The Prosecution specified in the Supplement to the Prosecution Pre-Trial Brief that Witness BL's evidence was relevant to paragraph 6.36 of the Indictment. *See* Supplement to the Prosecution Pre-Trial Brief, p. 13.

[112] Appeal Brief, para. 74.

[113] Prosecution Response Brief, para. 32.

[114] While mentioning that on the night of 6 April 1994, Ntabakuze sent "compan[ies]" to different locations, including Kabeza, and that "all the paracommando, except the one[s] who were guarding the camp, went out that night", Witness DBQ's summary refers to the killing of civilians by Ntabakuze's company on 7 April 1994 without specifying where these killings took place. *See* Prosecution Pre-Trial Brief, Appendix A, Witness DBQ, pp. 46, 47. As for Witness DAT, the summary of his anticipated testimony refers to killings perpetrated by Para-Commando soldiers on 7 April 1994 "near Kanombe", with no mention of Kabeza. *See* Prosecution Pre-Trial Brief, Appendix A, Witness DAT, pp. 37, 38.

[115] Reply Brief, para. 20.

not inconsistent with the anticipated testimony of Witness AH that Para-Commando soldiers participated in killings in Kabeza along with members of the Presidential Guard.

52. The Appeals Chamber also rejects Ntabakuze's argument that, by alleging that the killings in Kabeza on 7 and 8 April 1994 were committed by gendarmes, the summary of Witness CS's anticipated testimony contradicted the summaries of Witnesses AH's and BL's anticipated testimonies.[116] Witness CS's summary indeed refers to gendarmes and *Interahamwe* killing Tutsi civilians in Kabeza on 7 April 1994.[117] However, the Appeals Chamber notes that the summary also refers to the presence of military trucks transporting "soldiers".[118] As a result, the Appeals Chamber does not consider that Witness CS's summary would have created confusion with regard to the allegations advanced in the summaries of Witnesses AH's and BL's anticipated evidence.

53. In addition, the Appeals Chamber finds no merit in Ntabakuze's contention that "[a]dding two different crimes, on two different dates, in two completely different prefectures is far from 'clear and consistent'".[119] Paragraph 6.36 of the Indictment alleges the involvement of elements of the Rwandan army in massacres throughout Kigali. Consequently, the fact that other witnesses listed to testify in relation to paragraph 6.36 in the Prosecution Pre-Trial Brief and its Supplement identified other locations within Kigali where soldiers were involved in killings does not materially contradict the allegation that members of the Para-Commando Battalion participated in killings in Kabeza on 7 and 8 April 1994.

54. Additionally, Ntabakuze argues that the summaries of Witnesses BL's and AH's anticipated testimonies "fail[ed] to charge" murder and extermination as crimes against humanity and violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[120] The Appeals Chamber observes that the Prosecution indeed failed to indicate that the summaries of Witnesses BL's and AH's anticipated testimonies were relevant to these crimes. The Prosecution referred only to the crimes of genocide, persecution as a crime against humanity, and "War crimes-Belgians" in relation to Witness AH.[121] Similarly, it only referred to genocide and "Incitement to Genocide" with respect to Witness BL.[122] However, the Appeals Chamber notes that

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[116] Reply Brief, para. 21.
[117] Prosecution Pre-Trial Brief, Appendix A, Witness CS, p. 28.
[118] Prosecution Pre-Trial Brief, Appendix A, Witness CS, p. 28.
[119] Reply Brief, para. 19, *referring to* the fact that Kabeza is located in the Prefecture of Kigali-rural while IAMSEA is located in the Prefecture of Kigali-ville. *See also* Appeal Brief, para. 69.
[120] Appeal Brief, paras. 75, 101, fn. 90; Reply Brief, para. 62. *See also* Notice of Appeal, para. 50, at which Ntabakuze erroneously submits that the crime of persecution was not charged in relation to Kabeza.
[121] Prosecution Pre-Trial Brief, Appendix A, Witness AH, p. 4, at which the boxes for "Genocide/Complicity", "CAH-Persecution", and "War Crimes-Belgians" are checked, but the boxes for "CAH-Extermination", "CAH-Murder", "War Crimes-Violence", and "War Crimes-Killing" are not checked.
[122] Prosecution Pre-Trial Brief, Appendix A, Witness BL, p. 19, at which only the boxes for "Genocide/Complicity" and "Incitement to Genocide" are checked.

the Prosecution specified in the Supplement to the Prosecution Pre-Trial Brief that the evidence of Witnesses AH and BL was relevant to paragraph 6.36 of the Indictment.[123] Paragraph 6.36 is expressly cited in support of the counts of murder, extermination, and violence to life in the charging section of the Indictment.[124] Against this background, the Appeals Chamber considers that the Prosecution made clear as early as 7 June 2002 that it intended to rely on the evidence of Witnesses AH and BL to prove that Ntabakuze was criminally responsible for murder and extermination as crimes against humanity, and violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. In this respect, the Appeals Chamber considers that it was reasonable for the Trial Chamber to find that differences between the Prosecution Pre-Trial Brief and its Supplement did not amount to inconsistent notice.[125] The Supplement was filed after the Prosecution Pre-Trial Brief to correct deficiencies[126] and to indicate as to which paragraphs in the Indictment each of the witnesses listed would testify.[127] Consequently, the Supplement was unequivocally controlling to the extent that there were any inconsistencies between it and the original Prosecution Pre-Trial Brief.

55. Based on the foregoing, the Appeals Chamber concludes that the Trial Chamber did not err in finding that the vagueness of paragraph 6.36 of the Indictment regarding the killing of civilians in Kabeza by members of the Para-Commando Battalion on 7 and 8 April 1994 was cured by the provision of timely, clear, and consistent information.

3. Conclusion

56. Ntabakuze's submissions that he was not charged with the killings committed by Para-Commando soldiers and militiamen in Kabeza on 7 and 8 April 1994, or that he lacked notice that he was charged with these killings, are accordingly dismissed.

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[123] Supplement to the Prosecution Pre-Trial Brief, p. 13.
[124] Indictment, pp. 48 (murder as a crime against humanity – Count 4), 49 (extermination as a crime against humanity – Count 5), 53 (violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II – Count 9).
[125] Trial Judgement, para. 117.
[126] Such deficiencies include the pleading of the crime of direct and public incitement to commit genocide with respect to Kabiligi and Ntabakuze in the Prosecution Pre-Trial Brief although they were not charged with this crime in the Indictment. *See* Decision Relating to the Prosecution Pre-Trial Brief, para. 13.
[127] Decision Relating to the Prosecution Pre-Trial Brief, paras. 12, 19.

D. Alleged Lack of Notice Concerning Nyanza Hill

57. The Trial Chamber found that, on 11 April 1994, a large group of mostly Tutsi refugees fleeing from the *École technique officielle* ("ETO") in Kigali were stopped at the Sonatube junction by soldiers from the Para-Commando Battalion and marched towards Nyanza hill, where they were killed by soldiers, including members of the Para-Commando Battalion, and *Interahamwe* militiamen.[128] The Trial Chamber convicted Ntabakuze as a superior pursuant to Article 6(3) of the Statute of genocide (Count 2), murder, extermination, and persecution as crimes against humanity (Counts 4, 5, and 7, respectively), as well as of violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 9) for these killings.[129] These convictions were entered on the basis of paragraph 6.37 of the Indictment,[130] which reads as follows:

> *ETO-Nyanza*
> 6.37 As of 7 April 1994, many Tutsis sought refuge at the *École Technique Officielle (ETO)*, under the protection of UNAMIR, to escape the attacks against them. On 11 April 1994, immediately following the retreat of the UNAMIR Belgian contingent based at ETO, soldiers, including elements of the Presidential Guard, and *Interahamwe* rounded up a group of refugees and moved them to Nyanza. Théoneste Bagosora was present at the time. After forcing them to walk for two kilometres, the soldiers massacred the refugees. The survivors were dispatched by militiamen on the soldiers' orders.[131]

The Indictment indicates in relevant part that these allegations were being pursued under Counts 2, 4, 5, 7, and 9 pursuant to Article 6(3) of the Statute.[132]

58. In convicting Ntabakuze in relation to the killings at Nyanza hill, the Trial Chamber considered Ntabakuze's assertion that he was not reasonably informed of the charge concerning the Nyanza massacre.[133] The Trial Chamber determined that the Indictment was not vague in this respect and that it reasonably informed Ntabakuze that members of the Para-Commando Battalion acting in conjunction with militiamen were involved in the crimes committed at Nyanza.[134] Specifically, the Trial Chamber found that although there was "no explicit reference" to the Para-Commando Battalion in paragraph 6.37 of the Indictment, "the general reference to 'soldiers'

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[128] Trial Judgement, paras. 1340, 1346, 1354-1356, 1358, 2136.
[129] Trial Judgement, paras. 2136, 2138, 2139, 2160, 2188, 2196, 2215, 2247, 2258.
[130] Trial Judgement, paras. 1315, 1365, fn. 1453.
[131] Emphasis omitted.
[132] Indictment, pp. 46, 48-53. These allegations were not pursued under Article 6(1) of the Statute.
[133] Trial Judgement, paras. 1365-1369.
[134] Trial Judgement, para. 1365. *See also ibid.*, para. 1369.

include[d] members of that battalion when read in context".[135] The Trial Chamber further considered that, in any event, any possible ambiguity was eliminated by subsequent notice.[136]

59. Ntabakuze submits that the Trial Chamber erred in finding that he received sufficient notice that elements of the Para-Commando Battalion were alleged to have participated in the Nyanza massacre.[137] In support of his claim, Ntabakuze argues that paragraph 6.37 of the Indictment specifically identifies the perpetrators of the crimes at Nyanza as elements of the Presidential Guard and *Interahamwe* and does not implicate him or the Para-Commando Battalion in these crimes.[138] He adds that the Trial Chamber erred in relying on paragraph 6.31 of the Indictment as it is of a general nature and was not intended to expand the participants specifically identified in paragraph 6.37, nor was it pleaded under any charge of superior responsibility.[139] According to Ntabakuze, the Prosecution's failure to incriminate Para-Commando soldiers in paragraph 6.37 was not curable, and the Trial Chamber thus engaged in an impermissible *de facto* amendment of the Indictment by convicting him for the events in Nyanza based on this paragraph.[140] He further submits that, even if the defect in the Indictment was curable, the Trial Chamber erred in finding that it was cured.[141]

60. The Prosecution responds that, read as a whole, the Indictment clearly charges Ntabakuze for the killings perpetrated by members of the Para-Commando Battalion at Nyanza.[142] It submits that while paragraph 6.37 of the Indictment does not specifically refer to this Battalion, the phrase "soldiers, including elements of the Presidential Guard" explicitly notified Ntabakuze that other elements of the Rwandan army, and not only of the Presidential Guard, were alleged to be involved in the Nyanza killings.[143] In the Prosecution's view, other paragraphs of the Indictment made it clear that Para-Commando soldiers were also involved in this incident.[144] The Prosecution adds

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[135] Trial Judgement, para. 1365, *also referring to* Decision on Exclusion of Evidence, paras. 37, 38 *and The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision Reconsidering Exclusion of Evidence Following Appeals Chamber Decision, 17 April 2007 ("Reconsideration Decision on Exclusion of Evidence"), paras. 17, 18.
[136] Trial Judgement, paras. 1366-1369.
[137] Notice of Appeal, paras. 28, 29; Appeal Brief, para. 61. *See also* Notice of Appeal, para. 49. At the appeal hearing, Ntabakuze pointed out that in the Decision on Exclusion of Evidence, the Trial Chamber had found that there was some ambiguity as to whether the Indictment sufficiently pleaded the involvement of Para-Commando soldiers in the Nyanza massacre. Ntabakuze therefore qualified the Trial Chamber's findings regarding paragraph 6.37 as "inconsistent". *See* AT. 27 September 2011 p. 16. Ntabakuze did not further elaborate on this issue.
[138] Notice of Appeal, para. 28; Appeal Brief, para. 63. *See also* Reply Brief, para. 57; AT. 27 September 2011 p. 16.
[139] Appeal Brief, para. 63; AT. 27 September 2011 pp. 16, 17.
[140] Notice of Appeal, para. 29; Appeal Brief, paras. 66, 67. *See also* AT. 27 September 2011 pp. 18, 19.
[141] Notice of Appeal, paras. 37-40; Appeal Brief, paras. 64, 65, 83-90; AT. 27 September 2011 pp. 20, 22-29. *See also* Notice of Appeal, para. 49.
[142] Prosecution Response Brief, para. 17; AT. 27 September 2011 p. 41.
[143] Prosecution Response Brief, para. 17. *See also ibid.*, paras. 66-68.
[144] Prosecution Response Brief, para. 18. *See also* AT. 27 September 2011 p. 41.

that, in any event, post-indictment communications put Ntabakuze on notice that it was alleged that Para-Commando soldiers were involved in the Nyanza massacre.[145]

61. In his Reply Brief, Ntabakuze submits that the "use of the word 'including' is insufficient to put an accused on notice of the case against him".[146] He claims that, because he was unaware that he was being prosecuted for alleged crimes of Para-Commando soldiers at Nyanza, he did not cross-examine any Prosecution witness or call any Defence witness on this allegation, nor did he discuss it "as such" in his Closing Brief.[147]

62. Paragraph 6.37 of the Indictment expressly alleges the participation of "soldiers, including elements of the Presidential Guard, and *Interahamwe*" in the Nyanza massacre and refers to Bagosora's presence. As the Trial Chamber recognised, paragraph 6.37 makes no explicit reference to Para-Commando soldiers,[148] nor does it make any reference to Ntabakuze.

63. The Appeals Chamber notes that Ntabakuze was neither charged with nor convicted for direct participation in the Nyanza massacre, but for failing to prevent his subordinates' criminal conduct.[149] In these circumstances, the lack of express reference to Ntabakuze in paragraph 6.37 of the Indictment was not material. By specifically indicating in its charging section that the allegations set out in paragraph 6.37 were pursued against Ntabakuze pursuant to Article 6(3) of the Statute, the Indictment clearly informed Ntabakuze that he was allegedly liable as a superior for the crimes described in this paragraph.[150]

64. The involvement of soldiers from the Para-Commando Battalion in the Nyanza massacre, on the other hand, was a significant material fact of which Ntabakuze required notice, as the role these soldiers played at Nyanza was the basis of Ntabakuze's conviction.[151] While the broad reference to "soldiers" and the use of the term "including" indicate that soldiers from units other than the

[145] Prosecution Response Brief, paras. 19-23, 68, 69, 77-82.
[146] Reply Brief, para. 29. *See also* AT. 27 September 2011 p. 17.
[147] Reply Brief, para. 53, *referring to The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Major Aloys Ntabakuze Amended Final Trial Brief, public redacted version, 5 October 2007 ("Ntabakuze Closing Brief").
[148] Trial Judgement, para. 1365.
[149] The Appeals Chamber observes that the Trial Chamber did not expressly conclude whether Ntabakuze failed in his duty to punish his culpable subordinates. *See* Trial Judgement, para. 2067. The Trial Chamber's finding that the perpetrators were not punished afterwards cannot in itself amount to a finding that Ntabakuze failed to discharge his duty to take necessary and reasonable measures to punish the perpetrators of the crimes. *See Bagosora and Nsengiyumva* Appeal Judgement, paras. 234, 683. In the absence of the necessary finding, the Appeals Chamber considers that the Trial Chamber did not hold Ntabakuze responsible pursuant to Article 6(3) of the Statute for failing to punish his culpable subordinates. By contrast, the Trial Chamber clearly found that Ntabakuze failed to prevent the crimes committed by his subordinates. *See* Trial Judgement, para. 2067.
[150] *See* Indictment, pp. 45-49, 51-53.
[151] The Appeals Chamber notes that Ntabakuze was also convicted for the crimes committed by militiamen at Nyanza. *See* Trial Judgement, paras. 1358, 1364, 1365, 2063, 2064. The Appeals Chamber refers to its discussion on whether Ntabakuze was put on notice of the material facts underpinning his conviction as a superior for the crimes committed by

Presidential Guard were also involved, the Appeals Chamber finds that paragraph 6.37 of the Indictment was too vague, when considered in isolation, to put Ntabakuze on notice that members of the Para-Commando Battalion allegedly participated in the massacre.

65. The Appeals Chamber recalls, however, that in determining whether an accused was adequately put on notice of the nature and cause of the charges against him, the indictment must be considered as a whole.[152] In proceeding with this holistic consideration, the Trial Chamber referred to paragraphs 6.19, 6.31, 6.34, and 6.44 of the Indictment.[153]

66. Paragraph 6.31 of the Indictment specifies that Ntabakuze exercised authority over members of the "FAR" (*Forces armées rwandaises* or Rwandan Armed Forces), their officers, as well as militiamen who committed massacres of the Tutsi population and of moderate Hutus throughout Rwanda. It does not refer to the Para-Commando Battalion. The Appeals Chamber considers that the broad formulation of paragraph 6.31 thus does not clearly indicate that the members of the FAR referred to therein necessarily included Para-Commando soldiers.

67. Similarly, paragraph 6.19 of the Indictment, which implicates the Para-Commando Battalion in killings and massacres perpetrated from 7 April 1994 in the capital and around the country, and paragraph 6.34 of the Indictment, which introduced the allegations concerning Kigali, are too general to clarify that the soldiers implicated in the Nyanza massacre comprised Para-Commando soldiers.

68. By contrast, paragraph 6.44 of the Indictment, which deals with Ntabakuze's responsibility, specifically indicates that members of the Para-Commando Battalion were among those units "most implicated" in the crimes and massacres perpetrated from 7 April 1994 in Kigali and in other prefectures. Moreover, the Appeals Chamber notes that paragraphs 4.6 and 4.8 of the Indictment allege that Ntabakuze was the "Commander of the Para-Commando Battalion [of] the Rwandan Army" and, in this capacity, he "exercised authority over the units of this Battalion". These paragraphs are found in the section describing the accused[154] and were unambiguously meant to apply to the Indictment as a whole.[155] Paragraph 6.37 was therefore to be read in conjunction with these paragraphs. Ntabakuze's command over the Para-Commando Battalion is also clearly stated in paragraph 6.8 and reiterated in paragraphs 6.24, 6.27, 6.28, and 6.29 of the Indictment. Put on

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militiamen in the section of this Judgement addressing the alleged lack of notice of the elements of superior responsibility. *See infra*, Section IV.G.1.

[152] *Bagosora and Nsengiyumva* Appeal Judgement, para. 182; *Seromba* Appeal Judgement, para. 27; *Simba* Appeal Judgement, fn. 158; *Gacumbitsi* Appeal Judgement, para. 123. *See also* Trial Judgement, para. 1365.

[153] Trial Judgement, para. 1365, fn. 1509.

[154] Indictment, Section 4 ("The Accused"), pp. 16, 17.

[155] *See infra*, paras. 106, 107.

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notice that he was charged in connection with the Nyanza massacre for his role as a superior,[156] Ntabakuze thus should have reasonably understood from a contextual reading of paragraph 6.37 that the soldiers implicated in this massacre included soldiers over whom he exercised superior responsibility, namely, soldiers from the Para-Commando Battalion.

69. In support of his contention that the Indictment is defective in relation to Nyanza, Ntabakuze relies on the *Muvunyi* Appeal Judgement of 29 August 2008. He points out that, in that case, the Appeals Chamber found that the indictment against Tharcisse Muvunyi was defective because it did not identify soldiers from a given camp among the perpetrators of an attack against the Beneberika Convent.[157] The Appeals Chamber finds no merit in the comparison between the two cases. Tharcisse Muvunyi was convicted by the Trial Chamber for the attack against the Beneberika Convent pursuant to Article 6(3) of the Statute based on the role played by soldiers from the *École des sous-officiers* camp notwithstanding the fact that the indictment only and specifically pleaded the involvement of "soldiers of the Ngoma camp" in the attack.[158] By contrast, the Indictment in the present case does not limit the alleged perpetrators of the Nyanza massacre to a specific military unit.[159] Rather, Ntabakuze was informed that the Prosecution alleged that soldiers from different units were involved in the killings at Nyanza hill, including soldiers allegedly under his command. The Appeals Chamber considers that he was therefore in a position to prepare his defence accordingly.

70. In this respect, the Appeals Chamber also observes that, contrary to Ntabakuze's submissions, his Counsel cross-examined Witness AR concerning the identity of the soldiers involved in the Nyanza massacre, and questioned Witness AFJ on the participation of the Para-Commando Battalion in killings and, more specifically, on the position of Para-Commando soldiers at the Sonatube junction and on Ntabakuze's alleged order that the refugees be killed at Nyanza.[160] Ntabakuze's Pre-Defence Brief also reflects that he intended to call three witnesses to testify that he never issued an order to send fleeing civilians to Nyanza from the Sonatube combat

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[156] *See supra*, para. 57, *noting* that the allegations in paragraph 6.37 were pursued under Counts 2, 4, 5, 7, and 9 pursuant to Article 6(3) of the Statute.
[157] Appeal Brief, paras. 62, 66, 67, *referring to Muvunyi* Appeal Judgement of 29 August 2008, paras. 40, 41.
[158] *See Muvunyi* Appeal Judgement of 29 August 2008, paras. 33, 34, 40, 41.
[159] *See Muvunyi* Appeal Judgement of 29 August 2008, para. 41 ("[...] this is not a case where the Indictment identified the alleged perpetrators in a general manner. Rather, the perpetrators of the attack are specifically identified in paragraph 3.27 of the Indictment as soldiers from the Ngoma Camp.").
[160] Witness AR, 1 October 2003 pp. 75-77; Witness AFJ, T. 8 June 2004 pp. 86-89. The Appeals Chamber also notes that, in the course of his testimony, Ntabakuze was asked by his Counsel to comment on the evidence given by Witness AFJ regarding the "crimes that were supposed to have been committed by paracommandos [on 11 April 1994]" and Witness AR's testimony regarding the "events on April 11th involving refugees." *See* Ntabakuze, T. 21 September 2006 pp. 10, 11. *See also ibid.*, pp. 8, 9.

position,[161] as well as a witness to testify about "events that took place on the morning of 11th of April regarding a group of individuals that had found refuge at ETO, and decided on that day to try to cross a combat position".[162] He ultimately called two of these witnesses, who testified about the events at the Sonatube junction during which refugees fleeing ETO were turned back[163] and the role of Para-Commando soldiers in these events.[164] Ntabakuze also misrepresents the record when he submits that he did not discuss his alleged responsibility and the involvement of Para-Commando soldiers in the Nyanza massacre in his Closing Brief.[165] The Appeals Chamber considers that the conduct of Ntabakuze's defence demonstrates that he was on notice of the allegations against him concerning Nyanza.

71. For the foregoing reasons, the Appeals Chamber concludes that the Trial Chamber did not err in finding that the Indictment, read in its totality, put Ntabakuze on notice that members of the Para-Commando Battalion were alleged to have been involved in the killings perpetrated at Nyanza hill on 11 April 1994, and that he could be held accountable based on his role as their Commander. This part of Ntabakuze's appeal is therefore dismissed.

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[161] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Ntabakuze Pre-Defence Brief, confidential, 13 January 2005 ("Ntabakuze Pre-Defence Brief"), Section III "Expected Testimony of Ntabakuze Defence Witnesses" ("Section III"), Witnesses DH-50, DH-51, *and* DK-11, pp. 11, 12, 24, 25.
[162] Ntabakuze Pre-Defence Brief, Section III, Witness DK-37, p. 30. *See also The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Supplementary Witnesses to Ntabakuze Pre-Defence Brief, 8 April 2005, Witnesses DM-12 *and* DH-26, pp. 2, 11.
[163] Witness DK-11, T. 19 July 2005 pp. 61-66; Witness DK-37, T. 26 July 2005 pp. 63-70. *See also* Trial Judgement, paras. 1330-1335, *summarising* the evidence of Witnesses DK-11, DK-37, *and* Joseph Dewez; Ntabakuze Pre-Defence Brief, Witnesses DH-51, DK-11, *and* DK-37, pp. 12, 24, 25, 30.
[164] Witness DK-11, T. 19 July 2005 pp. 61-66.
[165] *See* Ntabakuze Closing Brief, paras. 1669-1681, 1690-1760. Ntabakuze stated in particular: "There is no dispute that a group of refugees were met at SONATUBE by Para Commando soldiers and that Major Ntabakuze instructed that they be turned back toward the Belgian UNAMIR base at ETO, but there is no connection between this act of concern for the safety of the refugees by Major Ntabakuze, and any massacres that occurred much later in the day in Nyanza, some 5-6 kilometers southwest of Sonatube." *See ibid.*, para. 1692. *See also, in particular, ibid.*, paras. 1681, 1693, 1698, 1700, 1706, 1727, 1752, 1759.

E. Alleged Lack of Notice Concerning the Sonatube Junction

72. The Trial Chamber found that, in the afternoon of 11 April 1994, a large group of mostly Tutsi refugees fleeing from ETO was stopped at the Sonatube junction by soldiers from the Para-Commando Battalion and then marched to Nyanza hill by members of that Battalion and *Interahamwe*, where they were killed by soldiers, including Para-Commando soldiers, and *Interahamwe*.[166] Based on these findings, the Trial Chamber convicted Ntabakuze of other inhumane acts as a crime against humanity (Count 8) as a superior pursuant to Article 6(3) of the Statute "for preventing the refugees killed at Nyanza hill from seeking sanctuary".[167]

73. Ntabakuze submits that the Trial Chamber erred in convicting him under Count 8 for the incident that allegedly took place at the Sonatube junction on 11 April 1994 as this incident was not pleaded in the Indictment.[168] He contends that, in convicting him for events at the Sonatube junction as a crime separate from that of Nyanza hill, the Trial Chamber made the location of the Sonatube junction a material fact which should have been pleaded in the Indictment.[169] In his view, the Trial Chamber erred in finding that this incident was linked to paragraph 6.37 of the Indictment, as this paragraph does not implicate Para-Commando soldiers, nor does it refer to the occurrence of any incident at the Sonatube junction.[170] Ntabakuze submits that this defect in the Indictment was not curable by post-indictment communications and that, had it been, it was not cured.[171]

74. The Prosecution responds that Ntabakuze was not convicted in relation to the Sonatube junction, but rather in relation to what ultimately happened at Nyanza pursuant to paragraph 6.37 of the Indictment, which alleged the movement of refugees from ETO and their eventual massacre at Nyanza hill.[172] The Prosecution also contends that, in the event that there was any ambiguity about the alleged involvement of the Para-Commando Battalion in the Nyanza massacre, it was clarified by post-indictment communications.[173]

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[166] Trial Judgement, paras. 1340, 1346, 1354-1356, 1358, 2136.
[167] Trial Judgement, paras. 2226, 2258.
[168] Notice of Appeal, paras. 26, 27, 35; Appeal Brief, paras. 23, 58, 80, 82, 101. *See also* Notice of Appeal, para. 49; Reply Brief, para. 46, *citing* Trial Judgement, para. 2221; AT. 27 September 2011 pp. 16, 19.
[169] Notice of Appeal, para. 26; Appeal Brief, paras. 59, 260-262. *See also* Reply Brief, para. 48; AT. 27 September 2011 pp. 27, 28.
[170] Notice of Appeal, para. 35; Appeal Brief, paras. 60, 80, 82. *See also* AT. 27 September 2011 p. 26.
[171] Notice of Appeal, paras. 35, 36; Appeal Brief, paras. 80-82; Reply Brief, para. 49; AT. 27 September 2011 pp. 19, 20, 22-30.
[172] Prosecution Response Brief, paras. 5, 14, 62-64. *See also* AT. 27 September 2011 p. 40.
[173] Prosecution Response Brief, para. 64. In this respect, the Prosecution submits that the Trial Chamber made it clear in an oral ruling on 16 June 2003 that it would consider evidence related to the role of Ntabakuze and the Para-Commando Battalion in moving Tutsi refugees from Sonatube towards Nyanza, thereby providing "additional advance notice" to Ntabakuze. *See ibid.*, para. 22, *referring to* T. 16 June 2003 pp. 58, 59 ("Oral Ruling of 16 June 2003"). *See also* AT. 27 September 2011 pp. 41, 42, 51.

75. In reply, Ntabakuze asserts that the Prosecution's contention that he was not convicted in relation to the Sonatube junction confirms the ambiguity of the case against him.[174]

76. The Appeals Chamber considers that it is clear from a plain reading of the Trial Judgement that, contrary to the Prosecution's contention, the Trial Chamber did not convict Ntabakuze under Count 8 for the fact that refugees fleeing from ETO had been killed at Nyanza, but rather for the fact that the refugees had been prevented from seeking sanctuary before they were killed.[175] In convicting Ntabakuze, the Trial Chamber considered that preventing the refugees from seeking sanctuary was a crime "in connection with the Nyanza hill massacre",[176] and accordingly convicted Ntabakuze on the basis of paragraph 6.37 of the Indictment.[177] The Indictment indicates that the allegations in paragraph 6.37 were being pursued under Count 8 pursuant to Article 6(3) of the Statute.[178]

77. Paragraph 6.37 of the Indictment alleges that soldiers and *Interahamwe* "rounded up a group of refugees and moved them to Nyanza", and that "[a]fter forcing them to walk for two kilometres, the soldiers massacred the refugees". However, nothing in this paragraph suggests that these specific acts constituted a separate and distinct allegation of preventing refugees from seeking sanctuary which was intended to support a charge of other inhumane acts as a crime against humanity.

78. The Trial Chamber acknowledged that the Indictment does not refer to specific acts of inhumane treatment.[179] Nevertheless, the Trial Chamber found that notice of the material facts supporting the charge had been provided through the summary of Witness AR's anticipated testimony annexed to the Prosecution Pre-Trial Brief.[180] The relevant part of this summary reads as follows:

> The witness is a survivor from the ETO/Nyanza Massacres. [...] On the 11th April 1994, the UNAMIR soldiers evacuated from ETO. The witness left the site. The witness and other refugees, were stopped by soldiers. Witness is sure the soldiers belonged to the Presidential Guard. The refugees were turned back and led towards the ETO. The witness recognized Colonel

[174] Reply Brief, para. 49. *See also* AT. 27 September 2011 p. 28.
[175] *See* Trial Judgement, para. 2226.
[176] Trial Judgement, para. 2223. *See also ibid.*, paras. 2220, 2222 ("The Chamber is satisfied that each of these acts conducted *in the course of* the attacks against [...] the civilians at [...] Nyanza hill [...] constitutes a serious attack on human dignity." (Emphasis added)), fn. 2374.
[177] Trial Judgement, paras. 1315, 1365-1367, fns. 1453, 2374.
[178] Indictment, pp. 51, 52. These allegations were not pursued under Article 6(1) of the Statute.
[179] Trial Judgement, para. 2221. The Trial Chamber also found that the Indictment did not refer to the Sonatube junction, where the refugees were stopped. *See ibid.*, para. 1368. However, the Trial Chamber considered that this location did not constitute a material fact which required pleading, but rather evidence which was "simply relevant to proving the allegations pleaded in the Indictment". *See idem.*
[180] Trial Judgement, para. 2221, fn. 2374. The Trial Chamber further specified that, in the Supplement to the Prosecution Pre-Trial Brief, Witness AR "is listed under a relevant paragraph in the [Indictment] which is charged as other inhumane acts". *See ibid.*, fn. 2374.

> BAGOSORA sitting inside a Mercedes Benz painted with Military colours. The witness and the other refugees were led to the top of NYANZA hill and ordered to sit. They were surrounded by soldiers and *Interahamwe*. The soldiers started shooting at the people and the *Interahamwe* were throwing grenades.[181]

The Appeals Chamber considers that this summary could not serve to put Ntabakuze on notice that this chain of events was pleaded as a material fact supporting a crime of other inhumane acts and that Ntabakuze was being charged accordingly.[182]

79. Likewise, a careful reading of the Trial Chamber's Oral Ruling of 16 June 2003 does not allow for the conclusion that Ntabakuze was properly informed that, taken together, the allegations set out in paragraph 6.37 could support a conviction for other inhumane acts as a crime against humanity.[183]

80. The Appeals Chamber further considers that the information relating to the involvement of Para-Commando soldiers in the Nyanza massacre provided to Ntabakuze through post-indictment communications[184] was inadequate to put him on notice of his alleged responsibility for preventing the refugees from seeking sanctuary. Ntabakuze's conviction under Count 8 is based on the chain of events which led up to the killings at Nyanza. Notice that the Prosecution intended to rely on this series of events to underpin the charge of other inhumane acts was only provided at the close of the trial, in the Prosecution Closing Brief.[185] Considering that the basic purpose of informing an accused clearly of the charges against him is so that he may prepare his defence, the Appeals Chamber reiterates that notification in closing submissions cannot constitute proper notice.[186]

81. For these reasons, the Appeals Chamber finds that the Indictment did not provide Ntabakuze adequate notice that he was charged with other inhumane acts as a crime against humanity on the basis of preventing refugees eventually killed at Nyanza hill from seeking sanctuary. It further finds that this defect was not cured by the provision of appropriate information.

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[181] Prosecution Pre-Trial Brief, Appendix A, Witness AR, p. 10.

[182] If anything, by specifying that the soldiers who stopped the refugees from fleeing ETO were from the Presidential Guard, Witness AR's summary narrowed the scope of the category of soldiers allegedly involved in preventing the refugees killed at Nyanza hill from seeking sanctuary.

[183] The Appeals Chamber also notes that, while ruling on Ntabakuze's contention that the allegation that Para-Commando soldiers at the Sonatube junction re-directed refugees who were fleeing from ETO towards Nyanza was not pleaded in his Indictment, the Trial Chamber's Decision on Exclusion of Evidence did not shed any light on the matter. *See* Decision on Exclusion of Evidence, paras. 37, 38. *See also* Reconsideration Decision on Exclusion of Evidence, paras. 14-18.

[184] *See* Trial Judgement, paras. 1366, 1367.

[185] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Prosecutor's Final Trial Brief, public redacted version, signed 1 March 2007, filed 2 March 2007 ("Prosecution Closing Brief"), para. 203 ("In particular, there is evidence that witness AR and his family suffered from inhumane treatment when, along with numerous other Tutsi refugees fleeing from ETO to the safety of Amahoro Stadium, the Paracommandos led by Major Ntabakuze refused to permit the refugees to seek safety at Amahoro. Such a deprivation of liberty, while arguably falling short of actual imprisonment, is inhumane in that it can be said it is a fundamental human right to seek safety and protection from dangerous circumstances. There was widespread deprivation of the right to seek safety.").

[186] *Ntawukulilyayo* Appeal Judgement, para. 202.

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82. The Appeals Chamber recalls that a vague or ambiguous indictment which is not cured of its defect constitutes a prejudice to the accused.[187] The defect may only be deemed harmless if it is demonstrated that the accused's ability to prepare his defence was not materially impaired.[188] The Prosecution has not done so.[189]

83. In view of the foregoing, the Appeals Chamber grants this part of Ntabakuze's appeal and, accordingly, reverses his conviction for other inhumane acts as a crime against humanity entered under Count 8 of the Indictment. As a result, the Appeals Chamber will not examine Ntabakuze's arguments relating to the assessment of the evidence concerning this incident developed under Ground 20 of his appeal. The Appeals Chamber will consider the impact, if any, of this finding on sentencing in the appropriate section below.

[187] *See, e.g., Renzaho* Appeal Judgement, para. 125; *Ntagerura et al.* Appeal Judgement, para. 30; *Simić* Appeal Judgement, paras. 24, 57; *Ntakirutimana* Appeal Judgement, para. 58.
[188] *See, e.g., Renzaho* Appeal Judgement, para. 125; *Nahimana et al.* Appeal Judgement, para. 326; *Simić* Appeal Judgement, paras. 24, 57; *Ntakirutimana* Appeal Judgement, para. 58.
[189] The Appeals Chamber recalls that when an accused has previously raised the issue of lack of notice before the Trial Chamber, the burden rests on the Prosecution to prove on appeal that the ability of the accused to prepare his defence was not materially impaired. *See, e.g., Renzaho* Appeal Judgement, paras. 56, 125; *Ntagerura et al.* Appeal Judgement, para. 31; *Niyitegeka* Appeal Judgement, para. 200. In this case, Ntabakuze had previously raised the issue of lack of notice and deficient pleadings in respect of paragraph 6.37 of the Indictment in his motions for exclusion of evidence and for judgement of acquittal. *See The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Ntabakuze Defence Motion for the Exclusion of Evidence of Allegations Falling Outside the Scope of the Indictment, 28 March 2006, paras. 129-138; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Ntabakuze Defence Motion for Judgement of Acquittal, 21 October 2004 ("Motion for Acquittal"), paras. 192-194. It therefore fell to the Prosecution to show that Ntabakuze's ability to prepare his defence was not materially impaired.

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F. Alleged Lack of Notice Concerning IAMSEA

84. The Trial Chamber found that, around 15 April 1994, members of the Para-Commando Battalion and *Interahamwe* participated in the killing of Tutsi refugees 600 metres away from IAMSEA in the Remera area of Kigali.[190] The Trial Chamber convicted Ntabakuze as a superior pursuant to Article 6(3) of the Statute of genocide (Count 2), murder, extermination, and persecution as crimes against humanity (Counts 4, 5, and 7, respectively), as well as violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 9) for these killings.[191] These convictions were entered on the basis of paragraph 6.36 of the Indictment.[192]

85. The Trial Chamber found that, although paragraph 6.36 of the Indictment was vague in relation to the specific allegation concerning IAMSEA, this defect was cured by timely, clear, and consistent information provided in the Prosecution Pre-Trial Brief and its Supplement.[193]

86. Ntabakuze submits that he was not on notice that he was charged as a superior for killings committed at IAMSEA, as paragraph 6.36 of the Indictment only incriminates Para-Commando soldiers in the killing of political opponents.[194] He argues that the defect in the Indictment with respect to IAMSEA was not one that could be cured since it constituted a separate charge, and that, in convicting him for this incident, the Trial Chamber engaged in an impermissible *de facto* amendment of the Indictment.[195] Ntabakuze further submits that the Trial Chamber erred in concluding that post-indictment communications provided clear and consistent information concerning his alleged responsibility for killings committed at IAMSEA.[196] In addition, he contends that the summary of Prosecution Witness WB's anticipated evidence "fails to charge" extermination as a crime against humanity and violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[197]

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[190] Trial Judgement, paras. 1404, 1427, 1428, 2137.
[191] Trial Judgement, paras. 2137, 2139, 2160, 2188, 2196, 2215, 2247, 2258.
[192] Trial Judgement, paras. 1404, 1430, fn. 1549. Paragraph 6.36 of the Indictment reads as follows:

> 6.36 Starting on 7 April, in Kigali, elements of the Rwandan Army, Gendarmerie and *Interahamwe* perpetrated massacres of the civilian Tutsi population. Concurrently, elements of the Presidential Guard, Para-Commando Battalion and Reconnaissance Battalion murdered political opponents. Numerous massacres of the civilian Tutsi population took place in places where they had seek [*sic*] refuge for their safety.

[193] Trial Judgement, para. 1430, *referring to* Decision on Exclusion of Evidence, paras. 33-35.
[194] Notice of Appeal, paras. 30, 31, 41-43; Appeal Brief, paras. 54-56, 71-73, 76-78; Reply Brief, para. 55. *See also* Notice of Appeal, para. 49; AT. 27 September 2011 pp. 13, 20.
[195] Notice of Appeal, paras. 30, 31; Appeal Brief, paras. 55, 56, 71-73. *See also* Appeal Brief, para. 23; Reply Brief, paras. 10, 17, 44, 54; AT. 27 September 2011 pp. 15, 16, 19.
[196] Notice of Appeal, paras. 41, 43; Appeal Brief, paras. 76, 78, *referring to* Trial Judgement, para. 1421. In his Reply Brief, Ntabakuze submits that the Prosecution wrongly relies on Witness DBQ's will-say statement as providing notice. *See* Reply Brief, paras. 22, 23.
[197] Appeal Brief, paras. 77, 101, fn. 91; Reply Brief, para. 64. *See also* Notice of Appeal, para. 50.

87. The Prosecution responds that the IAMSEA incident was not a new charge, but "fell within the parameters of the Indictment".[198] It submits that, where there was any ambiguity regarding the incident, adequate notice was provided through post-indictment communications, including the will-say statement of Witness DBQ.[199]

88. There is no question that paragraph 6.36 of the Indictment is manifestly defective in relation to the allegation concerning the IAMSEA massacre; it fails to specify the location, circumstances, and approximate date of the alleged incident. However, the Appeals Chamber considers that this event clearly falls within the broader allegation related to the massacre of the civilian Tutsi population in Kigali by elements of the Rwandan army pleaded in paragraph 6.36 of the Indictment.[200]

89. The Appeals Chamber considers that the allegation regarding the killings at IAMSEA did not constitute a new charge and that the material facts in support thereof did not lead to a radical transformation of the Prosecution's case against Ntabakuze, nor could they, on their own, have supported a separate charge. The Appeals Chamber accordingly finds that the defect in the Indictment with respect to the massacre at IAMSEA was one that could be cured by the provision of timely, clear, and consistent information. The Appeals Chamber will therefore consider whether the Trial Chamber erred in finding that the defect was cured.

90. The Trial Chamber found that the summary of Witness WB's anticipated testimony appended to the Prosecution Pre-Trial Brief, together with the Supplement to the Prosecution Pre-Trial Brief, put Ntabakuze on notice of the material facts concerning his role in the killing of Tutsi refugees at IAMSEA.[201]

91. The relevant part of the summary of Witness WB's anticipated testimony reads as follows:

> The witness will testify on selective killings at IAMSEA in Kigali. [...] On the 15th April 1994 FAR soldiers and *Interahamwe* invaded the institute and took the Tutsis to an execution site about 600 meters away. People selected were Tutsi. The witness was taken with the group of refugees. Then a soldier took the witness out of the group with three of his children and brought them back to the institute. On the way back, they heard some gunshots from the execution site. Witness found out after the genocide that the Major who ordered the selection of the Tutsi and who was in charge of the FAR soldiers would have been Ntabakuze.[202]

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[198] Prosecution Response Brief, para. 24. *See also ibid.*, paras. 13, 15, 16, 25-29, 32, 61, 71-73.
[199] Prosecution Response Brief, paras. 25, 29, 32, 61, 72; AT. 27 September 2011 pp. 40, 43, 48. *See also* Prosecution Response Brief, paras. 75, 76.
[200] The Appeals Chamber refers in this respect to its discussion of paragraph 6.36 in the part of this Judgement addressing Ntabakuze's arguments relating to Kabeza. *See supra*, paras. 41-44.
[201] Trial Judgement, para. 1430, fn. 1577, *referring to* Decision on Exclusion of Evidence, paras. 32-35, Prosecution Pre-Trial Brief, Appendix A, Witness WB, p. 134, *and* Supplement to the Prosecution Pre-Trial Brief, p. 13.
[202] Prosecution Pre-Trial Brief, Appendix A, Witness WB, p. 134 (emphasis omitted).

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In the Supplement to the Prosecution Pre-Trial Brief, the Prosecution further specified that Witness WB's summary was relevant to paragraph 6.36 of the Indictment.[203]

92. The Appeals Chamber agrees with the Trial Chamber that this summary adequately cured the defect in the Indictment regarding the IAMSEA killings. Witness WB's summary alleges with precision the involvement of soldiers from the Rwandan army acting under Ntabakuze's control in the killing of Tutsi refugees at IAMSEA on 15 April 1994. While this summary does not expressly incriminate Para-Commando soldiers, Ntabakuze should have understood that the Prosecution was charging him for their acts from the reference to his responsibility over the soldiers involved. In this regard, it is notable that paragraph 6.36 of the Indictment was exclusively pleaded pursuant to Article 6(3) of the Statute,[204] and that the Indictment made clear that Ntabakuze was alleged to have superior responsibility over the Para-Commando Battalion.[205]

93. Ntabakuze correctly points out that the Prosecution Pre-Trial Brief failed to indicate that the summary of Witness WB's anticipated testimony related to the charges of extermination as a crime against humanity (Count 5) and violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 9).[206] The Appeals Chamber observes, however, that the Prosecution specified in the Supplement to the Prosecution Pre-Trial Brief that the evidence of Witness WB was relevant to paragraph 6.36 of the Indictment.[207] The Appeals Chamber considers that the Prosecution thereby clarified that it intended to rely on this evidence to prove that Ntabakuze incurred criminal responsibility pursuant to Article 6(3) of the Statute for all counts in support of which paragraph 6.36 was relied on.[208] Ntabakuze was therefore put on clear and timely notice that the allegation advanced in Witness WB's testimony was relevant to Counts 5 and 9.

94. Turning to the parties' arguments regarding Witness DBQ's evidence, the Appeals Chamber notes that the Prosecution notified Ntabakuze on the eve of Witness DBQ's testimony that the witness would testify that "[t]he Paracommando's [*sic*] were involved in the massacres at IAMSEA".[209] While this notification does not constitute timely notice,[210] it is consistent with the

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[203] Supplement to the Prosecution Pre-Trial Brief, p. 13.
[204] *See* Indictment, pp. 45-49, 51-53.
[205] *See supra*, para. 35, *and infra*, para. 107.
[206] Appeal Brief, paras. 77, 101, fn. 91; Reply Brief, para. 64.
[207] Supplement to the Prosecution Pre-Trial Brief, p. 13.
[208] The Appeals Chamber refers to its earlier discussion of the issue in the section of this Judgement addressing the lack of notice concerning Kabeza. *See supra*, para. 54.
[209] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Interoffice Memorandum, Subject: "Notification of anticipated evidence of witnesses [*sic*] DBQ in the matter of the Prosecutor v. Théoneste Bagosora [*et al.*]", confidential, 22 September 2003.
[210] *See The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Admissibility of Evidence of Witness DBQ, confidential, 18 November 2003, para. 27.

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information provided in the Indictment and Witness WB's summary. The fact that Witness DBQ eventually testified that the incident occurred at the end of April 1994 goes to proof of the Prosecution's allegation, not to notice of the allegation provided to Ntabakuze by the Prosecution.

95. Based on the foregoing, the Appeals Chamber concludes that the Trial Chamber did not err in finding that the vagueness of paragraph 6.36 of the Indictment with respect to the killings at IAMSEA was cured by the provision of timely, clear, and consistent information.

96. Ntabakuze's submissions that he was not charged with these killings, or that he lacked notice that he was charged with these killings, are accordingly dismissed.

G. Alleged Lack of Notice Concerning Superior Responsibility

97. The Trial Chamber found Ntabakuze guilty as a superior pursuant to Article 6(3) of the Statute for crimes committed by members of the Para-Commando Battalion and *Interahamwe* militiamen.[211]

98. Ntabakuze submits that the Indictment did not properly charge him with the crimes for which he was convicted as a superior.[212] In particular, he argues that the Prosecution failed to plead in the Indictment any of the crimes allegedly committed by members of the Para-Commando Battalion during any of the incidents for which he was convicted.[213] Ntabakuze further contends that the Prosecution failed to plead that he exercised effective control over subordinates alleged to have committed crimes, that he had knowledge of the criminal conduct of his subordinates, and that he failed to prevent the crimes or punish his culpable subordinates.[214]

99. The Prosecution responds that the Indictment and post-indictment communications sufficiently notified Ntabakuze that he was charged pursuant to Article 6(3) of the Statute with regard to all of the incidents for which he was convicted, and provided adequate notice of all underlying material facts supporting his responsibility as a superior.[215]

[211] Trial Judgement, paras. 38, 2062-2067, 2160, 2188, 2196, 2215, 2226, 2247, 2258. Although in certain instances the Trial Chamber referred only to Ntabakuze's responsibility for the crimes committed by members of the Para-Commando Battalion (*see ibid.*, paras. 25, 28, 928, 1430), a reading of the Trial Judgement as a whole reflects that Ntabakuze was held guilty for crimes committed in Kabeza, Nyanza, and IAMSEA by Para-Commando soldiers *and* militiamen (*see ibid.*, paras. 1358, 1364, 1365, 1369, 2063, 2064).
[212] Notice of Appeal, paras. 14, 15, 53-56; Appeal Brief, paras. 23, 38, 42-46. *See also* Appeal Brief, paras. 52, 75, 77, 78, 89, 240.
[213] Appeal Brief, para. 24.
[214] Notice of Appeal, para. 54; Appeal Brief, paras. 25, 42-46. *See also* Notice of Appeal, paras. 59, 66, 71; Reply Brief, para. 43; AT. 27 September 2011 pp. 8-13, 18.
[215] Prosecution Response Brief, paras. 13, 15-17, 19, 24, 26, 36, 58.

100. The Appeals Chamber recalls that when an accused is charged with superior responsibility pursuant to Article 6(3) of the Statute, the indictment must plead the following material facts:

> (i) the accused is the superior of sufficiently identified subordinates over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible;
>
> (ii) the criminal conduct of those others for whom the accused is alleged to be responsible;
>
> (iii) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and
>
> (iv) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[216]

1. Identification of Subordinates

101. The Trial Chamber found that Ntabakuze had *de jure* and *de facto* authority over members of the Para-Commando Battalion, including its *Commando de recherche et d'action en profondeur* Platoon ("CRAP Platoon"),[217] and that the Para-Commando soldiers and the *Interahamwe* militiamen who participated in the attacks at Kabeza, Nyanza hill, and IAMSEA were his subordinates acting under his effective control at the time the crimes were committed.[218] The Trial Chamber considered that paragraphs 4.6, 4.8, and 6.31 of the Indictment alleged that "Ntabakuze exercised authority over the Rwandan military, their officers and militiamen by virtue of his position as commander of the Para Commando Battalion".[219] It concluded that, read as a whole, the Indictment reasonably identified the co-Accused's subordinates by category.[220]

102. Ntabakuze submits that the Trial Chamber erred in convicting him as a superior based on material facts pleaded in paragraphs 4.6, 4.8, and 6.31 of the Indictment, as the Prosecution had specifically excluded these paragraphs as support for charges set forth pursuant to Article 6(3) of the Statute.[221] He also points out that paragraphs 4.6, 4.8, and 6.31 do not refer to any particular incident.[222] According to Ntabakuze, none of the paragraphs in the Indictment relied on by the Trial Chamber to support the counts for which he was convicted plead that he exercised effective control over subordinates alleged to have committed crimes.[223] At the appeal hearing, he also specifically argued that the Indictment did not plead that he was the superior of *Interahamwe* militiamen[224] and

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[216] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 191; *Muvunyi* Appeal Judgement of 29 August 2008, para. 19; *Nahimana et al.* Appeal Judgement, para. 323.
[217] Trial Judgement, paras. 2058-2061.
[218] Trial Judgement, paras. 2062, 2063.
[219] Trial Judgement, para. 2057, fn. 2263.
[220] Trial Judgement, para. 125.
[221] Appeal Brief, paras. 26, 27, 47, 50, 60, 63; Reply Brief, paras. 9, 11-14, 16. *See also* AT. 27 September 2011 pp. 4, 7-11, 13, 18.
[222] Appeal Brief, paras. 48, 49. *See also* AT. 27 September 2011 p. 16.
[223] Appeal Brief, para. 25. *See also* AT. 27 September 2011 pp. 8, 9.
[224] AT. 27 September 2011 pp. 8-10.

that his convictions as a superior for their crimes "came out as a surprise".[225] Ntabakuze further asserts that pre-trial communications did not cure the Prosecution's failure to plead the mode of liability of superior responsibility.[226]

103. The Prosecution responds that the Indictment sufficiently identified Ntabakuze's subordinates as members of the Para-Commando Battalion and that Ntabakuze received adequate notice of their involvement in the crimes at Kabeza, Nyanza, and IAMSEA.[227] It argues that because paragraphs 4.6 and 4.8 of the Indictment provided a description of Ntabakuze, as opposed to a statement of facts, there was no need to repeat these paragraphs when dealing with the charges.[228] The Prosecution further asserts that paragraphs 4.6, 4.8, and 6.31 formed part of the Indictment's "charging formula" since it generally referred to "paragraphs 5.1 to 6.51" in respect of each count.[229] With regard to the pleading of Ntabakuze's superior responsibility for the criminal conduct of militiamen in particular, the Prosecution argued at the appeal hearing that any defect in this respect was cured by post-indictment communications, and caused no prejudice to Ntabakuze, who failed to raise a timely objection on the matter.[230]

104. Paragraphs 4.6 through 4.8 of the Indictment describe Ntabakuze's employment history, training, qualifications, and professional function during the period of the events alleged in the Indictment. Paragraphs 4.6 and 4.8 specifically allege that during the events referred to in the Indictment, Ntabakuze was the Commander of the Para-Commando Battalion and, in this capacity, exercised authority over the units of this Battalion. Paragraph 6.31 of the Indictment further identifies "members of the *Forces Armées Rwandaises*, their officers and militiamen" as persons over whom Ntabakuze allegedly "exercised authority".

105. The Appeals Chamber notes that, for each count in the Indictment, the Prosecution made specific references to the paragraphs to which each alleged mode of liability applied. For every count charged pursuant to Article 6(1) of the Statute, paragraphs 4.6 through 4.8 and 6.31 of the Indictment were relied on.[231] The Appeals Chamber observes that these same counts were also charged pursuant to Article 6(3) of the Statute, but paragraphs 4.6 through 4.8 and 6.31 were not specifically referred to in support thereof.[232] Counts 6 and 10, however, which were charged only

[225] AT. 27 September 2011 p. 10.
[226] Notice of Appeal, para. 56; Appeal Brief, paras. 52, 75, 77, 78, 89; Reply Brief, para. 38.
[227] Prosecution Response Brief, paras. 17-23, 25-48, 57-59. *See also* AT. 27 September 2011 pp. 52-63.
[228] Prosecution Response Brief, para. 38.
[229] Prosecution Response Brief, paras. 37-41.
[230] AT. 27 September 2011 pp. 52-63.
[231] Indictment, Counts 1 through 5 and 7 through 9, pp. 45-53.
[232] Indictment, pp. 45-53.

pursuant to Article 6(3) of the Statute and of which Ntabakuze was acquitted, expressly relied on paragraphs 4.6 through 4.8.[233]

106. The Appeals Chamber recalls that the Prosecution's failure to expressly state that a paragraph in the indictment supports a particular count in the indictment is indicative that the allegation in the paragraph is not charged as a crime.[234] Paragraphs 4.6 and 4.8 of the Indictment, however, are contained in a section titled "The Accused", which merely describes Ntabakuze and provides information on his professional background and military authority during the period of the relevant events.[235] Although they contain material facts supporting elements of crimes pleaded elsewhere in the Indictment, paragraphs 4.6 and 4.8 do not plead allegations that may be separately charged as a crime. As a result, the Appeals Chamber considers that the Prosecution was not required to plead these paragraphs expressly under each of the counts in the charging section of the Indictment.

107. The Appeals Chamber further considers that, despite the Prosecution's irregular reference to paragraphs 4.6 through 4.8 of the Indictment, it would be unreasonable to conclude that they do not apply to the Indictment as a whole. The allegation that Ntabakuze was in command of the Para-Commando Battalion is restated in several paragraphs of the Indictment.[236] While these paragraphs were not systematically relied on in relation to the counts of which Ntabakuze was found guilty,[237] when reading the Indictment as a whole, the Appeals Chamber is satisfied that there is no doubt that the Prosecution intended to rely on Ntabakuze's command of the Para-Commando Battalion to establish his criminal liability under Article 6(3) of the Statute. In this respect, the Appeals Chamber recalls that the description of an accused as the commander of a specified military unit is a sufficient basis for asserting the material fact that he was in a position of superior authority over it for the purposes of an allegation under Article 6(3) of the Statute.[238] The Appeals Chamber therefore considers that Ntabakuze's superior position and effective control over members of the Para-Commando Battalion were adequately pleaded in the Indictment.

108. Paragraph 6.31 of the Indictment, on the other hand, is contained in a section titled "Concise Statement of the Facts: Other Violations of International Humanitarian Law" and, unlike paragraphs 4.6 through 4.8, alleges criminal activity. As such, the Appeals Chamber considers that

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[233] Indictment, pp. 50 (Count 6 - rape as a crime against humanity), 53 *and* 54 (Count 10 - outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II).
[234] *Karera* Appeal Judgement, para. 365, *citing Muvunyi* Appeal Judgement of 29 August 2008, para. 156.
[235] Indictment, Section 4 ("The Accused"), pp. 16, 17.
[236] *See* Indictment, paras. 6.24, 6.27-6.29.
[237] The Appeals Chamber notes that, among the paragraphs cited, only paragraph 6.8 of the Indictment is specifically mentioned in relation to Article 6(3) of the Statute under Counts 2 through 5 and 7 through 9. *See* Indictment, pp. 45-49, 50-53.
[238] *See Blaškić* Appeal Judgement, para. 227.

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paragraph 6.31 does not necessarily apply to the Indictment as a whole. Moreover, the Appeals Chamber does not agree with the Prosecution's contention that the general reference to "paragraphs 5.1 to 6.51" in the charging formula of each count necessarily implies that the allegations contained in paragraph 6.31 were charged pursuant to both Articles 6(1) and 6(3) of the Statute even though paragraph 6.31 of the Indictment was specifically referred to in support of Article 6(1) and not Article 6(3).[239] Indeed, most paragraphs between 5.1 and 6.51 relied on in support of a count charged against Ntabakuze pursuant to Article 6(1) of the Statute are not the same as those invoked to support the count pursuant to Article 6(3). Different paragraphs also support the counts charged against Kabiligi, who was jointly indicted with Ntabakuze and charged under the same general formula. Accordingly, while paragraphs 5.1 through 6.51 of the Indictment may collectively apply to a given count in respect of both Articles 6(1) and 6(3), those paragraphs specifically relied on in relation to Ntabakuze pursuant to only one mode of liability may be presumed to apply exclusively to that mode of liability.

109. In these circumstances, the Appeals Chamber considers that the fact that the Prosecution did not expressly refer to paragraph 6.31 of the Indictment in support of any count charged pursuant to Article 6(3) of the Statute could reasonably be understood by Ntabakuze to mean that paragraph 6.31 was not part of the Prosecution's superior responsibility case against him. The Trial Chamber could therefore not reasonably rely on paragraph 6.31 to find that Ntabakuze's authority over the militiamen for the purposes of superior responsibility had been adequately pleaded in the Indictment.[240] While several other paragraphs in the Indictment evoke a relationship of collaboration and training between the military and militiamen,[241] no paragraph other than paragraph 6.31 identifies militiamen as acting under Ntabakuze's authority.[242] The Appeals Chamber accordingly considers that the Indictment failed to put Ntabakuze on adequate notice that he could be held responsible as a superior for the crimes committed by militiamen.

110. The Appeals Chamber observes that the relationship of collaboration and training between the military and militiamen alleged in the Indictment is also evoked in the summaries of witnesses'

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[239] *See* Indictment, pp. 45-47, 49-53. The charging formula for each count reads as follows:

> By the acts or omissions described in paragraphs 5.1 to 6.51 and more specifically in the paragraphs referred to below:
> **Gratien Kabiligi**: [...]
> **Aloys Ntabakuze**:
> -pursuant to Article 6(1), according to paragraphs: [...]
> -pursuant to Article 6(3), according to paragraphs: [...]

The headings at Counts 4 and 6 refer to paragraphs 5.1 to 6.50. *See* Indictment, pp. 48, 50.

[240] *See* Trial Judgement, paras. 1364, 2057, fn. 2263.

[241] *See* Indictment, paras. 1.26, 1.27, 3.9. *See also ibid.*, paras. 5.16, 5.31-5.35, 6.44, 6.45.

[242] The Appeals Chamber considers that the pleading at paragraph 6.18 of the Indictment that "militiamen" committed crimes on the "orders and directives" of, among others, Ntabakuze, is insufficient to provide adequate notice that the militiamen were alleged to be Ntabakuze's subordinates within the meaning of Article 6(3) of the Statute.

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anticipated testimonies annexed to the Prosecution Pre-Trial Brief,[243] as well as in the Prosecution's Opening Statement.[244] The summaries of the anticipated evidence of Prosecution Witnesses BL, DW, and GS even allege a slightly deeper link by implicating Ntabakuze and FAR soldiers in supervising killings perpetrated by the *Interahamwe*.[245] Nevertheless, even if the failure to properly plead Ntabakuze's responsibility for the militiamen's crimes could be deemed curable, the Appeals Chamber considers that such an alleged role does not constitute clear notice of a superior-subordinate relationship between Ntabakuze and the militiamen, or of his material ability to prevent or punish their criminal conduct.

111. The Prosecution submits that "if Ntabakuze still had any doubt about his Article 6(3) liability over the acts of the militiamen, the Trial Chamber's Rule 98 *bis* decision highlighted [...] his liability".[246] In its Decision on Motions for Judgement of Acquittal, the Trial Chamber indeed stated that "[t]he evidence [...] of the relationship between the four Accused and the *Interahamwe* could, if believed, establish a relationship of 'effective control' over the *Interahamwe*".[247] However, this statement was made after the close of the Prosecution's case and, in these circumstances, cannot be deemed to constitute timely notice.

112. The Prosecution further claims that Ntabakuze's failure to object to evidence at trial and the conduct of his defence at trial demonstrate that he had understood that he was charged as a superior for the crimes of militiamen.[248] The Appeals Chamber observes that the evidence introduced at trial to which the Prosecution claims Ntabakuze should have objected also reflected collaboration and training between the military and militiamen.[249] Given that he was on clear notice of such alleged collaboration, it is not surprising that Ntabakuze did not object to the introduction of this evidence. By the same token, given the Appeals Chamber's finding that such an alleged role does not constitute clear notice of a superior-subordinate relationship with, or effective control over,

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[243] *See* Prosecution Pre-Trial Brief, Appendix A, Witnesses AA, AJ, AK, AX, BL, DA, DBQ, DN, GH, GU, HU, Marc Rugenera, WB, XAB, XAN, XAO, XAQ, pp. 1, 6, 7, 13, 14, 18, 19, 32, 33, 46, 47, 58, 80, 82, 86, 120, 121, 134, 138, 141-143.

[244] Opening Statement, T. 2 April 2002 pp. 170-174. When mentioning the co-Accused's superior responsibility, the Prosecution only referred to their "responsibility to prevent *their soldiers* from carrying out attacks against civilians" and "punish those [...] or *their soldiers* who did such things". *See* Opening Statement, T. 2 April 2002 p. 189 (emphasis added).

[245] *See* Prosecution Pre-Trial Brief, Appendix A, Witness BL, p. 19 ("There was a Captain from the Para-Commandos who came to the neighbourhood and was supervising the killings by the *Interahamwe*."); Witness DW, p. 64 ("Around the 10th April 1994, witness saw *Interahamwe* start killing Tutsis who had sought refuge at a church. The *Interahamwe* were being supervised by soldiers."); Witness GS, p. 81 ("Witness will state that Bagosora, Ntabakuze, Ntibihora and Mutabera were part of the death squad that supervised the *Interahamwe* and provided them with grenades. The death squad targeted mainly Tutsis. Ntabakuze was in charge of *interahamwe* logistics while the instructors came from the Para Commando Battalion and Presidential Guards." (Emphasis omitted)).

[246] AT. 27 September 2011 p. 59.

[247] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motions for Judgement of Acquittal, 2 February 2005, para. 31.

[248] *See* AT. 27 September 2011 pp. 59-62.

militiamen, Ntabakuze's failure to object to the introduction of this evidence does not constitute a failure to object to the allegation that he was liable as a superior for the acts of militiamen. Furthermore, Ntabakuze's submissions referred to by the Prosecution do not suggest that Ntabakuze was defending himself against superior responsibility charges for crimes committed by militiamen.[250] Rather, the Prosecution's references to Ntabakuze's purported failures to object at trial and its description of the presentation of his defence demonstrate a focus on Ntabakuze's authority over Para-Commando soldiers only, either by virtue of crimes committed directly by them, or through their involvement in crimes committed by others, such as militiamen.[251]

113. Based on the foregoing, the Appeals Chamber concludes that the Indictment failed to put Ntabakuze on notice that militiamen involved in the crimes were alleged to be his subordinates and that he was being charged with superior responsibility for their crimes.[252]

2. Criminal Conduct of Subordinates

114. The issue of notice of the crimes allegedly committed by Para-Commando soldiers at Kabeza, Nyanza hill, and IAMSEA[253] has been dealt with in the sections of this Judgement addressing the alleged lack of pleading of the material facts underpinning each of the specific incidents. In these sections, the Appeals Chamber has found that Ntabakuze was put on notice that members of the Para-Commando Battalion were alleged to have participated in massacres perpetrated at Kabeza on 7 and 8 April 1994, Nyanza on 11 April 1994, and IAMSEA on 15 April 1994.[254]

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[249] *See* AT. 27 September 2011 pp. 59-62.
[250] *See* Witness WB, T. 13 November 2003 pp. 22, 23; Witness XAB, T. 6 April 2004 pp. 78-83; Witness AJF, T. 8 June 2004 pp. 83, 92, 93, 95-97; Witness BL, T. 4 May 2005 pp. 3-13, 21, 22; Motion for Acquittal, paras. 131-144; Ntabakuze Pre-Defence Brief, Witnesses DH50, DH62, DH86, pp. 11-13, 20; Ntabakuze Closing Brief, paras. 23, 97; Closing Arguments, T. 30 May 2007 pp. 64, 65.
[251] *See* AT. 27 September 2011 pp. 60-62.
[252] This finding has no bearing on the Trial Chamber's conclusion that Ntabakuze would still remain liable for the role of his subordinates from the Para-Commando Battalion in aiding and abetting the crimes. *See* Trial Judgement, para. 2064. In this regard, the Appeals Chamber finds no merit in Ntabakuze's contention at the appeal hearing that the material facts according to which Para-Commando soldiers allegedly aided and abetted the militiamen involved in the crimes of which he was convicted were not pleaded. *See* AT. 27 September 2011 p. 11. In finding that Ntabakuze would also be liable for the crimes of the militiamen that his subordinates would have aided and abetted, the Trial Chamber noted that paragraphs 6.44 and 6.48 of the Indictment alleged that military personnel aided and abetted militiamen in the commission of the crimes. *See* Trial Judgement, fn. 2277. The Appeals Chamber notes that paragraph 6.48 was not relied on in support of any count charged pursuant to Article 6(3) of the Statute. Paragraph 6.44, by contrast, was relied on in support of all relevant counts charged pursuant to Article 6(3) and, in the Appeals Chamber's view, sufficiently pleaded that the criminal conduct of the military, including Para-Commando soldiers, encompassed assistance to militiamen. *See* Indictment, pp. 45-53.
[253] *See* Appeal Brief, para. 24; Reply Brief, para. 38.
[254] *See supra*, Sections IV.C, D, F. The Appeals Chamber recalls its finding that Ntabakuze was not given adequate notice that he was charged with other inhumane acts as a crime against humanity for preventing refugees killed at Nyanza hill from seeking sanctuary. Ntabakuze's conviction for other inhumane acts as a crime against humanity entered on this basis has accordingly been reversed. *See supra*, para. 83.

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115. The Appeals Chamber also rejects Ntabakuze's argument that the Prosecution failed to plead that the perpetrators "had the intent to destroy the group 'as such'".[255] Not only do paragraphs 6.36 and 6.37 of the Indictment setting out the allegations concerning Kabeza, Nyanza, and IAMSEA specifically identify the Tutsis as being the victims of the killings, but the general paragraphs describing the historical context and addressing the Tribunal's jurisdiction also make abundantly clear that the Tutsis were identified as an ethnic or racial group which was targeted for extermination as such.[256]

3. Knowledge of Subordinates' Crimes

116. The Trial Chamber was satisfied that Ntabakuze had actual knowledge that his subordinates were about to commit crimes.[257] In a general section of the Trial Judgement which addressed issues relating to notice of the charges, the Trial Chamber found that "[k]nowledge of the crimes has flowed mainly from their open and notorious or wide-spread and systematic nature" and that "[n]otice of [the co-Accused's] knowledge as well as their participation in the crimes follow[s] from reading the Indictments as a whole".[258]

117. Ntabakuze submits that none of the paragraphs pleaded in the Indictment in support of the counts for which he was convicted allege that he had the requisite knowledge to sustain a conviction under Article 6(3) of the Statute.[259]

118. The Prosecution responds that the material facts relating to Ntabakuze's knowledge were pleaded, such as the fact that he was personally involved or consented to the massacres, the systematic and widespread participation of the Para-Commando Battalion in killings throughout Rwanda, and the massive scale of the killings.[260]

119. The Appeals Chamber notes that paragraph 6.18 of the Indictment pleads that the crimes alleged in the Indictment were carried out on Ntabakuze's orders and directives, which implies his knowledge of the crimes. This paragraph was specifically relied on in support of Ntabakuze's superior responsibility under the relevant counts. Paragraph 6.51 of the Indictment, which was also specifically referred to in relation to the Article 6(3) charges, alleges that Ntabakuze knew of and consented to the crimes perpetrated by his subordinates. The Appeals Chamber further notes that

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[255] *See* Appeal Brief, paras. 241, 247, 248. The Appeals Chamber notes that this argument exceeds the scope of Ntabakuze's Notice of Appeal but considers that it is in the interests of justice to examine it. *See infra*, fn. 550. As the Prosecution responded to this allegation despite its objection to its consideration, the Appeals Chamber finds that there is no unfairness to the Prosecution in this respect. *See* Response Brief, paras. 175, 176.
[256] *See* Indictment, paras. 1.26-1.30, 2.3.
[257] Trial Judgement, paras. 2065, 2066. *See also infra*, fn. 475.
[258] Trial Judgement, para. 125.
[259] Appeal Brief, para. 25. *See also* AT. 27 September 2011 pp. 8, 13.
[260] Prosecution Response Brief, para. 47. *See also ibid.*, para. 58.

several other paragraphs in the Indictment charged pursuant to Article 6(3) of the Statute allege the role and frequent participation of elements of the Para-Commando Battalion in mass killings throughout Rwanda.[261] Taken together, these paragraphs clearly plead that Ntabakuze knew or had reason to know that his subordinates were about to or had committed the crimes alleged in the Indictment, as well as the conduct by which he may be found to have known or had reason to know.

4. Failure to Prevent or Punish

120. The Trial Chamber found that Ntabakuze failed in his duty to prevent the crimes "because he in fact participated in them" and that "[t]here is absolutely no evidence that the perpetrators were punished afterwards".[262]

121. Ntabakuze submits that the Indictment and post-indictment communications are devoid of factual allegations to support the legal element of superior responsibility that he failed to prevent or punish the crimes of his subordinates.[263]

122. The Prosecution responds that the Indictment adequately pleaded that Ntabakuze was personally involved in, or consented to, the massacres perpetrated by his subordinates, and that despite his knowledge of his subordinates' crimes, Ntabakuze took no action to prevent or punish them.[264]

123. The Appeals Chamber recalls that in respect of this element of superior responsibility, in many cases it will be sufficient to plead that the accused did not take any necessary and reasonable measures to prevent or punish the commission of criminal acts.[265] This stems from the fact that the accused's failure to prevent or punish may often be inferred from the continuing or widespread nature of the violations committed by his subordinates as alleged in the indictment.[266]

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[261] *See, e.g.*, Indictment, paras. 6.8, 6.15, 6.19, 6.41, 6.44. Although not specifically invoked in relation to the charges of superior responsibility, paragraph 6.49 of the Indictment also states that, from April to July 1994, the officers of the General Staff of the army, including Ntabakuze, "participated in daily meetings at which they were informed of the massacres of the civilian Tutsi population". *See also ibid.*, para. 6.50 ("Knowing that massacres of the civilian population were being committed, the political and military authorities, including [...] Ntabakuze, took no measures to stop them.").

[262] Trial Judgement, para. 2067.

[263] Notice of Appeal, para. 56; Appeal Brief, para. 46; AT. 27 September 2011 p. 13.

[264] Prosecution Response Brief, para. 48. *See ibid.*, Prosecution Response Brief, para. 58.

[265] *Renzaho* Appeal Judgement, para. 54; *Nahimana et al.* Appeal Judgement, para. 323.

[266] *Cf. Muvunyi* Appeal Judgement of 29 August 2008, para. 62. The Appeals Chamber emphasises that the finding at paragraph 44 of the *Muvunyi* Appeal Judgement of 29 August 2008 relied on by Ntabakuze must be read in context. *See* Appeal Brief, paras. 43, 44. In the *Muvunyi* case, the Appeals Chamber found that the Prosecution had failed to plead in the indictment the role played by Tharcisse Muvunyi's subordinates in an attack against the Beneberika Convent. *See Muvunyi* Appeal Judgement of 29 August 2008, paras. 40, 41. It is against this background that the Appeals Chamber concluded that the mere repetition of the legal elements of superior responsibility was not enough to provide notice of the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent or punish. *See ibid.*, paras. 44, 45. In another section of the *Muvunyi* Appeal Judgement

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124. Paragraph 6.50 of the Indictment pleads that Ntabakuze "took no measures to stop [the massacres of the civilian population]". The Appeals Chamber notes, however, that the Prosecution did not expressly refer to this paragraph in support of its charges pursuant to Article 6(3) of the Statute.[267] The Appeals Chamber considers that this is indicative that the Prosecution did not intend to rely on paragraph 6.50 to establish Ntabakuze's superior responsibility. The Prosecution may therefore not rely on it now to argue that Ntabakuze's failure to prevent the crimes or punish his culpable subordinates was properly pleaded.

125. In fact, a review of the Indictment reflects that the Prosecution did not explicitly plead Ntabakuze's failure to prevent or punish the crimes of his subordinates. However, the Appeals Chamber observes that paragraph 6.18 of the Indictment, which was specifically relied on in support of Ntabakuze's superior responsibility, pleads that the crimes alleged in the Indictment were carried out on his orders and directives. This, in the Appeals Chamber's opinion, gave notice to Ntabakuze that he was alleged to have failed to take the necessary measures to prevent or punish the crimes. Further notice was provided through the allegations of repeated and continuing crimes by Ntabakuze's subordinates from the Para-Commando Battalion,[268] and the allegation at paragraph 6.44 of the Indictment that "[c]ertain units of the Para-Commando, Reconnaissance and Presidential Guard battalions were the most implicated in these crimes".[269]

126. The Appeals Chamber is therefore satisfied that, read as a whole, the Indictment put Ntabakuze on adequate notice that the Prosecution was alleging that he had failed to prevent or punish his subordinates' criminal conduct, and of the conduct by which he was alleged to have failed to take the necessary and reasonable measures to prevent or punish. The Appeals Chamber further notes that, in its Opening Statement, the Prosecution clearly re-affirmed its intention to prove that Ntabakuze, along with his co-Accused, had failed to discharge his duty as a superior.[270]

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of 29 August 2008 relating to attacks at the University of Butare, the Appeals Chamber dismissed Tharcisse Muvunyi's submission that his indictment was defective with respect to the pleading of his failure to prevent or to punish his subordinates. The Appeals Chamber reasoned that the Trial Chamber implicitly inferred Tharcisse Muvunyi's failure from the continuing nature of the violations committed by his subordinates, which followed from the assertion in the indictment that the attacks against the University were "widespread". *See ibid.*, para. 62.

[267] *See* Indictment, pp. 45-54.

[268] *See* Indictment, paras. 6.8, 6.15, 6.19, 6.36, 6.41, 6.44. All these paragraphs were relied on in relation to superior responsibility under the relevant counts. *See* Indictment, pp. 46, 48-53.

[269] Paragraph 6.44 of the Indictment was relied on in support of all relevant counts charged pursuant to Article 6(3) of the Statute. *See* Indictment, pp. 46, 48-53.

[270] Opening Statement, T. 2 April 2002 pp. 189, 190:

> Your Honours, the defendants' responsibilities, we need to touch on a little while before proceeding. As officers, they had a responsibility to prevent their soldiers from carrying out attacks against civilians. They had a responsibility to punish [...] those or their soldiers who did such things, and they had a responsibility to make their best efforts in carrying out these obligations.
>
> Your Honours will hear evidence that the Defendants never lifted a finger to do this, to prevent these things or punish those who did them, but their criminal liability does not stop there. You will hear evidence that the

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5. Conclusion

127. For the foregoing reasons, the Appeals Chamber finds no merit in Ntabakuze's submission that he was not properly charged as a superior pursuant to Article 6(3) of the Statute for the crimes committed by members of the Para-Commando Battalion at Kabeza, Nyanza hill, and IAMSEA.

128. Nonetheless, the Appeals Chamber finds that the Indictment failed to put Ntabakuze on notice that militiamen involved in the crimes were alleged to be his subordinates and that he was being charged with superior responsibility for their crimes. The Appeals Chamber therefore grants this part of Ntabakuze's appeal and finds that the Trial Chamber erred in holding him responsible for the commission of crimes by militiamen. Accordingly, the Appeals Chamber sets aside the finding that Ntabakuze is responsible under Article 6(3) of the Statute for failing to prevent the militiamen's criminal conduct at Kabeza, Nyanza hill, and IAMSEA.

Defendants positively gave their subordinates and other genociders [*sic*] the guidance and leadership in these deeds.

H. Alleged Failure to Consider Prejudice

129. Ntabakuze submits that the Trial Chamber erred in law in failing to properly apply established jurisprudence with respect to determining prejudice arising from the addition of new material facts expanding the charges or supporting separate charges,[271] and in failing to require the Prosecution to demonstrate the absence of prejudice suffered as a result.[272] He contends that he could not mount a proper defence with respect to the incidents for which he was convicted and that the Trial Chamber "unreasonably limited its consideration of 'prejudice' from the lack of notice to an evaluation of whether [he] was 'permitted sufficient time by the court' to meet the new, 'surprise' evidence through cross-examination".[273] Ntabakuze further challenges the Trial Chamber's view that his "*acquittal* [...] on *all* charges brought against him pursuant to Article 6(1), and on *all* charges brought pursuant to Article 6(3) and which were actually set out in the Indictment, indicate[s] that [his] Defence was singularly successful in meeting the 'surprise' evidence and, therefore, was not 'prejudiced'".[274] Ntabakuze submits that the Trial Chamber's "reasoning completely ignores the prejudice arising from the Defence *not being given proper notice* of the specific 'charges' that the *Prosecutor considered to be supported by the new evidence*".[275]

130. The Prosecution responds that Ntabakuze was not convicted on the basis of new material facts supporting separate charges and that, as a result, the jurisprudence he invokes does not apply and the Prosecution was not required to prove the absence of prejudice in the manner that Ntabakuze alleges.[276] It also contends that Ntabakuze misrepresents the Trial Chamber's approach to prejudice.[277] In the Prosecution's view, Ntabakuze suffered no material prejudice.[278]

131. The Appeals Chamber observes that Ntabakuze's submissions are premised on the erroneous assumption that he was convicted on the basis of new material facts which formed new charges, led to a radical transformation of the case, or supported separate charges on their own. While the Trial Chamber acknowledged that the Indictment was defective in relation to some of the

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[271] Notice of Appeal, heading "Ground 12" at p. 18, paras. 44-46; Appeal Brief, heading "Ground 12" at p. 29, paras. 92-96. *See also* AT. 27 September 2011 pp. 3, 30.
[272] Notice of Appeal, paras. 47, 48; Appeal Brief, paras. 22, 97-99. *See also* AT. 27 September 2011 p. 30.
[273] Appeal Brief, para. 30. *See also* AT. 27 September 2011 p. 30.
[274] Appeal Brief, para. 31, *referring to* Trial Judgement, paras. 126, 127 (emphasis in the original).
[275] Appeal Brief, para. 32 (emphasis in the original). Ntabakuze argues that he was prejudiced in the presentation of his case because the Trial Chamber deemed relevant evidence of more than 30 incidents as to which he could have been found guilty. He submits that, "as a result, there was simply no way to anticipate that the Trial Chamber would condemn [him] for events at the four locations in question". *See* Appeal Brief, para. 33.
[276] Prosecution Response Brief, paras. 5, 13, 15, 16, 51, 53, 84.
[277] Prosecution Response Brief, paras. 51, 52, *referring to* Trial Judgement, paras. 124, 126, 127.
[278] Prosecution Response Brief, paras. 5, 13.

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charges for which Ntabakuze was convicted, it found that all defects were cured[279] and that, "where defects have been cured, they relate to more generally worded paragraphs and do not add new elements to the case".[280] With respect to Nyanza hill, the Trial Chamber held that the Indictment, when read in its totality, was not defective and provided adequate notice.[281] In these circumstances, Ntabakuze's contentions that the Trial Chamber erred in not considering the prejudice arising from the introduction of new material facts, expanding the charges, or supporting separate charges, and in failing to require the Prosecution to demonstrate the absence of prejudice arising from the introduction of new material facts and evidence of separate crimes are without merit.

132. Despite finding that the defects had been cured by post-indictment communications, the Trial Chamber considered that it was required to examine "whether the extent of these defects materially prejudiced the accused's right to a fair trial by hindering the preparation of a proper defence".[282] After conducting its analysis, the Trial Chamber concluded that "the trial ha[d] not been rendered unfair due to the number of defects in the Indictments which have been cured".[283] A reading of the Trial Chamber's analysis clearly reflects that the Trial Chamber did not limit its assessment to an evaluation of whether the Defence was permitted sufficient time to meet the evidence through cross-examination. The Trial Chamber considered a number of other factors, including that the curing took place nearly a year before the testimony of the majority of the Prosecution witnesses, that there had been a number of breaks throughout the proceedings, and that the Trial Chamber excluded evidence, granted the postponement of testimonies, or recalled witnesses where necessary.[284]

133. The Appeals Chamber also notes that nowhere in its analysis did the Trial Chamber rely on the number of acquittals as indicating that the Defence was successful in meeting the "surprise evidence" and was therefore not prejudiced. Instead, the Trial Chamber noted the aptitude of the Defence to impeach the Prosecution's evidence, considering it indicative of their ability to prepare their case.[285] The Appeals Chamber considers that this is a relevant factor when considering the cumulative effect of defects in an indictment and sees no error in the Trial Chamber's approach.

134. The Appeals Chamber does not minimise the extent of the Prosecution's failure to provide adequate notice in the Indictment; in respect of the four incidents for which Ntabakuze was found

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[279] Trial Judgement, paras. 123, 928, 1430, 2221. The Appeals Chamber considers that its findings of error regarding notice of the charge of inhumane acts for preventing refugees from seeking sanctuary and of the charge relating to superior responsibility over militiamen have no bearing on the analysis of the Trial Chamber's approach to prejudice.
[280] Trial Judgement, para. 124.
[281] Trial Judgement, para. 1369.
[282] Trial Judgement, para. 123, *referring to* Appeal Decision on Exclusion of Evidence, para. 48.
[283] Trial Judgement, para. 127.
[284] *See* Trial Judgement, paras. 124-126. *See also* Reconsideration Decision on Exclusion of Evidence, paras. 27-32.
[285] Trial Judgement, para. 126.

guilty, three were not adequately pleaded in the Indictment. The record of the case also reflects that the Indictment suffered from a number of other defects.[286] However, Ntabakuze does not demonstrate that the defects in the Indictment materially hampered the preparation of his defence.

135. Accordingly, the Appeals Chamber dismisses Grounds 12 and 13 of Ntabakuze's appeal.

I. Conclusion

136. In light of the foregoing, the Appeals Chamber finds that Ntabakuze has failed to demonstrate that he was not charged pursuant to Article 6(3) of the Statute for the criminal conduct of Para-Commando soldiers at Kabeza, Nyanza hill, and IAMSEA for which he was convicted, or that he lacked adequate notice of the material facts underpinning these charges. However, the Appeals Chamber finds that Ntabakuze was not put on sufficient notice that he was charged with other inhumane acts as a crime against humanity under Count 8 of the Indictment for preventing the refugees killed at Nyanza hill from seeking sanctuary. The Appeals Chamber also finds that the Trial Chamber erred in holding Ntabakuze responsible as a superior for the criminal conduct of militiamen as he was not charged on this basis in the Indictment.

137. Accordingly, the Appeals Chamber grants Ground 9 of Ntabakuze's appeal and reverses his conviction for other inhumane acts as a crime against humanity under Count 8 of the Indictment. It also grants Grounds 1 and 17 of Ntabakuze's appeal in part and sets aside the finding that he is responsible pursuant to Article 6(3) of the Statute for the commission of crimes by militiamen. The Appeals Chamber dismisses the remainder of Ntabakuze's submissions relating to lack of notice.

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[286] *See* Decision on Exclusion of Evidence, paras. 18, 22, 27, 40, 43, 47, 55.

V. ALLEGED ERRORS RELATING TO KABEZA (GROUNDS 18, 22, 23, 26, 27)

138. The Trial Chamber found that, on 7 and 8 April 1994, members of the Para-Commando Battalion, the Presidential Guard, and *Interahamwe* went from house to house in the Kabeza area of Kigali, killing civilians.[287] The Trial Chamber found that the Para-Commando soldiers implicated in these killings were Ntabakuze's subordinates acting under his effective control and with his knowledge and approval.[288] It concluded that Ntabakuze "failed in his duty to prevent the crimes because he in fact participated in them" and that "[t]here is absolutely no evidence that the perpetrators were punished afterwards".[289]

139. Ntabakuze submits that the Trial Chamber erred in law and fact in its assessment of the evidence relating to the crimes allegedly committed in Kabeza.[290] Specifically, he contends that the Trial Chamber erred in finding that: (i) members of the Para-Commando Battalion participated in these crimes; (ii) he had the requisite knowledge and effective control over the Para-Commando soldiers allegedly involved; and (iii) he failed to prevent the crimes or punish his culpable subordinates.[291] The Appeals Chamber will consider these contentions in turn.

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[287] Trial Judgement, paras. 926, 927, 2063, 2128.
[288] Trial Judgement, paras. 2062, 2063, 2065, 2066. The Trial Chamber also found that the militiamen involved in the crimes of which Ntabakuze was convicted were Ntabakuze's subordinates acting under his effective control and that Ntabakuze was liable for their crimes. *See ibid.*, para. 2063. The Appeals Chamber notes that Ntabakuze does not address this aspect of the Trial Chamber's findings under any of the grounds alleging errors in the assessment of the evidence. More importantly, the Appeals Chamber has concluded above that Ntabakuze was not on notice that militiamen were alleged to be his subordinates and has accordingly set aside the finding that Ntabakuze is responsible pursuant to Article 6(3) of the Statute for the commission of crimes by militiamen. *See supra*, Section IV.G.1. The Appeals Chamber will therefore limit its analysis to Ntabakuze's responsibility for the criminal conduct of Para-Commando soldiers.
[289] Trial Judgement, para. 2067.
[290] Notice of Appeal, paras. 57-61, 74-86, 99-110; Appeal Brief, paras. 104-129, 156-166, 180-192.
[291] Notice of Appeal, paras. 59-61, 74-86, 99-110; Appeal Brief, paras. 112-129, 158-166, 181-192. *See also* Reply Brief, paras. 67-82, 95, 100-102; AT. 27 September 2011 pp. 31-36, 68-71. The Appeals Chamber notes that Ntabakuze failed to raise the alleged error pertaining to his failure to prevent or punish in his Notice of Appeal. However, since the Prosecution did not object on this basis and responded to Ntabakuze's submissions, the Appeals Chamber will exercise its discretion to consider Ntabakuze's arguments developed in his Appeal Brief. *See Simba* Appeal Judgement, para. 12.

A. Alleged Errors Regarding the Identification of Para-Commando Soldiers

140. The Trial Chamber found that members of the Para-Commando Battalion participated in killings in Kabeza on 7 and 8 April 1994 based primarily on the evidence of Prosecution Witnesses BL and AH.[292] The Trial Chamber reasoned in part as follows:

> The evidence of Witnesses BL and AH demonstrates that members of the Para Commando Battalion and the Presidential Guard were operating in Kabeza on 7 and 8 April. Both witnesses provided direct and convincing testimony and accurately identified members of the Para Commando [Battalion] by their distinctive camouflage beret.[293]

141. Ntabakuze submits that the Trial Chamber erred in its assessment of Witnesses BL's and AH's evidence regarding the involvement of Para-Commando soldiers in the killings perpetrated in Kabeza.[294] He also argues that the Trial Chamber failed to explain its reliance on the evidence of Witnesses BL and AH despite the fact that their evidence was contradicted by other Prosecution and Defence witnesses.[295]

1. Witness BL's Evidence

142. Ntabakuze contends that the Trial Chamber did not act reasonably and failed to exercise the requisite caution in finding that Para-Commando soldiers committed crimes in Kabeza on the morning of 7 April 1994 based on the uncorroborated circumstantial and hearsay testimony of Witness BL, the single witness who implicated Para-Commando soldiers in the events of that morning.[296] Ntabakuze argues that the soldiers wearing camouflage berets identified by Witness BL as Para-Commando soldiers could have been from other units of the Rwandan army, including from the Huye Battalion, undisciplined soldiers, deserters, or *Interahamwe* wearing camouflage uniforms.[297] He contrasts her evidence with that of witnesses who testified that the Para-Commando Battalion remained "on alert" in Camp Kanombe after President Habyarimana's plane was shot down until being deployed to the battlefront on the afternoon of 7 April 1994.[298] In this regard, Ntabakuze submits that, by stating that it was "not fully convinced that the entire battalion remained on the tarmac for nearly 18 hours after the death of the President awaiting orders for

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[292] Trial Judgement, paras. 920-926.
[293] Trial Judgement, para. 923.
[294] Notice of Appeal, paras. 74, 75, headings "Ground 22" *and* "Ground 23" at pp. 29, 30; Appeal Brief, paras. 113, 114, 124, 157, 158, 167. *See also* Reply Brief, para. 95; AT. 27 September 2011 pp. 31-33. Ntabakuze also makes the general argument with respect to all of the incidents for which he was convicted that the Prosecution witnesses were contradicted by their earlier statements. *See* Notice of Appeal, para. 75; Appeal Brief, para. 157. Because Ntabakuze has failed to substantiate this contention, the Appeals Chamber declines to address it.
[295] Notice of Appeal, paras. 104, 110, headings "Ground 26" *and* "Ground 27" at pp. 34, 35; Appeal Brief, paras. 181, 186, 188, 189, 192.
[296] Appeal Brief, paras. 113, 114, 124, 158, 159, 162, 166; AT. 27 September 2011 pp. 31-33.
[297] Appeal Brief, paras. 115, 120, 161, 182, 185. *See also* Notice of Appeal, paras. 99, 102; Reply Brief, para. 100; AT. 27 September 2011 pp. 31, 33.

deployment",[299] the Trial Chamber confirmed that there was reasonable doubt as to whether Para-Commando soldiers were in Kabeza during those 18 hours.[300] More importantly, he suggests, the Trial Chamber appears to have erroneously placed the burden on him to prove that the perpetrators of the crimes in Kabeza were not Para-Commando soldiers.[301] He also avers that the Trial Chamber's reliance on the proximity of Camp Kanombe to identify the perpetrators of crimes in Kabeza as members of the Para-Commando Battalion contradicts its findings of acquittal for other crimes allegedly committed closer to Camp Kanombe.[302]

143. Ntabakuze further contends that Witness BL only testified about deaths which she believed were committed by *Interahamwe*, not Para-Commando soldiers, and that the only link in her testimony to Para-Commando soldiers committing crimes was uncorroborated hearsay from a person not called as a witness.[303] Finally, he submits that the Trial Chamber erred in finding that Witness BL's testimony regarding the events in Kabeza was corroborated by that of Witness AH because the witnesses testified about different events on two different days.[304] In this regard, he argues that Witness BL did not leave Kabeza on 8 April 1994 as the Trial Chamber stated and that the Trial Chamber therefore clearly erred in finding that Witness BL's evidence did not detract from Witness AH's evidence concerning events on 8 April 1994.[305]

144. The Prosecution responds that Ntabakuze's presentation of events in Kabeza on 7 and 8 April 1994 as if they were unrelated incidents is erroneous, and that the Trial Chamber reached its findings based on the totality of the evidence concerning both days, including the direct evidence of Witness BL, which was confirmed by Witness AH.[306] The Prosecution adds that Ntabakuze's arguments either misconstrue Witness BL's testimony or the Trial Judgement, or are misconceived.[307]

145. The Appeals Chamber notes that Witness BL testified to seeing soldiers in Kabeza on the morning of 7 April 1994, and that she identified them as Para-Commando soldiers by their camouflage uniforms and berets.[308] Although she did not observe any killings, she testified to

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[298] Notice of Appeal, para. 100; Appeal Brief, para. 116. *See also* Appeal Brief, para. 183; AT. 27 September 2011 p. 70.
[299] Trial Judgement, para. 925.
[300] Notice of Appeal, para. 103; Appeal Brief, paras. 117, 187; AT. 27 September 2011 p. 70.
[301] Appeal Brief, para. 118.
[302] Appeal Brief, para. 119.
[303] Notice of Appeal, paras. 76, 77; Appeal Brief, paras. 115, 159, 160; AT. 27 September 2011 pp. 32, 33, 70.
[304] Notice of Appeal, para. 78; Appeal Brief, para. 162; Reply Brief, paras. 70, 71, 73, 75.
[305] Notice of Appeal, paras. 76, 84, 85; Appeal Brief, para. 159; Reply Brief, para. 73. *See also* AT. 27 September 2011 pp. 32, 70.
[306] Prosecution Response Brief, paras. 88, 89, 123, 124, 126, 127. *See also ibid.*, paras. 92, 147, 154; AT. 27 September 2011 p. 64.
[307] Prosecution Response Brief, paras. 92-94, 126, 127.
[308] Witness BL, T. 4 May 2004 pp. 2, 3, 10, 15-18. *See also* Trial Judgement, paras. 909, 921.

hearing gunshots immediately after the Para-Commando soldiers passed her house and hearing that they were committing killings.[309] In addition, she testified that the wife of one of her neighbours sought refuge in her house because her husband had been killed that day by Para-Commando soldiers.[310] The Trial Chamber found Witness BL's account to be both credible and convincing.[311]

146. The Appeals Chamber observes that the Trial Chamber expressly addressed the possibility that the soldiers whom Witness BL saw passing her house could have been from other units.[312] The Trial Chamber weighed the fact that soldiers from three other commando units wore camouflage berets against both the close proximity of Kabeza to the Para-Commando Battalion's main base at Camp Kanombe and the fact that Witness AH testified to seeing members of the Para-Commando Battalion killing civilians in Kabeza on 8 April 1994.[313] The Trial Chamber noted in this regard that Witness AH was a professional soldier and, as such, in a position to accurately identify the military units of the assailants.[314] Based on the direct evidence of Witness AH and the other evidence in the record, including Witness BL's testimony, the Trial Chamber was satisfied that the soldiers operating in Kabeza were from the Para-Commando Battalion.[315] Ntabakuze's argument that the soldiers seen wearing camouflage in Kabeza could instead have been *Interahamwe* or undisciplined soldiers merely because some of them were also known to wear this type of uniform does not suffice to show that the Trial Chamber erred in reaching this conclusion.

147. The Trial Chamber also explicitly considered Defence evidence suggesting that members of the Battalion did not leave Camp Kanombe until mid-afternoon on 7 April 1994, weighed this evidence against the credible accounts of Witnesses BL and AH, and concluded that it was "satisfied that at least a small contingent was present in Kabeza".[316] The Appeals Chamber considers that, read in context, the Trial Chamber's statement that it was "not fully convinced that the entire battalion remained on the tarmac for nearly 18 hours after the death of the President awaiting orders for deployment" indicates that the Trial Chamber was not satisfied that the Defence evidence raised doubts as to the evidence of Witnesses BL and AH on this issue.[317] Although the Trial Chamber's statement could have been clearer, the Appeals Chamber considers that it cannot be reasonably interpreted as confirming the existence of a reasonable doubt as to the presence of Para-Commando soldiers in Kabeza, or as denoting a shift of the burden of proof to Ntabakuze's detriment.

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[309] Witness BL, T. 4 May 2004 pp. 2, 3, 15, 16. *See also* Trial Judgement, para. 909.
[310] Witness BL, T. 4 May 2004 pp. 4, 5. *See also* Trial Judgement, paras. 909, 921.
[311] Trial Judgement, paras. 923, 925.
[312] Trial Judgement, para. 923.
[313] Trial Judgement, para. 923.
[314] Trial Judgement, para. 923.
[315] Trial Judgement, para. 923.

148. The Appeals Chamber further notes that the Trial Chamber acquitted Ntabakuze for ordering killings in areas surrounding Camp Kanombe due to its doubts about what actually transpired at Camp Kanombe after the death of President Habyarimana and the absence of conclusive evidence that Ntabakuze ordered members of the Para-Commando Battalion to avenge the death of the President.[318] Contrary to Ntabakuze's claim, this acquittal is unconnected to the issue of proximity to Camp Kanombe and in no way contradicts the Trial Chamber's finding regarding the presence of members of the Para-Commando Battalion in Kabeza.

149. The Appeals Chamber also finds no error in the Trial Chamber's reliance on Witness BL's hearsay evidence that she was told by one of her neighbours that the latter's husband was killed by Para-Commando soldiers on 7 April 1994 and that she also heard later that they were killing people.[319] The Appeals Chamber notes in this respect that Witness BL also testified to hearing gunshots immediately after the Para-Commando soldiers passed her house.[320] Ntabakuze does not demonstrate that the Trial Chamber erred in considering that the only reasonable inference to be drawn from Witness BL's testimony, examined in light of the totality of the evidence, was that members of the Para-Commando Battalion were going from house to house in the Kabeza area on 7 April 1994 killing civilians.

150. Turning to Ntabakuze's argument that Witness BL's testimony was not corroborated, the Appeals Chamber recalls that a Trial Chamber has the discretion to decide, in the circumstances of each case, whether corroborating evidence is necessary and to rely on uncorroborated, but otherwise credible, witness testimony.[321] In this instance, however, the Trial Chamber's findings were not based on the uncorroborated testimony of a single witness. Although Witnesses BL and AH testified about two different days, the Trial Chamber considered the evidence as a whole and found that the direct and convincing accounts of Witnesses BL and AH demonstrated that members of the Para-Commando Battalion were operating in Kabeza on 7 and 8 April 1994 and that they were killing civilians there.[322] The Appeals Chamber recalls in this regard that two *prima facie* credible testimonies need not be identical in all aspects or describe the same fact in the same way in order to

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[316] Trial Judgement, para. 925.
[317] Trial Judgement, para. 925.
[318] Trial Judgement, paras. 866, 867.
[319] The Appeals Chamber recalls that a Trial Chamber has both the discretion to cautiously consider hearsay evidence and the discretion to rely on it. *See Kalimanzira* Appeal Judgement, para. 96, *citing Karera* Appeal Judgement, para. 39.
[320] Witness BL, T. 4 May 2004 pp. 2, 3, 15, 16. *See also* Trial Judgement, para. 909.
[321] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 251; *Ntawukulilyayo* Appeal Judgement, para. 21; *Nchamihigo* Appeal Judgement, para. 42. A Trial Chamber may thus convict an accused on the basis of a single witness, although such evidence must be assessed with appropriate caution. *See Karera* Appeal Judgement, para. 45; *Kordić and Čerkez* Appeal Judgement, para. 274.
[322] Trial Judgement, paras. 921-926.

be corroborative.[323] Ntabakuze does not show that the Trial Chamber's holistic approach to the evidence was unreasonable.

151. With respect to Ntabakuze's argument that Witness BL's evidence conflicted with that of Witness AH concerning events on 8 April 1994, the Appeals Chamber notes that the Trial Chamber concluded that the fact that Witness BL did not see soldiers on 8 April 1994 but only saw and heard about *Interahamwe* did not detract from Witness AH's first-hand account of events, "since [Witness BL] fled her home that day".[324] A review of the transcripts reveals that the Trial Chamber incorrectly stated that Witness BL fled her home on 8 April 1994.[325] The Appeals Chamber notes, however, that Witness BL witnessed the events of 8 April 1994 from her house,[326] which did not offer her the opportunity to see what was happening elsewhere in Kabeza. The Appeals Chamber therefore considers that it was not unreasonable for the Trial Chamber to conclude that the fact that Witness BL did not also see soldiers on 8 April 1994 does not detract from Witness AH's evidence, notwithstanding its incorrect statement as to when Witness BL fled her home.[327] The Appeals Chamber also fails to see how Witness BL's evidence concerning deaths which she believed were perpetrated by *Interahamwe* in the following days demonstrates any error.[328]

2. Witness AH's Evidence

152. Ntabakuze submits that the testimony of Witness AH, the sole witness to implicate Para-Commando soldiers in the killings in Kabeza on 8 April 1994, was contradicted and that the Trial Chamber did not act reasonably and with requisite caution in relying on it.[329] In particular, Ntabakuze contends that Witness AH's lack of credibility with respect to Ntabakuze's physical presence in Kabeza on 8 April 1994 should have cast reasonable doubt on the witness's other allegations.[330] Ntabakuze adds that Witness AH's evidence concerning the presence in Kabeza of the CRAP Platoon, one of the Para-Commando Battalion's units, is contradicted by the Trial Chamber's finding that the CRAP Platoon was posted at the site of the President's plane crash from the evening of 6 April to 9 April 1994 and by Witness BL's testimony that she "only saw and heard

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[323] *See, e.g., Ntawukulilyayo* Appeal Judgement, para. 24; *Munyakazi* Appeal Judgement, para. 103; *Bikindi* Appeal Judgement, para. 81, *citing Nahimana et al.* Appeal Judgement, para. 428.
[324] Trial Judgement, para. 923. *See also ibid.*, para. 921.
[325] Trial Judgement, para. 923. While the witness referred to 8 April 1994 once during her testimony, she later clarified that she fled her home on 8 May 1994. *See* Witness BL, T. 4 May 2004 pp. 8, 21, 24.
[326] Witness BL, T. 4 May 2004 pp. 2-4.
[327] Trial Judgement, para. 923.
[328] *See* Trial Judgement, para. 909.
[329] Appeal Brief, paras. 124, 165, 166. *See also ibid.*, paras. 113, 114, qualifying the evidence the Trial Chamber relied on as "circumstantial" and "hearsay". Ntabakuze also argues that the evidence of Witness AH concerning the events of 8 April 1994 is uncorroborated. *See* Appeal Brief, para. 166. The Appeals Chamber has already dismissed a similar claim in light of the Trial Chamber's holistic approach to the evidence. *See supra*, para. 150.
[330] Notice of Appeal, paras. 80-82, 106; Appeal Brief, paras. 122, 163, 164, 190-192; Reply Brief, para. 73; AT. 27 September 2011 p. 70.

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about *Interahamwe* in the area on 8 April".[331] Ntabakuze further avers that the Trial Chamber accepted evidence that the rest of the Para-Commando Battalion was deployed to the battlefront on the afternoon of 7 April 1994, where they remained on 8 April 1994 and thereafter.[332]

153. The Prosecution responds that the Trial Chamber committed no error in relying on Witness AH's evidence.[333] It also submits that the Trial Chamber never found that all members of the CRAP Platoon were deployed to the crash site from 6 to 9 April 1994 or that the remainder of the Battalion was deployed to the battlefront on 7 April 1994.[334]

154. The Appeals Chamber notes that Witness AH provided direct evidence of the involvement of members of the Para-Commando Battalion in the killing of civilians in Kabeza on 8 April 1994. The witness testified that, on the morning of 8 April 1994, he saw members of the Presidential Guard and the CRAP Platoon of the Para-Commando Battalion going from house to house in the area shooting civilians.[335] The Trial Chamber found Witness AH's account to be convincing and credible.[336]

155. Contrary to Ntabakuze's suggestion, the Trial Chamber did not find that Witness AH lacked credibility when it declined to rely on his testimony regarding Ntabakuze's presence in Kabeza on 8 April 1994.[337] Rather, the Trial Chamber noted that Witness AH was the sole witness to testify about Ntabakuze's presence in the area, that the witness did not indicate his basis of knowledge for identifying the officer he saw as Ntabakuze, and that he was not asked to identify Ntabakuze in court.[338] The Trial Chamber consequently expressed doubt as to the witness's identification of Ntabakuze in Kabeza.[339] The Trial Chamber also noted evidence indicating that Ntabakuze departed Camp Kanombe for ETO at around 10:30 a.m.[340] While acknowledging the possibility that the incident described by Witness AH could have occurred before Ntabakuze returned to Camp Kanombe, the Trial Chamber considered that this evidence raised additional doubt about whether Ntabakuze was supervising soldiers in Kabeza on 8 April 1994.[341] Ntabakuze fails to show

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[331] Appeal Brief, paras. 121, 123, 165, 191, 192; Reply Brief, paras. 101, 102; AT. 27 September 2011 pp. 32, 70. The Appeals Chamber notes that Ntabakuze fails to develop in his Appeal Brief the argument at paragraph 83 of his Notice of Appeal that Witness AH's account of taking his Tutsi family to Camp Kanombe lacks credibility. The Appeals Chamber therefore considers that Ntabakuze has abandoned this contention.
[332] Appeal Brief, para. 123, *referring to* Trial Judgement, para. 2268.
[333] Prosecution Response Brief, paras. 90, 91, 125, 128, 129, 155.
[334] Prosecution Response Brief, paras. 92, 128, 129, 156.
[335] Witness AH, T. 19 February 2004 pp. 33-35 *and* T. 20 February 2004 pp. 40, 41.
[336] Trial Judgement, paras. 923, 925.
[337] Trial Judgement, para. 924.
[338] Trial Judgement, para. 924.
[339] Trial Judgement, para. 924.
[340] Trial Judgement, para. 924.
[341] Trial Judgement, para. 924.

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that the Trial Chamber's decision not to rely on this particular aspect of Witness AH's testimony rendered the Trial Chamber's reliance on other parts of the witness's testimony unreasonable.[342]

156. Likewise, the Appeals Chamber notes that Ntabakuze misstates the Trial Judgement when he asserts that the Trial Chamber found that the CRAP Platoon was at the plane crash site from the evening of 6 April to 9 April 1994.[343] A review of the Trial Judgement shows that the Trial Chamber merely found that, on the night of 6 April 1994, Ntabakuze ordered the CRAP Platoon to secure the crash site of the President's plane.[344] The Trial Chamber did not determine how many members of the Platoon remained at the crash site, or for how long.

157. Ntabakuze's assertion that the Trial Chamber accepted evidence that the remainder of the Para-Commando Battalion was deployed to the battlefront from the afternoon of 7 April 1994 onwards is also inaccurate.[345] The Trial Chamber clearly held that, while it appeared from the evidence that Ntabakuze's Battalion spent most of the war engaged with Rwandan Patriotic Front ("RPF") forces,[346] "at least a small contingent was present in Kabeza".[347] The Appeals Chamber finds no contradiction between Witness AH's evidence and the Trial Chamber's finding in this respect.

158. Finally, for the reasons already stated, the Appeals Chamber considers that the fact that Witness BL testified to only seeing and hearing about *Interahamwe* in the area on 8 April 1994 does not render unreasonable the Trial Chamber's reliance on Witness AH's direct evidence concerning the presence and actions of Para-Commando soldiers in Kabeza that day.[348]

3. Alleged Failure to Explain Reliance on Witnesses BL and AH

159. Ntabakuze submits that the Trial Chamber failed to explain its reliance on the uncorroborated and contradicted evidence of Witnesses BL and AH.[349] In support of this contention, Ntabakuze repeats his assertions that Witness AH's lack of credibility with respect to Ntabakuze's presence in Kabeza demonstrates that the remainder of his testimony was not credible,

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[342] The Appeals Chamber has repeatedly held that a Trial Chamber may accept some parts of a witness's testimony while rejecting others. *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 243; *Ntawukulilyayo* Appeal Judgement, para. 155; *Munyakazi* Appeal Judgement, para. 103.

[343] The references Ntabakuze provides in support of his contention are to the Trial Chamber's summaries of his submission and certain Defence evidence, not to the Trial Chamber's findings. *See* Appeal Brief, paras. 123, 165, 191, 192. *See also* Reply Brief, para. 101.

[344] *See* Trial Judgement, para. 2060.

[345] *See* Appeal Brief, para. 123, *referring to* Trial Judgement, para. 2268.

[346] Trial Judgement, para. 2268.

[347] Trial Judgement, para. 925. *See also ibid.*, para. 2268.

[348] *See supra*, para. 151.

[349] Notice of Appeal, headings "Ground 26" *and* "Ground 27" at pp. 34, 35, paras. 104, 110; Appeal Brief, paras. 181, 186, 188, 189, 192.

and that Witness BL's testimony concerning the presence of *Interahamwe* in Kabeza on 8 April 1994 contradicts Witness AH's evidence.[350] He also points again to Defence evidence which, he maintains, shows that the Para-Commando Battalion remained on alert at Camp Kanombe after the President's plane was shot down and that other units wore camouflage berets.[351] He further argues that the Trial Chamber failed to address Defence Witness DI-40's evidence regarding the leader of the assailants in Kabeza and the fact that Witness BL named as the leader someone who was not a member of the Para-Commando Battalion.[352]

160. The Prosecution responds that the Trial Chamber clearly explained both why it accepted Witnesses BL's and AH's evidence and why it rejected the Defence evidence.[353]

161. The Appeals Chamber recalls that the Trial Chamber's obligation to provide a reasoned opinion relates to the Trial Judgement as a whole rather than to each submission made at trial.[354] As a general rule, a Trial Chamber is not required to articulate every step of its reasoning for each finding it makes.[355] Nor is it required to set out in detail why it accepted or rejected a particular testimony,[356] or to refer to the testimony of every witness or every piece of evidence on the trial record.[357]

162. The Appeals Chamber observes that the Trial Chamber duly discussed Witness AH's evidence regarding Ntabakuze's presence in Kabeza, the alleged contradiction between Witnesses BL's and AH's evidence regarding the presence of Para-Commando soldiers in Kabeza on 8 April 1994, and the evidence that members of other units also wore camouflage berets, and expressly set out the reasons for its findings on these issues.[358] The Trial Chamber also explained its reliance on the "first-hand accounts" of Witnesses BL and AH regarding the presence of members of the Para-Commando Battalion in Kabeza over the "general assertions of Witnesses DH-51 and DI-40 that there were no soldiers operating in Kabeza".[359] As discussed above, the Trial Chamber

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[350] Notice of Appeal, paras. 106, 107, 109; Appeal Brief, paras. 191, 192.
[351] Notice of Appeal, paras. 100-102; Appeal Brief, paras. 183, 185.
[352] Appeal Brief, para. 186.
[353] Prosecution Response Brief, paras. 146, 149, 153.
[354] *See, e.g., Nchamihigo* Appeal Judgement, para. 165; *Krajišnik* Appeal Judgement, para. 139; *Kvočka et al.* Appeal Judgement, para. 23.
[355] *See, e.g., Nchamihigo* Appeal Judgement, para. 165; *Krajišnik* Appeal Judgement, para. 139; *Musema* Appeal Judgement, paras. 18, 20.
[356] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 269; *Nchamihigo* Appeal Judgement, para. 165; *Musema* Appeal Judgement, paras. 18, 20.
[357] *See, e.g., Rukundo* Appeal Judgement, para. 102; *Nchamihigo* Appeal Judgement, para. 121; *Karera* Appeal Judgement, para. 20. The Appeals Chamber recalls that there 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. *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, fn. 625; *Kvočka et al.* Appeal Judgement, para. 23, *cited in Kalimanzira* Appeal Judgement, para. 195; *Karera* Appeal Judgement, para. 20.
[358] Trial Judgement, paras. 923-925.
[359] Trial Judgement, para. 925.

further explicitly addressed the credibility of Witnesses BL and AH with regard to the Defence evidence suggesting that members of the Battalion did not leave Camp Kanombe until mid-afternoon on 7 April 1994 before concluding that it was "satisfied that at least a small contingent was present in Kabeza".[360]

163. With respect to Ntabakuze's argument concerning an alleged contradiction between the evidence of Witnesses DI-40 and BL as to who was leading the assailants in Kabeza,[361] the Appeals Chamber notes that Witness BL testified that she only heard that an individual named "Sebarera", who she supposed was a captain of the Para-Commando Battalion, was the one in charge of supervising killings by *Interahamwe*.[362] She stated repeatedly that she had never actually seen "Sebarera".[363] As for Witness DI-40, Ntabakuze fails to substantiate his claim that the witness gave the name of the leader of the assailants.[364] In any event, the Trial Chamber explained that, although Witness DI-40 was in Kabeza, he "did not have direct knowledge about the identity of the assailants there".[365] In these circumstances, it was fully within the Trial Chamber's discretion not to discuss this evidence in the Trial Judgement.

164. The Appeals Chamber finds that the Trial Judgement reflects that the Trial Chamber carefully evaluated the witnesses' evidence in light of the totality of the evidence and sufficiently explained its reliance on the evidence of Witnesses BL and AH.

4. Conclusion

165. For the foregoing reasons, the Appeals Chamber concludes that Ntabakuze has failed to demonstrate that the Trial Chamber erred in its assessment of the evidence on the involvement of elements of the Para-Commando Battalion in killings in Kabeza on 7 and 8 April 1994 or that it erred with respect to its obligation to provide a reasoned opinion in this regard.

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[360] Trial Judgement, para. 925. *See supra*, para. 147.
[361] *See* Appeal Brief, para. 186.
[362] Witness BL, T. 4 May 2004 pp. 18, 20-22.
[363] Witness BL, T. 4 May 2004 pp. 20, 21.
[364] *See* Appeal Brief, para. 186.
[365] Trial Judgement, para. 925.

B. Alleged Errors Regarding Knowledge and Effective Control

166. The Trial Chamber considered that the attack in Kabeza reflected military organisation and would only have occurred with the authorisation or orders of higher military authorities.[366] It found that "[i]n light of his command and control over members of the Para Commando Battalion [...] as well as the organisation of the crime, [...] it could only have been carried out with the knowledge and approval of Ntabakuze".[367] It further found that Ntabakuze had effective control over the Para-Commando soldiers involved in the killings in Kabeza.[368]

167. Ntabakuze argues that the Trial Chamber erred in finding that he knew or had reason to know of the killings in Kabeza and had effective control over the perpetrators, as these were not the only reasonable inferences that may be drawn from the circumstantial evidence on which the Trial Chamber relied.[369] In support of his claim, Ntabakuze submits that the Trial Chamber erred in drawing inferences of "knowledge and effective control" from his own admission that he had *de jure* command over the Para-Commando Battalion.[370] He posits that the Para-Commando soldiers allegedly involved in the Kabeza killings could have been from the Second Company of the Battalion, which had been transferred to Camp Kimihurura and was no longer under his command.[371] In this regard, he avers that Kimihurura is closer to Kabeza than Camp Kanombe.[372] Ntabakuze also contends that the Trial Chamber's finding that the killings in Kabeza could only have been carried out with his knowledge and approval is based on speculation.[373] He adds that the Trial Chamber erred in inferring that the killings were organised and in considering this fact as a basis of his knowledge and approval.[374]

168. The Prosecution responds that Ntabakuze does not demonstrate any error in the Trial Chamber's approach to the evidence.[375] According to the Prosecution, *de jure* authority constitutes some evidence of effective control and, in the instant case, the Trial Chamber established Ntabakuze's effective control based on a number of other indicators.[376] The Prosecution further

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[366] Trial Judgement, para. 2062.
[367] Trial Judgement, para. 927. *See also ibid.*, paras. 2065, 2066.
[368] Trial Judgement, para. 2062.
[369] Notice of Appeal, paras. 59-61; Appeal Brief, paras. 112-114, 126. *See also* Appeal Brief, paras. 107-109; Reply Brief, paras. 76-79; AT. 27 September 2011 pp. 31, 34, 35.
[370] Appeal Brief, paras. 125, 243. *See also ibid.*, paras. 107-109; Reply Brief, para. 79; AT. 27 September 2011 pp. 33, 34, 68, 69.
[371] Notice of Appeal, para. 101; Appeal Brief, paras. 161, 184; Reply Brief, para. 100; AT. 27 September 2011 p. 71. In his Reply Brief, Ntabakuze emphasises that the Prosecution failed to challenge his assertion that the soldiers could be from the Second Company of the Para-Commando Battalion. *See* Reply Brief, para. 100.
[372] Notice of Appeal, para. 101; Appeal Brief, para. 184; AT. 27 September 2011 p. 71.
[373] Notice of Appeal, paras. 60, 61.
[374] Appeal Brief, para. 126.
[375] Prosecution Response Brief, para. 96.
[376] Prosecution Response Brief, para. 99; AT. 27 September 2011 pp. 63, 64.

submits that even assuming that the Trial Chamber considered Ntabakuze's *de jure* authority in inferring his knowledge, it was only one of the indicia taken into account by the Trial Chamber.[377]

169. Turning first to Ntabakuze's submissions concerning effective control, the Appeals Chamber recalls that, while *de jure* authority is not synonymous with effective control, the possession of *de jure* powers may suggest a material ability to prevent or punish criminal acts of subordinates.[378] More importantly, the Appeals Chamber notes that the Trial Chamber did not find that Ntabakuze had effective control over the Para-Commando Battalion based solely on his *de jure* command over the Battalion, including its CRAP Platoon.[379] The Trial Chamber also established Ntabakuze's *de facto* authority over both the Battalion and its CRAP Platoon.[380] The Trial Chamber emphasised that it was not disputed that the Battalion was well trained, disciplined, and loyal to Ntabakuze.[381] Further, the Trial Chamber relied on the fact that "[t]he attacks reflect military organisation and, in view of the elite nature of these units as well as their discipline, would only have occurred with the authorisation or orders of higher military authorities, in particular the commander of their battalion, Ntabakuze".[382] Ntabakuze fails to demonstrate that the Trial Chamber erred in relying on these factors to establish his effective control over the Para-Commando Battalion.

170. The Appeals Chamber observes, however, that the Trial Chamber reached the conclusion that the Para-Commando soldiers who committed crimes in Kabeza "were clearly Ntabakuze's subordinates acting under his effective control"[383] without addressing the fact that it accepted evidence that one of the Battalion's companies was not under Ntabakuze's command at the time. In the section of the Trial Judgement relating to the murder of officials in the Kimihurura neighbourhood of Kigali on 7 April 1994, the Trial Chamber stated that it was not disputed that the Second Company of the Para-Commando Battalion was transferred to Camp Kimihurura to reinforce the Presidential Guard a few days before the President's death, and that the Second Company was under the command of the Presidential Guard at that time.[384]

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[377] Prosecution Response Brief, para. 98.
[378] *Orić* Appeal Judgement, para. 91; *Nahimana et al.* Appeal Judgement, para. 625.
[379] Trial Judgement, paras. 2057-2061.
[380] Trial Judgement, para. 2060.
[381] *See* Trial Judgement, para. 2060, fn. 2273.
[382] Trial Judgement, para. 2062.
[383] Trial Judgement, para. 2062.
[384] Trial Judgement, paras. 746, 747. While finding that members of the Second Company of the Para-Commando Battalion stationed at Camp Kimihurura played a role in the killing of leading opposition figures on 7 April 1994, the Trial Chamber concluded that it was not proven beyond reasonable doubt that these soldiers were acting under the authority of Ntabakuze. *See ibid.*, para. 753.

171. The Appeals Chamber considers that the evidence that a company of the Para-Commando Battalion was under the command of the Presidential Guard at the relevant time was of critical importance. It should therefore have been addressed by the Trial Chamber when discussing Ntabakuze's responsibility for the crimes perpetrated in Kabeza by members of the Para-Commando Battalion. The Appeals Chamber considers that the Trial Chamber's failure to undertake this analysis amounted to a failure to provide a reasoned opinion.

172. Nonetheless, the Trial Chamber's reliance on the proximity of Kabeza to Camp Kanombe in support of its finding seems to suggest that it considered that the Para-Commando soldiers involved in the crimes in Kabeza were from the Battalion's main base and not from Camp Kimihurura.[385] The proximity of Kabeza to Camp Kanombe is a factor that the Trial Chamber could reasonably take into account in determining to which unit the soldiers implicated in the killings belonged. Additionally, a review of the different maps admitted into evidence does not support Ntabakuze's assertion that Camp Kimihurura is closer to Kabeza than Camp Kanombe.[386] This review, however, confirms the proximity of Kabeza to Camp Kimihurura. Therefore, the proximity of Kabeza to Camp Kanombe alone cannot reasonably exclude the possibility that the Para-Commando soldiers implicated in the killings in Kabeza were from Camp Kimihurura.

173. The Appeals Chamber further observes that, in its summary of Witness AH's testimony, the Trial Chamber noted that the witness testified that the Para-Commando soldiers implicated in the killings in Kabeza were from the CRAP Platoon.[387] The Trial Chamber, however, did not discuss this aspect of Witness AH's testimony when making its factual findings, and it concluded that elements of the Para-Commando Battalion were involved in the Kabeza killings without making any reference to or findings concerning the CRAP Platoon in particular. In addition, the Appeals Chamber observes that Witness AH's reference to the CRAP Platoon was made only once and during cross-examination, prompted by a question from Ntabakuze's Lead Counsel. Witness AH explained that he deduced that the soldiers he saw belonged to the CRAP Platoon based on their uniforms and weapons.[388] The Trial Chamber did not address whether it considered the witness's identification of members of the CRAP Platoon to be reliable,[389] nor did it address whether

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[385] *See* Trial Judgement, para. 923.
[386] A review of the maps reveals that Camp Kanombe is approximately less than four kilometres away from Kabeza, whereas Kimihurura is approximately five and a half kilometres away. *See, e.g.*, Exhibit DNT29 (Map of Kigali and surrounding area eastwards); Exhibit DNT35 (Map of Kigali); Exhibit DNT54 (Map of Kanombe and the surrounding areas); Exhibit DNT90 (Map of Kigali); Exhibit DNT130 (Map of Kigali).
[387] Trial Judgement, para. 911; Witness AH, T. 20 February 2004 pp. 40, 41. The Appeals Chamber notes that, in her testimony, Witness BL did not identify which unit of the Para-Commando Battalion was present in Kabeza on 7 April 1994.
[388] Witness AH, T. 20 February 2004 pp. 40, 41.
[389] Although the Trial Chamber found that Witness AH was in a position to correctly identify the military units of the assailants based on his profession as a soldier, in reaching this conclusion the Trial Chamber indicated only that

members of the CRAP Platoon wore a different uniform or carried different weapons than the other members of the Para-Commando Battalion.[390] In these circumstances, the Appeals Chamber, Judges Pocar and Liu dissenting, is not persuaded that Witness AH's evidence could have reasonably served as a basis to establish beyond reasonable doubt that the Para-Commando soldiers who participated in killings in Kabeza on 8 April 1994 were from the CRAP Platoon.

174. In light of the foregoing, and given that the Trial Chamber found that members of the Presidential Guard also participated in the killings on 8 April 1994,[391] the Appeals Chamber finds, Judges Pocar and Liu dissenting, that no reasonable trier of fact could have excluded the distinct possibility that the Para-Commando soldiers identified by Witnesses BL and AH on 7 and 8 April 1994 may have been from the Second Company of the Para-Commando Battalion, which was under the command of the Presidential Guard at the time, and not under Ntabakuze's command. As a result, the Appeals Chamber, Judges Pocar and Liu dissenting, considers that the Trial Chamber erred in finding that it was proven beyond reasonable doubt that the Para-Commando soldiers involved in the Kabeza killings were acting under Ntabakuze's effective control.[392] Ntabakuze's remaining submissions related to his knowledge and his alleged failure to prevent or punish are therefore rendered moot and need not be considered.

C. Conclusion

175. For the foregoing reasons, the Appeals Chamber, Judges Pocar and Liu dissenting, grants Ground 18 of Ntabakuze's appeal in part and finds that the Trial Chamber erred in holding Ntabakuze responsible as a superior under Article 6(3) of the Statute for the criminal conduct of elements of the Para-Commando Battalion in Kabeza on 7 and 8 April 1994. Accordingly, the Appeals Chamber, Judges Pocar and Liu dissenting, reverses Ntabakuze's convictions under Counts 2, 4, 5, 7, and 9 of the Indictment for the crimes of Para-Commando soldiers in Kabeza. The Appeals Chamber will discuss the impact, if any, of this finding on Ntabakuze's sentence in the appropriate section below.

Witness AH "accurately described the uniform of the Para Commando Battalion". *See* Trial Judgement, para. 923, fn. 1046.

[390] When invited to focus on Witness AH's evidence concerning the involvement of the CRAP Platoon at the appeal hearing, the Prosecution merely noted Witness AH's professional affiliation and did not identify any evidence demonstrating on what basis, if any, members of the CRAP Platoon could be distinguished from other members of the Para-Commando Battalion. *See* AT. 27 September 2011 pp. 21, 63, 64.

[391] Trial Judgement, para. 926. *See also ibid.*, paras. 923, 2128.

[392] Trial Judgement, para. 2062.

VI. ALLEGED ERRORS RELATING TO NYANZA HILL (GROUNDS 19, 24, 28)

176. The Trial Chamber found that, on 11 April 1994, a small group of refugees fleeing from ETO arrived at the Sonatube junction around noon and that a second and significantly larger group of mostly Tutsi refugees was stopped at the junction a few hours later by soldiers from the Para-Commando Battalion.[393] The second group of refugees was then marched by soldiers and *Interahamwe* to Nyanza hill, where they arrived at around 5:00 p.m.[394] There, they were met by 15 to 20 Para-Commando soldiers who had passed the refugees on their way to Nyanza hill in a pick-up truck.[395] The soldiers and *Interahamwe* opened fire on the refugees shortly after they arrived, and later sought additional ammunition to continue the attack until nightfall.[396] The Trial Chamber concluded that the Para-Commando soldiers involved in the attack were Ntabakuze's subordinates acting under his effective control and that the operation could only have been carried out with Ntabakuze's knowledge and approval.[397]

177. Ntabakuze submits that the Trial Chamber erred in law and fact in its assessment of the circumstantial evidence relating to the crimes allegedly committed at Nyanza hill on 11 April 1994.[398] Specifically, he contends that the Trial Chamber erred in finding that members of the Para-Commando Battalion participated in these crimes and that he had the requisite knowledge and effective control over the Para-Commando soldiers allegedly involved.[399] The Appeals Chamber will consider these contentions in turn.

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[393] Trial Judgement, paras. 1340, 1347, 1354, 1358, 2136. The second group of refugees fled from ETO after the Belgian peacekeepers withdrew from the position. *See ibid.*, para. 2136.
[394] Trial Judgement, paras. 1340, 1346, 1354.
[395] Trial Judgement, paras. 1354, 1356, 2136.
[396] Trial Judgement, paras. 1355, 1356, 2136.
[397] Trial Judgement, paras. 1358, 2062. The Trial Chamber also found that the militiamen involved in the crimes at Nyanza hill were Ntabakuze's subordinates acting under his effective control and that Ntabakuze was liable for their crimes. *See ibid.*, para. 2063. As discussed above in relation to Kabeza, the Appeals Chamber will limit its analysis to Ntabakuze's responsibility for the criminal conduct of Para-Commando soldiers. *See supra*, fn. 288.
[398] Notice of Appeal, paras. 57, 58, 62-65, 74, 75, 87-92, 98, 111-115; Appeal Brief, paras. 104-111, 136-145, 156, 157, 167-173, 180, 193-200.
[399] Notice of Appeal, paras. 62-65, 87-92, 111-115; Appeal Brief, paras. 137-145, 167-173, 193-200. *See also* Reply Brief, paras. 67, 88-92, 96-98, 103; AT. 27 September 2011 pp. 31-35.

A. Alleged Errors Regarding the Identification of Para-Commando Soldiers

178. The Trial Chamber found that the soldiers who escorted the refugees from the Sonatube junction to Nyanza hill and the soldiers who passed them in a pick-up truck and met them at Nyanza hill were primarily members of the Para-Commando Battalion because "they left from the Para Commando position at the Sonatube junction and because of their camouflage uniforms and camouflage berets".[400] In reaching this finding, the Trial Chamber relied primarily on the evidence of Prosecution Witness AR.[401]

179. Ntabakuze contends that the Trial Chamber failed to exercise the necessary caution in assessing the uncorroborated evidence of Witness AR and that the involvement of Para-Commando soldiers in the massacre at Nyanza is not the only reasonable inference that could be drawn from the circumstantial evidence.[402] In particular, Ntabakuze points out that Witness AR did not testify that he saw Para-Commando soldiers but only that he saw troops wearing camouflage.[403] He underscores that Witness AR declared in his pre-trial statement that the soldiers at Nyanza were from the Presidential Guard and that the Trial Chamber inferred that Para-Commando soldiers were present at Nyanza despite finding that Witness AR did not have a sufficient basis of knowledge about military uniforms to distinguish between different units.[404] Ntabakuze submits that the troops seen by Witness AR could have been members of units other than the Para-Commando Battalion, deserters, "non-military personnel", or *Interahamwe* wearing camouflage uniforms.[405] He further argues that the Battalion had military trucks to transport troops, not pick-up trucks, and that Para-Commando soldiers wore helmets during combat, not berets.[406] He emphasises that Witness AR did not testify that the soldiers passing the column of refugees marching to Nyanza were the same soldiers whom he saw at the Sonatube junction earlier in the day, nor that they were coming from that location.[407] Ntabakuze also avers that two Prosecution eyewitnesses testified that Para-Commando soldiers were not present at Nyanza.[408]

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[400] Trial Judgement, para. 1354.
[401] Trial Judgement, para. 1354.
[402] Notice of Appeal, paras. 65, 87-93; Appeal Brief, heading "Ground 24" at p. 49, paras. 138-141, 167, 169-171, 173; Reply Brief, para. 89, 98; AT. 27 September 2011 pp. 31, 33, 71.
[403] Notice of Appeal, paras. 90, 115; Appeal Brief, paras. 138, 140, 169, 170, 199; Reply Brief, para. 88. *See also* AT. 27 September 2011 p. 32.
[404] Notice of Appeal, paras. 91, 92; Appeal Brief, paras. 170, 173, 194, 199. *See also* Appeal Brief, para. 134; Reply Brief, para. 90.
[405] Notice of Appeal, para. 92; Appeal Brief, paras. 141, 171, 173; Reply Brief, para. 88; AT. 27 September 2011 pp. 31, 33. Ntabakuze further submits that the court record reflects the presence of the Huye Battalion, wearing camouflage, in Kigali town close to Nyanza. *See* Reply Brief, para. 96; AT. 27 September 2011 p. 33.
[406] Appeal Brief, paras. 140, 171, 173; Reply Brief, para. 96; AT. 27 September 2011 p. 32. *See also* Notice of Appeal, para. 92.
[407] Notice of Appeal, para. 90; Appeal Brief, paras. 169, 170.
[408] Notice of Appeal, paras. 65, 92; Appeal Brief, para. 139; AT. 27 September 2011 p. 32. *See also* Appeal Brief, para. 172; Reply Brief, para. 90.

180. In addition, Ntabakuze submits that the Trial Chamber erred in failing to fully explain its preference for Witness AR's uncorroborated evidence over Prosecution Witness Jean-Bosco Kayiranga's exculpatory evidence.[409] Specifically, he contends that the Trial Chamber failed to explain why it disregarded the fact that Witness Kayiranga identified a soldier of the Light Anti-Aircraft Battalion at Nyanza, not Para-Commando soldiers, despite the fact that this witness was much better acquainted with army units and uniforms than Witness AR.[410] This contradiction, Ntabakuze submits, should at least have raised a reasonable doubt as to his criminal responsibility.[411] Ntabakuze also notes that Witness Kayiranga testified that the leader of the assailants was an *Interahamwe* named Bosco.[412]

181. The Prosecution responds that the characterisation of the evidence as purely circumstantial is erroneous, as Witness AR provided direct evidence about events at Nyanza hill.[413] The Prosecution submits that the Trial Chamber carefully evaluated Witness AR's testimony together with the totality of the evidence before it and that Ntabakuze's specific challenges to Witness AR's evidence are without merit.[414] The Prosecution also contends that the Trial Chamber provided a reasoned opinion for accepting Witness AR's evidence and duly considered Witness Kayiranga's testimony.[415]

182. The Appeals Chamber notes that the Trial Chamber found that members of the Para-Commando Battalion were present and participated in the attack at Nyanza hill primarily based on the direct evidence of Witness AR,[416] who gave a "mostly consistent and convincing account of the events".[417] The Trial Chamber did not state that Witness AR testified that he saw Para-Commando soldiers but that he saw soldiers wearing camouflage uniforms and berets open fire on the refugees who had previously been escorted from the Sonatube junction to Nyanza.[418] The Trial Chamber explained that it inferred that the assailant soldiers were from the Para-Commando Battalion based on their camouflage uniforms and berets, and based on the fact that they had come from the Para-Commando position at the Sonatube junction.[419] It further relied

[409] Notice of Appeal, heading "Ground 28" at p. 36, paras. 111-115; Appeal Brief, paras. 193-200; Reply Brief, para. 103.
[410] Notice of Appeal, paras. 112-115; Appeal Brief, paras. 172, 193, 195-200; Reply Brief, para. 103; AT. 27 September 2011 p. 32. Ntabakuze adds that, had there been any Para-Commando soldiers present, Witness Kayiranga, as an officer of the Rwandan army, would have identified them, but that the Prosecution failed to question him on this point. *See* Reply Brief, para. 98; AT. 27 September 2011 pp. 23, 32.
[411] Appeal Brief, para. 198. *See also* Reply Brief, paras. 90, 91.
[412] Appeal Brief, paras. 139, 195.
[413] Prosecution Response Brief, paras. 109, 133, 137, 138.
[414] Prosecution Response Brief, paras. 109, 131-139. *See also ibid.*, para. 158.
[415] Prosecution Response Brief, paras. 134, 139, 158-161.
[416] Trial Judgement, paras. 1354, 1356.
[417] Trial Judgement, para. 1343. *See also ibid.*, para. 1352.
[418] Trial Judgement, paras. 1344, 1354. *See also* Witness AR, T. 1 October 2003 pp. 16, 24-26.
[419] Trial Judgement, paras. 1354, 1355.

on the fact that, during the attack, additional ammunition was sought from the military position of the Para-Commando Battalion at the junction.[420] The Trial Chamber also found that the evidence of Witness Kayiranga broadly corroborated "significant portions" of Witness AR's evidence,[421] and that Witness XAB's hearsay evidence that members of the CRAP Platoon participated in the killings provided additional corroboration.[422]

183. In reaching its conclusions with respect to the presence and participation of members of the Para-Commando Battalion in the massacre at Nyanza, the Trial Chamber explicitly considered Witness AR's prior statement that he was sure that the soldiers wearing camouflage uniforms whom he saw were members of the Presidential Guard, as well as the witness's explanation as to why he surmised that the soldiers were from the Presidential Guard.[423] However, the Trial Chamber was not satisfied that the witness had a sufficient basis of knowledge about military uniforms to adequately distinguish between various units, and it weighed Witness AR's evidence against other, "more reliable" evidence that the Presidential Guard wore black, rather than camouflage, berets.[424] Ntabakuze fails to show that the Trial Chamber erred in this respect.

184. As for Ntabakuze's argument that the soldiers wearing camouflage could have been from other units, deserters, "non-military personnel", or *Interahamwe* wearing camouflage uniforms, the Appeals Chamber notes that the Trial Chamber considered Ntabakuze's evidence that three other units in the Rwandan army wore camouflage berets like those of the Para-Commando Battalion, including the Huye Commando Battalion.[425] In finding that the soldiers at the Sonatube junction were primarily members of the Para-Commando Battalion, the Trial Chamber found that "[t]here has been no suggestion" that any of these other units were operating in the immediate area around the junction at the relevant time.[426] Ntabakuze does not challenge the Trial Chamber's conclusion directly, although he argues that elements of the Huye Battalion were operating in Nyamirambo, approximately five kilometres from Nyanza, referring to the Trial Chamber's discussion of Prosecution Witness XXJ's evidence in support of his contention.[427] In this regard, the Appeals Chamber notes that while Witness XXJ testified that members of the Huye Battalion were operating in the Nyamirambo area, this aspect of the witness's evidence concerned events in mid-May to mid-June 1994.[428] Ntabakuze thus does not point to any evidence demonstrating that other units wearing camouflage were present in the immediate area of Nyanza at the relevant time. Ntabakuze

[420] *See* Trial Judgement, paras. 1355, 1356.
[421] Trial Judgement, para. 1355. *See also ibid.*, paras. 1352, 1353.
[422] *See* Trial Judgement, para. 1355.
[423] Trial Judgement, para. 1344.
[424] Trial Judgement, para. 1344.
[425] Trial Judgement, para. 1345.
[426] Trial Judgement, para. 1345.
[427] Reply Brief, para. 96, fn. 119; AT. 27 September 2011 p. 33.

likewise fails to substantiate his contention that it would have been reasonable to conclude that the soldiers wearing camouflage involved in the attack at Nyanza could have been deserters or "non-military personnel". Further, the Appeals Chamber notes that Witness AR's testimony that soldiers and *Interahamwe* participated in the attack demonstrates that the witness was able to distinguish between them.[429]

185. With regard to Ntabakuze's assertion that the Para-Commando Battalion would use military trucks to transport troops, not pick-up trucks, the Appeals Chamber observes that the evidence that Ntabakuze cites is general in nature and does not exclude the possibility that the Para-Commando Battalion may also have used other means of transportation for its operations.[430] The Appeals Chamber is likewise not persuaded by Ntabakuze's argument that members of the Para-Commando Battalion wore helmets during combat. The evidence on which Ntabakuze relies in this regard[431] is contradicted by Witness AR's direct evidence that most of the soldiers at the Battalion's combat position at the Sonatube junction wore camouflage berets.[432] The Appeals Chamber notes that the fact that elements of the Para-Commando Battalion were stationed in a combat position at the junction and the fact that members of the Battalion wore camouflage berets were not disputed at trial.[433] There was therefore direct and credible evidence that Para-Commando soldiers in combat position did not always wear helmets and, more importantly, that Para-Commando soldiers operating in the area of the Sonatube junction wore camouflage berets.

186. Ntabakuze correctly points out that, contrary to what the Trial Judgement suggests, Witness AR did not testify that the soldiers who passed the refugees on their way to Nyanza in a pick-up truck had left from the Para-Commando Battalion position at the Sonatube junction.[434] In fact, the witness could not specify from what location the soldiers in the pick-up truck were coming.[435] The Appeals Chamber considers, however, that this incorrect statement of Witness AR's evidence does not invalidate the Trial Chamber's conclusion that the soldiers wearing camouflage uniforms seen in the pick-up truck by Witness AR were Para-Commando soldiers. The Appeals

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[428] Witness XXJ, T. 14 April 2004 p. 48 *and* T. 16 April 2004 pp. 8, 10, 11.
[429] Witness AR, T. 30 September 2003 p. 91. Witness AR also testified to seeing *Interahamwe* at the Sonatube junction and during the march to Nyanza hill. *See* Witness AR, T. 1 October 2003 pp. 5, 16, 25-27.
[430] *See* Appeal Brief, paras. 140, 171, *referring to* Witness DBN, T. 5 April 2004 p. 9 *and* Witness DK-120, T. 4 July 2005 p. 74.
[431] Appeal Brief, para. 133, *referring to* Exhibit DNT235 (Statement of Ntabakuze), p. 47 ("So, from [1988], helmet was mandatory in the Para Cdo Bn during combat training and on the battlefield"), Witness DP, T. 2 October 2003 p. 72 ("Q. Isn't it true that during military operations the paracommandos would wear helmets when they were about to confront the enemy? A. That is correct."), *and* Witness DK-120, T. 4 July 2005 p. 74 ("Q. When you're on standby [on the tarmac at Camp Kanombe on the night of 6 to 7 April 1994], what uniform did you wear and what equipment did you have at your disposal? A. We wore combat uniform and even helmets."). *See also* Appeal Brief, para. 171.
[432] Witness AR, T. 1 October 2003 pp. 8, 9.
[433] *See* Trial Judgement, paras. 1340, 1345.
[434] *See* Trial Judgement, para. 1354.
[435] *See* Witness AR, T. 1 October 2003 pp. 56, 57.

Chamber notes in particular the attire worn by these soldiers, the proximity of the junction where the Battalion was stationed, the fact that there has been no suggestion that other units of the Rwandan army wearing camouflage berets were operating in the area, and the fact that the refugees had been stopped at the junction before being escorted to Nyanza by Para-Commando soldiers.[436] Considering these factors together, the Appeals Chamber is satisfied that the only reasonable inference that could be drawn from the circumstantial evidence was that the soldiers wearing camouflage in the pick-up truck were members of the Para-Commando Battalion. Furthermore, the Appeals Chamber underscores that the Trial Chamber's incorrect summary of Witness AR's evidence concerning the location from which the pick-up truck was coming does not affect its finding that the other soldiers wearing camouflage who escorted the refugees to Nyanza and later opened fire on them had left from the Para-Commando position at the Sonatube junction.[437]

187. Turning to Ntabakuze's contention that two Prosecution witnesses testified that Para-Commando soldiers were not present at Nyanza, the Appeals Chamber notes that Ntabakuze refers to paragraphs 1321 and 1353 of the Trial Judgement, which discuss the testimony of Prosecution Witnesses AFJ and Kayiranga, respectively.[438] Neither witness, however, made the statement ascribed to him by Ntabakuze. Although Witness AFJ testified that only *Interahamwe* led the refugees to Nyanza,[439] the Trial Chamber concluded that Witnesses AFJ and AR were giving evidence concerning different incidents which occurred approximately two hours apart.[440] As for Witness Kayiranga, the Appeals Chamber observes that the witness generally referred to "soldiers" accompanying the refugees to Nyanza and taking part to the killings.[441] He described talking to a soldier whom he knew who belonged to the Light Anti-Aircraft Battalion,[442] but apart from the assailants whom he recognised, the witness was never questioned about the identity or the affiliation of the other soldiers whom he saw.[443] The Appeals Chamber finds no merit in

[436] Trial Judgement, paras. 1346, 1354; Witness AR, T. 1 October 2003 p. 56.
[437] Trial Judgement, paras. 1354, 1355. *See* Witness AR, T. 1 October 2003 pp. 16, 25, 26, 56.
[438] Appeal Brief, para. 139. *See also* Notice of Appeal, para. 65.
[439] Witness AFJ, T. 8 June 2004 pp. 82, 83. *See also* Trial Judgement, para. 1321.
[440] Trial Judgement, para. 1347.
[441] Jean-Bosco Kayiranga, T. 30 April 2004 pp. 16, 17.
[442] Jean-Bosco Kayiranga, T. 30 April 2004 pp. 16, 17, 24.
[443] Jean-Bosco Kayiranga, T. 30 April 2004 pp. 15-24. The witness was not cross-examined. The Appeals Chamber finds no merit in Ntabakuze's argument that the summary of Witness Kayiranga's anticipated testimony annexed to the Prosecution Pre-Trial Brief indicated that the witness would testify about soldiers of the Presidential Guard being present at Nyanza in light of Witness Kayiranga's actual testimony before the Trial Chamber and the fact that no prior written statement from this witness was admitted into the record. *See* Appeal Brief, para. 196. *See also Kalimanzira* Appeal Judgement, para. 180, *noting* that Rule 90(A) of the Rules provides that witnesses shall be heard by the Trial Chamber and concluding that "will-say statements have no probative value except to the extent that the witness confirms their content".

Ntabakuze's speculative argument that, had there been any Para-Commando soldiers present, Witness Kayiranga would have identified them.[444]

188. Further, the Appeals Chamber considers that, contrary to Ntabakuze's claim, the Trial Chamber fully explained its reasons for relying on Witness AR's evidence. The Trial Chamber duly considered the variations in the details of the accounts of Witnesses AR and Kayiranga but found that the differences in their evidence were not significant and that the evidence of Witness Kayiranga broadly corroborated significant portions of Witness AR's evidence.[445] It addressed why, in its view, Witness Kayiranga's evidence concerning the presence of a member of the Light Anti-Aircraft Battalion did not detract from Witness AR's evidence that soldiers wearing camouflage berets who left from the Sonatube junction participated in the attack.[446] It also noted the additional corroboration provided by Witness XAB's hearsay evidence that members of the CRAP Platoon participated in the killings.[447] The Appeals Chamber sees no error in this assessment. Nor is the Appeals Chamber persuaded that Witness Kayiranga's identification of an *Interahamwe* named Bosco as the alleged leader of the attack at Nyanza undermines the Trial Chamber's conclusion that Para-Commando soldiers took part in the killings together with *Interahamwe*.[448] Ntabakuze does not show that this specific aspect of Witness Kayiranga's evidence, which was duly recalled in the Trial Chamber's summary of the witness's testimony,[449] was so significant that the Trial Chamber should have explicitly addressed it in its Judgement.

189. For the foregoing reasons, the Appeals Chamber considers that Ntabakuze has failed to demonstrate that the Trial Chamber erred in its assessment of the evidence in finding that the only reasonable inference to be drawn was that Para-Commando soldiers were among the assailants at Nyanza hill on 11 April 1994, or that it erred with respect to its obligation to provide a reasoned opinion explaining its reliance on Witness AR's evidence.

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[444] *See* Reply Brief, para. 98; AT. 27 September 2011 pp. 23, 32.
[445] Trial Judgement, paras. 1353, 1355.
[446] Trial Judgement, para. 1355. *See also ibid.*, fn. 1496, *referring to* Witness AR, T. 1 October 2003 p. 24.
[447] Trial Judgement, para. 1355.
[448] Jean-Bosco Kayiranga, T. 30 April 2004 pp. 17, 18; Trial Judgement, paras. 1353, 1355, 1358, 2063, 2136.
[449] Trial Judgement, para. 1322.

B. Alleged Errors Regarding Knowledge and Effective Control

190. The Trial Chamber found that the killings of the refugees at Nyanza hill resulted from prior planning and that the movement of the refugees and the attack itself clearly demonstrated organisation.[450] It determined that, in view of the extensive radio communications between the Para-Commando position at the Sonatube junction, Ntabakuze, and Rwandan army headquarters concerning a relatively small group of refugees earlier in the day, it could not accept that "Ntabakuze would not have been informed about the significantly larger group a few hours later".[451] Considering Ntabakuze's command and control over members of the Para-Commando Battalion, the fact that the Battalion was a particularly disciplined and elite unit, the proximity of Nyanza to a military position of the Battalion, and the manner in which this extensive military operation was executed, the Trial Chamber concluded that the operation could only have been carried out with Ntabakuze's knowledge and approval and found that he had effective control over members of the Para-Commando Battalion involved in the attack.[452]

191. Ntabakuze submits that the Trial Chamber erroneously convicted him under Article 6(3) of the Statute based on the inference, drawn from the alleged military organisation of the attack and the elite nature and general discipline of the Para-Commando Battalion, that he ordered or authorised the killings at Nyanza.[453] In particular, Ntabakuze contends that there was no direct evidence that he gave orders to commit any crimes, that the military organisation of the attack was not the only reasonable inference to be drawn from the evidence, and that the Trial Chamber erred in inferring "knowledge and effective control on the basis of his *de jure* command over the Para-Commando Battalion and the organisation of the attack".[454] He underscores that: (i) the method of transport used by the implicated soldiers indicates an unofficial undertaking, not a military operation ordered by a superior; (ii) all Prosecution and Defence witnesses testified that there were soldiers from various units present at Nyanza and that the killings were perpetrated in a disorderly fashion; and (iii) the alleged military organisation of the attack is contradicted by Witness Kayiranga's testimony that the attack was led by an *Interahamwe* named Bosco.[455]

192. In addition, Ntabakuze argues that there was no evidence suggesting he was ever informed that soldiers under his command committed crimes at Nyanza.[456] In this regard, he asserts that the Trial Chamber "erroneously inferred from [his] use of radio communications during the 11 April

[450] Trial Judgement, paras. 1356, 2065.
[451] Trial Judgement, para. 1358. *See also ibid.*, paras. 2062, 2066.
[452] Trial Judgement, paras. 1358, 2062, 2065, 2066.
[453] Notice of Appeal, paras. 62-65; Appeal Brief, para. 137.
[454] Appeal Brief, para. 145. *See also* Notice of Appeal, paras. 62-65; AT. 27 September 2011 pp. 33-35, 68, 70.
[455] Notice of Appeal, paras. 62, 65; Appeal Brief, paras. 139, 140; AT. 27 September 2011 p. 32.
[456] Appeal Brief, para. 142.

late morning incident at Sonatube junction that he must have been notified of criminal events that allegedly took place that afternoon, despite the Chamber finding that he was no longer present".[457] He emphasises that knowledge of the presence of refugees at the Sonatube junction in the morning does not imply knowledge of subsequent killings five hours later at a location five kilometres away by unknown soldiers and *Interahamwe*.[458]

193. The Prosecution responds that Ntabakuze does not demonstrate any error.[459] In its view, the Trial Chamber carefully considered the totality of the evidence in reaching its findings regarding the planning and organisation of the killings and regarding Ntabakuze's knowledge.[460]

194. Turning first to Ntabakuze's challenge concerning the organisation of the attack at Nyanza, the Appeals Chamber reiterates that it is not persuaded that the use of a pick-up truck by the assailant soldiers indicates that the operation was an unofficial undertaking and not a military operation.[461] Similarly, the Appeals Chamber considers that the fact that there may have been a variety of soldiers involved does not undermine the Trial Chamber's finding that the operation was organised and resulted from prior planning.[462] The finding was based on the fact that the Para-Commando Battalion was a particularly disciplined elite unit,[463] as well as on: (i) the high degree of coordination between the *Interahamwe* and the Para-Commando soldiers; (ii) the corralling of the refugees at the Sonatube junction and again at Nyanza just before the assault; (iii) the fact that Para-Commando soldiers passed the column of refugees and then waited for them at Nyanza; and (iv) the fact that additional ammunition was sought during the attack from the position of the Para-Commando Battalion at the junction.[464]

195. Against this background, Witness Kayiranga's testimony that "it seemed that the killings were done in disorder"[465] and that he was under the impression that the leader of the killers was an *Interahamwe* named Bosco[466] is insufficient to demonstrate that the Trial Chamber erred in concluding that the massacre at Nyanza was an organised military operation. In this regard, the Appeals Chamber recalls that the Trial Chamber established that there was a pattern of organised

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[457] Appeal Brief, para. 143 (internal references omitted). *See also ibid.*, paras. 135, 142, 263.
[458] Appeal Brief, para. 144. *See also ibid.*, para. 135.
[459] Prosecution Response Brief, paras. 110, 111.
[460] Prosecution Response Brief, para. 111.
[461] *See supra*, para. 185.
[462] *See* Trial Judgement, paras. 1356, 2065.
[463] The Trial Chamber emphasised that there was no dispute that the Para-Commando Battalion was "well trained, disciplined and loyal to Ntabakuze". *See* Trial Judgement, para. 2060. Ntabakuze also recognised that, with the exception of the Battalion's Second Company, he commanded the Para-Commando Battalion at the time. *See* Ntabakuze Closing Brief, paras. 471, 474, 2481; Trial Judgement, para. 2057.
[464] *See* Trial Judgement, para. 1356. *See also ibid.*, para. 1358.
[465] Jean-Bosco Kayiranga, T. 30 April 2004 p. 18.

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killings involving the Rwandan military working in conjunction with militiamen in Kigali in the days following President Habyarimana's death.[467] With respect to events at Nyanza in particular, the Trial Chamber noted that the evidence reflected "a high degree of coordination between members of the Para Commando Battalion and civilian militiamen".[468] The Appeals Chamber further observes that Ntabakuze fails to point to evidence other than Witness Kayiranga's to support his assertion that "all Prosecution and Defence witnesses alike testified that [...] killings were done in a disorderly fashion".[469] Accordingly, the Appeals Chamber finds that Ntabakuze does not demonstrate that the Trial Chamber erred in finding that the killings at Nyanza were an organised military operation.

196. As for Ntabakuze's assertion that there was no direct evidence that he gave orders to commit any crimes, the Appeals Chamber recalls that the existence of an order may be inferred from circumstantial evidence.[470] Ntabakuze fails to show that the Trial Chamber erred in inferring from the circumstantial evidence that the attack at Nyanza would only have occurred with the authorisation or orders of higher military authorities, in particular Ntabakuze.[471] His claim in this regard is accordingly rejected.

197. Likewise, the Appeals Chamber rejects Ntabakuze's challenge concerning effective control. The Appeals Chamber notes that the Trial Chamber did not infer Ntabakuze's effective control over the members of the Para-Commando Battalion solely based on his *de jure* command and the organised nature of the attack, but also relied on his *de facto* authority over both the Battalion and its CRAP Platoon, and on the discipline and elite nature of the Battalion.[472] Ntabakuze fails to demonstrate that the Trial Chamber erred in relying on any of these factors to establish his effective control over the Para-Commando soldiers involved in the Nyanza massacre.[473]

198. As regards Ntabakuze's knowledge of his subordinates' involvement in the killings at Nyanza, the Appeals Chamber observes that the Trial Chamber relied on a number of factors in making its finding, such as Ntabakuze's command and control over members of the Para-Commando Battalion, the manner in which the military operation was executed, the extensive

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[466] Jean-Bosco Kayiranga, T. 30 April 2004 p. 17. The Trial Chamber was demonstrably aware of this aspect of the evidence, since it referred to this part of Witness Kayiranga's testimony in its summary of the witness's evidence. *See* Trial Judgement, para. 1322. *See also supra*, para. 188.
[467] *See* Trial Judgement, paras. 23, 902, 905, 938, 971, 986, 988, 1427, 1428, 1502, 1505.
[468] Trial Judgement, para. 1358.
[469] Appeal Brief, para. 139.
[470] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 278; *Nchamihigo* Appeal Judgement, para. 80, *citing Stakić* Appeal Judgement, para. 219.
[471] *See* Trial Judgement, para. 2062.
[472] Trial Judgement, paras. 2060, 2062.

nature of the operation, and the fact that Para-Commando soldiers were particularly disciplined.[474] In its legal findings, the Trial Chamber also referred to the fact that the attack was an organised military operation "requiring authorisation, planning and orders from the highest levels", and relied on the fact that "the vigilance of military authorities would have been at its height" at that time.[475] The Trial Chamber further relied on the proximity of Nyanza to military positions of the Para-Commando Battalion.[476] Ntabakuze does not demonstrate that the Trial Chamber erred in relying on any of these factors to establish his knowledge of the involvement of his subordinates in the killings at Nyanza.

199. In addition, the Trial Chamber relied on the existence of extensive radio communications between the Para-Commando soldiers at the Sonatube junction, Ntabakuze, and Rwandan army headquarters concerning a relatively small group of refugees earlier in the day, from which it inferred that Ntabakuze would have been informed of the significantly larger group of refugees a few hours later.[477] Ntabakuze does not challenge the existence of extensive radio communications between the Para-Commando Battalion position at the Sonatube junction, the Rwandan army headquarters, and himself concerning the first, smaller group of refugees which arrived at the junction on 11 April 1994 at around 12:30 p.m. While the Trial Chamber did not expressly indicate on which evidence it relied for this finding, it appears to have relied on Ntabakuze's own testimony.[478] The existence of radio communications between Ntabakuze and his men at the junction was further evidenced by the *Chronique* of the Kigali Battalion of the United Nations Assistance Mission for Rwanda ("KIBAT" and "UNAMIR", respectively), which referred to an

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[473] The Appeals Chamber observes that Ntabakuze has not argued that the members of the Para-Commando Battalion involved in the killings at Nyanza hill could have been members of a Battalion unit under the authority of the Presidential Guard at the time. *Compare supra*, para. 167.

[474] Trial Judgement, para. 1358.

[475] Trial Judgement, para. 2065:

> The Chamber is satisfied that Ntabakuze had actual knowledge that his subordinates were about to commit crimes or had in fact committed them. As discussed above, it is clear that these attacks were organised military operations requiring authorisation, planning and orders from the highest levels. It is inconceivable that Ntabakuze would not be aware that his subordinates would be deployed for these purposes, in particular in the immediate aftermath of the death of President Habyarimana and the resumption of hostilities with the RPF, when the vigilance of military authorities would have been at its height.

The Appeals Chamber notes that, while the Trial Chamber referred to "crimes" in general and to both prior and *post-facto* knowledge in the first sentence of this paragraph, its subsequent reasoning in the same paragraph clarified that it was ultimately satisfied, based on circumstantial evidence, that Ntabakuze had *actual knowledge* that his subordinates *were about to commit* each of the specific attacks for which he was convicted.

[476] Trial Judgement, para. 2066.

[477] Trial Judgement, paras. 1358, 2066.

[478] Trial Judgement, paras. 1326, 1327, 1350, *referring to* Ntabakuze, T. 21 September 2006 pp. 8, 9, 11, 13, 14 *and* T. 25 September 2006 pp. 52-54, 57. The Appeals Chamber notes that it transpires from the Trial Judgement that the Trial Chamber did not accept Ntabakuze's testimony that he relayed the instruction from headquarters that the refugees be escorted back to ETO and that he received confirmation that the refugees had been returned there because the Defence evidence diverged regarding the fate of the group of refugees. *See* Trial Judgement, para. 1351, fn. 1494.

incident between that Battalion and the FAR soldiers stationed at the junction at around 12:00 p.m.[479]

200. As correctly pointed out by the Prosecution,[480] Ntabakuze did not need to be present at the site of the killings to have received relevant radio communications. The Appeals Chamber also notes Witness AR's testimony that, while waiting at the Sonatube junction after being stopped with the second group of refugees, he noticed that the soldier wearing a camouflage beret, who seemed to be in command, had a radio set which he apparently used to seek instructions.[481] Moreover, the evidence discussed by the Trial Chamber reveals that while the first group was composed of approximately 150 to 250 refugees, there were more than 1,000 refugees in the second group.[482] In these circumstances, the Appeals Chamber considers that it was reasonable for the Trial Chamber to rely on the existence of radio communications concerning the first group of refugees earlier in the day to find beyond reasonable doubt that Ntabakuze would have been informed about the second and significantly larger group of refugees a few hours later.

201. The Appeals Chamber therefore rejects Ntabakuze's contention that there was no evidence that he was informed that soldiers under his command committed crimes at Nyanza, and finds no error in the Trial Chamber's finding that the only reasonable inference from the circumstantial evidence was that Ntabakuze had actual knowledge that Para-Commando soldiers under his command were about to commit crimes at Nyanza hill.[483]

202. For the foregoing reasons, the Appeals Chamber finds that Ntabakuze has failed to demonstrate that the Trial Chamber erred in finding that the attack at Nyanza hill was an organised military operation involving Para-Commando soldiers under Ntabakuze's effective control and carried out with his knowledge and approval.

C. Conclusion

203. For the foregoing reasons, the Appeals Chamber dismisses Grounds 19, 24, and 28 of Ntabakuze's appeal in their entirety.

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[479] Exhibit P149B (KIBAT *Chronique* from 6 April to 19 April 1994), para. 48(j)(7), *referred to in* Trial Judgement, para. 1335, fn. 1475.
[480] Prosecution Response Brief, para. 110.
[481] Witness AR, T. 1 October 2003 pp. 7-9. *See also* Trial Judgement, para. 1318.
[482] *See* Trial Judgement, paras. 1340, 2136.
[483] *See* Trial Judgement, para. 2065.

VII. ALLEGED ERRORS RELATING TO IAMSEA (GROUNDS 21, 25, 29)

204. The Trial Chamber found that, after the death of President Habyarimana, many Hutus and Tutsis sought refuge along with the students and staff at IAMSEA in the Remera area of Kigali.[484] There, around 15 April 1994, *Interahamwe* and a member of the Para-Commando Battalion separated Hutu and Tutsi refugees into two groups.[485] *Interahamwe* and around ten members of the Para-Commando Battalion then led a group of approximately 60 Tutsis to an area 600 metres away where other members of the Battalion were waiting in a pick-up truck and where, the Trial Chamber found, the *Interahamwe* and Para-Commando soldiers killed the refugees.[486] The Trial Chamber concluded that the Para-Commando soldiers were Ntabakuze's subordinates acting under his effective control and that the operation could only have been carried out with Ntabakuze's knowledge and approval.[487]

205. Ntabakuze submits that the Trial Chamber erred in law and fact in its assessment of the evidence relating to the crimes allegedly committed at IAMSEA.[488] Specifically, Ntabakuze contends that the Trial Chamber erred in finding that members of the Para-Commando Battalion participated in these crimes and that he had the requisite knowledge and effective control over the Para-Commando soldiers allegedly involved.[489] The Appeals Chamber will consider these contentions in turn.

A. Alleged Errors Regarding the Identification of Para-Commando Soldiers

206. The Trial Chamber found that members of the Para-Commando Battalion participated in killings at IAMSEA in mid-April 1994 based primarily on the evidence of Prosecution Witness WB, who provided a "first-hand, consistent and detailed narrative of the events".[490] The Trial Chamber reasoned that Witness WB personally interacted with some of the soldiers during the events and consistently described their uniforms and berets as khaki or camouflage.[491]

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[484] Trial Judgement, para. 1420.
[485] Trial Judgement, para. 1427.
[486] Trial Judgement, paras. 1428, 2137.
[487] Trial Judgement, para. 1429. *See also ibid.*, paras. 2065, 2066. The Trial Chamber also found that the militiamen involved in the crimes at IAMSEA were Ntabakuze's subordinates acting under his effective control and that Ntabakuze was liable for their crimes. *See* Trial Judgement, para. 2063. As discussed above in relation to Kabeza, the Appeals Chamber will limit its analysis to Ntabakuze's responsibility for the criminal conduct of Para-Commando soldiers. *See supra*, fn. 288.
[488] Notice of Appeal, paras. 57, 58, 71-75, 93-98, 116, 117; Appeal Brief, paras. 104-111, 146-157, 174-180, 201-205.
[489] Notice of Appeal, paras. 71-73, 93-97, 116, 117; Appeal Brief, paras. 149-155, 174-179, 201-205. *See also* Reply Brief, paras. 67-69, 93, 94, 99, 104; AT. 27 September 2011 pp. 31-35. The Appeals Chamber notes that Ntabakuze failed to raise the alleged error pertaining to effective control in his Notice of Appeal. However, since the Prosecution did not object on this basis and responded to Ntabakuze's submissions, the Appeals Chamber will exercise its discretion to consider Ntabakuze's argument raised in his Appeal Brief. *See Simba* Appeal Judgement, para. 12.
[490] Trial Judgement, paras. 1421, 1424.
[491] Trial Judgement, para. 1424.

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The Trial Chamber also relied on the nearby position of the Para-Commando Battalion, recalled that the members of the Battalion wore camouflage berets, and noted that there was no suggestion that the other commando units who wore the same type of beret were operating in the area.[492] The Trial Chamber further observed that its finding was in conformity with the evidence of Witness WB, who had been informed a few days earlier by one of the soldiers present during the attack that he was a member of the Para-Commando Battalion.[493]

207. Ntabakuze submits that the Trial Chamber failed to exercise the necessary caution in assessing Witness WB's uncorroborated evidence and that the involvement of Para-Commando soldiers in the crimes committed at IAMSEA is not the only reasonable inference that could be drawn from the witness's circumstantial evidence.[494] In particular, Ntabakuze argues that Witness WB's identification of the Para-Commando soldiers should be called into question, as the witness did not identify the soldiers whom he saw waiting in a pick-up truck at the killing site as Para-Commando soldiers, but instead referred only to "soldiers wearing 'khaki' uniforms and 'khaki' berets" and stated that he could not remember whether the berets were the same colour as the berets of the soldiers who came to his house on 9 April 1994.[495] Ntabakuze adds that the evidence demonstrates that there were "many other groups and individuals, including *Interahamwe* such as 'Paulin' who affected 'military' uniform"[496] and that Para-Commando soldiers wore helmets, not berets, on the battlefield.[497] Ntabakuze also emphasises that there is no evidence that he was present at IAMSEA during the relevant events,[498] and contends that the fact that Witness WB was not found credible when he identified Ntabakuze as the "Major" whom he saw in the vicinity of IAMSEA on 14 April 1994 casts considerable doubt on the remainder of the witness's testimony.[499]

208. In addition, Ntabakuze submits that Witness WB's evidence was contradicted by Defence Witness L-22, who testified that soldiers were not involved in the raids at IAMSEA, and by Defence Witness DBQ, who did not testify about crimes committed at IAMSEA on 15 April 1994, but rather about crimes committed toward the end of the month.[500] Ntabakuze also submits that the Trial Chamber failed to fully explain its reliance on the "uncorroborated" and "contradicted" evidence of Witness WB and failed to provide sufficient reasons for discrediting the evidence of

[492] Trial Judgement, para. 1424.
[493] Trial Judgement, para. 1424.
[494] Notice of Appeal, heading "Ground 25" at p. 33, para. 97; Appeal Brief, paras. 151, 174, 179; AT. 27 September 2011 pp. 31, 33. *See also* Notice of Appeal, para. 72; Reply Brief, paras. 99, 104.
[495] Appeal Brief, paras. 149, 177, 179, 202; AT. 27 September 2011 p. 31.
[496] Appeal Brief, para. 150 (emphasis omitted). *See also* AT. 27 September 2011 p. 31.
[497] Appeal Brief, paras. 202, 205; AT. 27 September 2011 p. 32.
[498] Notice of Appeal, para. 96; Appeal Brief, para. 176.
[499] Notice of Appeal, paras. 94, 95; Appeal Brief, paras. 175, 202.

Witnesses L-22 and DBQ.[501] Finally, Ntabakuze argues that Witness WB did not see what happened to the group of Tutsis who were taken away from IAMSEA, but only heard gunfire.[502]

209. The Prosecution responds that Ntabakuze fails to demonstrate that the Trial Chamber erred in its assessment of Witness WB's testimony, which includes direct evidence, and that the Trial Chamber correctly found that members of the Para-Commando Battalion participated in the IAMSEA massacre based on the totality of the evidence.[503] The Prosecution argues that the Trial Chamber duly assessed the evidence of both Prosecution and Defence witnesses and that it provided a reasoned opinion explaining why it accepted Witness WB's evidence.[504]

210. The Trial Judgement reflects that the Trial Chamber did not rely solely on circumstantial evidence to conclude that soldiers involved in the killings at IAMSEA were members of the Para-Commando Battalion. In addition to relying on Witness WB's description of the uniforms and berets worn by the soldiers and the nearby position of the Para-Commando Battalion, the Trial Chamber also relied on Witness WB's testimony that one of the soldiers present at IAMSEA had earlier identified himself as a member of the Para-Commando Battalion.[505] Ntabakuze fails to address this aspect of the evidence. Ntabakuze also overlooks Witness WB's testimony regarding the presence of Para-Commando soldiers at IAMSEA in the days preceding the massacre,[506] which suggests that the Battalion was operating in the area.

211. The Appeals Chamber also considers that the Trial Chamber was correct in finding that Witness WB's testimony reflected that he considered khaki and camouflage to be essentially the same.[507] Ntabakuze fails to demonstrate any error in this regard. Ntabakuze also fails to show how the witness's inability, at one point of his testimony, to remember whether the berets of the soldiers present at IAMSEA were the same colour as the berets of the soldiers who came to his house on 9 April 1994[508] undermines the witness's consistent description of the uniforms and berets worn by the soldiers involved in the killings.[509]

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[500] Notice of Appeal, para. 116; Appeal Brief, paras. 178, 203, 204; AT. 27 September 2011 p. 32.
[501] Notice of Appeal, heading "Ground 29" at p. 37, paras. 116, 117; Appeal Brief, paras. 201-205.
[502] Appeal Brief, para. 176.
[503] Prosecution Response Brief, paras. 112-115, 140, 141, 143, 163.
[504] Prosecution Response Brief, paras. 141-144, 164-168.
[505] Trial Judgement, para. 1424. *See* Witness WB, T. 12 November 2003 pp. 34, 35, 43, 49.
[506] *See* Trial Judgement, para. 1407, fn. 1552, *referring to* Witness WB, T. 12 November 2003 pp. 39-44 *and* T. 13 November 2003 pp. 14, 17, 32.
[507] Trial Judgement, para. 1424; Witness WB, T. 12 November 2003 pp. 41, 44, 47-49, 54. *See also* Witness WB, T. 12 November 2003 pp. 40 ("*c'était un kaki de camouflage.* [...] *c'était aussi un béret de camouflage, de couleur kaki*"), 43 ("[*ils*] *portaient des tenues militaires de camouflage de couleur kaki.*"), 52 (French).
[508] Witness WB, T. 12 November 2003 p. 54, *referred to in* Trial Judgement, fn. 1554.
[509] *See* Witness WB, T. 12 November 2003 pp. 47-49.

212. With respect to Ntabakuze's claim that other groups and individuals, including *Interahamwe*, "affected 'military' uniform",[510] the Appeals Chamber considers that Witness WB's testimony that *Interahamwe* and soldiers participated in the massacre demonstrates that the witness was able to distinguish between them,[511] and notes that Ntabakuze does not point to any evidence demonstrating that "*other* groups and individuals"[512] wore uniforms and berets similar to those worn by the soldiers present at IAMSEA. Ntabakuze's submissions concerning helmets are similarly unavailing, for the reasons already stated.[513]

213. With regard to Ntabakuze's submission concerning the identification of the soldiers in the pick-up truck waiting at the massacre site, the Appeals Chamber notes that the Trial Chamber found that these soldiers were from the Para-Commando Battalion.[514] A review of Witness WB's testimony reveals that the witness did not specify the attire these soldiers wore, nor did he identify in any other way the unit to which they belonged.[515] While it is not unreasonable to infer that these soldiers were from the same unit as the soldiers wearing "khaki-camouflage" uniforms and berets who were involved in the incident, there is nothing in Witness WB's testimony or the other evidence in the record which would render such an inference the only reasonable one that could be drawn. The Appeals Chamber considers, however, that this error does not invalidate the Trial Chamber's overall conclusion that members of the Para-Commando Battalion participated in the crimes perpetrated at IAMSEA. In this regard, the Appeals Chamber notes that Witness WB provided specific evidence that soldiers wearing "khaki-camouflage" uniforms and berets led the Tutsi group to the massacre site and took part in the killings.[516]

214. Turning to Ntabakuze's arguments concerning Witness WB's credibility, the Appeals Chamber notes that, contrary to Ntabakuze's suggestion, the Trial Chamber did not find that Witness WB lacked credibility when it declined to rely on his evidence concerning Ntabakuze's presence at IAMSEA before 15 April 1994. Instead, the Trial Chamber explained that it was not satisfied that Witness WB's brief sighting of an officer's epaulettes and information obtained after the relevant events were sufficient to demonstrate that the officer in question was Ntabakuze, in particular in view of the traumatic nature of the events.[517] In the absence of corroboration, the Trial Chamber found that Witness WB's evidence did not suffice to demonstrate that Ntabakuze was

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[510] Appeal Brief, para. 150.
[511] Witness WB, T. 12 November 2003 pp. 49, 50.
[512] Appeal Brief, para. 150 (emphasis in the original).
[513] *See supra*, para. 185.
[514] Trial Judgement, paras. 1428, 2137.
[515] *See* Witness WB, T. 12 November 2003 p. 49.
[516] Witness WB, T. 12 November 2003 pp. 49, 50.
[517] Trial Judgement, para. 1426.

present at IAMSEA or in the surrounding area before the attack.[518] Ntabakuze fails to show that the Trial Chamber's decision in this regard renders the Trial Chamber's reliance on the remainder of the witness's testimony unreasonable.[519] Ntabakuze likewise fails to show how the absence of evidence of his presence during the incident has any bearing on the Trial Chamber's evaluation of Witness WB's testimony.

215. Further, the Appeals Chamber finds no error in the Trial Chamber's reliance on Witness WB's testimony regarding the involvement of soldiers in the events at IAMSEA despite the fact that Witness L-22 denied such involvement.[520] Contrary to Ntabakuze's assertion, the Trial Chamber provided a comprehensive explanation for preferring the testimony of Witness WB over that of Witness L-22 on the issue of the participation of soldiers in the events at IAMSEA.[521] It specifically discussed the discrepancy between Witnesses WB's and L-22's evidence concerning this issue, explained that it found Witness WB more credible, and provided reasons for its preference.[522] Ntabakuze's mere assertion that the Trial Chamber's reasons for "discrediting" Witness L-22's evidence were not sufficient fails to demonstrate any error.[523] The Appeals Chamber also notes that the Trial Chamber found that Witness WB's narrative of events was corroborated in a number of respects by Witness L-22,[524] which further demonstrates that the Trial Chamber duly considered Witness L-22's evidence.

216. As for Witness DBQ, the Appeals Chamber observes that the Trial Chamber had doubts about the credibility of this witness in respect of his testimony about other events as well as about the events at IAMSEA.[525] With respect to the events at IAMSEA, the Trial Chamber provided examples of differences between Witness DBQ's evidence, on the one hand, and the testimony of Witnesses WB and L-22, on the other.[526] For instance, the Trial Chamber specifically noted that Witness WB, as corroborated by Witness L-22, placed the round-up and killing of refugees at IAMSEA in mid-April 1994, while Witness DBQ suggested that it occurred at the end of April and explicitly rejected the proposition that it happened in mid-April 1994.[527] The Trial Chamber clearly

[518] Trial Judgement, para. 1426.
[519] *See supra*, para. 155, fn. 342.
[520] Witness L-22, T. 2 March 2006 p. 43.
[521] Trial Judgement, para. 1424.
[522] Trial Judgement, para. 1424.
[523] The Appeals Chamber recalls that, when faced with competing versions of events, it is the prerogative of the trier of fact to determine which is more credible. *See Gacumbitsi* Appeal Judgement, para. 81; *Rutaganda* Appeal Judgement, para. 29. *Cf. also Munyakazi* Appeal Judgement, para. 57; *Muvunyi* Appeal Judgement of 1 April 2011, para. 57; *Muhimana* Appeal Judgement, para. 103.
[524] Trial Judgement, para. 1423.
[525] Trial Judgement, paras. 1421, 1422, fn. 1572. *See also ibid.*, paras. 379, 855, 1617-1620.
[526] Trial Judgement, paras. 1421-1423.
[527] Trial Judgement, para. 1422.

explained its reasons for not relying on Witness DBQ's evidence with respect to the events at IAMSEA and the Appeals Chamber sees no error in its assessment.

217. Finally, Ntabakuze correctly points out that Witness WB was not an eyewitness to the killings.[528] However, the Appeals Chamber considers that the Trial Chamber was correct in finding that the only reasonable conclusion to be drawn from Witness WB's testimony was that the Tutsi refugees taken away from IAMSEA were subsequently killed by the soldiers and *Interahamwe* present at the massacre site. The Appeals Chamber notes in particular Witness WB's testimony that: (i) he heard sustained gunfire a few minutes after leaving the group; (ii) the refugees were never seen again; (iii) soldiers told him that the people taken away had been killed; and (iv) he later saw the bodies of some members of his family which were exhumed from a mass grave.[529]

218. For the foregoing reasons, the Appeals Chamber concludes that Ntabakuze has failed to demonstrate that the Trial Chamber erred in finding that elements of the Para-Commando Battalion participated in killings at IAMSEA in mid-April 1994, or that it erred with respect to its obligation to provide a reasoned opinion in this regard.

B. Alleged Errors Regarding Knowledge and Effective Control

219. The Trial Chamber considered that "[t]he joint participation of *Interahamwe* and soldiers, the separation of Hutus and Tutsis, and the presence of the pickup truck with additional soldiers at the killing site indicate[d] organisation and prior planning".[530] It found that "[i]n light of his command and control over members of the Para Commando Battalion [...], as well as the organisation of the crime, [...] the operation could only have been carried out with the knowledge and approval of Ntabakuze".[531] It further found that Ntabakuze had effective control over the Para-Commando soldiers involved in the killings at IAMSEA.[532]

220. Ntabakuze submits that the Trial Chamber erred in finding that he knew or had reason to know of the killings at IAMSEA and had effective control over his allegedly culpable subordinates involved in the killings, as these were not the only reasonable inferences that could be drawn from the circumstantial evidence.[533] He asserts that he was not present at IAMSEA or in the surrounding areas before or during the attack and that the Trial Chamber found that soldiers helped refugees at

[528] *See* Trial Judgement, paras. 1409, 1428; Witness WB, T. 12 November 2003 pp. 49-52.
[529] *See* Witness WB, T. 12 November 2003 pp. 49-52.
[530] Trial Judgement, para. 1428.
[531] Trial Judgement, para. 1429. *See also ibid.*, paras. 2065, 2066.
[532] Trial Judgement, para. 2062.
[533] Notice of Appeal, paras. 71-73; Appeal Brief, para. 155. *See also* Appeal Brief, paras. 107-109; Reply Brief, para. 93; AT. 27 September 2011 pp. 31, 34, 70.

IAMSEA and saved Witness WB and his children.[534] Ntabakuze also argues that the inference that the attack was organised by Para-Commando soldiers was not the only reasonable one that could be drawn from the evidence.[535] In this regard, Ntabakuze contends that: (i) the civilian assailants were under the direction of an *Interahamwe* named "Paulin"; (ii) the presence of both civilian and military assailants does not suggest order and discipline; (iii) the pick-up truck was not the normal means for transporting troops on mission; and (iv) there was no evidence of the presence of any company commander, platoon, section, or squad leader which could have implied a military operation.[536] He further avers that the Trial Chamber erred in inferring that the soldiers at IAMSEA were under his command, and in inferring his knowledge based on his *de jure* command over the Para-Commando Battalion.[537]

221. The Prosecution responds that Ntabakuze does not demonstrate how the Trial Chamber erred in relation to its findings concerning his knowledge or effective control.[538] The Prosecution contends that the Trial Chamber was alive to all of the factors identified by Ntabakuze and relied on additional factors besides those related to prior planning and organisation of the operation in reaching its conclusions on Ntabakuze's knowledge.[539]

222. The Appeals Chamber finds Ntabakuze's contention regarding his absence from IAMSEA or its surroundings unpersuasive. Ntabakuze was not convicted as a physical perpetrator of the crimes but as a superior pursuant to Article 6(3) of the Statute, and his absence from the crime scene did not prevent him from having either knowledge of the events or effective control over the soldiers involved in the killings. The Appeals Chamber also considers that the fact that a soldier permitted Witness WB and his children to escape[540] is immaterial to the issues of Ntabakuze's knowledge or approval of the participation of his subordinates in killings at IAMSEA, or his effective control.

223. With respect to the organisation of the attack, the Appeals Chamber sees no merit in Ntabakuze's argument that the civilian assailants were under the direction of an *Interahamwe* named "Paulin". This fact[541] does not invalidate the Trial Chamber's conclusion that *Interahamwe* and soldiers jointly participated in the killings, nor does it affect the Trial Chamber's finding that the civilian militia group acted as "an auxiliary or complementary force to the soldiers" and that

[534] Notice of Appeal, para. 72; Appeal Brief, para. 152. *See also* AT. 27 September 2011 p. 70.
[535] Appeal Brief, para. 154. *See also* AT. 27 September 2011 pp. 34, 35.
[536] Appeal Brief, para. 153.
[537] Appeal Brief, para. 151; AT. 27 September 2011 pp. 33, 34.
[538] Prosecution Response Brief, paras. 116, 120.
[539] Prosecution Response Brief, paras. 118, 119.
[540] Trial Judgement, para. 1409.
[541] *See* Trial Judgement, para. 1420.

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militiamen were "working in close coordination with military perpetrators" during the attack.[542] Moreover, Ntabakuze fails to substantiate his contention that the presence of both civilian and military assailants does not suggest order and discipline. The Appeals Chamber reiterates that it places no weight on the argument that pick-up trucks were not the normal means for transporting troops on mission,[543] and it is also not persuaded by Ntabakuze's argument regarding the absence of evidence of any company commander, platoon, section, or squad leader at IAMSEA. Although, as Ntabakuze suggests, evidence of a military leader could support an inference of a military operation, he fails to show how the absence of such evidence demonstrates that the Trial Chamber erred in its conclusions regarding the organisation of the attack or the role of Para-Commando soldiers therein.[544] The Appeals Chamber accordingly finds that Ntabakuze does not demonstrate that the Trial Chamber erred in concluding that the attack was organised, or in relying on the organisation of the attack to reach its finding concerning Ntabakuze's knowledge of his subordinates' involvement in the crimes.

224. The Appeals Chamber also rejects Ntabakuze's contention that the Trial Chamber erred in inferring his knowledge from his *de jure* authority over the Para-Commando Battalion. The Appeals Chamber notes in this regard that the Trial Chamber's finding that Ntabakuze had actual knowledge that his subordinates were about to commit crimes at IAMSEA[545] was inferred from a number of factors. In addition to relying on Ntabakuze's command and control over members of the Para-Commando Battalion and the organisation of the operation, the Trial Chamber also reasoned that "[i]t is inconceivable that Ntabakuze would not be aware that his subordinates would be deployed for these purposes, in particular in the immediate aftermath of the death of President Habyarimana and the resumption of hostilities with the RPF, when the vigilance of military authorities would have been at its height".[546] The Trial Chamber further relied on the fact that the location of the massacre at IAMSEA was near military positions of the Para-Commando Battalion.[547] Ntabakuze fails to challenge any of these factors, or the Trial Chamber's express reliance thereupon in support of its inference of Ntabakuze's knowledge. In these circumstances, the Appeals Chamber finds that Ntabakuze fails to demonstrate that the Trial Chamber erred in finding that he had actual knowledge that his subordinates from the Para-Commando Battalion were about to commit the crimes at IAMSEA.

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[542] Trial Judgement, para. 2063.
[543] *See supra*, para. 185.
[544] The Appeals Chamber observes that Witness WB was not asked any question on the matter and notes that Ntabakuze fails to provide any basis for his suggestion that military operations of Para-Commando soldiers could not have occurred without the physical presence of a company commander, platoon, section, or squad leader.
[545] The Appeals Chamber refers to its discussion of the Trial Chamber's legal finding on Ntabakuze's knowledge. *See supra*, fn. 475.
[546] Trial Judgement, para. 2065.
[547] Trial Judgement, para. 2066. *See also ibid.*, para. 1420.

225. Finally, the Appeals Chamber rejects Ntabakuze's unsubstantiated general assertion that the Trial Chamber erred in inferring that the Para-Commando soldiers involved in the crimes at IAMSEA were under his effective control.[548]

226. Based on the foregoing, the Appeals Chamber finds that Ntabakuze has failed to demonstrate that the Trial Chamber erred in finding that he had effective control over the members of the Para-Commando Battalion involved in the killings at IAMSEA, or in finding that he had knowledge that they were about to commit these crimes.

C. Conclusion

227. For the foregoing reasons, the Appeals Chamber dismisses Grounds 21, 25, and 29 of Ntabakuze's appeal in their entirety.

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[548] The Appeals Chamber observes that Ntabakuze has not argued that the members of the Para-Commando Battalion involved in the killings at IAMSEA could have been members of a Battalion unit under the authority of the Presidential Guard at the time. *Compare supra*, para. 167.

VIII. ALLEGED ERRORS RELATING TO THE ELEMENTS OF THE CRIMES (GROUNDS 30-33)

228. The Trial Chamber convicted Ntabakuze as a superior pursuant to Article 6(3) of the Statute of genocide, murder, extermination, persecution, and other inhumane acts as crimes against humanity, as well as violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[549]

229. Ntabakuze submits that essential elements of the crimes for which he was convicted pursuant to Article 6(3) of the Statute were not proven beyond reasonable doubt.[550] Specifically, he contends that the Trial Chamber erred in convicting him in the absence of proof of the requisite *mens rea*.[551]

230. Before turning to examine Ntabakuze's arguments, the Appeals Chamber notes the Prosecution's claim that Ntabakuze's submissions in his Appeal Brief on the law applicable to Grounds 30 through 33 constitute an impermissible amendment of his Notice of Appeal.[552] The Appeals Chamber observes that, in his Notice of Appeal, Ntabakuze argues that the Trial Chamber erred, *inter alia*, "as a matter of law"[553] and refers to the *mens rea* requirements for a conviction under Article 6(3) of the Statute.[554] In this context, the Appeals Chamber understands that Ntabakuze's submissions in his Appeal Brief concerning the relevant law were intended to introduce his ensuing submissions concerning alleged errors regarding proof of the elements of the crimes. The Appeals Chamber will consider them as such.

[549] Trial Judgement, paras. 2160, 2188, 2196, 2215, 2226, 2247, 2258.
[550] Notice of Appeal, heading "D" at p. 38, paras. 118-133; Appeal Brief, paras. 206-263. *See also* AT. 27 September 2011 pp. 5, 34, 72. The Appeals Chamber notes that, while in his Notice of Appeal Ntabakuze argues the "absence of proof beyond reasonable doubt" of all required elements of the crimes for which he was convicted, he alleges in his Appeal Brief the absence of *pleading and proof* of the elements of the crimes. *See* Appeal Brief, heading "D" at p. 59, paras. 207, 239-241, 247, 248, 250, 257-262. Specifically, Ntabakuze argues that the Prosecution failed to plead that the perpetrators at Kabeza, Nyanza hill, and IAMSEA "had the intent to destroy the group 'as such'", and that the location of the Sonatube junction was a material fact that should have been pleaded in the Indictment. *See* Appeal Brief, paras. 241, 247, 248, 260-262. The Appeals Chamber notes that Ntabakuze's argument regarding the Sonatube junction was properly raised in his Notice of Appeal under Ground 5, and has been considered in the section of this Judgement addressing this ground of appeal. *See supra*, Section IV.E. However, the Appeals Chamber accepts the Prosecution's objection that Ntabakuze's contention regarding the lack of pleading of the perpetrators' genocidal intent goes beyond the scope of his Notice of Appeal. *See* Prosecution Response Brief, paras. 5, 170, 186. The Appeals Chamber has nonetheless considered that it was in the interests of justice to examine Ntabakuze's argument in this regard, and has accordingly addressed the argument under the section of this Judgement discussing Ntabakuze's submissions relating to the Indictment. *See supra*, para. 115.
[551] Notice of Appeal, paras. 118, 119, 123, 128-131; Appeal Brief, paras. 241-244, 247, 248, 250-256, 263.
[552] Prosecution Response Brief, para. 170.
[553] Notice of Appeal, headings "Ground 30", "Ground 31", "Ground 32", *and* "Ground 33" at pp. 39-41, paras. 121, 125, 130, 133.
[554] Notice of Appeal, paras. 119, 123, 131.

231. The Appeals Chamber also recalls that it has found in prior sections of this Judgement that the Trial Chamber erred in convicting Ntabakuze of other inhumane acts as a crime against humanity for preventing the refugees killed at Nyanza hill from seeking sanctuary and, Judges Pocar and Liu dissenting, that the Trial Chamber erred in convicting him for the killings perpetrated in Kabeza.[555] As a result, the Appeals Chamber considers that Ground 32 of Ntabakuze's appeal relating to the elements of other inhumane acts as a crime against humanity and Ntabakuze's arguments under Grounds 30, 31, and 33 of his appeal related to his convictions based on the Kabeza killings have become moot, and dismisses them as such.

A. Alleged Errors Regarding Genocide

232. Ntabakuze submits that there was insufficient evidence for the Trial Chamber to conclude that: (i) his subordinates had the requisite specific intent for the crime of genocide; and (ii) he knew or had reason to know that his subordinates had such intent when perpetrating the crimes for which he was convicted.[556] The Appeals Chamber will examine these contentions in turn.

1. Genocidal Intent of Ntabakuze's Subordinates

233. Ntabakuze submits that the Trial Chamber erred in convicting him of genocide in the absence of proof beyond reasonable doubt that his subordinates possessed the intent to bring about the destruction of the Tutsi group "as such" when they killed Tutsis at Nyanza hill and IAMSEA.[557] The Prosecution responds that, *inter alia*, the manner, scale, and general context of the killings at Nyanza hill and IAMSEA show that the perpetrators carried them out with genocidal intent.[558]

(a) Nyanza Hill

234. The Trial Chamber found that, on 11 April 1994, more than 1,000 Tutsi refugees fleeing from ETO were stopped at the Sonatube junction and then marched to Nyanza hill.[559] Upon their arrival, the refugees were met by 15 to 20 Para-Commando soldiers, rounded up, and executed by the soldiers and *Interahamwe*.[560] The Trial Chamber found that, in view of the manner in which the attack at Nyanza unfolded, the assailants intentionally killed members of the Tutsi ethnic group.[561]

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[555] *See supra*, paras. 83, 175.
[556] Notice of Appeal, paras. 123, 125, 128-131, 133; Appeal Brief, paras. 245-254, 257; Reply Brief, paras. 108-113.
[557] Notice of Appeal, paras. 123, 128-131; Appeal Brief, paras. 246-249, 251, 252, 254; Reply Brief, paras. 111, 112.
[558] Prosecution Response Brief, paras. 181-183.
[559] Trial Judgement, paras. 1340, 1346, 1354, 1355, 2136.
[560] Trial Judgement, paras. 1354-1356, 2136.
[561] Trial Judgement, para. 2138. *See also ibid.*, para. 2139.

It also held that the only reasonable conclusion was that the perpetrators of the killings possessed the intent to destroy, in whole or in part, the Tutsi group.[562]

235. Ntabakuze argues that the Trial Chamber reached its findings concerning the crime of genocide despite evidence that among the victims at Nyanza were persons of Hutu ethnicity,[563] and alleges a lack of proof of the perpetrators' intent to destroy the Tutsi group "as such".[564]

236. As a preliminary matter, the Appeals Chamber observes that the Trial Chamber did not explicitly state that the physical perpetrators of the killings at Nyanza hill possessed the intent to destroy the Tutsi group, in whole or in substantial part, "as such".[565] The Appeals Chamber is nonetheless satisfied that the Trial Chamber's findings clearly reflect that the Trial Chamber considered that the Tutsi ethnic group "as such" was targeted for destruction in whole or in part.[566]

237. In finding that the assailants at Nyanza had genocidal intent, the Trial Chamber considered a variety of factors, including the manner in which this and other attacks unfolded, as well as similar targeted killings of Tutsis in Rwanda at the same time and the large number of Tutsi victims at Nyanza.[567] The Appeals Chamber also notes the Trial Chamber's finding that the assailants separated Hutus from Tutsis along ethnic lines during the attack, allowing Hutu refugees to leave.[568] Against this background, the Appeals Chamber does not consider that the fact that there may have been some Hutu victims among the large group of Tutsi victims suffices to demonstrate that the Trial Chamber erred in considering that the assailants possessed the intent to destroy, in whole or in part, the Tutsi ethnic group as such. Moreover, Ntabakuze does not show on appeal what other reasonable conclusion could have been reached based on the evidence before the Trial Chamber.

238. The Appeals Chamber accordingly finds that Ntabakuze has failed to demonstrate an error in the Trial Chamber's conclusion that the only reasonable inference to be drawn from the evidence before it was that the perpetrators of the massacre at Nyanza hill possessed genocidal intent.

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[562] Trial Judgement, para. 2138. *See also ibid.*, para. 2139.
[563] Notice of Appeal, para. 122; Appeal Brief, para. 246, *referring to* Jean-Bosco Kayiranga, T. 30 April 2004 p. 17.
[564] Notice of Appeal, para. 123; Appeal Brief, para. 247.
[565] *See* Trial Judgement, para. 2138.
[566] *See* Trial Judgement, para. 2138. *See also ibid.*, paras. 2087, 2115. The Appeals Chamber is likewise satisfied that the Trial Chamber's findings in relation to IAMSEA reflect conclusions on the targeting of the Tutsi ethnic group "as such". *See ibid.*, para. 2138.
[567] Trial Judgement, para. 2138. *See also ibid.*, para. 2134.
[568] Trial Judgement, para. 1355.

(b) IAMSEA

239. The Trial Chamber found that, around 15 April 1994, *Interahamwe* and a member of the Para-Commando Battalion separated Hutu and Tutsi refugees who had sought refuge at IAMSEA into two groups based mainly on ethnicity, although it recognised the possibility that some Hutus were also part of the Tutsi group.[569] *Interahamwe* and members of the Para-Commando Battalion then led a group of approximately 60 Tutsis to an area where other members of the Battalion were waiting and where the refugees were executed.[570] The Trial Chamber held that the only reasonable conclusion to be drawn from the circumstantial evidence was that the perpetrators of the killings possessed genocidal intent.[571]

240. Ntabakuze submits that, in light of Prosecution Witness WB's evidence that some members of the Para-Commando Battalion present at IAMSEA actually helped refugees prior to 15 April 1994 and the possible presence of some Hutus amongst the group of Tutsis there, the inference that the killings at IAMSEA occurred for ethnic reasons was not the only reasonable one that could be drawn from the evidence.[572]

241. The Appeals Chamber notes Witness WB's testimony that members of the Para-Commando Battalion accompanied him, his family, and others to IAMSEA and brought the refugees food in the days prior to the killings, and that a member of that Battalion permitted him and three of his children to escape shortly before the killings started.[573] However, Witness WB also testified that the soldiers lined up the refugees inside IAMSEA, checked their identity cards, separated Tutsi and Hutu refugees into two groups, and executed those in the Tutsi group.[574] The Appeals Chamber considers that Witness WB's evidence of a single perpetrator's limited and selective assistance in saving a few Tutsi individuals did not preclude the Trial Chamber from finding that the only reasonable conclusion from the evidence before it was that the perpetrators had the intent to destroy in whole or in part the Tutsi group as such.[575] The Appeals Chamber also fails to see the relevance of evidence of limited and selective assistance provided by some members of the Battalion in the days before the killings at IAMSEA.

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[569] Trial Judgement, paras. 1427, 2137.
[570] Trial Judgement, paras. 1428, 2137.
[571] Trial Judgement, para. 2138.
[572] Notice of Appeal, paras. 128-130; Appeal Brief, paras. 248, 249. Ntabakuze also argues that the assistance provided by Para-Commando soldiers to refugees prior to the day of the killings demonstrates that they did not receive any order to kill civilians. *See* Notice of Appeal, para. 128; Appeal Brief, para. 249. The Appeals Chamber fails to see how this unsubstantiated argument supports Ntabakuze's allegation of error regarding his subordinates' genocidal intent and finds, in any event, that it lacks merit.
[573] Witness WB, T. 12 November 2003 pp. 37, 44, 49, 50. *See also* Trial Judgement, paras. 1406, 1407, 1409, 1424.
[574] Witness WB, T. 12 November 2003 pp. 47-54 *and* T. 13 November 2003 p. 28. *See also* Trial Judgement, paras. 1409, 1427. The Trial Chamber found Witness WB's testimony to be corroborated by Witness L-22 on certain points, including the separation of refugees. *See ibid.*, para. 1423.

242. In light of the totality of the evidence before the Trial Chamber, including evidence that refugees at IAMSEA were separated into two groups based on their ethnicity and evidence of similar targeted killings of Tutsis in Rwanda at the same time, the Appeals Chamber does not consider that the possible presence of some Hutus amongst the group of Tutsis at IAMSEA demonstrates that the Trial Chamber erred in inferring that the physical perpetrators possessed genocidal intent. Moreover, Ntabakuze does not show what other reasonable conclusion could have been reached by the Trial Chamber based on the evidence before it.

243. In light of the foregoing, the Appeals Chamber finds that Ntabakuze has failed to demonstrate an error in the Trial Chamber's conclusion that the only reasonable inference available from the totality of the evidence was that the perpetrators of the killings at IAMSEA possessed genocidal intent.

(c) Conclusion

244. The Appeals Chamber finds that Ntabakuze has failed to demonstrate that the Trial Chamber erred in holding that the only reasonable conclusion was that Ntabakuze's subordinates who participated in the killings at Nyanza hill and IAMSEA possessed genocidal intent.

2. Knowledge of Subordinates' Genocidal Intent

245. The Trial Chamber found that Ntabakuze was aware of the genocidal intent of his subordinates who participated in the attacks at Nyanza hill and IAMSEA.[576]

246. Ntabakuze submits that there was insufficient evidence for the Trial Chamber to find beyond reasonable doubt that he knew or had reason to know that his subordinates had genocidal intent.[577] He argues that the Trial Chamber erred in inferring his awareness of the perpetrators' genocidal intent solely from his *de jure* command of the Para-Commando Battalion.[578] He also contends that his acquittal of all charges brought under Article 6(1) of the Statute shows the absence of proof that he had any genocidal intent himself, thus weakening the Trial Chamber's conclusion that the only reasonable inference available from the evidence was that he knew or had reason to know of his subordinates' genocidal intent.[579]

[575] *Cf. Muhimana* Appeal Judgement, para. 32; *Rutaganda* Appeal Judgement, para. 537. *See also Nahimana et al.* Appeal Judgement, para. 571. *See also supra*, para. 237, fn. 566.
[576] Trial Judgement, para. 2139.
[577] Notice of Appeal, paras. 123, 131; Appeal Brief, paras. 251-254, 257; Reply Brief, paras. 108-110, 113; AT. 27 September 2011 p. 72.
[578] Notice of Appeal, paras. 123, 131; Appeal Brief, paras. 250, 253; AT. 27 September 2011 p. 34. The Appeals Chamber notes that the issue of Ntabakuze's knowledge of the involvement of his subordinates in the killings perpetrated at Nyanza and IAMSEA has already been addressed in this Judgement. *See supra*, Sections VI.B *and* VII.B.
[579] Notice of Appeal, para. 119. *See also* Reply Brief, para. 113.

247. The Prosecution responds that Ntabakuze's knowledge was established beyond reasonable doubt based on the totality of the evidence.[580]

248. The Appeals Chamber notes that, contrary to Ntabakuze's contention, the Trial Chamber did not infer Ntabakuze's knowledge of his subordinates' specific intent merely from his *de jure* command over the Para-Commando Battalion. Rather, the Trial Judgement reflects that the Trial Chamber reached the finding that Ntabakuze was fully aware of his subordinates' genocidal intent from "the circumstances of the attacks" at Nyanza and IAMSEA.[581] In this regard, the Appeals Chamber notes the Trial Chamber's findings pertaining to the systematised and large-scale killings of Tutsi civilians at both crime sites as well as throughout Rwanda, the level of discipline and organisation within the Para-Commando Battalion under Ntabakuze's command, the location of the crime sites in proximity to military positions of the Battalion or its base, and his knowledge of the organised operations carried out by his subordinates.[582] Ntabakuze does not show how the Trial Chamber erred in its consideration of the evidence underlying these findings or in reaching its conclusion as to Ntabakuze's knowledge based on these factors. Ntabakuze likewise fails to show how the fact that he was acquitted of all charges brought under Article 6(1) of the Statute for other incidents undermines the Trial Chamber's findings.[583]

249. The Appeals Chamber accordingly considers that Ntabakuze has failed to demonstrate that the Trial Chamber erred in finding that he had knowledge of his subordinates' genocidal intent.

3. Conclusion

250. For the foregoing reasons, the Appeals Chamber concludes that Ntabakuze has failed to demonstrate that the Trial Chamber erred in finding that his subordinates had the requisite specific intent for the crime of genocide and that he knew that his subordinates had such intent.

B. Alleged Errors Regarding Crimes against Humanity

251. Ntabakuze submits that the Trial Chamber erred in convicting him of murder, extermination, and persecution as crimes against humanity in the absence of proof that he knew or had reason to know that the crimes at Nyanza hill and IAMSEA were part of a widespread or systematic attack against the civilian population and that his subordinates had "intent and knowledge of such a

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[580] Prosecution Response Brief, paras. 180-183.
[581] Trial Judgement, para. 2139. *See also ibid.*, paras. 2065, 2066.
[582] Trial Judgement, paras. 1356, 1358, 1429, 2060, 2062, 2065, 2066, 2138.
[583] The Appeals Chamber recalls that Ntabakuze was charged with the incidents at Nyanza hill and IAMSEA solely pursuant to Article 6(3) of the Statute. *See supra*, para. 92, fn. 132.

circumstance".[584] In addition, Ntabakuze argues that there was insufficient proof that these crimes "were committed against any person on the basis of their membership to an identifiable group" or that he knew or had reason to know that his subordinates had such intent, and that the Trial Chamber therefore erred in convicting him of persecution.[585]

252. The Prosecution responds that Ntabakuze fails to show any error by the Trial Chamber.[586]

253. The Appeals Chamber notes the Trial Chamber's explicit finding that both the perpetrators of the attacks and Ntabakuze knew that their actions formed part of widespread and systematic attacks against the civilian population on ethnic and political grounds.[587] The Trial Chamber made this finding in light of a number of factors.[588] In particular, the Trial Chamber considered "the ethnic composition of the individuals who sought refuge at various sites as well as the actual or perceived political leanings of many of those killed or singled out at roadblocks" at the time.[589] It was also mindful of Ntabakuze's position as a high-ranking military officer and his necessary familiarity with the situation as it developed both nationally and in the areas under his control, and of the open and notorious manner in which many of the attacks and massacres were carried out.[590] As Ntabakuze does not substantiate his contention of insufficient proof in this respect, his claim is dismissed. In light of the totality of the evidence considered by the Trial Chamber,[591] the Appeals Chamber likewise dismisses Ntabakuze's unsubstantiated claim that there was no proof that he knew that his subordinates intended the crimes and were aware that their acts formed part of widespread and systematic attacks against the civilian population on ethnic and political grounds. As held above, the Appeals Chamber finds no error in the Trial Chamber's finding that Ntabakuze had actual knowledge that his subordinates were about to commit the crimes at Nyanza hill and IAMSEA.[592]

254. Turning to Ntabakuze's specific challenge to his conviction for persecution, the Appeals Chamber notes that the Trial Chamber convicted Ntabakuze of persecution on ethnic or political grounds in relation to the events at Nyanza and IAMSEA.[593] Ntabakuze does not adduce any arguments to substantiate his submissions regarding these crimes. He neither elaborates on his understanding of an identifiable group, nor specifies any particular error of the Trial Chamber in

[584] Appeal Brief, para. 255.
[585] Appeal Brief, para. 254.
[586] Prosecution Response Brief, paras. 184, 185, 189-191.
[587] Trial Judgement, para. 2167. *See also ibid.*, paras. 2172, 2193, 2212.
[588] Trial Judgement, para. 2167.
[589] Trial Judgement, para. 2167.
[590] Trial Judgement, para. 2167.
[591] *See* Trial Judgement, paras. 2060, 2062, 2065, 2066. *See also, e.g., ibid.*, paras. 1356, 1429, 2134, 2167, 2237.
[592] *See supra*, paras. 202, 225.
[593] Trial Judgement, paras. 2210-2212, 2215.

defining the targeted group.[594] The Appeals Chamber considers that Ntabakuze merely seeks to substitute his own evaluation of the evidence for that of the Trial Chamber without attempting to demonstrate any specific error. Ntabakuze's arguments are accordingly dismissed without further consideration.

255. For the foregoing reasons, the Appeals Chamber concludes that Ntabakuze has failed to demonstrate that the Trial Chamber erred in finding that he had the requisite *mens rea* to be convicted of murder, extermination, and persecution as crimes against humanity pursuant to Article 6(3) of the Statute in relation to the killings perpetrated at Nyanza hill and IAMSEA.

C. Alleged Errors Regarding Violence to Life as a Serious Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II

256. Ntabakuze submits that the Trial Chamber erred in convicting him of violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II "without addressing not only the question of whether he knew or had reason to know that crimes were being committed, but that the alleged victims were *not* taking any active part in hostilities".[595] The Prosecution responds that Ntabakuze's submissions should be dismissed.[596]

257. The Appeals Chamber recalls that it has already held that the Trial Chamber did not err in finding that Ntabakuze had actual knowledge of the involvement of his subordinates in the crimes perpetrated at Nyanza hill and IAMSEA.[597] The Appeals Chamber also notes the Trial Chamber's explicit finding that, given the circumstances of the attacks, it was clear that the perpetrators of the crimes were aware "that the victims were not taking an active part in the hostilities".[598] Ntabakuze's argument is accordingly rejected.

D. Conclusion

258. For the foregoing reasons, the Appeals Chamber dismisses Grounds 30 through 33 of Ntabakuze's appeal in their entirety.

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[594] *See* Trial Judgement, para. 2211, *referring to ibid.*, Sections IV.3.4.3 (*referring to* Section IV.3.3.3) *and* IV.3.5.3.
[595] Appeal Brief, para. 256 (emphasis in the original). *See also* Notice of Appeal, paras. 120, 121, 124, 125, 132, 133.
[596] Prosecution Response Brief, para. 184.
[597] *See supra*, paras. 202, 225.
[598] Trial Judgement, para. 2244. *See also ibid.*, paras. 2167, 2172, 2193, 2210.

IX. ALLEGED ERROR RELATING TO CUMULATIVE CONVICTIONS (GROUND 15)

259. Ntabakuze submits that the Trial Chamber erred in convicting him of murder and extermination as crimes against humanity based on the same set of facts.[599] He argues that it is settled law that an accused cannot be convicted of both crimes for the same facts and that the count of murder should be subsumed by the count of extermination.[600] The Prosecution does not object to this ground of appeal but submits that the potential vacation of the convictions for murder should not impact Ntabakuze's sentence.[601]

260. The Appeals Chamber recalls that cumulative convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other.[602] An element is materially distinct if it requires proof of a fact that is not required by the other.[603] Applying this well-established principle, the Appeals Chamber recently reiterated that cumulative convictions for extermination and murder as crimes against humanity are not permissible, reasoning that, "whereas extermination requires the materially distinct element that the killings occur on a mass scale, murder does not contain an element materially distinct from extermination".[604]

261. The Trial Chamber therefore erred in law in entering cumulative convictions for both murder and extermination as crimes against humanity for the killings perpetrated at Nyanza hill and IAMSEA.[605] Since the offence of extermination contains an additional materially distinct element and the conviction under the more specific provision should be retained,[606] the Appeals Chamber concludes that Ntabakuze's convictions for extermination entered under Count 5 of the Indictment should be upheld, while his convictions for murder as a crime against humanity under Count 4 of the Indictment should be vacated.

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[599] Notice of Appeal, para. 51; Appeal Brief, paras. 264-273. The Appeals Chamber recalls that Ntabakuze withdrew Ground 16 of his appeal, in which he alleged another error of law regarding cumulative convictions. *See* Notice of Appeal, para. 52; Reply Brief, para. 118.
[600] Appeal Brief, paras. 267, 268, 273.
[601] Prosecution Response Brief, para. 192. *See also ibid.*, para. 196; AT. 27 September 2011 p. 37
[602] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 413; *Krajišnik* Appeal Judgement, para. 386, *citing Čelebići* Appeal Judgement, para. 412; *Nahimana et al.* Appeal Judgement, para. 1019.
[603] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 413; *Krajišnik* Appeal Judgement, para. 386, *citing Čelebići* Appeal Judgement, para. 412; *Ntagerura et al.* Appeal Judgement, para. 425.
[604] *Bagosora and Nsengiyumva* Appeal Judgement, para. 416, *referring to Ntakirutimana* Appeal Judgement, para. 542. *See also Bagosora and Nsengiyumva* Appeal Judgement, para. 736.
[605] *See* Trial Judgement, paras. 2188, 2196, 2258.
[606] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 416, fn. 961, *referring to Krajišnik* Appeal Judgement, para. 386, *citing Čelebići* Appeal Judgement, para. 413. *See also Bagosora and Nsengiyumva* Appeal Judgement, para. 736.

262. In light of the foregoing, the Appeals Chamber grants Ground 15 of Ntabakuze's appeal and reverses his convictions for murder as a crime against humanity under Count 4 of the Indictment.

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X. ALLEGED ERRORS RELATING TO SENTENCING (GROUNDS 35-38)

263. The Trial Chamber sentenced Ntabakuze to life imprisonment.[607] Ntabakuze submits that the Trial Chamber erred in: (i) basing the sentence upon multiple convictions for the same acts and "lesser included offenses"; (ii) engaging in impermissible double-counting; (iii) imposing a single sentence; and (iv) venturing outside the scope of its discretion in imposing a life sentence.[608]

264. In addressing Ntabakuze's submissions, the Appeals Chamber bears in mind that Trial Chambers are vested with broad discretion in determining an appropriate sentence due to their obligation to individualise penalties to fit the circumstances of the convicted person and the gravity of the crime.[609] As a rule, the Appeals Chamber will not substitute its own sentence for that imposed by the Trial Chamber unless the appealing party demonstrates that the Trial Chamber committed a discernible error in exercising its discretion, or failed to follow the applicable law.[610]

A. Alleged Reliance on Multiple Convictions

265. Ntabakuze submits that the Trial Chamber erred in "basing the sentence upon multiple convictions for the same acts and lesser included offenses".[611] He argues that, since a person must not be punished more than once for his criminal conduct, the Trial Chamber was bound to adjust the sentence to reflect the fact that all of the convictions against him were based on the same set of facts.[612] In his view, the Trial Chamber "must have erroneously relied" on the number of convictions, rather than on the criminal conduct for which he was convicted, which led it to a "plainly unjust" sentence.[613]

266. The Prosecution responds that the sentence imposed on Ntabakuze was proper and should not be adjusted.[614]

267. The Appeals Chamber recalls that the primary goal in sentencing is to ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender.[615] In this case, there is nothing to suggest that the Trial Chamber relied on the number of

[607] Trial Judgement, para. 2278.
[608] Notice of Appeal, paras. 139-152; Appeal Brief, paras. 285-322.
[609] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 419; *Ntawukulilyayo* Appeal Judgement, para. 232; *Setako* Appeal Judgement, para. 277.
[610] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 419; *Setako* Appeal Judgement, para. 277; *Munyakazi* Appeal Judgement, para. 166.
[611] Notice of Appeal, heading "Ground 35" at p. 44. *See also ibid.*, paras. 139-141.
[612] Appeal Brief, paras. 287-289.
[613] Appeal Brief, para. 290.
[614] Prosecution Response Brief, paras. 5, 192, 196.
[615] *Martić* Appeal Judgement, para. 350, *referring to Čelebići* Appeal Judgement, para. 430.

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convictions pronounced against Ntabakuze rather than on the totality of his criminal conduct and his overall culpability. In light of the gravity of the offences for which Ntabakuze was convicted and the individual circumstances, including aggravating and mitigating factors, relied on by the Trial Chamber, the Appeals Chamber considers that the imposition of a life sentence does not in itself suggest that the Trial Chamber erred in the exercise of its discretion. Ntabakuze does not adduce any other argument in support of his claim, which is accordingly dismissed.

268. However, the Appeals Chamber recalls that it has set aside the finding that Ntabakuze is responsible pursuant to Article 6(3) of the Statute for the commission of crimes by militiamen and has found that the Trial Chamber erred in holding Ntabakuze responsible as a superior for other inhumane acts as a crime against humanity for preventing the refugees killed at Nyanza hill from seeking sanctuary, for murder as a crime against humanity, and, Judges Pocar and Liu dissenting, for the killings perpetrated in Kabeza.[616] The Appeals Chamber will consider in a section below whether these findings reduce Ntabakuze's overall culpability and call for a revision of the sentence.

B. Alleged Double-Counting

269. Ntabakuze submits that the Trial Chamber erroneously relied on his role as a superior as a basis for his responsibility under Article 6(3) of the Statute, as an aspect of the gravity of the offence, and as an aggravating factor to justify his life sentence.[617] He claims that, by using his "senior status and stature in the Rwandan army" to discount mitigation, the Trial Chamber *de facto* considered this factor as an aggravating circumstance.[618] In addition, Ntabakuze contends that the Trial Chamber erred in relying on the number of victims at Nyanza hill in its determination of both the gravity of the crimes and the aggravating factors.[619]

270. The Prosecution responds that the Trial Chamber did not engage in any impermissible double-counting.[620]

271. The Appeals Chamber notes that the Trial Chamber did not refer to Ntabakuze's role as a superior in its discussion of the aggravating circumstances.[621] In its discussion of mitigating factors, the Trial Chamber acknowledged that Ntabakuze was "at times following superior orders in

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[616] *See supra*, paras. 83, 128, 175, 261.
[617] Notice of Appeal, paras. 142, 143, 151; Appeal Brief, paras. 294-296, 317-320.
[618] Appeal Brief, para. 296, *citing* Trial Judgement, para. 2274. *See also* Appeal Brief, paras. 317, 318; Reply Brief, para. 123. In his Reply Brief, Ntabakuze recalls that a defendant may not be punished twice for the same factor and submits that, accordingly, "[w]hether that punishment is meted out as aggravation or denial of mitigation is irrelevant". *See* Reply Brief, para. 130.
[619] Appeal Brief, para. 319.
[620] Prosecution Response Brief, paras. 5, 198-201, 221-224.

executing [his] crimes", but concluded that mitigation was not warranted on this ground based, in part, on Ntabakuze's "own senior status and stature in the Rwandan army".[622] Contrary to Ntabakuze's submission, the Appeals Chamber does not consider that the Trial Chamber's reliance on Ntabakuze's senior status and stature to deny mitigation implies that it *de facto* counted them as aggravating circumstances.[623] Grounds for denying mitigation do not, *per se*, constitute aggravating circumstances, and there is nothing in the Trial Judgement which suggests that the Trial Chamber considered them as such. The Appeals Chamber accordingly rejects Ntabakuze's argument that the Trial Chamber relied on Ntabakuze's role as a superior as an aggravating factor in sentencing.

272. Likewise, the Appeals Chamber dismisses Ntabakuze's submission that the Trial Chamber erroneously relied on his superior status both to establish his responsibility under Article 6(3) of the Statute and to emphasise the gravity of the crimes.[624] The Appeals Chamber observes that the Trial Chamber referred to Ntabakuze's position as Commander of the Para-Commando Battalion in the section of the Trial Judgement dedicated to the gravity of the offences for the sole purpose of describing the form of his participation in the crimes.[625] Accordingly, the Appeals Chamber is satisfied that the Trial Chamber did not rely on Ntabakuze's position as an aspect of the gravity of the crimes.

273. Turning to Ntabakuze's contention regarding the Trial Chamber's reliance on the number of victims at Nyanza hill, the Appeals Chamber notes that, while the Trial Chamber specifically referred to the Nyanza massacre in its consideration of the gravity of the offences, no emphasis was put on the number of victims.[626] Moreover, in its consideration of the aggravating circumstances, the Trial Chamber clearly referred to the "large number of Tutsi victims" during the course of *all* attacks and massacres for which Ntabakuze was convicted, not limiting its finding to the number of victims at Nyanza alone.[627] The Appeals Chamber considers that it was the overall number of

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[621] *See* Trial Judgement, para. 2272.
[622] Trial Judgement, para. 2274.
[623] In his Reply Brief, Ntabakuze further argues that there was no evidence that he received or gave unlawful orders and that the Trial Chamber's "serious misstatement of the facts" in this respect warrants reconsideration of the sentence imposed on him. *See* Reply Brief, paras. 121, 122. The Appeals Chamber notes that this argument exceeds the scope of Ntabakuze's appeal as defined in the Notice of Appeal and considers that, by raising this argument for the first time in his Reply Brief, Ntabakuze effectively prevented the Prosecution from making any submission on the issue. In these circumstances, the Appeals Chamber declines to consider this argument.
[624] *See* Appeal Brief, paras. 317, 318.
[625] Trial Judgement, para. 2268.
[626] Trial Judgement, para. 2268 ("When deployed along the frontline at Sonatube junction, members of the [Para-Commando] battalion and *Interahamwe* stopped a large group of predomina[n]tly Tutsi refugees fleeing to safety and marched them to their death at Nyanza hill in one of the most notorious early massacres of the genocide, a crime of which the Appeals Chamber has already emphasised the gravity."), *referring to 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. 21.
[627] *See* Trial Judgement, para. 2272 ("The large number of Tutsi victims during the course of the attacks and massacres is also aggravating with respect to each of the Accused's conviction for genocide, which is a crime with no numeric minimum of victims.").

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victims of Ntabakuze's crimes that was assessed as an aggravating circumstance. Ntabakuze's contention that the Trial Chamber relied on the number of victims at Nyanza hill in its determination of both the gravity of the crimes and the aggravating factors is therefore ill-founded.

274. Based on the foregoing, the Appeals Chamber finds that Ntabakuze has failed to demonstrate that the Trial Chamber engaged in impermissible double-counting in determining the sentence. However, in light of the finding that the Trial Chamber erred in holding Ntabakuze responsible for the killings perpetrated in Kabeza,[628] the Appeals Chamber considers that the number of victims during the course of the attacks on Kabeza cannot be held against Ntabakuze in the determination of his sentence.

C. Alleged Error in Imposing a Single Sentence

275. Ntabakuze submits that, in light of Rule 87 of the Rules, the Trial Chamber erred in imposing a single sentence for all counts for which he was convicted.[629] The Prosecution responds that Rule 87(C) of the Rules vests the Trial Chamber with the discretion to impose a single sentence.[630]

276. Rule 87(C) of the Rules provides that "[i]f the Trial Chamber finds the accused guilty on one or more of the counts contained in the indictment, it shall impose a sentence in respect of each finding of guilt [...] unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused".[631] The Trial Chamber decided to impose a single sentence on the ground that Ntabakuze's convictions were based largely on the same underlying criminal acts.[632] The Appeals Chamber considers this to be an appropriate exercise of the Trial Chamber's discretion. Ntabakuze's contention in this respect is accordingly dismissed.

D. Alleged Abuse of Discretion in Imposing a Life Sentence

277. Ntabakuze submits that the Trial Chamber ventured outside the scope of its discretion in imposing a life sentence on him.[633] Specifically, he asserts that the Trial Chamber: (i) failed to consider certain mitigating circumstances; (ii) failed to give weight to his good character as a mitigating factor; (iii) erred in imposing on him the same sentence as on Bagosora and Nsengiyumva; and (iv) failed to impose a sentence proportionate to the form and degree of his

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[628] *See supra*, para. 175.
[629] Notice of Appeal, para. 144; Appeal Brief, para. 292.
[630] Prosecution Response Brief, para. 197.
[631] The Appeals Chamber notes that Rule 87(C) of the Rules was amended on 14 March 2008 to expressly provide for the imposition of single sentences.
[632] Trial Judgement, para. 2276.

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participation in the crimes.[634] Ntabakuze further submits that the Trial Chamber failed to credit him for time served in detention and to reduce his sentence as a result of the violation of his right to an expeditious trial.[635]

278. The Prosecution responds that the Trial Chamber took into account all of the factors it was required to consider and properly individualised the penalty to fit Ntabakuze's circumstances and the gravity of the crimes.[636] The Prosecution submits that Ntabakuze fails to demonstrate any discernible error committed by the Trial Chamber in the exercise of its discretion or in its application of the law.[637]

1. Failure to Consider Certain Mitigating Circumstances

279. Ntabakuze submits that the Trial Chamber failed to consider certain mitigating circumstances which were "either undisputed or proven on a balance of probabilities".[638] He avers that the Trial Chamber thereby violated its duty pursuant to Article 22(2) of the Statute to issue a reasoned opinion.[639]

280. Before turning to Ntabakuze's specific arguments, the Appeals Chamber recalls that while a Trial Chamber has the obligation to consider any mitigating circumstances when determining the appropriate sentence, it enjoys a considerable degree of discretion in determining what constitutes a mitigating circumstance and the weight, if any, to be accorded to that factor.[640] Accordingly, the existence of mitigating circumstances does not automatically imply a reduction of sentence[641] or preclude the imposition of a sentence of life imprisonment where the gravity of the offence so requires.[642]

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[633] Notice of Appeal, para. 152; Appeal Brief, para. 297.
[634] Notice of Appeal, paras. 146-151; Appeal Brief, paras. 297-315.
[635] Appeal Brief, paras. 321, 322. The Appeals Chamber notes that Ntabakuze failed to raise these allegations of error in his Notice of Appeal. However, the Appeals Chamber notes that the Prosecution did not object to the allegations on this basis and responded to them. In these circumstances, the Appeals Chamber will consider them.
[636] Prosecution Response Brief, paras. 203-220, 225-227.
[637] Prosecution Response Brief, para. 203. *See also* AT. 27 September 2011 pp. 44-67.
[638] Appeal Brief, para. 301.
[639] Appeal Brief, paras. 298-301. *See also* Reply Brief, paras. 127, 128.
[640] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 424; *Bikindi* Appeal Judgement, para. 158. *See also Munyakazi* Appeal Judgement, para. 174.
[641] *Nahimana et al.* Appeal Judgement, para. 1038; *Kajelijeli* Appeal Judgement, para. 299; *Niyitegeka* Appeal Judgement, para. 267.
[642] *See, e.g., Ntawukulilyayo* Appeal Judgement, fn. 581; *Renzaho* Appeal Judgement, para. 612; *Niyitegeka* Appeal Judgement, para. 267.

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(a) Absence of Conviction Pursuant to Article 6(1) of the Statute

281. Ntabakuze asserts that nothing in the Trial Judgement suggests that the Trial Chamber took into account the fact that he was not convicted for direct responsibility under Article 6(1) of the Statute or conspiracy to commit genocide and that his only convictions arise from a failure to prevent or punish the underlying offences under Article 6(3) of the Statute.[643]

282. The Appeals Chamber considers that the fact that Ntabakuze was acquitted of all charges against him pursuant to Article 6(1) of the Statute and was solely convicted pursuant to Article 6(3) of the Statute is not subject to consideration as a mitigating factor. The form of liability is not an individual circumstance of the accused but the objective definition of his participation in the criminal conduct. Further, failure to prevent or punish subordinates' crimes constitutes the culpable conduct under Article 6(3) of the Statute and the absence of conviction under Article 6(1) of the Statute does not reduce that culpability.[644] The Appeals Chamber finds that the Trial Chamber was therefore correct in not considering in mitigation the fact that Ntabakuze was not convicted pursuant to Article 6(1) of the Statute and, accordingly, rejects Ntabakuze's argument in this respect.

(b) Military Career, Family Situation, and Background

283. Ntabakuze asserts that nothing in the Trial Judgement suggests that the following factors were taken into consideration: (i) his "exemplary" military career; (ii) the fact that he is married and has four children; and (iii) his previously unblemished professional, social, and educational background suggesting a strong likelihood of successful rehabilitation.[645]

284. The Appeals Chamber notes that, in determining the sentence, the Trial Chamber expressly took into account Ntabakuze's family situation and his lengthy public service to his country as a military officer, as well as his social, educational, and professional background.[646] The Trial Chamber, however, concluded that the gravity of the crimes and the aggravating factors greatly outweighed these mitigating factors.[647] The Appeals Chamber recalls that in general only little weight is afforded to the family situation of the convicted person in the absence of exceptional

[643] Appeal Brief, paras. 298, 300(a), 301.
[644] *Čelebići* Appeal Judgement, para. 737. *Cf. also Ntawukulilyayo* Appeal Judgement, para. 236. Moreover, the Appeals Chamber notes that the Prosecution did not charge Ntabakuze pursuant to Article 6(1) of the Statute for the crimes for which he was ultimately convicted. *See* Indictment, references to paragraphs 6.36 and 6.37 under the respective counts on pp. 45, 47-53; Trial Judgement, para. 2005.
[645] Appeal Brief, paras. 300(b), (e), (f), 301.
[646] Trial Judgement, para. 2273, *referring to ibid.*, paras. 58-63.
[647] Trial Judgement, para. 2275.

family circumstances.[648] Similarly, the lack of a previous criminal record and a purported likelihood of successful rehabilitation are common characteristics among many convicted persons which are accorded little weight, if any, in mitigation in the absence of exceptional circumstances.[649] As for Ntabakuze's "exemplary" military career, the Appeals Chamber also considers that it was in the Trial Chamber's discretion not to accord this factor any mitigating value in the absence of particular reasons for doing so. Ntabakuze does not submit that exceptional circumstances obliged the Trial Chamber to accord special value to any of the factors listed above.

285. The Appeals Chamber finds that the Trial Chamber duly considered the above-mentioned circumstances and discerns no error in the exercise of the Trial Chamber's discretion in the determination of the weight to be accorded to them. Ntabakuze's arguments in these respects are therefore rejected.

(c) Even-Handed Treatment of Soldiers

286. Ntabakuze submits that the Trial Chamber failed to consider his even-handed treatment of members of all ethnicities within the Para-Commando Battalion and that none of its Tutsi members abandoned or deserted the unit between April and July 1994.[650]

287. The Trial Chamber did not elaborate on Ntabakuze's purported even-handed treatment of members of all ethnicities of the Para-Commando Battalion in its discussion of the mitigating circumstances.[651] The Appeals Chamber considers, nonetheless, that the Trial Chamber's express reference to this contention in its summary of Ntabakuze's sentencing submissions indicates that it included this contention in its consideration of the sentence.[652] The Appeals Chamber considers that the Trial Chamber was under no obligation to expressly reiterate Ntabakuze's argument in its deliberations as it remains within the Trial Chamber's discretion not to set out in detail each and every factor considered,[653] especially if the Trial Chamber accords minor importance to that factor.[654] Ntabakuze's argument in this respect is therefore rejected.

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[648] *Nahimana et al.* Appeal Judgement, para. 1108, *referring to Jokić* Judgement on Sentencing Appeal, para. 62. *See also Kunarac et al.* Appeal Judgement, para. 413.
[649] *See Ntagerura et al.* Appeal Judgement, para. 439.
[650] Appeal Brief, paras. 300(c), 301.
[651] The Appeals Chamber notes that Ntabakuze raised the matter in relation to sentencing in his Closing Brief. *See* Ntabakuze Closing Brief, para. 2598.
[652] *See* Trial Judgement, para. 2262 ("The Ntabakuze Defence submits that [...] Ntabakuze [...] maintained discipline, cohesion and combat effectiveness within his unit without resort to discrimination amongst his soldiers.").
[653] *Renzaho* Appeal Judgement, para. 610; *Ntagerura et al.* Appeal Judgement, para. 436; *Babić* Judgement on Sentencing Appeal, para. 43; *Kupreškić et al.* Appeal Judgement, para. 430.
[654] In addition, the Appeals Chamber notes that the testimony that Ntabakuze cites in support of his contention does not in fact support it. *See* Appeal Brief, fn. 311, *referring to* Witness DM-25, T. 11 April 2005 p. 65 (closed session).

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(d) Saving Lives

288. Ntabakuze submits that the Trial Chamber failed to address the fact that he saved the lives of a senior political opponent of the late President Habyarimana (Witness DM-25), the witness's family, and others.[655]

289. The Appeals Chamber notes that Ntabakuze did not make any explicit sentencing submission at trial regarding this argument.[656] Rule 86(C) of the Rules clearly indicates that sentencing submissions shall be addressed during closing arguments. It was therefore Ntabakuze's responsibility to identify all mitigating circumstances he wished to have considered at the time.[657] Ntabakuze failed to do so. In view of the lack of specific pleadings at trial, the Appeals Chamber finds no error in the Trial Chamber not expressly considering whether this factor should have been taken into consideration in mitigation.[658] Ntabakuze's argument in this respect is therefore rejected.

(e) Public and Genuine Regret

290. Ntabakuze submits that the Trial Chamber failed to take into account in mitigation the fact that he "expressed public and genuine regret for the tragic events that befell Rwanda".[659]

291. The Appeals Chamber observes that, in support of his submission in his Closing Brief that his good character should be considered in mitigation of the sentence, Ntabakuze argued that "[d]uring his testimony before the Chamber, he expressed regret for not having been able to stop the massacres".[660] Whereas the Trial Chamber recounted a number of Ntabakuze's submissions on sentencing,[661] it did not refer to Ntabakuze's assertion of regret in its summary of Ntabakuze's submissions, nor did it discuss it in determining the sentence.

292. The Appeals Chamber recalls that expressions of sincere regret, sympathy, compassion, or sorrow for the victims of the crimes with which an accused is charged may be considered as

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[655] Appeal Brief, para. 300(b).
[656] Ntabakuze mentions Witness DM-25 in his Closing Brief as proof of his good character without arguing, as a mitigating factor, that he saved Witness DM-25's life and the lives of others. *See* Ntabakuze Closing Brief, para. 2598. Similarly, Ntabakuze referred to Witness DM-25 during his closing arguments when arguing the merits of the case, albeit without any mention that the witness's testimony should serve as an argument for mitigation. *See* Closing Arguments, T. 30 May 2007 p. 44.
[657] *See, e.g.*, *Setako* Appeal Judgement, para. 286; *Rukundo* Appeal Judgement, para. 255; *Muhimana* Appeal Judgement, para. 231.
[658] The Appeals Chamber observes that the Trial Chamber explicitly referred to Witness DM-25's testimony in its summary of Ntabakuze's submissions on his good character, which allows for the conclusion that the Trial Chamber was mindful of Witness DM-25's entire testimony when deciding upon the sentence. *See* Trial Judgement, para. 2262.
[659] Appeal Brief, para. 300(d).
[660] Ntabakuze Closing Brief, para. 2598.
[661] *See* Trial Judgement, para. 2262.

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mitigating factors.[662] In light of the possible impact genuine regret may have on a sentence, the Appeals Chamber considers that the fact that the Trial Chamber expressly referred to other particular factors while not expressly mentioning Ntabakuze's statement of regret allows for the conclusion that it failed to consider Ntabakuze's submission. The Appeals Chamber finds that the Trial Chamber should have considered whether this factor constituted a mitigating circumstance, and, if so, whether it should have been accorded any weight. In order to establish whether this error invalidates the Trial Chamber's determination of the sentence, the Appeals Chamber turns to examine Ntabakuze's alleged expression of regret.

293. In his Closing Brief, Ntabakuze expressed his eagerness "to be given the chance to work together with his countrymen, without distinction, to reconstruct and reconcile the nation".[663] He also expressly referred to his testimony at trial during which he stated that he strongly condemned the massacres of Tutsi refugees throughout Rwanda, calling them a "terrible tragedy", expressed his sadness for the victims, and, while denying his involvement in the massacres, stated: "I regret that I could not have done more to stop [the massacres] [...] personally, and using my troops. [...] It is regrettable, it is a terrible situation, it is a very sad tragedy [...]".[664]

294. The Appeals Chamber considers that Ntabakuze's expression of regret should have been considered as a mitigating factor in sentencing by the Trial Chamber,[665] and that the Trial Chamber erred in failing to consider it as such. However, the Appeals Chamber does not find that this error

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[662] *Nchamihigo* Appeal Judgement, para. 396, *citing Strugar* Appeal Judgement, paras. 365, 366 (stating that such expressions of sympathy or compassion have been accepted as mitigating circumstances by Trial Chambers of both the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the Tribunal); *Vasiljević* Appeal Judgement, para. 177.

[663] Ntabakuze Closing Brief, para. 477. *See also ibid.*, para. 2598.

[664] Ntabakuze Closing Brief, para. 477, *citing* Ntabakuze, T. 21 September 2006 pp. 61, 62. *See also* Exhibit DNT235 ("Report by Ntabakuze"), Conclusion at p. 48:

> I was not involved in the massacres which plunged my country into mourning in 1994. I strongly condemn these massacres from the bottom of my heart. I feel very sad to talk about the tragedy. So many people died for nothing. It is painful, regrettable and shocking. There is no single family in Rwanda that has not lost their loved ones. Some of them were acquaintances, friends and even relatives to me. I feel sorry for all of them not only because the[y] were my countrymen but because they were human beings whose live [*sic*] should have been respected and protected. War is a dirty business and definitely no one won it. The country has been destroyed. It is a very sad situation. I regret that I could not have done more personally and with the troops under my command to prevent and stop the killing of civilians.
>
> I would like to take this opportunity to pay my due respect in the memory of all Rwandans from all ethnic groups and various regions and of all foreigners who died in the Rwandan tragedy. I would like also to pay my respect before the suffering of the survivors, of the orphans, widows and before all the handicapped because of this insane war that destroyed Rwanda since 1990. I pay my respect to all these thousands souls while wishing to all sons and girls of Rwanda to reject forever the axe of hate and war in order to rebuild a reconciled and democratic nation, to make a land of peace and happiness for all Rwandans and for all inhabitants of Rwanda without distinction. I would be very happy to be able to give my modest contribution to this worthy work of the children of God.

[665] The Appeals Chamber recalls that sincere regret can be expressed without admitting participation in a crime. The Appeals Chamber has previously found that remorse nonetheless requires acceptance of some measure of moral blameworthiness for personal wrongdoing, falling short of the admission of criminal responsibility or guilt. *See Strugar* Appeal Judgement, para. 365; *Vasiljević* Appeal Judgement, para. 177.

invalidates the sentence imposed by the Trial Chamber, as it considers that the gravity of the crimes for which Ntabakuze was convicted at trial and the aggravating factors identified by the Trial Chamber greatly outweighed this mitigating factor. The Appeals Chamber therefore dismisses this part of Ntabakuze's appeal.

2. Failure to Give Weight to Good Character

295. Ntabakuze submits that the Trial Chamber failed to give weight, or at least sufficient weight, in mitigation to his good character.[666]

296. The Appeals Chamber observes that the Trial Chamber expressly referred to "Ntabakuze's role in facilitating UNAMIR convoys and the general positive view of him held by certain UNAMIR and foreign officers and high ranking opposition officials".[667] The Trial Chamber found, however, that Ntabakuze's selective assistance carried only limited weight as a mitigating factor and that the gravity of the crimes and the aggravating factors greatly outweighed any mitigating factors.[668] The Appeals Chamber reiterates that in most cases the good character of a convicted person carries little weight in the determination of the sentence.[669] Ntabakuze does not submit any argument demonstrating a discernible error in the Trial Chamber's assessment. His contention in this respect is therefore rejected.

3. Comparability of Sentences

297. Ntabakuze submits that, by imposing the same sentence on him as on Bagosora and Nsengiyumva, the Trial Chamber "failed to exercise its discretion in a manner consistent with the principle that 'sentences of like individuals in like cases should be comparable'".[670] He argues that his case is distinct from the cases of Bagosora and Nsengiyumva as: (i) the "volume of factual allegations" found to be proven is "significantly greater" for Bagosora and Nsengiyumva than for him; and (ii) Bagosora and Nsengiyumva were found also to have directly participated in criminal conduct pursuant to Article 6(1) of the Statute, whereas he "was convicted under Article 6(3) only" and acquitted of a large number of other charges.[671]

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[666] Appeal Brief, paras. 303, 304, *referring to* Trial Judgement, para. 2273.
[667] Trial Judgement, para. 2273.
[668] Trial Judgement, paras. 2273, 2275.
[669] *See, e.g., Seromba* Appeal Judgement, para. 235, *citing Semanza* Appeal Judgement, para. 398; *Nahimana et al.* Appeal Judgement, para. 1069, *citing Babić* Judgement on Sentencing Appeal, para. 50; *Kajelijeli* Appeal Judgement, para. 301.
[670] Notice of Appeal, para. 146.
[671] Appeal Brief, para. 306. *See also* Notice of Appeal, paras. 148, 149.

298. The Appeals Chamber recalls that while sentences of like individuals in like cases should indeed be comparable,[672] Trial Chambers have broad discretion in determining the appropriate sentence on account of their obligation to tailor the penalties to fit the individual circumstances of the convicted person and to reflect the gravity of the crimes.[673] Comparison between cases is thus generally of limited assistance.[674] Any given case may contain a multitude of variables, ranging from the number and type of crimes committed to the personal circumstances of the individual,[675] and often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results for every individual.[676] In the same vein, the Appeals Chamber considers that materially different criminal behaviour of different convicted persons may, by measure of its specific gravity, warrant a coincidentally similar punishment.

299. The Appeals Chamber acknowledges that Bagosora and Nsengiyumva were convicted by the Trial Chamber pursuant to Article 6(1) of the Statute.[677] However, it considers that, in the circumstances of this case, superior responsibility under Article 6(3) of the Statute is not to be seen as less grave than criminal responsibility under Article 6(1) of the Statute.[678] It also observes that Ntabakuze was convicted on counts of genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II for events where a substantial number of Tutsi refugees were brutally slaughtered. As to Ntabakuze's degree of participation in the crimes, it is worth noting that the Trial Chamber found that the massacres for which Ntabakuze was held accountable were "organised military operations which, in such a disciplined and elite unit, only would have occurred following Ntabakuze's orders or with his authorisation".[679] Further, the Appeals Chamber notes that the Trial Chamber emphasised the gravity of the Nyanza massacre – an incident for which Bagosora and Nsengiyumva were not convicted – as "one of the most notorious early massacres of the genocide".[680]

300. In these circumstances, the Appeals Chamber, mindful of the difference in the number and nature of convictions between Ntabakuze on the one hand, and Bagosora and Nsengiyumva on the other hand, finds that Ntabakuze does not demonstrate that the sentence imposed on him by the

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[672] *Milošević* Appeal Judgement, para. 326, *citing Strugar* Appeal Judgement, para. 348; *Kvočka et al.* Appeal Judgement, para. 681.
[673] *See supra*, para. 264.
[674] *See, e.g., Muvunyi* Appeal Judgement of 1 April 2011, para. 72; *Rukundo* Appeal Judgement, para. 263; *Milošević* Appeal Judgement, para. 326; *Nahimana et al.* Appeal Judgement, paras. 1046, 1066; *Muhimana* Appeal Judgement, para. 232.
[675] *Simba* Appeal Judgement, para. 336; *Strugar* Appeal Judgement, para. 348.
[676] *See, e.g., Milošević* Appeal Judgement, para. 326; *Nahimana et al.* Appeal Judgement, para. 1046, *citing Čelebići* Appeal Judgement, para. 719.
[677] The Appeals Chamber notes that these convictions were overturned on appeal. *See Bagosora and Nsengiyumva* Appeal Judgement, para. 742.
[678] *Cf. Bagosora and Nsengiyumva* Appeal Judgement, para. 740.
[679] Trial Judgement, para. 2268. *See also ibid.*, paras. 2062, 2065, 2067.

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Trial Chamber was out of reasonable proportion with those it imposed on Bagosora and Nsengiyumva.[681] Ntabakuze's argument in this respect is therefore rejected.

4. Form and Degree of Participation in the Crimes

301. Ntabakuze submits that, as he did not participate in or order any of the crimes and was not present during their commission, his sentence does not properly reflect the degree of his participation in the crimes.[682] Citing the Trial Chamber's statement that "a sentence of life imprisonment is generally reserved [for] those who planned or ordered atrocities as well as the most senior authorities",[683] Ntabakuze argues that he was not convicted for having planned or ordered any of the crimes, as he was convicted as a superior, and that there is no evidence that he was among the most senior authorities.[684] In support of his contention that his sentence is too harsh, Ntabakuze also emphasises that he is the first accused before the Tribunal and the ICTY to receive the maximum sentence provided for in the Statute based solely on convictions for superior responsibility.[685]

302. The Appeals Chamber recalls that the sentence must reflect the gravity of the offences.[686] The determination of the gravity of the offences requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the convicted person in the crime.[687] Further, the seriousness of a superior's conduct in failing to prevent or punish crimes must be measured to some degree by the nature of the crimes to which this failure relates, *i.e.* the gravity of the crimes committed by the direct perpetrator(s).[688]

303. Regarding Ntabakuze's degree of responsibility by virtue of his conviction pursuant to Article 6(3) of the Statute, the Appeals Chamber observes that the Statute does not accord any "lesser" form of individual criminal responsibility to superior responsibility. While the Appeals Chamber also acknowledges that, in appropriate cases, a conviction under Article 6(3) of the Statute

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[680] Trial Judgement, para. 2268.
[681] The Appeals Chamber notes that the life sentences imposed on Bagosora and Nsengiyumva by the Trial Chamber were set aside on appeal as a result of the reversal of a number of their convictions. Bagosora and Nsengiyumva were sentenced on appeal to 35 and 15 years of imprisonment, respectively. *See Bagosora and Nsengiyumva* Appeal Judgement, para. 742.
[682] Notice of Appeal, paras. 147, 151; Appeal Brief, paras. 314, 315.
[683] Appeal Brief, para. 308, *citing* Trial Judgement, para. 2270.
[684] Notice of Appeal, para. 147; Appeal Brief, para. 311. In his Reply Brief, Ntabakuze asserts that having acquitted him of any direct participation, the Trial Chamber was not entitled to rely on findings of ordering, authorisation, or acquiescence in determining his sentence. *See* Reply Brief, para. 126.
[685] Notice of Appeal, para. 147; Appeal Brief, paras. 307, 315. *See also* AT. 27 September 2011 pp. 4, 5, 72.
[686] *Stakić* Appeal Judgement, para. 380; *Muhimana* Appeal Judgement, para. 234; *Ndindabahizi* Appeal Judgement, para. 138.
[687] *See, e.g., Munyakazi* Appeal Judgement, para. 185; *Rukundo* Appeal Judgement, para. 243; *Stakić* Appeal Judgement, para. 380; *Aleksovski* Appeal Judgement, para. 182.
[688] *Čelebići* Appeal Judgement, para. 732.

may result in a lesser sentence as compared to that imposed in the context of an Article 6(1) conviction,[689] it reiterates its view that, in the circumstances of this case, superior responsibility under Article 6(3) of the Statute is not to be seen as less grave than criminal responsibility under Article 6(1) of the Statute.[690] The Appeals Chamber also recalls 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.[691]

304. In this case, the Appeals Chamber finds that Ntabakuze does not demonstrate that the sentence imposed by the Trial Chamber was disproportionate to the form and degree of his participation in the crimes of which he was convicted by the Trial Chamber. The Trial Chamber found Ntabakuze guilty of extremely serious crimes. With regard to the degree of his participation, it found that he failed to prevent the commission of crimes by his subordinates "because he in fact participated in them" through his position as a commander of a highly disciplined and elite unit.[692] The Trial Chamber described the assaults as "organised military operations which, in such a disciplined and elite unit, only would have occurred following Ntabakuze's orders or with his authorisation", illustrating Ntabakuze's high degree of involvement in the crimes.[693] The Appeals Chamber dismisses as baseless Ntabakuze's contention that the Trial Chamber could not rely on his orders or authorisation since it did not convict him pursuant to Article 6(1) of the Statute. In this regard, the Appeals Chamber observes that Ntabakuze was not charged pursuant to Article 6(1) of the Statute for his role in the events on the basis of which he was convicted.[694] His contention that he was acquitted of directly participating in them is therefore inaccurate.

305. In light of the foregoing, the Appeals Chamber finds no abuse of discretion in the Trial Chamber's holding that the gravity of the crimes committed by Ntabakuze warranted similar treatment to those who planned or ordered atrocities as well as the most senior authorities.[695] In the same vein, the fact that Ntabakuze was the first person before the Tribunal to be sentenced to life imprisonment solely based on superior responsibility does not have any bearing on the reasonableness of the Trial Chamber's findings on the matter. The Appeals Chamber emphasises that a sentence of life imprisonment is provided for in Rule 101(A) of the Rules irrespective of the mode of liability of which an accused is convicted. The Appeals Chamber therefore dismisses this part of Ntabakuze's appeal.

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[689] *Milošević* Appeal Judgement, para. 334. *Cf. Strugar* Appeal Judgement, paras. 353, 354.
[690] *See supra*, para. 300.
[691] *Kalimanzira* Appeal Judgement, para. 236.
[692] Trial Judgement, para. 2067. *See also ibid.*, para. 2268.
[693] Trial Judgement, para. 2268. *See also ibid.*, paras. 2062, 2065, 2067.
[694] *See supra*, fn. 644.
[695] *See* Trial Judgement, para. 2270.

306. However, the Appeals Chamber recalls that it will consider below whether the setting aside of the finding that Ntabakuze is responsible as a superior for the criminal conduct of militiamen and the reversal of some of his convictions reduce his overall culpability and call for a revision of the sentence by the Appeals Chamber.

5. Credit for Time Served in Detention

307. Ntabakuze argues that by imposing a life sentence upon him, the Trial Chamber effectively denied him the entitlement to credit for time already served in custody.[696] He requests that the Appeals Chamber revisit his sentence and credit him with the 12 years he has already served in detention.[697]

308. Rule 101(C) of the Rules states that "[c]redit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal". As already held by the Appeals Chamber, this provision does not affect the ability of a Chamber to impose the maximum sentence, as provided in Rule 101(A) of the Rules.[698] The Appeals Chamber therefore dismisses Ntabakuze's contention that the sentence imposed by the Trial Chamber deprived him of the benefit of any credit based on the period already spent in detention.

6. Reduction of Sentence for Violation of Procedural Rights

309. Ntabakuze submits that the Trial Chamber erred in failing to afford any mitigation for the violation of his rights to an expeditious trial and in failing to provide a reasoned opinion.[699]

310. The Appeals Chamber has found above that Ntabakuze failed to demonstrate that his right to be tried without undue delay was violated.[700] It further observes that the length of the proceedings is not one of the factors that a Trial Chamber must consider, even as a mitigating circumstance, in the determination of the sentence.[701] The Appeals Chamber accordingly dismisses Ntabakuze's allegation of error.

7. Conclusion

311. The Appeals Chamber finds that Ntabakuze has failed to demonstrate that the Trial Chamber abused its discretion in imposing a life sentence.

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[696] Appeal Brief, para. 321.
[697] Appeal Brief, para. 321.
[698] *Karera* Appeal Judgement, para. 397.
[699] Appeal Brief, para. 322.
[700] *See supra*, paras. 20, 21, 24.
[701] *See Nahimana et al.* Appeal Judgement, para. 1073.

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E. Conclusion

312. For the foregoing reasons, the Appeals Chamber dismisses Grounds 35 through 38 of Ntabakuze's appeal in their entirety.

F. Impact of the Appeals Chamber's Findings on the Sentence

313. The Appeals Chamber has affirmed Ntabakuze's convictions pursuant to Article 6(3) of the Statute for genocide, extermination and persecution as crimes against humanity, and violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II based on the participation of members of the Para-Commando Battalion in the killings perpetrated at Nyanza hill on 11 April 1994 and at IAMSEA around 15 April 1994.

314. The Appeals Chamber recalls, however, that it has reversed Ntabakuze's convictions pursuant to Article 6(3) of the Statute for preventing the refugees killed at Nyanza hill from seeking sanctuary on 11 April 1994 and, Judges Pocar and Liu dissenting, for the killings perpetrated in Kabeza on 7 and 8 April 1994. It has also found that the Trial Chamber erred in holding Ntabakuze responsible as a superior for the criminal conduct of militiamen. In addition, the Appeals Chamber has reversed Ntabakuze's convictions for murder as a crime against humanity.

315. The Appeals Chamber, Judges Pocar and Liu dissenting, considers that the reversal of Ntabakuze's convictions for preventing the refugees killed at Nyanza hill from seeking sanctuary and for the killings perpetrated in Kabeza on 7 and 8 April 1994 results in a reduction of his overall culpability which calls for a reduction of his sentence.

316. The Appeals Chamber, Judges Pocar and Liu dissenting, therefore sets aside Ntabakuze's sentence of imprisonment for the remainder of his life and sentences him to a term of 35 years of imprisonment.

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XI. DISPOSITION

317. 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 appeal hearing on 27 September 2011;

SITTING in open session;

GRANTS Ground 9 of Ntabakuze's appeal and **REVERSES** his conviction for other inhumane acts as a crime against humanity for preventing the refugees killed at Nyanza hill from seeking sanctuary;

GRANTS Grounds 1 and 17 of Ntabakuze's appeal in part and **SETS ASIDE** the finding that he is responsible for the commission of crimes by militiamen;

GRANTS, Judges Pocar and Liu dissenting, Ground 18 of Ntabakuze's appeal in part and **REVERSES**, Judges Pocar and Liu dissenting, his convictions for genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killings in Kabeza on 7 and 8 April 1994;

GRANTS Ground 15 of Ntabakuze's appeal and **REVERSES** his convictions for murder as a crime against humanity;

DISMISSES Ntabakuze's appeal in all other respects;

AFFIRMS Ntabakuze's convictions for genocide, extermination and persecution as crimes against humanity, and violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for the killings at Nyanza hill on 11 April 1994 and IAMSEA around 15 April 1994;

SETS ASIDE, Judges Pocar and Liu dissenting, the sentence of life imprisonment imposed on Ntabakuze by the Trial Chamber, and, Judges Pocar and Liu dissenting, **IMPOSES** a sentence of 35 years of imprisonment, 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 18 July 1997;

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

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

Judges Pocar and Liu append a joint declaration.

Judges Pocar and Liu append a joint dissenting opinion.

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

Judge Theodor Meron, Presiding

Judge Mehmet Güney

Judge Fausto Pocar

Judge Liu Daqun

Judge Arlette Ramaroson

Done this eighth day of May 2012 at Arusha, Tanzania.

[Seal of the Tribunal]

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XII. JOINT DECLARATION OF JUDGES POCAR AND LIU

1. In this Judgement, the Appeals Chamber considers Ntabakuze's submissions with regard to the elements of the crimes in the context of Article 6(3) of Statute.[1] The Appeals Chamber concludes that the Trial Chamber did not err in finding that Ntabakuze had knowledge of his subordinates' genocidal intent with regard to the crimes committed at Nyanza hill and IAMSEA.[2] Although we concur with this conclusion, we consider that the Trial Chamber was not required to make such findings. For the purpose of criminal responsibility for genocide pursuant to Article 6(3) of the Statute, it is not necessary to establish that a superior knew of the specific intent of his subordinates. In our view, it is sufficient for a superior to know or have reason to know that his subordinates are about to commit *a crime* but it is not necessary that he be aware of their specific *mens rea*.[3]

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

Judge Fausto Poca[illegible] Judge Liu Daqun

Done this eighth day of May 2012 at Arusha, Tanzania.

[Seal of the Tribunal]

[1] Appeal Judgement, paras. 245-249.
[2] Appeal Judgement, para. 249.
[3] *See Čelebići* Appeal Judgement, para. 238 ("A showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he 'had reason to know'. [...] This information does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge."). *Cf. Bagosora and Nsengiyumva* Appeal Judgement, para. 384; *Nahimana et al.* Appeal Judgement, para. 865.

XIII. JOINT DISSENTING OPINION OF JUDGES POCAR AND LIU

A. Alleged Errors Relating to Ntabakuze's Effective Control over the Para-Commando Soldiers at Kabeza

1. In this Judgement, the Majority concludes that the Trial Chamber erred in finding that Ntabakuze had effective control over the Para-Commando soldiers involved in the killings on 7 and 8 April 1994 at Kabeza. In particular, the Majority considers that the testimony of Witness AH was insufficient to establish that the perpetrators were members of the CRAP Platoon and, therefore, were subordinate to Ntabakuze.[1] We respectfully disagree.

2. The Majority claims that the Trial Chamber accepted Witness AH's testimony identifying the Para-Commando soldiers involved in the killings at Kabeza but did not examine whether Witness AH was in fact able to accurately identify these soldiers.[2] However, we note that the ability of Witness AH to identify members of the CRAP Platoon was not challenged by the parties either at trial or on appeal. In these circumstances, we consider that the Trial Chamber was under no obligation to explicitly discuss the matter in the Trial Judgement. The Majority's approach amounts to a *de novo* assessment of the evidence and is inconsistent with the standard of appellate review. By substituting the Trial Chamber's assessment of the evidence with its own evaluation, the Majority's approach is based on little more than *proprio motu* speculation, particularly in the absence of any submissions from the parties.

3. In his testimony, Witness AH, a soldier in the Rwandan Armed Forces,[3] expressly identified the soldiers involved in the killings at Kabeza as members of the CRAP Platoon.[4] Witness AH stated that he was able to identify these individuals by their uniforms and weapons.[5] As a soldier stationed at Camp Kigali at the relevant time, Witness AH was well-placed to positively identify specific units in the Rwandan Armed Forces.[6] The Trial Chamber noted these facts and was satisfied by Witness AH's evidence in this regard.[7] In our view, such a conclusion was not unreasonable.

4. Having concluded that the Trial Chamber did not err in finding that Ntabakuze had effective control over these perpetrators, we now turn to examine whether the Trial Chamber reasonably

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[1] Appeal Judgement, para. 173. Notably, the CRAP Platoon, which was part of the Para-Commando Battalion, was under Ntabakuze's effective control at the relevant time. *See* Trial Judgement, para. 2061; Appeal Judgement, para. 169.
[2] Appeal Judgement, para. 173.
[3] Witness AH, T. 19 February 2004 pp. 26, 27.
[4] Witness AH, T. 20 February 2004 pp. 40, 41.
[5] Witness AH, T. 20 February 2004 pp. 40, 41.
[6] Witness AH, T. 19 February 2004 p. 27.
[7] Trial Judgement, paras. 911, 925. *See also ibid.*, para. 926.

found that Ntabakuze had knowledge of the culpable conduct of his subordinates. In this respect, we note that the Trial Chamber's finding was inferred from a number of factors. Specifically, the Trial Chamber found that "[i]n light of his command and control over members of the Para Commando Battalion [...] as well as the organisation of the crime, [the killings in Kabeza by members of the Para-Commando Battalion] could only have been carried out with the knowledge and approval of Ntabakuze".[8] Further, in its legal findings regarding Ntabakuze's knowledge, the Trial Chamber referred to the fact that the attack was an organised military operation "requiring authorisation, planning and orders from the highest levels", and relied on the fact that "the vigilance of military authorities would have been at its height" at that time.[9] The Trial Chamber also relied on the proximity of Kabeza to Camp Kanombe, where the Para-Commando Battalion was based.[10] Ntabakuze does not show that the Trial Chamber erred in finding that the killings were organised.[11] He likewise fails to demonstrate how the Trial Chamber's reliance on any of the factors cited above was in error, or that the Trial Chamber ignored or excluded other reasonable inferences favourable to him.

5. Consequently, we consider that Ntabakuze has failed to demonstrate that the Trial Chamber erred in finding that he had effective control over the members of the Para-Commando Battalion involved in the killings in Kabeza and that he had knowledge that they were about to commit these crimes. In light of the above, we would have upheld Ntabakuze's convictions for genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killings at Kabeza on 7 and 8 April 1994.

B. Sentencing

6. In this Judgement, the Majority sets aside Ntabakuze's sentence of life imprisonment and imposes a term of 35 years.[12] The principal justification offered for such a considerable reduction in sentence is the decision to vacate a number of Ntabakuze's convictions.[13] In so doing, the Majority

[8] Trial Judgement, para. 927. *See also ibid.*, para. 2062.
[9] Trial Judgement, para. 2065. We note that, while the Trial Chamber referred to "crimes" in general and to both prior and *post-facto* knowledge in the first sentence of this paragraph, its subsequent reasoning in the paragraph clarified that it was ultimately satisfied, based on circumstantial evidence, that Ntabakuze had *actual knowledge* that his subordinates *were about to commit* each of the specific attacks for which he was convicted.
[10] Trial Judgement, para. 2066.
[11] Ntabakuze merely points out that "BL reported seeing soldiers passing by her house whom she thought were Para-Commando because of their uniform, and AH reported seeing a combination of soldiers from at least two different units" without explaining how this demonstrates that the Trial Chamber erred in finding that the attack was organised. *See* Appeal Brief, para. 126.
[12] Appeal Judgement, paras. 316, 317.
[13] Appeal Judgement, paras. 314-316. In this regard, we note that in other cases, the Appeals Chamber has upheld sentences of life imprisonment despite its decision to quash significant convictions. *See, e.g., Renzaho* Appeal Judgement, paras. 620-622. We further note that the Appeals Chamber imposed a 40-year sentence of imprisonment on Siméon Nchamihigo, notwithstanding its decision to overturn the majority of his most significant convictions. *See Nchamihigo* Appeal Judgement, paras. 402-405.

focuses entirely on the reversal of a limited part of the Trial Chamber's verdict. In our view, such an approach is erroneous and contrary to past practice.[14] It disregards the gravity of the remaining convictions that have been unanimously upheld on appeal with respect to the killings at Nyanza hill on 11 April 1994 and at IAMSEA around 15 April 1994.[15] For each of these incidents, Ntabakuze has been held criminally liable for genocide, extermination and persecution as crimes against humanity, and violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[16]

7. These crimes are particularly grave. Ntabakuze is responsible for the killing of approximately 60 Tutsis murdered by members of the Para-Commando Battalion at IAMSEA.[17] This crime, though grave, is positively dwarfed by the execution of more than 1,000 Tutsi refugees at Nyanza hill, for which Ntabakuze is also responsible.[18]

8. Given the extremely serious nature of these crimes, we respectfully dissent and would have affirmed Ntabakuze's sentence of life imprisonment.

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

Judge Fausto Pocar Judge Liu Daqun

Done this eighth day of May 2012 at Arusha, Tanzania.

[Seal of the Tribunal]

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[14] Notably, in the *Renzaho* Appeal Judgement, the Appeals Chamber found that although "[the] reversals concern[ed] very serious crimes", it nevertheless considered "that the crimes for which Renzaho remains convicted are extremely grave. These crimes include genocide, murder as a crime against humanity, and murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. Consequently, [it found] that the reversals [did] not impact the sentence imposed by the Trial Chamber." *See Renzaho* Appeal Judgement, para. 620.
[15] Appeal Judgement, para. 313.
[16] Appeal Judgement, para. 313.
[17] Trial Judgement, paras. 1428, 2137, 2139.
[18] Trial Judgement, paras. 1340, 1355, 1356, 2136, 2139. *See also Rutaganda* Appeal Judgement, para. 592, affirming Georges Anderson Nderubumwe Rutaganda's sentence of life imprisonment for the killings at Nyanza.

XIV. ANNEX A: PROCEDURAL HISTORY

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

A. Notice of Appeal and Briefs

2. Trial Chamber I of the Tribunal rendered its judgement in this case on 18 December 2008 and issued the written Trial Judgement on 9 February 2009.

3. On 19 January 2009, the Pre-Appeal Judge granted Ntabakuze's request for an extension of time to file his notice of appeal 30 days from the filing of the written Trial Judgement.[1] Ntabakuze filed his initial notice of appeal on 11 March 2009.[2] Nsengiyumva and Bagosora (together with Ntabakuze, "co-Appellants") also lodged appeals against the Trial Judgement.[3]

4. On 16 April 2009, the Pre-Appeal Judge ordered Ntabakuze to file a revised version of his initial notice of appeal in full compliance with Rule 108 of the Rules and the Practice Direction on Formal Requirements for Appeals from Judgement within seven days.[4] Ntabakuze filed his amended notice of appeal on 23 April 2009 as an annex to a confidential motion.[5] On 15 May 2009, the Pre-Appeal Judge ordered Ntabakuze to re-file publicly his amended notice of appeal,[6] which he did on 18 May 2009.[7]

5. Ntabakuze filed his initial appeal brief on 25 May 2009.[8] On 23 June 2009, the Pre-Appeal Judge granted in part Ntabakuze's request to make minor corrections, and ordered him to file a revised version of his initial appeal brief in which all grounds of appeal would be numbered as in his notice of appeal.[9] Ntabakuze filed his amended appeal brief on 25 June 2009.[10]

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[1] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motion for Extension of Time for Filing Notice of Appeal, 19 January 2009.
[2] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Notice of Appeal in the Interest of: Major Aloys Ntabakuze, 11 March 2009.
[3] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Notice of Appeal Appellant: Théoneste Bagosora, 2 March 2010; *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Nsengiyumva's Second Amended Notice of Appeal pursuant to Article 24, Rule 108 of the Rules of Procedure and Evidence, 26 May 2009.
[4] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Prosecution Motion Requesting Compliance with Requirements for Filing Notices of Appeal, 16 April 2009.
[5] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Motion for Leave to File an Amended Notice of Appeal Pursuant to this Chamber's Decision of April 16, 2009, 23 April 2009.
[6] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motion for Leave to File an Amended Notice of Appeal Pursuant to the 16 April 2009 Decision, 15 May 2009.
[7] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Public Amended Notice of Appeal in the Interest of: Major Aloys Ntabakuze, 18 May 2009.
[8] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Appeal Brief in the Interest of: Major Aloys Ntabakuze, 25 May 2009.
[9] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motion for Leave to File a Corrected Appeal Brief and Order Concerning the Appeal Brief, 23 June 2009.

6. On 12 June 2009, the Prosecution informed the Appeals Chamber and the co-Appellants that, in light of the overlapping nature of the issues relevant to their cases, it considered that it would be of greater assistance to the Appeals Chamber if it responded to all three respective appeal briefs in one consolidated response brief rather than in separate response briefs.[11] Following the Prosecution's notice, Ntabakuze filed a motion requesting the Appeals Chamber to sever his case from that of Bagosora and Nsengiyumva and enforce the briefing schedule.[12] On 24 July 2009, the Appeals Chamber denied Ntabakuze's request for severance, but ordered the Prosecution to file a separate response brief to each co-Appellant's appeal brief.[13] The Prosecution filed its response brief to Ntabakuze's appeal on 7 September 2009.[14]

7. Ntabakuze was granted extensions of time to file his reply brief on 18 and 28 September 2009, respectively.[15] Ntabakuze filed his reply brief on 6 October 2009.[16]

B. Severance and Representation

8. Ntabakuze requested severance of his appeal case from that of Bagosora and Nsengiyumva on 24 June 2009.[17] The Appeals Chamber denied his request on 24 July 2009 on the grounds that Ntabakuze neither established a conflict of interest causing him serious prejudice nor demonstrated that the severance of his case would protect the interests of justice, and that he might benefit from the challenges of Bagosora and Nsengiyumva where their cases were legally or factually interrelated.[18]

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[10] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Amended Appeal Brief in the Interest of: Major Aloys Ntabakuze, 25 June 2009.
[11] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Prosecutor's Notice Regarding the Filing of a Consolidated Respondent's Brief, 12 June 2009.
[12] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Extremely Urgent Motion for: (a) Severance, and Retention of Briefing Schedule; in the Alternative, (b) Judicial Bar to the Untimely Filing of Respondent's Brief, and Dismissal of Appellant's Conviction, 24 June 2009.
[13] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motion for Severance, Retention of the Briefing Schedule and Judicial Bar to the Untimely Filing of the Prosecution's Response Brief, 24 July 2009 ("Decision Denying Severance").
[14] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Prosecutor's Brief in Response to Aloys Ntabakuze's Appeal, 7 September 2009. *See also Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motion to Declare the Prosecution's Response Brief Inadmissible and the Prosecution's Motion for Leave to File a Sur-Reply, 16 September 2009.
[15] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motion for Extension of Time for Filing his Reply to the Response Brief, 18 September 2009; *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Urgent Motion for Further Extension of Time for Filing his Brief in Reply, confidential, 28 September 2009.
[16] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Ntabakuze Brief in Reply, 6 October 2009.
[17] *See supra*, fn. 12.
[18] *See* Decision Denying Severance, paras. 10-49.

9. On 1 December 2009, Ntabakuze filed a request for an immediate and separate hearing of his appeal.[19] On 19 January 2010, the Appeals Chamber, considering that Ntabakuze's request was akin to his previous motion for severance, declined to reconsider its prior Decision on Severance based on the fact that an immediate hearing would deny him the opportunity to examine Bagosora's and Nsengiyumva's briefs and the Prosecution's responses thereto before being heard, and accordingly denied his request for a separate and immediate hearing.[20]

10. On 3 June 2010, Ntabakuze filed a motion before the Appeals Chamber to order the Registrar to take immediate action to secure the release of his Lead Counsel, Peter Erlinder, who was arrested in Rwanda on 28 May 2010 on allegations of "genocide denial", and to order the Government of Rwanda to stop all proceedings against his Lead Counsel.[21] In response to this motion, the Appeals Chamber instructed the Registrar to request the assistance of Rwandan authorities for the purpose of obtaining all information relating to the exact nature and basis of the charges brought against Peter Erlinder, to report to the Appeals Chamber on the outcome of this request, and to provide to the Appeals Chamber any information furnished by Rwanda in response to this request.[22] In addition, the Appeals Chamber denied the requests by the Association of Defence Lawyers in Arusha and the International Criminal Bar to appear as *amicus curiae*.[23] On 6 October 2010, the Appeals Chamber allowed in part Ntabakuze's motion for injunctions against the Government of Rwanda, requesting the Republic of Rwanda to desist from proceedings against Peter Erlinder in relation to words spoken or written in the course of his representation of Ntabakuze before the Tribunal.[24]

11. On 27 January 2011, the Appeals Chamber dismissed Ntabakuze's request for a permanent stay of the proceedings in his case on the basis of alleged intimidation of his Counsel by the

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[19] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Motion for the Scheduling of the Appeal Hearing, 1 December 2009.
[20] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motion for Scheduling of the Appeal Hearing, 19 January 2010.
[21] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Aloys Ntabakuze's Extremely Urgent Request for Injunctions Against the Government of Rwanda for the Illegal Arrest of and Investigation Against Lead Counsel, P. Erlinder, for Statements Made in the Course of Appellant's Defence, 3 June 2010.
[22] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Order in Relation to Aloys Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, 9 June 2010; *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Further Order in Relation to Aloys Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, 7 July 2010.
[23] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on the Motion of the Association of Defence Attorneys in Arusha for Leave to File *Amicus Curiae* Submissions in Relation to Aloys Ntabakuze's Motion Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, signed 29 June 2010, filed 30 June 2010; *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on the Request of the International Criminal Bar for Leave to File *Amicus Curiae* Submissions in Relation to Aloys Ntabakuze's Motion Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, signed 29 June 2010, filed 30 June 2010.
[24] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, 6 October 2010.

Rwandan government.[25] The same day, the Appeals Chamber informed the parties that the hearing of the co-Appellants' appeals would take place on 30 March, 31 March, and 1 April 2011.[26]

12. On 23 February 2011, Ntabakuze requested that his Lead Counsel participate in the appeal hearing by way of video-conference due to concerns for Lead Counsel's safety and to the fact that his Co-Counsel, André Tremblay, would be unable to travel to Arusha for medical reasons.[27] Ntabakuze's request was denied on 15 March 2011.[28]

13. On 25 March 2011, Ntabakuze's Lead Counsel informed the Appeals Chamber that his medical situation prevented him from representing Ntabakuze at the appeal hearing, and that Ntabakuze was prepared to represent himself at the hearing.[29] Considering that it was in the interests of justice for Ntabakuze to be represented by Counsel at the appeal hearing, the Appeals Chamber ordered on 29 March 2011 that the presentation of Ntabakuze's oral arguments on appeal would be heard at a later stage.[30]

14. On 30 March 2011, on Ntabakuze's request, the Appeals Chamber granted by oral decision the severance of Ntabakuze's case from that of Bagosora and Nsengiyumva, and indicated that his appeal would be heard at a later date.[31]

15. On 21 April 2011, the Appeals Chamber found that the imposition of sanctions against Ntabakuze's Lead Counsel, Peter Erlinder, was warranted, and sanctioned him by refusing him audience before the Tribunal, instructing the Registrar to replace him as soon as possible.[32]

16. On 3 May 2011, the Defence Counsel and Detention Management Section of the Tribunal assigned Co-Counsel André Tremblay as Lead Counsel for Ntabakuze.[33]

17. On 1 September 2011, the Appeals Chamber dismissed Peter Erlinder's request for reconsideration of the sanctions imposed on him.[34]

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[25] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motion for Stay of Proceedings, 27 January 2011.
[26] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Scheduling Order, 27 January 2011.
[27] *See Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Motion for Video-Link Partic[ip]ation of Lead Counsel at the Appeals Hearing, 23 February 2011.
[28] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motions for Video-Conference Participation of Lead Counsel in the Appeal Hearing and for the Withdrawal of Registrar's Public Decision, 15 March 2011.
[29] *See Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Further Scheduling Order, 29 March 2011 ("Further Scheduling Order"), p. 1.
[30] Further Scheduling Order, p. 2.
[31] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, AT. 30 March 2011 p. 2.
[32] Order Imposing Sanctions on Ntabakuze's Lead Counsel, 21 April 2011.
[33] *Commission d'office de Me André Tremblay à titre de Conseil principal pour la défense des intérêts de M. Aloys Ntabakuze*, dated 3 May 2011, Ref.: ICTR-JUD-11-5-2-527-mk.

C. Assignment of Judges

18. On 16 January 2009, the Presiding Judge of the Appeals Chamber assigned the following Judges to hear the appeals of Bagosora, Ntabakuze, and Nsengiyumva: Judge Patrick Robinson (Presiding), Judge Mohamed Shahabuddeen, Judge Mehmet Güney, Judge Fausto Pocar, and Judge Liu Daqun.[35] Judge Robinson also designated Judge Mehmet Güney as Pre-Appeal Judge.[36]

19. On 27 January 2009, Judge Robinson replaced Judge Mohamed Shahabuddeen with Judge Theodor Meron.[37]

20. Following the severance of Ntabakuze's case from that of Bagosora and Nsengiyumva, Judge Patrick Robinson assigned himself, Judge Mehmet Güney, Judge Fausto Pocar, Judge Liu Daqun, and Judge Theodor Meron to hear Ntabakuze's appeal.[38]

21. On 15 September 2011, Judge Patrick Robinson replaced himself with Judge Arlette Ramaroson.[39] Judge Meron was subsequently elected Presiding Judge.

D. Other Issues

22. On 2 September 2009, the Appeals Chamber dismissed Ntabakuze's motion for provisional release, finding that special circumstances warranting provisional release did not exist in his case.[40]

23. On 18 January 2011, the Appeals Chamber dismissed Ntabakuze's motions under Rule 68 of the Rules for disclosure of materials relating to crimes allegedly committed by the Rwandan Patriotic Front in Rwanda in 1994.[41]

E. Hearing of the Appeal

24. In accordance with the scheduling order issued on 22 June 2011,[42] the parties' oral arguments were heard at the appeal hearing held on 27 September 2011 in Arusha, Tanzania.[43]

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[34] Decision on Peter Erlinder's Motion to Reconsider Order Imposing Sanctions, 1 September 2011.
[35] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-A, Order Assigning Judges to a Case Before the Appeals Chamber and Assigning a Pre-Appeal Judge, 16 January 2009.
[36] *Idem.*
[37] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-A, Order Replacing a Judge in a Case Before the Appeals Chamber, signed 27 January 2009, filed 28 January 2009.
[38] Order Assigning Judges to a Case Before the Appeals Chamber, 12 April 2011.
[39] Order Replacing a Judge in a Case Before the Appeals Chamber, 15 September 2011.
[40] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motions for Provisional Release and Leave to File *Corrigendum*, 2 September 2009.
[41] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motions for Disclosure, 18 January 2011.
[42] Scheduling Order, 22 June 2011.
[43] Ntabakuze's appeal was originally scheduled to be heard on 30 March, 31 March, and 1 April 2011 but was not heard due to the unavailability of his Counsel. *See supra*, paras. 11-13.

XV. ANNEX B: CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. Tribunal

BAGOSORA *et al.*

Théoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor, Case No. ICTR-98-41-A, Judgement, 14 December 2011 ("*Bagosora and Nsengiyumva* Appeal Judgement").

Théoneste Bagosora et al. v. The Prosecutor, Case No. ICTR-98-41-A, Further Scheduling Order, 29 March 2011 ("Further Scheduling Order").

Théoneste Bagosora et al. v. The Prosecutor, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motion for Severance, Retention of the Briefing Schedule and Judicial Bar to the Untimely Filing of the Prosecution's Response Brief, 24 July 2009 ("Decision Denying Severance").

The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, and Anatole Nsengiyumva, Case No. ICTR-98-41-T, Judgement and Sentence, delivered in public and signed 18 December 2008, filed 9 February 2009 ("Trial Judgement").

The Prosecutor v. Théoneste Bagosora et al., Case No. ICTR-98-41-T, Decision Reconsidering Exclusion of Evidence Following Appeals Chamber Decision, 17 April 2007 ("Reconsideration Decision on Exclusion of Evidence").

The Prosecutor v. Théoneste Bagosora et al., Case No. ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006 ("Appeal Decision on Exclusion of Evidence").

The Prosecutor v. Théoneste Bagosora et al., Case No. ICTR-98-41-T, Decision on Ntabakuze Motion for Exclusion of Evidence, 29 June 2006 ("Decision on Exclusion of Evidence").

The Prosecutor v. Théoneste Bagosora et al., Case No. ICTR-98-41-T, T. 16 June 2003 pp. 58, 59 ("Oral Ruling of 16 June 2003").

The Prosecutor v. Théoneste Bagosora et al., Case No. ICTR-98-41-T, Decision (Motion by Aloys Ntabakuze's Defence for Execution of the Trial Chamber's Decision of 23 May 2002 on the Prosecutor's Pre-Trial Brief, Dated 21 January 2002, and Another Motion on a Related Matter), signed 4 November 2002, filed 20 November 2002 ("Second Decision Relating to the Prosecution Pre-Trial Brief").

The Prosecutor v. Théoneste Bagosora et al., Case No. ICTR-98-41-T, Decision on Defence Motions of Nsengiyumva, Kabiligi, and Ntabakuze Challenging the Prosecutor's Pre-Trial Brief and on the Prosecutor's Counter-Motion, 23 May 2002 ("Decision Relating to the Prosecution Pre-Trial Brief").

BIKINDI Simon

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

GACUMBITSI Sylvestre

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

KAJELIJELI Juvénal

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

KALIMANZIRA Callixte

Callixte Kalimanzira v. The Prosecutor, Case No. ICTR-05-88-A, Judgement, 20 October 2010 ("*Kalimanzira* Appeal Judgement").

KARERA François

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

MUHIMANA Mikaeli

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

MUNYAKAZI Yussuf

The Prosecutor v. Yussuf Munyakazi, Case No. ICTR-97-36A-A, Judgement, 28 September 2011 ("*Munyakazi* Appeal Judgement").

MUSEMA Alfred

Alfred Musema v. The Prosecutor, Case No. ICTR-96-13-A, Judgement, 16 November 2001 ("*Musema* Appeal Judgement").

MUVUNYI Tharcisse

Tharcisse Muvunyi v. The Prosecutor, Case No. ICTR-00-55A-A, Judgement, 1 April 2011 ("*Muvunyi* Appeal Judgement of 1 April 2011").

Tharcisse Muvunyi v. The Prosecutor, Case No. ICTR-00-55A-A, Judgement, 29 August 2008 ("*Muvunyi* Appeal Judgement of 29 August 2008").

NAHIMANA *et al.*

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NCHAMIHIGO Siméon

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NTAGERURA *et al.*

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SEROMBA Athanase

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2. International Criminal Tribunal for the Former Yugoslavia (ICTY)

ALEKSOVSKI Zlatko

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KRAJIŠNIK Momčilo

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KUNARAC *et al.*

Prosecutor v. Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković, Cases Nos. IT-96-23 and IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement").

KUPREŠKIĆ *et al.*

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KVOČKA *et al.*

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MARTIĆ Milan

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ORIĆ Naser

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SIMIĆ Blagoje

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STAKIĆ Milomir

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

STRUGAR Pavle

Prosecutor v. Pavle Strugar, Case No. IT-01-42-A, Judgement, 17 July 2008 ("*Strugar* Appeal Judgement").

VASILJEVIĆ Mitar

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B. Defined Terms and Abbreviations

Appeal Brief	*Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Amended Appeal Brief in the Interest of: Major Aloys Ntabakuze, 24 June 2009, *as corrected by* Amended Appeal Brief in the Interest of: Major Aloys Ntabakuze Second Corrigendum, 6 July 2009
AT.	Transcript from hearings on appeal in the present case. All references are to the official English transcript, unless otherwise indicated.
CRAP Platoon	*Commando de recherche et d'action en profondeur* Platoon, Para-Commando Battalion
ETO	*École technique officielle*, Kigali
FAR	*Forces armées rwandaises* (Rwandan Armed Forces)
IAMSEA	*Institut africain et mauricien de statistiques et d'économie*, Kigali
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. Gratien Kabiligi and Aloys Ntabakuze*, Cases Nos. ICTR-97-34-I & ICTR-97-30-I, Amended Indictment, 13 August 1999
KIBAT	Kigali Battalion of United Nations Assistance Mission for Rwanda
Notice of Appeal	*Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Public Amended Notice of Appeal in the Interest of: Major Aloys Ntabakuze, 18 May 2009
Ntabakuze Closing Brief	*The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Major Aloys Ntabakuze Amended Final Trial Brief, public redacted version, 5 October 2007
Ntabakuze Pre-Defence Brief	*The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Ntabakuze Pre-Defence Brief, confidential, 13 January 2005
Prosecution	Office of the Prosecutor

Prosecution Closing Brief	*The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Prosecutor's Final Trial Brief, public redacted version, signed 1 March 2007, filed 2 March 2007
Prosecution Pre-Trial Brief	*The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-I, Prosecutor's Pre-Trial Brief, 21 January 2002
Prosecution Response Brief	*Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Prosecutor's Brief in Response to Aloys Ntabakuze's Appeal, 7 September 2009
Reply Brief	*Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Ntabakuze Brief in Reply, 6 October 2009
RPF	Rwandan (also Rwandese) Patriotic Front
Rules	Rules of Procedure and Evidence of the Tribunal
Rules of Detention	Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, adopted on 5 June 1998
Statute	Statute of the Tribunal established by Security Council Resolution 955 (1994)
Supplement to the Prosecution Pre-Trial Brief *or* Supplement	*The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-I, The Prosecutor's Pre-Trial Brief Revision in Compliance with the Decision on Prosecutor's Request for an Extension of the Time Limit in the Order of 23 May, 2002, and with the Decision on the Defence Motion Challenging the Pre-Trial Brief, Dated 23 May, 2002, 7 June 2002
T.	Transcript from hearings at trial in the present case. All references are to the official English transcript, unless otherwise indicated
Trial Chamber	Trial Chamber I of the Tribunal
Tribunal *or* 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

UNAMIR	United Nations Assistance Mission for Rwanda