



Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

243/H

ICTR-00-56B-A

30<sup>th</sup> June 2014

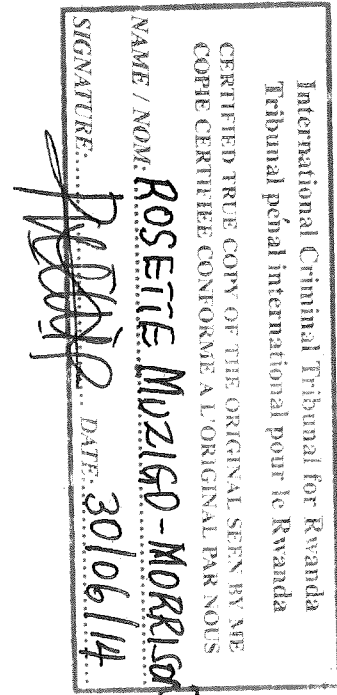
{243/H - 80/H}

IN THE APPEALS CHAMBER

**Before:** Judge Theodor Meron, Presiding  
Judge Liu Daqun  
Judge Carmel Agius  
Judge Khalida Rachid Khan  
Judge Bakhtiyar Tuzmukhamedov

**Registrar:** Mr. Bongani Majola

**Judgement of:** 30 June 2014



AUGUSTIN BIZIMUNGU

v.

THE PROSECUTOR

Case No. ICTR-00-56B-A

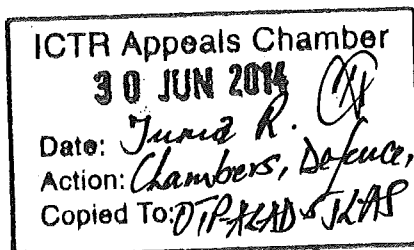
**JUDGEMENT**

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Mr. Abdoulaye Seye  
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Ms. Florida Kabasinga  
Mr. Takeh Sendze  
Ms. Christiana Fomenky  
Ms. Sunkarie Ballah-Conteh  
Ms. Betty Mbabazi  
Mr. Deo Mbuto





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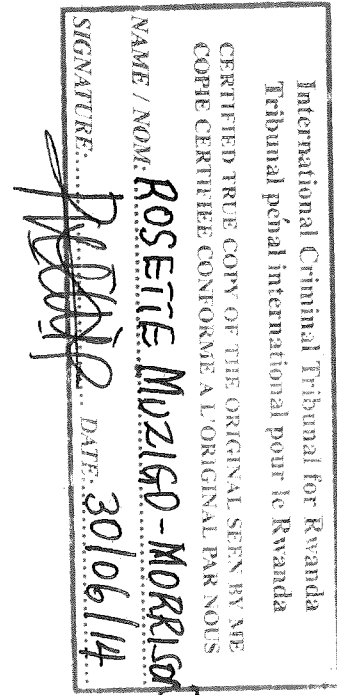
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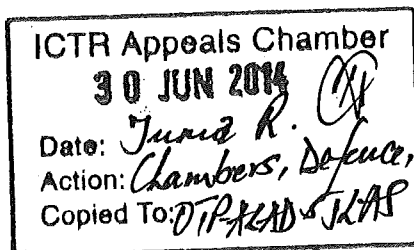
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CONTENTS

<b>I. INTRODUCTION</b> .....	<b>1</b>
A. BACKGROUND .....	1
B. THE APPEALS .....	2
<b>II. STANDARDS OF APPELLATE REVIEW</b> .....	<b>4</b>
<b>III. APPEAL OF AUGUSTIN BIZIMUNGU</b> .....	<b>6</b>
A. FAILURE TO MAKE LEGAL FINDINGS (GROUNDS 3, 14, 17 TO 19, IN PART).....	6
1. Genocide .....	6
2. Crimes Against Humanity.....	9
3. Serious Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II.....	11
4. Conclusion .....	12
B. RWANKERI SECTOR (GROUNDS 1 TO 7) .....	13
1. Notice .....	13
2. Assessment of the Evidence of Prosecution Witness GAP .....	20
3. Conclusion .....	26
C. SUPERIOR RESPONSIBILITY (GROUNDS 8 TO 13 AND 15 TO 17, IN PART) .....	27
1. Notice of Elements of Superior Responsibility .....	27
(a) Identification of Subordinates and Effective Control.....	28
(b) Criminal Acts of Bizimungu's Subordinates .....	33
(c) Knowledge of his Subordinates' Crimes .....	36
(d) Failure to Prevent or Punish his Subordinates .....	38
(e) Conclusion.....	39
2. Authority and Effective Control Over Soldiers and <i>Interahamwe</i> .....	39
(a) Authority and Effective Control Over Soldiers of the Rwandan Army .....	39
(b) Authority and Effective Control over <i>Interahamwe</i> .....	46
3. Bizimungu's Knowledge of the Crimes of his Subordinates.....	51
4. Failure to Prevent Crimes and Punish Culpable Subordinates .....	57
5. Conclusion .....	64
D. JOSEPHITE BROTHERS COMPOUND (GROUND 14).....	65
1. Assessment of the Evidence.....	65
2. Bizimungu's Knowledge .....	68
3. Failure to Make Legal Findings.....	71
4. Conclusion .....	73
E. CYANGUGU STADIUM (GROUND 15).....	74
1. Failure to Consider the <i>Ntagerura et al.</i> Case .....	74
2. Assessment of the Credibility of Prosecution Witnesses.....	78
3. Conclusion .....	80
F. BUTARE PREFECTURE OFFICE AND THE EPISCOPAL CHURCH OF RWANDA (EER) (GROUND 16).....	81
1. Involvement of Soldiers in the Crimes .....	81
(a) Killings .....	81
(b) Rapes.....	84
2. Bizimungu's Knowledge .....	88
3. Conclusion .....	92
G. <i>ÉCOLE DES SCIENCES INFIRMIERES DE KABGAYI</i> (ESI) (GROUND 17) .....	93
1. Effective Control Over the Perpetrators .....	93
2. Failure to Consider Witness DA5-2's Evidence .....	95
3. Bizimungu's Knowledge .....	96
4. Failure to Make Legal Findings.....	98

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(a) Genocide.....	98
(b) Murder and Rape as Crimes Against Humanity.....	100
5. Conclusion .....	101
H. MUSAMBIRA COMMUNE OFFICE AND DISPENSARY (GROUND 18) .....	102
1. Assessment of Prosecution Evidence.....	102
2. Failure to Consider Defence Evidence .....	105
3. Bizimungu's Knowledge .....	107
4. Failure to Make Legal Findings.....	109
(a) Genocide.....	109
(b) Murder as a Crime Against Humanity .....	111
5. Conclusion .....	113
I. TRAFIPRO (GROUND 19).....	114
1. Assessment of Evidence .....	114
2. Bizimungu's Knowledge .....	117
3. Failure to Make Legal Findings.....	120
(a) Genocide.....	120
(b) Murder and Rape as Crimes Against Humanity.....	122
4. Conclusion .....	123
<b>IV. APPEAL OF THE PROSECUTION.....</b>	<b>124</b>
A. RWANKERI SECTOR (GROUND 1) .....	124
B. BUSOGO PARISH (GROUND 2).....	125
C. CHARLES LWANGA CHURCH (GROUND 3).....	126
D. ÉCOLE TECHNIQUE OFFICIELLE (ETO) COMPLEX AND NYANZA HILL (GROUND 4) .....	128
<b>V. SENTENCING APPEALS.....</b>	<b>130</b>
A. BIZIMUNGU'S SENTENCING APPEAL (GROUND 20) .....	130
1. Aggravating Factors.....	130
2. Mitigating Factors.....	133
3. Conclusion .....	135
B. PROSECUTION'S SENTENCING APPEAL (GROUND 5).....	135
1. Relevant Sentencing Considerations.....	135
2. Application of the Tribunal's Sentencing Practices.....	138
3. Conclusion .....	139
C. IMPACT OF THE APPEALS CHAMBER'S FINDINGS ON BIZIMUNGU'S SENTENCE.....	139
<b>VI. DISPOSITION.....</b>	<b>141</b>
<b>VII. SEPARATE DECLARATION OF JUDGE LIU.....</b>	<b>144</b>
<b>VIII. ANNEX A – PROCEDURAL HISTORY .....</b>	<b>148</b>
A. NOTICES OF APPEAL AND BRIEFS .....	148
1. Bizimungu's Appeal .....	148
2. Prosecution's Appeal .....	149
B. ASSIGNMENT OF JUDGES .....	149
C. MOTION FOR THE ADMISSION OF ADDITIONAL EVIDENCE ON APPEAL .....	150
D. OTHER ISSUES .....	150
E. APPEAL HEARING .....	150
F. SEVERANCE .....	150

**IX. ANNEX B – CITED MATERIALS AND DEFINED TERMS ..... 151**

A. JURISPRUDENCE ..... 151

    1. Tribunal..... 151

    2. International Criminal Tribunal for the Former Yugoslavia ..... 154

B. DEFINED TERMS AND ABBREVIATIONS..... 157

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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 appeals by Augustin Bizimungu (“Bizimungu”) and the Prosecution against the Judgement in the case of *The Prosecutor v. Augustin Ndindiliyimana et al.*, which was pronounced on 17 May 2011 by Trial Chamber II of the Tribunal (“Trial Chamber”) and filed in writing on 17 June 2011 (“Trial Judgement”).<sup>1</sup>

## I. INTRODUCTION

### A. Background

2. Bizimungu was born on 28 August 1952 in Mukarange Commune, Byumba Prefecture, Rwanda.<sup>2</sup> He was appointed the commander of military operations for Ruhengeri Sector in January 1994 and, on 16 April 1994, was promoted from colonel to the rank of major general and appointed Chief of Staff of the Rwandan army.<sup>3</sup> Bizimungu assumed the position of Chief of Staff on 19 April 1994.<sup>4</sup>

3. The Trial Chamber convicted Bizimungu of aiding and abetting genocide in relation to attacks in Rwankeri Sector in Ruhengeri Prefecture.<sup>5</sup> It also found him guilty as a superior for genocide and extermination as a crime against humanity in relation to attacks at the Josephite Brothers compound in Kigali Prefecture.<sup>6</sup> The Trial Chamber convicted Bizimungu as a superior for 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 based on violence at the *École des sciences infirmières de Kabgayi* (“ESI”),<sup>7</sup> the TRAFIPRO Centre (“TRAFIPRO”),<sup>8</sup> and the

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<sup>1</sup> For ease of reference, two annexes are appended: Annex A – Procedural History and Annex B – Cited Materials and Defined Terms.

<sup>2</sup> Trial Judgement, para. 88.

<sup>3</sup> Trial Judgement, paras. 90, 1957.

<sup>4</sup> Trial Judgement, paras. 90, 1957.

<sup>5</sup> Trial Judgement, paras. 8, 72, 73, 931, 2163, 2177.

<sup>6</sup> Trial Judgement, paras. 16, 72, 73, 2115, 2120, 2163. *See also* Trial Judgement, paras. 2100, 2101, 2106, 2113, 2114 (finding that while Bizimungu could be held liable for murder as a crime against humanity for killings at the Josephite Brothers compound, extermination was the more appropriate crime).

<sup>7</sup> Trial Judgement, paras. 16, 30, 72, 73, 1181, 1205, 1220, 2145, 2153, 2163. *See also* Trial Judgement, paras. 2145, 2160.

<sup>8</sup> Trial Judgement, paras. 16, 30, 72, 73, 1196, 1205, 1220, 2145, 2153, 2163. *See also* Trial Judgement, paras. 2145, 2160.

Musambira Commune office and dispensary in Gitarama Prefecture.<sup>9</sup> The Trial Chamber also found that Bizimungu incurred superior responsibility for murder as a crime against humanity in relation to killings at the Cyangugu Prefecture stadium,<sup>10</sup> and the Butare Prefecture office and Episcopal Church of Rwanda in Butare Prefecture (“EER”).<sup>11</sup>

4. The Trial Chamber also convicted Bizimungu as a superior for rape as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to sexual violence at the Cyangugu Prefecture stadium,<sup>12</sup> the Butare Prefecture office and EER,<sup>13</sup> the ESI,<sup>14</sup> the TRAFIPRO,<sup>15</sup> and the Musambira Commune office and dispensary in Gitarama Prefecture.<sup>16</sup> The Trial Chamber sentenced Bizimungu to 30 years of imprisonment.<sup>17</sup>

### **B. The Appeals**

5. Bizimungu and the Prosecution have filed appeals against the Trial Judgement.<sup>18</sup> On 7 February 2014, the Appeals Chamber severed the case of Bizimungu, who had been tried with Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, and Innocent Sagahutu, and ordered additional submissions.<sup>19</sup> Bizimungu raises 20 grounds of appeal and asks that he be acquitted on all charges and immediately released or, alternatively, that he be retried or that his sentence be reduced.<sup>20</sup> The Prosecution responds that the appeal should be dismissed.<sup>21</sup>

6. The Prosecution presents five grounds of appeal, seeking the reversal of several acquittals in relation to crimes alleged against Bizimungu.<sup>22</sup> It further requests that the sentence of Bizimungu be increased to life imprisonment.<sup>23</sup> Bizimungu responds that the Prosecution’s appeal should be dismissed.<sup>24</sup>

<sup>9</sup> Trial Judgement, paras. 16, 30, 72, 73, 1192, 1205, 1220, 2145, 2153, 2163. *See also* Trial Judgement, paras. 2145, 2160.

<sup>10</sup> Trial Judgement, paras. 2104-2106.

<sup>11</sup> Trial Judgement, paras. 2102, 2103, 2106.

<sup>12</sup> Trial Judgement, paras. 59, 1899, 2124, 2126-2128, 2160, 2162, 2163.

<sup>13</sup> Trial Judgement, paras. 59, 1899, 2125-2128, 2160, 2162, 2163.

<sup>14</sup> Trial Judgement, paras. 59, 1899, 2160, 2162, 2163.

<sup>15</sup> Trial Judgement, paras. 59, 1899, 2160, 2162, 2163.

<sup>16</sup> Trial Judgement, paras. 59, 1899, 2160, 2162, 2163.

<sup>17</sup> Trial Judgement, paras. 79, 2266.

<sup>18</sup> *See generally* Bizimungu Notice of Appeal; Bizimungu Appeal Brief; Prosecution Notice of Appeal; Prosecution Appeal Brief.

<sup>19</sup> *See* Order for Further Submissions and Severance, 7 February 2014, pp. 1, 2.

<sup>20</sup> Bizimungu Notice of Appeal, paras. 12-232; Bizimungu Appeal Brief, paras. 4-507 and pp. 122, 123.

<sup>21</sup> Prosecution Response Brief (Bizimungu), para. 252.

<sup>22</sup> Prosecution Notice of Appeal, paras. 1-26; Prosecution Appeal Brief, paras. 15-146. *See also* Prosecution’s Additional Submissions.

<sup>23</sup> Prosecution Notice of Appeal, paras. 27-31, 49-58; Prosecution Appeal Brief, paras. 214-249, 292-322.

<sup>24</sup> Bizimungu Response Brief, p. 90. *See also* Bizimungu’s Additional Submissions.



7. The Appeals Chamber heard oral submissions regarding these appeals from 7 to 10 May 2013.

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**II. STANDARDS OF APPELLATE REVIEW**

8. 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.<sup>25</sup>

9. 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.<sup>26</sup>

10. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, it will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.<sup>27</sup> 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.<sup>28</sup>

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

Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.<sup>29</sup>

The same standard of reasonableness and the same deference to factual findings of the Trial Chamber apply when the Prosecution appeals against an acquittal. The Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could

<sup>25</sup> See, e.g., *Ndindiliyimana et al.* Appeal Judgement, para. 8; *Mugenzi and Mugiraneza* Appeal Judgement, para. 11; *Gatete* Appeal Judgement, para. 7. See also *Dorđević* Appeal Judgement, para. 13.

<sup>26</sup> *Ntakirutimana* Appeal Judgement, para. 11 (reference omitted). See also, e.g., *Ndindiliyimana et al.* Appeal Judgement, para. 9; *Mugenzi and Mugiraneza* Appeal Judgement, para. 12; *Gatete* Appeal Judgement, para. 8. See also *Dorđević* Appeal Judgement, para. 14.

<sup>27</sup> See, e.g., *Ndindiliyimana et al.* Appeal Judgement, para. 10; *Mugenzi and Mugiraneza* Appeal Judgement, para. 13; *Gatete* Appeal Judgement, para. 9. See also *Dorđević* Appeal Judgement, para. 15.

<sup>28</sup> See, e.g., *Ndindiliyimana et al.* Appeal Judgement, para. 10; *Mugenzi and Mugiraneza* Appeal Judgement, para. 13; *Gatete* Appeal Judgement, para. 9. See also *Dorđević* Appeal Judgement, para. 15.

<sup>29</sup> *Krstić* Appeal Judgement, para. 40 (references omitted). See also, e.g., *Ndindiliyimana et al.* Appeal Judgement, para. 11; *Mugenzi and Mugiraneza* Appeal Judgement para. 14; *Gatete* Appeal Judgement, para. 10. See also *Dorđević* Appeal Judgement, para. 16.

have made the impugned finding. However, considering that it is the Prosecution that bears the burden at trial of proving the guilt of the accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction. A convicted person must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt. The Prosecution must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the convicted person's guilt has been eliminated.<sup>30</sup>

12. 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.<sup>31</sup> Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.<sup>32</sup>

13. 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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup>

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<sup>30</sup> *Ndindiliyimana et al.* Appeal Judgement, para. 11; *Đorđević* Appeal Judgement, para. 18; *Mrkšić and Šljivančanin* Appeal Judgement, para. 15; *Seromba* Appeal Judgement, para. 11.

<sup>31</sup> See, e.g., *Ndindiliyimana et al.* Appeal Judgement, para. 12; *Mugenzi and Mugiraneza* Appeal Judgement, para. 15; *Gatete* Appeal Judgement, para. 11. See also *Đorđević* Appeal Judgement, para. 20.

<sup>32</sup> See, e.g., *Ndindiliyimana et al.* Appeal Judgement, para. 12; *Mugenzi and Mugiraneza* Appeal Judgement, para. 15; *Gatete* Appeal Judgement, para. 11; *Hategekimana* Appeal Judgement, para. 10. See also *Đorđević* Appeal Judgement, para. 20.

<sup>33</sup> Practice Direction on Formal Requirements for Appeals from Judgement, 15 June 2007, para. 4(b). See also, e.g., *Ndindiliyimana et al.* Appeal Judgement, para. 13; *Mugenzi and Mugiraneza* Appeal Judgement, para. 16; *Gatete* Appeal Judgement, para. 12. See also *Perišić* Appeal Judgement, para. 12.

<sup>34</sup> See, e.g., *Ndindiliyimana et al.* Appeal Judgement, para. 13; *Mugenzi and Mugiraneza* Appeal Judgement, para. 16; *Gatete* Appeal Judgement, para. 12. See also *Đorđević* Appeal Judgement, para. 20.

<sup>35</sup> See, e.g., *Ndindiliyimana et al.* Appeal Judgement, para. 13; *Mugenzi and Mugiraneza* Appeal Judgement, para. 16; *Gatete* Appeal Judgement, para. 12. See also *Perišić* Appeal Judgement, para. 12.

### III. APPEAL OF AUGUSTIN BIZIMUNGU

#### A. Failure to Make Legal Findings (Grounds 3, 14, 17 to 19, in part)

14. Bizimungu submits that the Trial Chamber failed to make the requisite legal findings for his convictions related to the following events:<sup>36</sup> killings in Rwankeri Sector on 7 April 1994;<sup>37</sup> attacks against Tutsis at the Josephite Brothers compound on 7 June 1994;<sup>38</sup> and crimes committed at the *École des sciences infirmières de Kabgayi* (“ESI”),<sup>39</sup> Musambira Commune office and dispensary,<sup>40</sup> and TRAFIPRO.<sup>41</sup>

15. The Prosecution responds that the relevant findings underpinning Bizimungu’s convictions can be found based on a holistic reading of the Trial Judgement.<sup>42</sup> The Prosecution also suggests that, if the Appeals Chamber were to find that the Trial Judgement lacks the required findings, it should make such findings itself based on the trial record.<sup>43</sup> With respect to Bizimungu’s responsibility for genocide, the Prosecution alternatively requests the Appeals Chamber to remand the case for assessment by a trial chamber.<sup>44</sup>

16. In this section, the Appeals Chamber shall consider whether the Trial Chamber made sufficient findings for Bizimungu’s convictions for genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II related to the above-mentioned events.

#### 1. Genocide

17. The Indictment charges Bizimungu with genocide in relation to the attacks against Tutsis in Rwankeri Sector, at the Josephite Brothers compound, ESI, Musambira Commune office and dispensary, and TRAFIPRO.<sup>45</sup> As indicated above, the Trial Chamber held Bizimungu responsible

<sup>36</sup> See Bizimungu Notice of Appeal, paras. 60, 61; Bizimungu Appeal Brief, paras. 78, 79, 81, 428, 481, 482, 498. The Appeals Chamber notes that in his notice of appeal, Bizimungu raises the argument only in relation to the killings in Rwankeri Sector. Additionally, Bizimungu does not expressly challenge on this basis his convictions for murder and rape as crimes against humanity and as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the events at the ESI. See Bizimungu Appeal Brief, paras. 470-481. Nonetheless, the Appeals Chamber exercises its discretion to consider these arguments in the interests of justice.

<sup>37</sup> See Trial Judgement, paras. 8, 72, 926, 931, 2177.

<sup>38</sup> See Trial Judgement, paras. 1147, 1209, 1220, 2101, 2115.

<sup>39</sup> See Trial Judgement, paras. 1181, 1184, 1205, 1220, 2145, 2153, 2160-2162.

<sup>40</sup> See Trial Judgement, paras. 1192, 1205, 1987, 1992, 1994, 2145, 2153, 2160-2162.

<sup>41</sup> Trial Judgement, paras. 1196, 1205, 1220, 1987, 1992, 1994, 2145, 2153, 2160-2162.

<sup>42</sup> Prosecution Response Brief, paras. 35-47, 238, 245; AT. 8 May 2013 pp. 18-20, referring to Trial Judgement, paras. 1197-1220, 2129-2142, 2160.

<sup>43</sup> AT. 8 May 2013 pp. 19-21.

<sup>44</sup> AT. 8 May 2013 p. 21.

<sup>45</sup> See Indictment, paras. 63, 69.

for the crimes committed at these locations.<sup>46</sup> However, while the Trial Chamber made factual findings related to these five incidents, it failed to make any accompanying legal findings, and thus did not analyse whether the elements of the crime of genocide were satisfied.<sup>47</sup> In particular, the Trial Judgement contains no analysis as to whether the factual findings constituted the *actus reus* of genocide, no analysis regarding the genocidal intent of the principal perpetrators, and no analysis as to whether Bizimungu had knowledge of any such genocidal intent.

18. The Appeals Chamber recalls that, under Article 22(2) of the Statute and Rule 88(C) of the Rules, trial chambers are required to provide a reasoned opinion.<sup>48</sup> Accordingly, a trial chamber should set out in a clear and articulate manner the factual and legal findings on the basis of which it reached the decision to convict or acquit an accused.<sup>49</sup> A reasoned opinion in the trial judgement is essential to ensuring that the Tribunal's adjudications are fair, and, *inter alia*, allows for a meaningful exercise of the right of appeal by the parties, and enables the Appeals Chamber to understand and review the trial chamber's findings.<sup>50</sup>

19. The Appeals Chamber finds that the absence of any relevant legal findings in the Trial Judgement constitutes a manifest failure to provide a reasoned opinion. Indeed, the Appeals Chamber considers the magnitude of this error to be unprecedented in the history of the Tribunal. Rather than engaging in "the most careful of analyses", as it was required to do,<sup>51</sup> the Trial Chamber failed to even attempt to address in the Trial Judgement the most fundamental of issues: whether the evidence adduced was sufficient to prove Bizimungu's individual criminal responsibility for genocide.<sup>52</sup>

20. In light of these omissions and to safeguard Bizimungu's right to an effective appeal, the Appeals Chamber ordered that the appeals concerning Bizimungu be severed.<sup>53</sup> For these same reasons, the Appeals Chamber also ordered additional submissions from the parties on the evidentiary basis for Bizimungu's conviction for genocide.<sup>54</sup>

21. In its supplemental submissions, the Prosecution argues that the Trial Chamber's failure to make explicit findings on the elements of genocide does not warrant reversal of Bizimungu's

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<sup>46</sup> See Trial Judgement, para. 2163.

<sup>47</sup> See Trial Judgement, para. 2071. See also Trial Judgement, paras. 2077-2085.

<sup>48</sup> See, e.g., *Nchamihigo* Appeal Judgement, para. 165; *Krajišnik* Appeal Judgement, para. 139; *Muvunyi I* Appeal Judgement, para. 144.

<sup>49</sup> See *Hadžihasanović and Kubura* Appeal Judgement, para. 13.

<sup>50</sup> *Hadžihasanović and Kubura* Appeal Judgement, para. 13. See also *Nchamihigo* Appeal Judgement, para. 165; *Karera* Appeal Judgement, para. 20.

<sup>51</sup> *Zigiranyirazo* Appeal Judgement, para. 75.

<sup>52</sup> By contrast, the Trial Chamber did enter relevant legal findings with respect to other convictions. See, e.g., Trial Judgement, paras. 2077-2085 (making legal findings on the crime of genocide in relation to Ndindiliyimana).

<sup>53</sup> Order for Further Submissions and Severance, 7 February 2014, p. 2.

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genocide conviction.<sup>55</sup> It contends that, consistent with its obligations under Article 24 of the Statute to correct any legal errors, including the failure to provide a reasoned opinion, the Appeals Chamber may consider the relevant evidence and factual findings to determine whether a reasonable trier of fact could have found beyond reasonable doubt that all of the required elements for the crime were established.<sup>56</sup>

22. Bizimungu's supplemental response contends that the Trial Chamber failed to make findings on the elements of genocide with respect to several crime scenes.<sup>57</sup> He argues that neither the parties nor the Appeals Chamber can be required to engage in speculation to determine from vague statements by the Trial Chamber the elements necessary to sustain criminal liability.<sup>58</sup> Consequently, he submits that he must be acquitted of the crime of genocide.<sup>59</sup>

23. The Appeals Chamber recalls that a trial chamber's failure to provide a reasoned opinion constitutes an error of law which allows the Appeals Chamber to consider the relevant evidence and factual findings in order to determine whether a reasonable trier of fact could have established beyond reasonable doubt the findings challenged by the appellant.<sup>60</sup>

24. Mindful of the extraordinary nature of the Trial Chamber's omissions and the gravity of a conviction for genocide, the Appeals Chamber shall assess the findings and evidence relevant to each incident supporting Bizimungu's genocide conviction to determine whether the elements of genocide are established beyond reasonable doubt.<sup>61</sup> In light of the additional submissions, Bizimungu has had a full and focused opportunity to appeal his genocide conviction and to respond to the Prosecution's case in this regard. In these circumstances, considerations of fairness do not preclude the Appeals Chamber from conducting this review, and, given the Trial Chamber's conclusions that genocide was committed and that Bizimungu was responsible for this crime, it is necessary in the interests of justice for the Appeals Chamber to determine whether such findings are sustained by the record.<sup>62</sup>

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<sup>54</sup> Order for Further Submissions and Severance, 7 February 2014, pp. 1, 2.

<sup>55</sup> Prosecution's Additional Submissions, para. 2.

<sup>56</sup> Prosecution's Additional Submissions, para. 4.

<sup>57</sup> Bizimungu's Additional Submissions, para. 4.

<sup>58</sup> Bizimungu's Additional Submissions, para. 5, quoting *Orić* Appeal Judgement, para. 56. See also Bizimungu Additional Submissions, para. 6, referring to *Gotovina and Markač* Appeal Judgement, paras. 150-155; *Krajišnik* Appeal Judgement, para. 176.

<sup>59</sup> See Bizimungu's Additional Submissions, paras. 4, 132, 133.

<sup>60</sup> *Ndindiliyimana et al.* Appeal Judgement, para. 293. See also *supra* para. 11.

<sup>61</sup> Such course of action has precedent. See, e.g., *Ndindiliyimana et al.* Appeal Judgement, paras. 292-312; *Bagosora and Nsengiyumva* Appeal Judgement, paras. 683-689; *Rukundo* Appeal Judgement, paras. 174, 175; *Kalimanzira* Appeal Judgement, paras. 89-91. See also *Kordić and Čerkez* Appeal Judgment, paras. 392-409. The Appeals Chamber undertakes this assessment below in paragraphs 195-201, 272-277, 309-314, and 343-348 of the judgement.

<sup>62</sup> See *Kordić and Čerkez* Appeal Judgment, paras. 384-388.

2. Crimes Against Humanity

25. The Indictment charges Bizimungu with extermination as a crime against humanity in relation to the attacks at the Josephite Brothers compound on 7 June 1994.<sup>63</sup> It further charges Bizimungu with murder and rape as crimes against humanity for the crimes committed at the ESI,<sup>64</sup> Musambira Commune office and dispensary,<sup>65</sup> and TRAFIPRO.<sup>66</sup>

26. The Trial Chamber convicted Bizimungu for extermination, murder, and rape as crimes against humanity.<sup>67</sup> Although the Trial Chamber made legal findings in respect of these charges in relation to Bizimungu's responsibility for the incidents at the Josephite Brothers compound, the Butare Prefecture office and EER, and the Cyangugu stadium, it did not consider the events at the ESI, Musambira Commune office and dispensary, and TRAFIPRO in its discussion of crimes against humanity.<sup>68</sup>

27. In the factual findings section of the Trial Judgement on murder as a crime against humanity, the Trial Chamber referred to the factual findings it had made on the events at the ESI, Musambira Commune office and dispensary, and TRAFIPRO in the section on genocide.<sup>69</sup> It recalled that the crimes committed at these locations had been proven beyond reasonable doubt and stated that it would analyse in the legal findings section of the Trial Judgement whether the evidence also supported the charge of murder as a crime against humanity.<sup>70</sup> However, the Trial Chamber made no legal findings with respect to the events at the ESI, Musambira Commune office and dispensary, and TRAFIPRO in the legal findings section on murder as a crime against humanity.<sup>71</sup> Nonetheless, in the legal findings section on murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, the Trial Chamber stated that: "in the legal findings for [...] murder as a crime against humanity, the Chamber has found Bizimungu responsible under Article 6(3) for the killings at the ESI, TRAFIPRO and the Musambira *commune* office and dispensary".<sup>72</sup>

28. Similarly, in the factual findings section on rape as a crime against humanity, the Trial Chamber referred to the factual findings it had made on the crimes committed at the ESI,

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<sup>63</sup> Indictment, paras. 85, 109.

<sup>64</sup> Indictment, paras. 86, 113.

<sup>65</sup> Indictment, paras. 87, 114.

<sup>66</sup> Indictment, paras. 88, 115.

<sup>67</sup> Trial Judgement, para. 2163.

<sup>68</sup> Trial Judgement, Section 5.9.

<sup>69</sup> Trial Judgement, para. 1408.

<sup>70</sup> Trial Judgement, para. 1408.

<sup>71</sup> See Trial Judgement, Section 5.9.3.

<sup>72</sup> Trial Judgement, para. 2145. See also Trial Judgement, para. 30.

T 14

Musambira Commune office and dispensary, and TRAFIPRO in the section on genocide.<sup>73</sup> It concluded that: “[t]herefore, the Chamber finds that the Prosecution has proved beyond reasonable doubt the allegations against Bizimungu of rape as a crime against humanity at ESI/Kabgayi Primary School, Musambira *commune* office and dispensary, and TRAFIPRO [...]. The Chamber will analyse Bizimungu’s superior responsibility for these crimes in detail in the legal findings section of the Judgement”.<sup>74</sup> However, in the legal findings section on rape as a crime against humanity, the Trial Chamber did not mention the crimes committed at the ESI, Musambira Commune office and dispensary, and TRAFIPRO.<sup>75</sup> Nonetheless, in the legal findings section on rape as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, the Trial Chamber stated that: “[i]n its legal findings for [...] rape as a crime against humanity, the Chamber has found Bizimungu responsible as a superior under Article 6(3) for the rape of women at ESI, TRAFIPRO and the Musambira *commune* office and dispensary”.<sup>76</sup>

29. The Appeals Chamber finds that the Trial Chamber’s failure to set out in the Trial Judgement any legal findings on Bizimungu’s responsibility for murder and rape as crimes against humanity in relation to the events at the ESI, Musambira Commune office and dispensary, and TRAFIPRO amounts to a manifest failure to provide a reasoned opinion. It is only from references in other parts of the Trial Judgement that the Appeals Chamber is able to understand that the Trial Chamber convicted Bizimungu for murder and rape as crimes against humanity in relation to the events at these locations.<sup>77</sup>

30. For the reasons noted above, the Appeals Chamber severed the appeals concerning Bizimungu in light of these omissions.<sup>78</sup> It further ordered additional submissions from the parties on the evidentiary basis for Bizimungu’s convictions for murder and rape as crimes against humanity.<sup>79</sup>

31. The Prosecution argues that the Trial Chamber’s failure to make explicit findings on the elements of murder and rape as crimes against humanity does not warrant reversal of Bizimungu’s

<sup>73</sup> Trial Judgement, para. 1896.

<sup>74</sup> Trial Judgement, para. 1899.

<sup>75</sup> See Trial Judgement, Section 5.9.5.

<sup>76</sup> Trial Judgement, para. 2160. See also Trial Judgement, para. 59.

<sup>77</sup> See Trial Judgement, paras. 30, 59, 2145, 2160. The Appeals Chamber rejects the Prosecution’s assertion that the necessary findings are contained in paragraphs 2129 to 2142 and 2160 of the Trial Judgement. Paragraphs 2129 to 2142 of the Trial Judgement concern the threshold requirements for serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. Paragraph 2160 of the Trial Judgement simply asserts that the Trial Chamber found Bizimungu responsible for rape as a crime against humanity in relation to ESI, Musambira Commune office and dispensary, and TRAFIPRO. As explained above, this was insufficient.

<sup>78</sup> See *supra* para. 20.

<sup>79</sup> Order for Further Submissions and Severance, 7 February 2014, pp. 1, 2.



convictions.<sup>80</sup> Bizimungu submits that he must be acquitted for these crimes in view of the Trial Chamber's failure to make legal findings.<sup>81</sup>

32. For the reasons stated above,<sup>82</sup> the Appeals Chamber considers that it is necessary in the interests of justice for it to assess the findings and evidence relevant to each incident supporting Bizimungu's convictions for murder and rape as crimes against humanity to determine whether the elements of these crimes are established beyond reasonable doubt. The Appeals Chamber shall conduct the assessment in conjunction with Bizimungu's appeals related to such incidents.<sup>83</sup>

3. Serious Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II

33. The Indictment charges Bizimungu with murder and rape as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II for crimes committed at the ESI, Musambira Commune office and dispensary, and TRAFIPRO.<sup>84</sup> The Trial Chamber entered corresponding convictions against Bizimungu.<sup>85</sup>

34. In the legal findings sections on murder and rape as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, the Trial Chamber stated that it had found Bizimungu responsible for the crimes committed at the ESI, Musambira Commune office and dispensary, and TRAFIPRO in its legal findings on genocide and crimes against humanity.<sup>86</sup> However, as explained above, the Trial Chamber made no legal findings with respect to the events at these locations in the legal findings sections on genocide and crimes against humanity.<sup>87</sup> Moreover, while the Trial Chamber found that the rapes committed at the ESI, Musambira Commune office and dispensary, and TRAFIPRO had a nexus with the non-international armed conflict taking place in Rwanda at the time and that the perpetrators were aware that the victims were not taking part in the hostilities,<sup>88</sup> it made no such findings in respect of the killings at these locations.<sup>89</sup>

35. In the factual findings section of the Trial Judgement, the Trial Chamber concluded that it was proven beyond reasonable doubt that soldiers killed and raped Tutsi refugees at these

<sup>80</sup> Prosecution's Additional Submissions, para. 2.

<sup>81</sup> Bizimungu's Additional Submissions, paras. 4-6.

<sup>82</sup> See *supra* para. 24.

<sup>83</sup> See *infra* paras. 278-283, 315-320, 349-353.

<sup>84</sup> Indictment, paras. 86-88, 113-115, 118, 119.

<sup>85</sup> Trial Judgement, paras. 2153, 2162, 2163.

<sup>86</sup> Trial Judgement, paras. 2145, 2160.

<sup>87</sup> See Trial Judgement, Sections 5.8, 5.9.3, 5.9.5.

<sup>88</sup> Trial Judgement, para. 2161.

<sup>89</sup> See Trial Judgement, paras. 2132, 2140-2142, 2145, 2153.

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locations.<sup>90</sup> Moreover, in the legal findings section, the Trial Chamber explained in general terms that: the main perpetrators of the crimes which it assessed in that section were soldiers of the Rwandan army, often acting in conjunction with militia groups; the main victims were unarmed civilians; many Tutsi civilians were killed at places of refuge; and no evidence was adduced at trial showing that the victims used violence or resisted in a way that would have negated their non-combatant status.<sup>91</sup> The Appeals Chamber considers that the killings committed at the ESI, Musambira Commune office and dispensary, and TRAFIPRO as described in the Trial Judgement fit within this general description.

36. Accordingly, Bizimungu's submission that the Trial Chamber failed to make legal findings on these crimes as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II is dismissed.

#### 4. Conclusion

37. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber failed to provide a reasoned opinion with respect to Bizimungu's convictions for genocide and murder and rape as crimes against humanity. However, the Appeals Chamber shall review the relevant findings and evidence to determine whether Bizimungu's convictions for these crimes are sustained by the record. The Appeals Chamber dismisses Bizimungu's assertion that the Trial Chamber failed to make necessary findings in relation to his convictions for murder and rape as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II concerning events at the ESI, Musambira Commune office and dispensary, and TRAFIPRO.

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<sup>90</sup> See Trial Judgement, paras. 1181, 1184, 1192, 1196.

<sup>91</sup> Trial Judgement, paras. 2135, 2140.

T 14

**B. Rwankeri Sector (Grounds 1 to 7)**

38. The Trial Chamber found that Bizimungu aided and abetted the killing of Tutsis on 7 April 1994 in Rwankeri Sector, Ruhengeri Prefecture.<sup>92</sup> Based on the testimony of Prosecution Witness GAP, the Trial Chamber concluded that Bizimungu attended a meeting of persons in positions of authority at the home of the mother of Joseph Nzirorera on the night of 6 to 7 April 1994, where he gave a speech calling for the killing of Tutsis.<sup>93</sup> The Trial Chamber further stated that the evidence suggested that, shortly after the meeting, a number of officials urged members of the *Interahamwe* who had gathered at the nearby Byangabo market to kill Tutsis in the area.<sup>94</sup> The Trial Chamber considered that there was “a close link between the anti-Tutsi remarks made by the authorities, including Bizimungu, during the meeting” and the ensuing killings of Tutsis by *Interahamwe* in Rwankeri Sector.<sup>95</sup> In light of these conclusions, the Trial Chamber found that Bizimungu’s speech at the home of Nzirorera’s mother substantially contributed to the killings.<sup>96</sup> The Trial Chamber convicted Bizimungu of genocide.<sup>97</sup>

39. Bizimungu submits that the Trial Chamber erred in convicting him for the killings in Rwankeri Sector.<sup>98</sup> In this section, the Appeals Chamber considers whether: (i) Bizimungu had sufficient notice of the relevant allegations; and (ii) the Trial Chamber erred in its assessment of the evidence of Prosecution Witness GAP.

1. Notice

40. The Trial Chamber considered that the allegations regarding Bizimungu’s responsibility in relation to the killings in Rwankeri Sector were pleaded in paragraphs 55 and 63 of the Indictment.<sup>99</sup> It found the Indictment to be defective because paragraph 63 of the Indictment alleged that the meeting where Bizimungu made his anti-Tutsi remarks occurred at Nzirorera’s home, whereas the evidence adduced at trial concerned a meeting at the house of Nzirorera’s mother.<sup>100</sup>

<sup>92</sup> See Trial Judgement, paras. 926, 931, 2177. See also Trial Judgement, para. 8.

<sup>93</sup> Trial Judgement, paras. 908, 910, 911, 924, 925.

<sup>94</sup> Trial Judgement, paras. 925, 926.

<sup>95</sup> Trial Judgement, para. 925. See also Trial Judgement, para. 926.

<sup>96</sup> Trial Judgement, para. 931. See also Trial Judgement, paras. 8, 2177.

<sup>97</sup> The Trial Chamber made no legal findings with respect to Bizimungu on the crime of genocide. The Appeals Chamber notes that the killings in Rwankeri Sector are discussed in a section of the Trial Judgement’s factual findings related to the charge of genocide. See Trial Judgement, p. 197. See also Trial Judgement, paras. 7, 8, which are contained in the Trial Chamber’s overview (Trial Judgement, Section 1.1.3) of allegations related to “Counts 2 and 3: Genocide or in the Alternative Complicity in Genocide”. In addition, the killings in Rwankeri Sector are only pursued in the Indictment as genocide or, alternatively, as complicity in genocide. See Indictment, para. 63. The Trial Chamber dismissed the latter charge. See Trial Judgement, paras. 2086, 2163. Accordingly, the Appeals Chamber considers that the Trial Chamber convicted Bizimungu for aiding and abetting genocide in relation to the killings in Rwankeri Sector.

<sup>98</sup> Bizimungu Notice of Appeal, paras. 12-91; Bizimungu Appeal Brief, paras. 4-242; Bizimungu Reply Brief, paras. 1-50.

<sup>99</sup> See Trial Judgement, paras. 862, 901.

<sup>100</sup> Trial Judgement, paras. 901, 902.

However, the Trial Chamber observed that the witness summaries of Prosecution Witnesses GFC, GFE, and GFA annexed to the Prosecution Pre-Trial Brief “all state that the meetings took place at the house of Nzirorera’s mother” and that no witness summary contained in the Prosecution Pre-Trial Brief mentioned a meeting at Nzirorera’s home.<sup>101</sup> Consequently, the Trial Chamber concluded that Bizimungu had notice that “the location of meetings included” the house of Nzirorera’s mother.<sup>102</sup> It further found that Bizimungu was not materially prejudiced as he called Defence witnesses to rebut the allegations against him.<sup>103</sup>

41. Bizimungu submits that the Indictment does not plead that he attended and spoke during the meeting at the home of Nzirorera’s mother on the night of 6 to 7 April 1994.<sup>104</sup> He contends that the Trial Chamber erred in finding that any defect in the Indictment was cured by information contained in the Prosecution Pre-Trial Brief.<sup>105</sup> He further asserts that the testimony of Witness GAP, who was the sole witness to implicate him in the meeting, differed significantly from the allegation in the Indictment not only with respect to the location of the meeting, but also its timing, the participants, and the content of his speech.<sup>106</sup> In his view, the Prosecution would have been required to formally amend the Indictment to include the allegations to which Witness GAP testified.<sup>107</sup>

42. In addition, Bizimungu maintains that he was not aware until the delivery of the Trial Judgement that the meeting at the home of Nzirorera’s mother was relevant to the charges in paragraphs 55 and 63 of the Indictment.<sup>108</sup> In support of this argument, Bizimungu submits that the Trial Chamber considered and the Prosecution conceded at trial that all evidence about meetings held at the home of Nzirorera’s mother was related to the charge of conspiracy to commit genocide in paragraphs 22 and 29 of the Indictment.<sup>109</sup> He further asserts that his belief that the Prosecution had produced no evidence with respect to paragraphs 55 and 63 of the Indictment was demonstrated by the fact that he did not request acquittal on the genocide charge in his motion pursuant to

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<sup>101</sup> Trial Judgement, para. 903.

<sup>102</sup> Trial Judgement, para. 903.

<sup>103</sup> Trial Judgement, paras. 904, 905.

<sup>104</sup> Bizimungu Notice of Appeal, para. 14; Bizimungu Appeal Brief, paras. 6, 37.

<sup>105</sup> See Bizimungu Notice of Appeal, paras. 19-23; Bizimungu Appeal Brief, paras. 10-14; Bizimungu Reply Brief, para. 8; AT. 7 May 2013 p. 73.

<sup>106</sup> See Bizimungu Notice of Appeal, paras. 16, 17; Bizimungu Appeal Brief, paras. 6, 19, 20; Bizimungu Reply Brief, paras. 1-7; AT. 7 May 2013 p. 71; AT. 8 May 2013 pp. 21, 22.

<sup>107</sup> Bizimungu Notice of Appeal, paras. 24-26; Bizimungu Appeal Brief, paras. 15-17.

<sup>108</sup> See Bizimungu Notice of Appeal, paras. 28-34, 36, 37, 40; Bizimungu Appeal Brief, paras. 19, 27-31, 35, 38; AT. 7 May 2013 p. 73.

<sup>109</sup> See Bizimungu Notice of Appeal, paras. 29, 40; Bizimungu Appeal Brief, paras. 21, 35; AT. 7 May 2013 p. 73. See also Bizimungu Reply Brief, para. 14.

T4

Rule 98bis of the Rules,<sup>110</sup> and that the Trial Chamber reiterated in its decision on this motion that meetings at the home of Nzirorera's mother, including the meeting on the night of 6 to 7 April 1994, were part of the conspiracy to commit genocide charge.<sup>111</sup> Bizimungu also contends that the Prosecution did not mention paragraphs 55 and 63 of the Indictment in its Closing Brief or closing submissions and thus ultimately did not rely on the meeting at the home of Nzirorera's mother in seeking his conviction for genocide in relation to the killings in Rwankeri.<sup>112</sup>

43. The Prosecution responds that Bizimungu had sufficient notice of the allegations against him.<sup>113</sup> It contends that the only difference between paragraphs 55 and 63 of the Indictment and the evidence led at trial concerned the exact location of the meeting where Bizimungu called for the killing of Tutsis.<sup>114</sup> In the Prosecution's view, this was a minor variance which did not prejudice Bizimungu.<sup>115</sup> In support of its contention, the Prosecution asserts that the location of the meeting "did not amount to a particular act and conduct that formed the basis for the charges against Bizimungu" and "did not expand the charges".<sup>116</sup> It further maintains that the home of Nzirorera's mother was close to Nzirorera's house and that paragraphs 55 and 63 of the Indictment provided Bizimungu with precise and correct details about the date and time of the meeting, his conduct and the content of his speech, the participants of the meeting, as well as the location of the ensuing crimes.<sup>117</sup>

44. Moreover, the Prosecution asserts that it can be inferred from the manner in which Bizimungu conducted his defence at trial that he fully understood the allegations against him and suffered no prejudice in preparing his defence.<sup>118</sup> In particular, the Prosecution contends that Bizimungu: did not specifically object to the introduction of the evidence concerning his participation in the meeting at the home of Nzirorera's mother on the night of 6 to 7 April 1994; extensively cross-examined the relevant Prosecution witnesses; and called various Defence witnesses who provided him with an alibi.<sup>119</sup> The Prosecution also submits that the summary of the

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<sup>110</sup> Bizimungu Notice of Appeal, para. 33; Bizimungu Appeal Brief, para. 26, referring to *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-2000-56-T, *Requête en acquittement de la défense d'Augustin Bizimungu*, 15 January 2007 ("Bizimungu Rule 98bis Motion"), paras. 39, 40. See also Bizimungu Reply Brief, para. 15.

<sup>111</sup> Bizimungu Notice of Appeal, para. 30; Bizimungu Appeal Brief, para. 23, referring to *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Defence Motions Pursuant to Rule 98bis, 20 March 2007 ("Trial Decision of 20 March 2007"), para. 18.

<sup>112</sup> Bizimungu Notice of Appeal, para. 43; Bizimungu Appeal Brief, para. 38.

<sup>113</sup> Prosecution Response Brief (Bizimungu), para. 20; AT. 8 May 2013 p. 2.

<sup>114</sup> Prosecution Response Brief (Bizimungu), para. 20; AT. 8 May 2013 pp. 2, 3.

<sup>115</sup> Prosecution Response Brief (Bizimungu), paras. 20, 21, 23-25. See also AT. 8 May 2013 p. 4.

<sup>116</sup> Prosecution Response Brief (Bizimungu), para. 25. See also AT. 8 May 2013 p. 3.

<sup>117</sup> Prosecution Response Brief (Bizimungu), paras. 20, 24, 25; AT. 8 May 2013 pp. 2, 3. See also AT. 8 May 2013 p. 3 (French) (which, unlike p. 2 of the English version of the transcript, correctly refers to paragraphs 55 and 63 of the Indictment). In particular, the Prosecution contends that there was no variance with respect to the audience of the meeting and the content of Bizimungu's speech. AT. 7 May 2013 pp. 4, 5.

<sup>118</sup> Prosecution Response Brief (Bizimungu), paras. 21, 26-30, 32.

<sup>119</sup> Prosecution Response Brief (Bizimungu), paras. 26-30; AT. 8 May 2013 pp. 3, 4.

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anticipated testimonies of potential Defence witnesses attached to Bizimungu's Pre-Defence Brief demonstrated that he was aware that their evidence was relevant to the allegations in paragraphs 55 and 63 of the Indictment,<sup>120</sup> and that the Bizimungu Rule 98bis Motion "showed that he fully understood the case against him including the precise location of the meeting on 6/7 April 1994".<sup>121</sup>

45. The Appeals Chamber observes that paragraph 55 of the Indictment, in relevant respects, states:

During the morning of 7 April 1994, Augustin Bizimungu went to Joseph Nzirorera's house in Ruhengeri and told MRND militants that [...] [the time has come to put into practice the recommendations made to you. I have just been talking on the phone with Nzirorera and we have agreed that you should start killing all the Tutsi. Start with your respective neighbourhoods before moving into the other areas of the commune...].

Paragraph 63 of the Indictment reads as follows:

On or about 7 April 1994, following the speech made to them by Augustin Bizimungu in Joseph Nzirorera's home, cited in paragraph 55 above, the MRND *Interahamwe* militiamen killed 150 Tutsi in Rwankeri [Sector] [...].

46. 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.<sup>122</sup> An indictment which fails to set forth the specific material facts underpinning the charges against the accused is defective.<sup>123</sup> The defect may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charge.<sup>124</sup> However, a clear distinction has to be drawn between vagueness in an indictment and an indictment omitting certain charges altogether.<sup>125</sup> 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.<sup>126</sup> A formal amendment has also been considered necessary where new material facts could lead to a radical transformation of the

<sup>120</sup> Prosecution Response Brief (Bizimungu), para. 27.

<sup>121</sup> Prosecution Response Brief (Bizimungu), para. 30.

<sup>122</sup> See, e.g., *Ntabakuze* Appeal Judgement, para. 30; *Bagosora and Nsengiyumva* Appeal Judgement, para. 96; *Ntawukulilyayo* Appeal Judgement, para. 188. See also *Dorđević* Appeal Judgement, para. 574; *Šainović et al.* Appeal Judgement, para. 262.

<sup>123</sup> *Ndindiliyimana et al.* Appeal Judgement, para. 172; *Ntabakuze* Appeal Judgement, para. 30; *Bagosora and Nsengiyumva* Appeal Judgement, para. 96. See also *Dorđević* Appeal Judgement, para. 576; *Šainović et al.* Appeal Judgement, para. 262.

<sup>124</sup> *Ndindiliyimana et al.* Appeal Judgement, paras. 172, 176; *Ntabakuze* Appeal Judgement, para. 30; *Bagosora and Nsengiyumva* Appeal Judgement, para. 96. See also *Dorđević* Appeal Judgement, para. 576; *Šainović et al.* Appeal Judgement, para. 262.

<sup>125</sup> *Bagosora and Nsengiyumva* Appeal Judgement, para. 96; *Rukundo* Appeal Judgement, para. 29; *Karera* Appeal Judgement, para. 293.

<sup>126</sup> *Bagosora and Nsengiyumva* Appeal Judgement, para. 96; *Rukundo* Appeal Judgement, para. 29; *Karera* Appeal Judgement, para. 293. See also *Dorđević* Appeal Judgement, para. 574.

T 14

Prosecution's case and, on their own, support separate charges.<sup>127</sup> However, in cases where there is only a minor difference between the indictment and the evidence presented at trial, a chamber need only satisfy itself that no prejudice has resulted.<sup>128</sup>

47. The Appeals Chamber is not convinced by Bizimungu's submissions that material differences exist between the Indictment and the evidence led at trial as regards the addressees of his call for the killing of Tutsis in Rwankeri Sector. In this regard, Bizimungu points out that, according to the Indictment, he spoke directly to "militiamen", whereas the evidence indicated that he addressed "officials of the MRND" or "persons in authority", and that an intermediary named Bambonye then instructed militiamen at Byangabo market to kill people.<sup>129</sup> However, the Appeals Chamber notes that the Trial Chamber found that Bambonye was present during the meeting at the house of Nzirorera's mother and among those officials who later urged the *Interahamwe* at Byangabo market to kill Tutsis.<sup>130</sup> The Trial Chamber also heard evidence linking Bambonye with the MRND party's militia, the *Interahamwe*,<sup>131</sup> prior to the genocide.<sup>132</sup> Under these circumstances, the Appeals Chamber can identify no material difference between the Indictment and the evidence adduced at trial.<sup>133</sup> The Appeals Chamber further recalls that the Prosecution is only required to plead the material facts supporting the charges but not the evidence by which the charges are to be proven.<sup>134</sup>

48. The Appeals Chamber further observes that paragraph 55 of the Indictment alleges that the meeting where Bizimungu called for the killings of Tutsis occurred in the morning of 7 April 1994. The Trial Chamber found that the meeting took place in the evening or early morning of 6 to 7 April 1994.<sup>135</sup> The Appeals Chamber cannot discern a material difference in this respect.<sup>136</sup> Moreover, the Trial Chamber concluded that Witness GAP's testimony on the content of Bizimungu's speech at the meeting was "substantially consistent with that found in paragraph 55 of

<sup>127</sup> 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, para. 30. See also *Dordević* Appeal Judgement, para. 576.

<sup>128</sup> See *Rutaganda* Appeal Judgement, paras. 302, 303 ("the question to be determined is whether an accused was reasonably able to identify the crime and criminal conduct alleged").

<sup>129</sup> Bizimungu Appeal Brief, paras. 31, 32; Bizimungu Reply Brief, paras. 3, 5, 7; AT. 7 May 2013 p. 71; AT. 8 May 2013 p. 21.

<sup>130</sup> Trial Judgement, paras. 925, 926 (relying on the evidence of Witnesses GFC, GFV, and GFA). See also Trial Judgement, para. 908.

<sup>131</sup> See, e.g., Trial Judgement, para. 291, quoting Witness Claeys, T. 11 October 2005 p. 28 (identifying the *Interahamwe* as the militia of the MRND party).

<sup>132</sup> See Trial Judgement, paras. 318 (Witness GFC testified that Bambonye and other authorities visited the *Interahamwe* during their training at the commune office towards the end of 1993), 324 (Witness GFV testified that Bambonye was a CDR official, but was among the authorities who visited Mukamira Camp to speak to the *Interahamwe* while they underwent training, which began in 1993).

<sup>133</sup> Cf. *Simba* Appeal Judgement, para. 92.

<sup>134</sup> See *Hategekimana* Appeal Judgement, para. 125; *Ntagerura et al.* Appeal Judgement, para. 21.

<sup>135</sup> See Trial Judgement, para. 908.

<sup>136</sup> See Trial Judgement, paras. 863, 864, 866, 877, 878, 910.

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the Indictment".<sup>137</sup> Bizimungu does not substantiate his assertion that the Trial Chamber should have found otherwise. His challenges as to the pleading of the timing of the meeting and the content of his speech are therefore dismissed.

49. Regarding the location of the meeting, the Appeals Chamber observes that paragraphs 55 and 63 of the Indictment refer to Nzirorera's house, whereas Bizimungu was convicted for participating in a meeting at the home of Nzirorera's mother. The Appeals Chamber is not persuaded that, in the context of this case, the discrepancy meant that the Prosecution introduced a new charge or radically transformed its case against Bizimungu. The Appeals Chamber considers that the difference between the Indictment and the evidence adduced at trial with respect to the location of the alleged meeting was minor and harmless and did not prejudice Bizimungu in the preparation of his defence.

50. In this respect, the Appeals Chamber notes that paragraphs 55 and 63 of the Indictment provided Bizimungu with relatively precise details concerning the timing of the meeting, the identities of the participants, his conduct, as well as the location and nature of the ensuing violence. Moreover, the record reflects that the residences of Nzirorera and his mother were only separated by a distance of about two to three kilometres.<sup>138</sup> There is also evidence that Nzirorera, like his mother, owned another house near Byangabo market.<sup>139</sup> In light of these facts, and, in particular, the familial link and the limited distance between the home of Nzirorera and his mother, the Appeals Chamber finds that the difference between the location specified in the Indictment and the evidence led was minor.

51. Moreover, the Appeals Chamber observes that Bizimungu extensively cross-examined Witness GAP about the meeting at the home of Nzirorera's mother on the night of 6 to 7 April 1994 and his presence there.<sup>140</sup> Additionally, his pre-Defence submissions reflect that preparations were made to invalidate the Prosecution's allegations about the meeting.<sup>141</sup> Bizimungu also led evidence rebutting the occurrence of the meeting,<sup>142</sup> and presented alibi evidence that he was not at Nzirorera's home or the house of Nzirorera's mother at the relevant time.<sup>143</sup> This conduct indicates that the minor difference between the location specified in the Indictment and the evidence led did not have a bearing on Bizimungu's ability to mount a meaningful defence.

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<sup>137</sup> Trial Judgement, para. 911.

<sup>138</sup> Witness GAP, T. 17 February 2005 p. 59; Witness GFA, T. 1 February 2006 p. 35.

<sup>139</sup> See Witness GAP, T. 22 February 2005 pp. 41, 51; Witness DB11-2, T. 12 June 2007 p. 32 (closed session).

<sup>140</sup> See Witness GAP, T. 17 February 2005 pp. 51, 52, 54, 57-62; T. 21 February 2005 pp. 3-25, 27-52, 54, 55, 58-66, 68, 70. See also Trial Judgement, paras. 912-918.

<sup>141</sup> See Bizimungu Pre-Defence Brief, para. 137, Annex I, pp. 3, 4, 15.

<sup>142</sup> See Trial Judgement, paras. 889, 892, 895.

<sup>143</sup> See Trial Judgement, paras. 882, 883, 885-887, 896, 897.

T M



52. Furthermore, the Appeals Chamber finds no merit in Bizimungu's submission that his defence was materially impaired because the Prosecution, and subsequently the Trial Chamber, misled him to believe that meetings at the home of Nzirorera's mother did not concern paragraphs 55 and 63 of the Indictment. In support of this argument, Bizimungu contends that when Witness GFA testified on 30 January 2006 that Bizimungu attended meetings at the house of Nzirorera's mother in 1993, the Prosecution and the Trial Chamber emphasized that the meetings in question were related to the charge of conspiracy to commit genocide in paragraphs 22 and 29 of the Indictment.<sup>144</sup> However, Bizimungu fails to explain how these statements caused him to assume that the evidence on his participation in the meeting at the home of Nzirorera's mother on the night of 6 to 7 April 1994 would not be considered in the context of paragraphs 55 and 63 of the Indictment. In this respect, the Appeals Chamber recalls that this evidence was primarily provided by Witness GAP, who appeared before the Trial Chamber almost a year before Witness GFA, in February 2005.<sup>145</sup>

53. Similarly, there is no merit to Bizimungu's assertion that the Trial Chamber's conclusion that the meeting at the home of Nzirorera's mother on the night of 6 to 7 April 1994 was relevant to the charge of conspiracy to commit genocide somehow precluded its consideration of this evidence in relation to the charge of genocide.<sup>146</sup> Bizimungu disregards that he only sought to be acquitted on the count of conspiracy to commit genocide but not genocide.<sup>147</sup> Logically, the Trial Chamber's decision focused on this request,<sup>148</sup> and nothing in it would have reasonably allowed Bizimungu to presume that the meeting at the home of Nzirorera's mother did not concern paragraphs 55 and 63 of the Indictment, or materially interfered in the preparation of his defence.<sup>149</sup>

54. Finally, the Appeals Chamber is not convinced by Bizimungu's argument that the Trial Chamber should not have convicted him of genocide based on the meeting at the home of

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<sup>144</sup> See Bizimungu Notice of Appeal, para. 29; Bizimungu Appeal Brief, para. 21. See also Witness GFA, T. 30 January 2006 pp. 58-61.

<sup>145</sup> See Witness GAP, T. 15 February 2005; T. 16 February 2005; T. 17 February 2005; T. 21 February 2005; T. 22 February 2005.

<sup>146</sup> See Bizimungu Notice of Appeal, para. 30; Bizimungu Appeal Brief, para. 23. See also Trial Decision of 20 March 2007, para. 18.

<sup>147</sup> See Bizimungu Rule 98bis Motion, paras. 26-43.

<sup>148</sup> See Trial Decision of 20 March 2007, paras. 13-18.

<sup>149</sup> Indeed, the Appeals Chamber notes that Bizimungu maintained in his Rule 98bis Motion that he should be acquitted because the testimonies of Witnesses GAP, GFV, and GFC concerned meetings at the home of Nzirorera's mother, rather than a meeting at Nzirorera's house as alleged in paragraphs 55 and 63 of the Indictment. Bizimungu Rule 98bis Motion, paras. 39, 40. Likewise, in his Pre-Defence Brief Bizimungu stated that he would lead evidence refuting the allegation that he was responsible for killings in Rwankeri Sector due to his participation in the meeting at the home of Nzirorera's mother on the night of 6 to 7 April 1994. See Bizimungu Pre-Defence Brief, paras. 127, 137. See also Bizimungu Pre-Defence Brief, Annex I, pp. 3, 4, 6, 9, 12-15, 17, 18, 20, 22, 23, 25, 28, 34, 35, 41, 44, 45, 52, 55, 56, 58-61, 63, 66 (mentioning Defence witnesses who would refute the allegations in paragraphs 55 and 63 of the Indictment). In the Appeals Chamber's view, Bizimungu's submissions reflect that he knew that the evidence of Witnesses GAP, GFV, and GFC was related to paragraphs 55 and 63 of the Indictment and understood the link between the meeting and the killings in Rwankeri Sector.

T M

Nzirorera's mother on the night of 6 to 7 April 1994, because the Prosecution did not rely on this event at the end of trial.<sup>150</sup> Although the Prosecution did not argue in its closing submissions that Bizimungu incurred liability for genocide in relation to the killings in Rwankeri Sector due to his participation in the meeting,<sup>151</sup> the Appeals Chamber finds that this omission had no impact on Bizimungu's notice, in particular because, as explained above, he was aware during trial on which basis the Prosecution was pursuing this allegation.<sup>152</sup>

55. Based on the foregoing, Bizimungu has not demonstrated that he lacked adequate notice or that any difference between the allegations and the evidence materially impacted on his ability to prepare his defence.

## 2. Assessment of the Evidence of Prosecution Witness GAP

56. In a separate chapter of the Trial Judgement entitled "Witness Credibility and Contempt of Court", the Trial Chamber considered whether Prosecution witnesses and, in particular, Witness GAP, were credible in light of the fact that they recanted or contradicted elements of their testimonies in relation to Bizimungu after giving their evidence in this case.<sup>153</sup> In stating the principles applicable to its review, the Trial Chamber considered that the key issue to be decided was not whether it was satisfied beyond reasonable doubt of the "truth of the witnesses' subsequent statements in which they allegedly recanted", but whether these statements raised doubts as to the credibility of their testimonies in the present case.<sup>154</sup> Significantly, the Trial Chamber stated that where the recantation "is completely implausible and there were multiple pieces of credible evidence that corroborated the witness's original testimony", a trial chamber could exercise its discretion to disregard the recantation and treat the witness's original testimony as credible.<sup>155</sup>

57. With respect to Witness GAP, the Trial Chamber observed that he gave a recorded statement to counsel for Nzirorera in the *Karempera et al.* trial in November 2009, which "raised questions about the credibility of his testimony".<sup>156</sup> However, the Trial Chamber observed that, when Witness GAP was called to testify in the *Karempera et al.* proceeding in January 2010, he "reaffirmed the veracity of his [prior] testimony", did so in "a resolute manner", and "clearly disavowed the

<sup>150</sup> See Bizimungu Notice of Appeal, para. 43; Bizimungu Appeal Brief, para. 38.

<sup>151</sup> See Prosecution Closing Brief, paras. 399-468 (discussing the meeting only in relation to the charge of conspiracy to commit genocide). See also Closing Arguments, T. 24 June 2009 p. 13 (mentioning in passing that Bizimungu conspired to commit genocide because he participated "in various meetings between 1991 and 1994 to discuss the identity of the enemy and how to combat it").

<sup>152</sup> See *supra* paras. 52, 53.

<sup>153</sup> See Trial Judgement, paras. 169, 171, 174-194.

<sup>154</sup> Trial Judgement, para. 173.

<sup>155</sup> Trial Judgement, para. 173, referring to *Kamuhanda* Appeal Judgement, paras. 212-221.

<sup>156</sup> Trial Judgement, para. 191.

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recantation statements he had made during his interview” with Nzirorera’s counsel.<sup>157</sup> Consequently, the Trial Chamber concluded that “the witness is yet to recant his testimony before any of the Chambers of this Tribunal” and that it would “accord more weight to the witness’s sworn testimony than to the statements that he gave outside the court”.<sup>158</sup>

58. In the factual findings section on Bizimungu’s responsibility for genocide in relation to the killings of Tutsis in Rwankeri Sector, the Trial Chamber identified Witness GAP as an accomplice witness<sup>159</sup> and observed that he was the only witness to have implicated Bizimungu in the meeting at the house of Nzirorera’s mother on the night of 6 to 7 April 1994.<sup>160</sup> It subsequently discussed “whether the sole testimony of Witness GAP [was] sufficient to support a finding that Bizimungu attended the meeting”,<sup>161</sup> in light of the fact that: (i) Witnesses GFV and GFA failed to see Bizimungu there;<sup>162</sup> (ii) Witness GAP provided varying accounts as to who chaired the meeting;<sup>163</sup> (iii) Witness GAP’s testimony in the present case differed from several prior statements in regards to which individuals made speeches at the meeting;<sup>164</sup> (iv) in his 23 September 2003 statement to Tribunal investigators and in the *Casimir Bizimungu et al.* trial, Witness GAP claimed that Kajelijeli attended the meeting, whereas he testified in the present case that Kajelijeli was not there;<sup>165</sup> and (v) a number of Defence witnesses testified that no meeting took place and that, in any event, Bizimungu did not attend the meeting because he was at home at the time.<sup>166</sup>

59. The Trial Chamber concluded that none of these issues called into question the credibility of Witness GAP’s direct evidence that Bizimungu participated in the meeting at the home of Nzirorera’s mother on the night of 6 to 7 April 1994.<sup>167</sup> It also held that Witness GAP’s testimony on the speech Bizimungu gave at this meeting, which called for the killing of Tutsis, was “substantially consistent with that found in paragraph 55 of the Indictment”.<sup>168</sup> Bizimungu’s involvement in this meeting was essential to the Trial Chamber’s conclusion that he aided and abetted the killing of Tutsis on 7 April 1994 in Rwankeri Sector.<sup>169</sup>

<sup>157</sup> Trial Judgement, paras. 193, 194. *See also* Trial Judgement, para. 191.

<sup>158</sup> Trial Judgement, para. 194.

<sup>159</sup> *See* Trial Judgement, para. 907, fn. 1583, referring to Witness GAP, T. 15 February 2005 p. 4 (closed session).

<sup>160</sup> Trial Judgement, para. 909.

<sup>161</sup> Trial Judgement, para. 909.

<sup>162</sup> Trial Judgement, para. 910.

<sup>163</sup> Trial Judgement, paras. 913-915.

<sup>164</sup> Trial Judgement, paras. 916, 917.

<sup>165</sup> Trial Judgement, para. 918. *See also* Witness GAP, T. 21 February 2005 pp. 20, 21.

<sup>166</sup> Trial Judgement, paras. 919-923.

<sup>167</sup> *See* Trial Judgement, paras. 910, 915, 917, 918, 920, 923.

<sup>168</sup> Trial Judgement, paras. 911, 924.

<sup>169</sup> *See* Trial Judgement, paras. 924-927, 2177.

T 14

60. Bizimungu submits that the Trial Chamber failed to approach Witness GAP's testimony with the appropriate caution in light of his status as an accomplice.<sup>170</sup> In particular, he contends that the Trial Chamber disregarded the circumstances under which the witness gave evidence and did not consider whether he had a motive to lie.<sup>171</sup> Bizimungu further asserts that the Trial Chamber ignored numerous inconsistencies in Witness GAP's evidence.<sup>172</sup> In Bizimungu's view, the Trial Chamber should have found Witness GAP not credible and thus dismissed his testimony in its entirety,<sup>173</sup> or at least not relied on it in the absence of corroboration.<sup>174</sup>

61. The Prosecution responds that Bizimungu fails to demonstrate that the Trial Chamber erred in assessing Witness GAP's testimony.<sup>175</sup> It asserts that Bizimungu raised the same issues regarding Witness GAP's credibility unsuccessfully at trial.<sup>176</sup> In the Prosecution's opinion, the Trial Chamber was apprised of the discrepancies in Witness GAP's evidence and made its conclusions based on the totality of the evidence.<sup>177</sup> In particular, the Prosecution submits that the Trial Chamber treated Witness GAP as an accomplice and approached his testimony with the appropriate caution.<sup>178</sup> It further submits that the Trial Chamber properly assessed Witness GAP's alleged recantation,<sup>179</sup> as well as Witness GFA's evidence that Ruhengeri inmates collaborated to fabricate evidence.<sup>180</sup> It also contends that Witness GAP's evidence was corroborated by Witnesses GFA, GFC, and GFV,<sup>181</sup> and that, in any event, the Trial Chamber found Witness GAP to be credible and could have therefore relied on his testimony alone.<sup>182</sup>

62. The Appeals Chamber observes that, in assessing evidence pertaining to Bizimungu's involvement in the meeting at the home of Nzirorera's mother on the evening of 6 to 7 April 1994, the Trial Chamber noted that "many" of the witnesses called by the Prosecution "[had] been convicted of crimes related to the 1994 genocide" and that, due to their role as accomplices, it

<sup>170</sup> Bizimungu Notice of Appeal, para. 63; Bizimungu Appeal Brief, paras. 93-97, 148; Bizimungu Reply Brief, para. 25; AT. 7 May 2013 p. 74.

<sup>171</sup> Bizimungu Notice of Appeal, para. 63; Bizimungu Appeal Brief, paras. 52, 84, 94, 97, 105, 148; AT. 7 May 2013 p. 74; AT. 8 May 2013 p. 23. *See also* Bizimungu Appeal Brief, paras. 99-104, 154-160.

<sup>172</sup> *See* Bizimungu Notice of Appeal, paras. 64-69; Bizimungu Appeal Brief, paras. 72, 107-167; AT. 8 May 2013 p. 23. *See also* AT. 7 May 2013 p. 74. Bizimungu submits that, while the Trial Chamber claimed that it had noted all discrepancies in Witness GAP's evidence, its consideration was in fact improperly limited to the specific issues discussed in paragraphs 913 to 915 of the Trial Judgement. Bizimungu Appeal Brief, paras. 140, 141.

<sup>173</sup> Bizimungu Appeal Brief, paras. 85, 92, 110.

<sup>174</sup> Bizimungu Appeal Brief, paras. 50-52, 167, 201-209; Bizimungu Reply Brief, paras. 31, 37.

<sup>175</sup> Prosecution Response Brief (Bizimungu), paras. 50-53. *See also* Prosecution Response Brief (Bizimungu), paras. 71, 78.

<sup>176</sup> Prosecution Response Brief (Bizimungu), para. 51.

<sup>177</sup> Prosecution Response Brief (Bizimungu), para. 51. *See also* Prosecution Response Brief (Bizimungu), para. 55; AT. 8 May 2013 pp. 6, 8, 9.

<sup>178</sup> Prosecution Response Brief (Bizimungu), paras. 57, 77; AT. 8 May 2013 p. 6.

<sup>179</sup> Prosecution Response Brief (Bizimungu), para. 55.

<sup>180</sup> Prosecution Response Brief (Bizimungu), para. 70.

<sup>181</sup> Prosecution Response Brief (Bizimungu), paras. 57, 66-69, 77.

<sup>182</sup> Prosecution Response Brief (Bizimungu), paras. 66, 77.

would treat their evidence with caution.<sup>183</sup> In this regard, the Trial Chamber referred to Witness GAP, among others, and his evidence.<sup>184</sup>

63. The Appeals Chamber recalls that it is within a trial chamber's discretion to rely on the evidence of accomplice witnesses.<sup>185</sup> However, the trial chamber must exercise appropriate caution in assessing such evidence and carefully consider the totality of the circumstances in which it was tendered.<sup>186</sup> Of the several factors relevant to a cautious assessment, consideration should be given to circumstances showing that the witness may have motives or incentives to incriminate the accused or to lie.<sup>187</sup>

64. The Appeals Chamber recalls that "[u]nder some circumstances, a reasoned explanation of the Trial Chamber's assessment of a particular witness's credibility is a crucial component of a 'reasoned opinion' – for instance, where there is a genuine and significant dispute surrounding a witness's credibility and the witness's testimony is truly central to the question whether a particular element is proven".<sup>188</sup> The Appeals Chamber considers the Trial Chamber's analysis to be inadequate given the existence of a genuine and significant dispute surrounding Witness GAP's credibility in light of his status as an accomplice witness and evidence suggesting that he may have had a motive to lie. In particular, the Trial Chamber failed to expressly consider evidence that Witness GAP had been pressured by Rwandan authorities to implicate Bizimungu in order to receive a more lenient sentence.<sup>189</sup> It failed to expressly address other evidence which alleged that

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<sup>183</sup> Trial Judgement, para. 907. In this regard, the Appeals Chamber observes that contrary to the Trial Chamber's statement, Witness GAP's testimony reflects that he was detained in Ruhengeri prison, awaiting a judgement and sentence for crimes to which he had confessed when he gave evidence against Bizimungu in the present case. Witness GAP, T. 15 February 2005 p. 4 (closed session). See also Witness GAP, T. 16 February 2005 pp. 11, 12; T. 17 February 2005 p. 50.

<sup>184</sup> Trial Judgement, para. 907, fn. 1583, referring to Witness GAP, T. 15 February 2005 p. 4 (closed session).

<sup>185</sup> *Gatete* Appeal Judgement, para. 154; *Munyakazi* Appeal Judgement, para. 93; *Setako* Appeal Judgement, para. 143. See also *Lukić and Lukić* Appeal Judgement, para. 128; *Krajišnik* Appeal Judgement, para. 146.

<sup>186</sup> *Gatete* Appeal Judgement, para. 154; *Setako* Appeal Judgement, para. 143; *Nchamihigo* Appeal Judgement, para. 305. See also *Lukić and Lukić* Appeal Judgement, para. 128.

<sup>187</sup> See *Kanyarukiga* Appeal Judgement, para. 181; *Setako* Appeal Judgement, para. 143; *Muvunyi II* Appeal Judgement, para. 37. See also *Lukić and Lukić* Appeal Judgement, para. 128.

<sup>188</sup> *Kajelijeli* Appeal Judgement, para. 61 (emphasis in original).

<sup>189</sup> The Appeals Chamber observes that Witness GAP retracted that he had been pressured by Rwandan authorities to implicate Bizimungu when he appeared before the *Karempera et al.* trial chamber in January 2010. See, e.g., Defence Exhibit 699a (*The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Witness GAP, T. 26 January 2010 pp. 32, 33, 36, 37, 43, 44). Other evidence reflects that pressure was applied on other inmates in Ruhengeri prison to fabricate evidence against several accused before the Tribunal and that fabricated evidence was given in this regard. See, e.g., Defence Exhibit 689a (*The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Witness BTH, T. 10 April 2008 pp. 50-60); Defence Exhibit 690a (*The Prosecutor v. Édouard Karemera et al.*, ICTR-Case No. 98-44-T, Witness BTH, T. 14 April 2008 pp. 2-53, 57-60, 62, 63); Defence Exhibit 691a (*The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Witness BTH, T. 15 April 2008 pp. 16-19, 21-35); Defence Exhibit 692a (*The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Witness BTH, T. 16 April 2008 pp. 13, 14, 26-36, 41-46, 48-51, 55-57, 61, 62, 64-71); Defence Exhibit 693a (*The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Witness BTH, T. 17 April 2008 pp. 21, 22, 25-28, 30). See also Witness DB11-2, T. 12 June 2007 pp. 42, 43 (closed session); T. 13 June 2007 pp. 16, 22, 23 (closed session); Witness CBP99, T. 3 March 2008 pp. 45, 46, 57, 58, 61, 62, 65-69. The Appeals Chamber observes that the Trial Chamber only generally discussed that Witness GFA was confronted with statements taken from other witnesses who he testified had provided false testimony before

Witness GAP facilitated the fabrication of evidence against accused before the Tribunal generally and Bizimungu specifically.<sup>190</sup> These omissions must be viewed in light of the Trial Chamber's further failure to expressly consider that Witness GAP never mentioned this meeting or Bizimungu's involvement in it in his statements to the Tribunal prior to 2003,<sup>191</sup> and that he failed to report this when confessing to his crimes before Rwandan authorities in 2002.<sup>192</sup> Mindful that trial chambers enjoy broad discretion in assessing evidence<sup>193</sup> and that they need not articulate every step of their reasoning for each finding they make,<sup>194</sup> the Appeals Chamber finds that the absence of any express consideration of these circumstances reflects a failure to apply necessary caution in light of the particular circumstances surrounding Witness GAP's evidence.

65. Moreover, the Appeals Chamber observes that the Trial Chamber failed to expressly consider the evolving nature of Witness GAP's evidence in relation to the involvement of a number of other prominent figures who were prosecuted before this Tribunal in the meeting at the home of Nzirorera's mother.<sup>195</sup> Likewise, it did not address significant discrepancies as to how Witness GAP

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the Tribunal, indicating that they had not lied. See Trial Judgement, paras. 178, 179. The Trial Chamber provided no indication that it found Witness GFA's testimony to lack credibility on this issue.

<sup>190</sup> Defence Exhibit 689a (*The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Witness BTH, T. 10 April 2008 pp. 58, 59) (referring to individual number 3); Defence Exhibit 690a (*The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Witness BTH, T. 14 April 2008 pp. 5, 8, 19, 20) (referring to individual number 2); Defence Exhibit 691a (*The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Witness BTH, T. 15 April 2008 pp. 22, 23, 30-34) (referring to individual number 2); Defence Exhibit 692a (*The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Witness BTH, T. 16 April 2008 pp. 61, 62) (referring to individual number 2); Defence Exhibit 693a (*The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Witness BTH, T. 17 April 2008 p. 31) (referring to individual number 2). To identify that the individual referred to in Witness BTH's testimony in the *Karemera et al.* proceeding as Witness GAP, Defence Exhibits 689a, and 690a must read in conjunction with Defence Exhibits 666 and 668, respectively, while Defence Exhibits 691a, 692a, and 693a must be read in conjunction with Defence Exhibit 678. All of these exhibits were admitted pursuant to Rules 89(C) and 92bis(D) of the Rules through *The Prosecutor v. Augustin Ndingiriyimana et al.*, Case No. ICTR-00-56-T, Decision on Bizimungu's Motion for the Admission into Evidence of the Transcripts and Exhibits of Witness BTH's Testimony in the *Karemera et al.* Case Pursuant to Rule 92bis, 4 December 2008, paragraph 1 of which identifies Witness BTH in the *Karemera et al.* case as being Witness GFA in the present case.

<sup>191</sup> See Witness GAP, T. 16 February 2005 pp. 22-27, 33, 37, 62, 63; T. 17 February 2005 pp. 6, 49; T. 22 February 2005 p. 47.

<sup>192</sup> See Witness GAP, T. 15 February 2005 pp. 4-6, 11, 12 (closed session), 36, 42-44; T. 16 February 2005 pp. 11, 12, 19-21, 27, 30, 33, 63.

<sup>193</sup> See, e.g., *Kanyarukiga* Appeal Judgement, para. 121; *Ntawukulilyayo* Appeal Judgement, para. 21; *Nchamihigo* Appeal Judgement, para. 47.

<sup>194</sup> See, e.g., *Ntabakuze* Appeal Judgement, para. 161; *Bagosora and Nsengiyumva* Appeal Judgement, para. 269; *Nchamihigo* Appeal Judgement, para. 165.

<sup>195</sup> When he first discussed the meeting in his 17 March 2003 statement, he did not name Ephrem Setako as being a participant, even though he later testified that Setako was among the authorities at the meeting. See Witness GAP, T. 21 February 2005 p. 30. In his statements of 17 March, 16 April, 14/15 July, and 23 September 2003, as well as his testimony in the *Casimir Bizimungu et al.* trial and the present case, Witness GAP maintained that Nzirorera attended the meeting. See Witness GAP, T. 21 February 2005 pp. 4, 5, 10, 11, 28-33, 44, 49, 50. On some of these occasions, the witness claimed that the meeting had to be delayed because of Nzirorera's late arrival. See Witness GAP, T. 21 February 2005 pp. 29, 31 (referring to Witness GAP's 16 April 2003 statement), 33, 50 (referring to Witness GAP's 14/15 July 2003 statement), 44. Nonetheless, Witness GAP subsequently testified in the *Karemera et al.* case that Nzirorera did not physically attend the meeting, but chaired it over the phone from Kigali. See Defence Exhibit 697a (*The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Witness GAP, T. 21 January 2010 p. 35); Defence Exhibit 698a (*The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Witness GAP, T. 25 January 2010 pp. 12-31). When confronted by Nzirorera's counsel with his prior testimony from the *Ndingiriyimana et al.* proceedings that Nzirorera left the meeting to go back to Kigali, he stated that the meeting ended when Nzirorera

came to attend the meeting at the home of Nzirorera's mother.<sup>196</sup> The Appeals Chamber concludes that the Trial Chamber's failure to assess the circumstances above<sup>197</sup> as well as these inconsistencies amounts to a failure to provide a reasoned opinion. Having reviewed the findings and relevant evidence, the Appeals Chamber finds that no reasonable trier of fact could have relied on Witness GAP's uncorroborated evidence in these circumstances.<sup>198</sup>

66. In this regard, the Appeals Chamber finds no merit in the Prosecution's contention that Witness GAP's evidence was corroborated by Witnesses GFA, GFV, and GFC.<sup>199</sup> The Appeals Chamber observes that a material aspect of Witness GAP's testimony – Bizimungu's presence at the meeting at the home of Nzirorera's mother, which is essential to Bizimungu's responsibility for the killings in Rwankeri Sector – is not corroborated. Witness GFA recanted his testimony regarding Bizimungu's participation in meetings at the home of Nzirorera's mother in the *Karemera et al.* trial.<sup>200</sup> The Trial Chamber therefore found his testimony in the present case to not be credible and concluded that it would not rely on it in the absence of corroboration by other credible evidence.<sup>201</sup> Of greater significance, the Trial Chamber did not find that Witness GFA corroborated Witness GAP's testimony concerning Bizimungu's presence at the meeting at the home of Nzirorera's mother on the evening of 6 to 7 April 1994.<sup>202</sup> Under these circumstances, the Appeals Chamber considers that Witness GFA could not have corroborated Witness GAP. As for Witness

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hung up the phone and it was therefore "as if he had returned to Kigali". Defence Exhibit 698a (*The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Witness GAP, T. 25 January 2010 pp. 30, 31).

<sup>196</sup> In his 23 September 2003 statement, the *Casimir Bizimungu et al.* trial, and the present case, Witness GAP asserted that he was personally invited by Nzirorera to attend the meeting when the latter phoned the communal office on the evening of 6 April 1994 in order to speak to Emmanuel Harelimana or Juvénal Kajelijeli. See Witness GAP, T. 21 February 2005 pp. 19-23. See also Defence Exhibit 703 (*The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Witness GAP, T. 23 January 2004 pp. 2, 8). The Appeals Chamber notes that while Witness GAP testified in the *Casimir Bizimungu et al.* case that Nzirorera attempted to reach Juvénal Kajelijeli at the communal office, he stated in the present case that this had been a mistake. See Witness GAP, T. 21 February 2005 pp. 10, 11. The witness claimed that he picked up the phone and talked to Nzirorera. Witness GAP, T. 21 February 2005 p. 19. He also stated that Harelimana was not at the communal office at the time, but that he only saw Harelimana later during the meeting at the home of Nzirorera's mother. Witness GAP, T. 21 February 2005 p. 19. By contrast, Witness GAP testified in the *Karemera et al.* trial that he never spoke directly to Nzirorera, but rather secretly listened to Nzirorera's phone conversation with Harelimana at the communal office on another line. See Defence Exhibit 697a (*The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Witness GAP, T. 21 January 2010 pp. 29, 30, 33); Defence Exhibit 698a (*The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Witness GAP, T. 25 January 2010 pp. 21-23, 25-28). When questioned by counsel for Nzirorera about the variances in his evidence, Witness GAP maintained that when he clandestinely listened to the phone conversation between Harelimana and Nzirorera, it was "as if I, myself, had participated in the conversation somewhat". See Defence Exhibit 698a (*The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Witness GAP, T. 25 January 2010 p. 25).

<sup>197</sup> See *supra* para. 64.

<sup>198</sup> By relying on Witness GAP's uncorroborated evidence, the Trial Chamber ignored its prior statement that it could disregard the recantation and treat the original testimony before the Chamber as credible when the recantation is deemed to be "completely implausible and there were multiple pieces of credible evidence that corroborated the witness's original testimony". Trial Judgment, para. 173 (emphasis added).

<sup>199</sup> See Prosecution Response Brief (Bizimungu), paras. 57, 66-69, 77.

<sup>200</sup> See Trial Judgement, paras. 176-179.

<sup>201</sup> Trial Judgement, para. 182.

<sup>202</sup> Trial Judgement, para. 909 ("The Chamber recalls that Witness GAP was the sole Prosecution witness to testify that Bizimungu attended the meeting at the house of Joseph Nzirorera's mother.").

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GFV, the Appeals Chamber observes that he expressly stated that he neither saw Bizimungu nor Witness GAP at the meeting at the home of Nzirorera's mother.<sup>203</sup> Finally, Witness GFC gave no evidence in relation to the meeting as such.<sup>204</sup>

67. Consequently, the Appeals Chamber finds that the Trial Chamber failed to provide a reasoned opinion with respect to Witness GAP's evidence and abused its discretion in relying on his uncorroborated testimony concerning Bizimungu's participation in a meeting at the home of Nzirorera's mother on the night of 6 to 7 April 1994. Since this conclusion was essential to the Trial Chamber's finding that Bizimungu aided and abetted the killings in Rwankeri Sector on 7 April 1994, his conviction for genocide on this basis cannot stand.

68. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in finding that Bizimungu aided and abetted the killings in Rwankeri Sector on 7 April 1994 and erred in convicting him for genocide on this basis.

### 3. Conclusion

69. In light of the foregoing, the Appeals Chamber dismisses Bizimungu's First Ground of Appeal regarding notice. However, the Appeals Chamber grants Bizimungu's Second, Fourth, and Sixth Grounds of Appeal and reverses his conviction pursuant to Article 6(1) of the Statute for aiding and abetting the killings in Rwankeri Sector on 7 April 1994. As a consequence, the Appeals Chamber need not address Bizimungu's remaining arguments concerning this incident,<sup>205</sup> or consider whether the findings and the evidence sustain the Trial Chamber's conclusion that Bizimungu was criminally responsible for genocide based on his participation in this event.<sup>206</sup>

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<sup>203</sup> See Trial Judgement, para. 865.

<sup>204</sup> See Trial Judgement, paras. 875, 876. The Prosecution also refers to an aspect of Witness GFC's testimony, which in its view, "provided further corroboration on events surrounding the meeting". Prosecution Response Brief (Bizimungu), para. 72, referring to Witness GFC, T. 1 March 2005 pp. 25, 26. Having reviewed the transcripts cited, the Appeals Chamber fails to see how this evidence would, in material respects, corroborate Witness GAP's testimony of Bizimungu's presence at meeting at the home of Nzirorera's mother on the evening of 6 to 7 April 1994.

<sup>205</sup> See Grounds Three, Five, and Seven of the Bizimungu Appeal Brief.

<sup>206</sup> See *supra* para. 24.

T 14



**C. Superior Responsibility (Grounds 8 to 13 and 15 to 17, in part)**

70. The Trial Chamber found that Bizimungu was criminally responsible as a superior pursuant to Article 6(3) of the Statute for the criminal acts of soldiers of the Rwandan army committed at the Josephite Brothers compound and TRAFIPRO.<sup>207</sup> It further found that Bizimungu was criminally responsible as a superior for the criminal acts of soldiers and *Interahamwe* committed at the *École des sciences infirmières de Kabgayi* (ESI), the Musambira Commune office and dispensary, the Butare Prefecture office and Episcopal Church of Rwanda (“EER”), and the Cyangugu stadium.<sup>208</sup>

71. Bizimungu submits that the Trial Chamber erred in finding that he was responsible for these crimes as a superior.<sup>209</sup> The Appeals Chamber will consider in turn Bizimungu’s arguments that the Trial Chamber erred in finding that: (i) his superior responsibility was sufficiently pleaded in the Indictment; (ii) a superior-subordinate relationship existed between Bizimungu and the soldiers and the *Interahamwe* who allegedly committed the crimes and, in particular, whether Bizimungu exercised effective control over them; (iii) he knew or had reason to know that the crimes were about to be or had been committed; and (iv) he failed to take the necessary and reasonable measures to prevent or punish those responsible for the crimes.

**1. Notice of Elements of Superior Responsibility**

72. Bizimungu submits that the Trial Chamber erred in convicting him pursuant to Article 6(3) of the Statute as the material facts underpinning the elements of superior responsibility were insufficiently pleaded in the Indictment.<sup>210</sup> Bizimungu argues that the Indictment fails to properly plead: (i) his authority over the soldiers and the *Interahamwe* who allegedly committed the crimes; (ii) the criminal acts of his subordinates; (iii) that he knew or had reason to know of the crimes

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<sup>207</sup> The Trial Chamber convicted Bizimungu of: (i) genocide and extermination in relation to killings at the Josephite Brothers compound; and (ii) genocide, murder and rape as crimes against humanity, and murder and rape as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto in relation to the criminal acts committed at TRAFIPRO. *See* Trial Judgement, paras. 2115, 2120, 2145, 2153, 2162, 2163.

<sup>208</sup> The Trial Chamber convicted Bizimungu of: (i) genocide and murder and rape as a crimes against humanity and as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto in relation to the criminal acts committed at the *École des sciences infirmières de Kabgayi* (ESI) and the Musambira Commune office and dispensary; and (ii) murder and rape as crimes against humanity and rape as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto in relation to the criminal acts committed at the Butare Prefecture office and EER and the Cyangugu stadium. Trial Judgement, paras. 2103, 2105, 2106, 2127, 2128, 2145, 2153, 2162, 2163. The Appeals Chamber further notes that in its factual findings the Trial Chamber found that soldiers were involved in the crimes committed at the *École des Sciences Infirmières de Kabgayi* (ESI) and the Musambira Commune office and dispensary. *See* Trial Judgement, paras. 1184, 1192. However, in the factual findings section relating to Bizimungu’s superior responsibility the Trial Chamber stated that it was also satisfied that *Interahamwe* were implicated in the killings at these two locations. *See* Trial Judgement, para. 1197. *See also* Trial Judgement, fn. 2118. The Appeals Chamber therefore understands that the Trial Chamber found Bizimungu responsible pursuant to Article 6(3) of the Statute for the involvement of both soldiers and *Interahamwe* in these killings.

<sup>209</sup> Bizimungu Notice of Appeal, para. 94; Bizimungu Appeal Brief, para. 243.

<sup>210</sup> Bizimungu Notice of Appeal, paras. 96, 102, 103; Bizimungu Appeal Brief, paras. 244, 270-272. *TM*

committed by his subordinates; and (iv) that he failed to take necessary and reasonable measures to prevent the crimes and punish the perpetrators.<sup>211</sup>

73. The Appeals Chamber recalls that if the Prosecution intends to rely on the mode of superior responsibility to hold an accused criminally responsible for a crime under Article 6(3) of the Statute, the indictment should plead the following material facts: (i) that the accused is the superior of subordinates sufficiently identified, 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 for whom he 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.<sup>212</sup>

(a) Identification of Subordinates and Effective Control

74. The Trial Chamber found that Bizimungu exercised authority over soldiers of the Rwandan army and *Interahamwe* during the period when he served as the Chief of Staff of the Rwandan army and had the material ability to prevent them from committing or punish them for having committed the crimes with which he was charged.<sup>213</sup> With respect to Bizimungu's notice of his authority over his alleged criminal subordinates, the Trial Chamber stated that:

The Indictment alleges that Bizimungu was appointed Chief of Staff of the Rwandan Army on 16 April 1994. The Indictment further alleges that during his tenure as Chief of Staff, Bizimungu exercised authority over soldiers of the Rwandan Army and members of the *Interahamwe*.<sup>214</sup>

75. Bizimungu submits that the Indictment fails to sufficiently identify his subordinates who allegedly committed the crimes for which he was convicted and does not plead his effective control over them.<sup>215</sup> While Bizimungu acknowledges that he was vested with authority within the hierarchy of the military, he argues that the Indictment does not indicate the chain of command or identify the units or camps from which the soldiers came.<sup>216</sup> He underscores that the Prosecution was in a position to identify the units and camps given that it had done so in relation to other events

<sup>211</sup> Bizimungu Notice of Appeal, paras. 96-107; Bizimungu Appeal Brief, paras. 244-277, 339. *See also* Bizimungu Notice of Appeal, para. 206; Bizimungu Appeal Brief, paras. 430-433, 442-444, 458, 459, 471.

<sup>212</sup> *See, e.g.,* Ntabakuze Appeal Judgement, para. 100; Bagosora and Nsengiyumva Appeal Judgement, para. 191; Muvunyi I Appeal Judgement, para. 19.

<sup>213</sup> Trial Judgement, para. 1983.

<sup>214</sup> Trial Judgement, para. 1957. *See also* Trial Judgement, paras. 1035, 1435, 1478, fn. 2118.

<sup>215</sup> Bizimungu Notice of Appeal, paras. 97, 98; Bizimungu Appeal Brief, paras. 250-252, 258, 277. *See also* Bizimungu Appeal Brief, paras. 431, 433, 458; AT. 7 May 2013 p. 57.

<sup>216</sup> Bizimungu Notice of Appeal, paras. 97, 98, 106; Bizimungu Appeal Brief, paras. 253, 254. *See also* Bizimungu Reply Brief, paras. 57, 58.

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in this case and in other cases in relation to the same events.<sup>217</sup> He adds that, in the absence of reference to the chain of command between him and the perpetrators of the crimes, the Indictment fails to plead the material facts showing that he had effective control over the perpetrators.<sup>218</sup> Further, citing the *Halilović* Appeal Judgement, he contends that pleading *de jure* and *de facto* authority does not amount to pleading effective control.<sup>219</sup>

76. Bizimungu also argues that the Trial Chamber erred in finding that the Indictment alleges that, in his capacity as the Chief of Staff of the Rwandan army, he had authority over *Interahamwe*, whereas the Indictment neither refers to his authority over *Interahamwe* nor pleads a relationship between the soldiers and the *Interahamwe*.<sup>220</sup> According to Bizimungu, these defects were not cured by subsequent information in either the Prosecution Pre-Trial Brief or the Prosecution's opening statement.<sup>221</sup>

77. The Prosecution responds that the Indictment adequately pleads a superior-subordinate relationship.<sup>222</sup> It argues that the Indictment identifies the category of subordinates as soldiers of the Rwandan army, *Interahamwe*, and *Impuzamugambi* militiamen.<sup>223</sup> The Prosecution emphasizes that, in the circumstances of this case where Bizimungu, as the Chief of Staff, was the overall superior of the army, the Indictment is only required to plead an identifiable group of subordinates.<sup>224</sup> The Prosecution asserts that the Indictment clearly identifies the *Interahamwe* as Bizimungu's subordinates and that it was not required to establish a nexus between the army and the *Interahamwe* which was a matter of evidence.<sup>225</sup> Similarly, according to the Prosecution, effective control was sufficiently pleaded.<sup>226</sup>

78. Paragraph 3 of the Indictment alleges that:

In his capacity as Chief of Staff of the Rwandan Army, Augustin Bizimungu exercised authority over all soldiers in the Rwandan Army.

Furthermore, paragraphs 13 to 16 of the Indictment set out the structure of the Rwandan army. When pleading Bizimungu's responsibility pursuant to Article 6(3) of the Statute, the *chapeau* of

<sup>217</sup> Bizimungu Appeal Brief, paras. 255, 256.

<sup>218</sup> Bizimungu Notice of Appeal, para. 98; Bizimungu Appeal Brief, paras. 258, 277. *See also* Bizimungu Reply Brief, para. 59.

<sup>219</sup> Bizimungu Appeal Brief, para. 277, *quoting Halilović* Appeal Judgement, para. 85, *and referring to Orić* Appeal Judgement, para. 91. *See also* Bizimungu Reply Brief, para. 59.

<sup>220</sup> Bizimungu Notice of Appeal, paras. 105, 118; Bizimungu Appeal Brief, paras. 257, 258, 263, 273, 274, 277, 307, 311. *See also* Bizimungu Reply Brief, para. 60.

<sup>221</sup> Bizimungu Appeal Brief, paras. 259-262, 275, 276, 308. *See also* AT. 7 May 2013 p. 60.

<sup>222</sup> Prosecution Response Brief (Bizimungu), para. 97. *See also* AT. 8 May 2013 p. 10.

<sup>223</sup> Prosecution Response Brief (Bizimungu), paras. 97, 98.

<sup>224</sup> Prosecution Response Brief (Bizimungu), paras. 98, 99. *See also* AT. 8 May 2013 p. 10.

<sup>225</sup> Prosecution Response Brief (Bizimungu), para. 100.

<sup>226</sup> Prosecution Response Brief (Bizimungu), para. 101.

T 14

each relevant count of the Indictment refers to the category of subordinates who perpetrated the crimes.<sup>227</sup> Further, in the paragraphs setting out the factual allegations, the Indictment specifies the alleged perpetrators for each event.<sup>228</sup>

79. The Appeals Chamber recalls that a superior need not necessarily know the exact identity of the subordinates who perpetrate crimes in order to incur liability under Article 6(3) of the Statute.<sup>229</sup> The Appeals Chamber has held that physical perpetrators of the crimes can be identified by category in relation to a particular crime site.<sup>230</sup> Furthermore, the proximity between the accused and the crime charged is one of the factors in determining the degree of specificity with which the Prosecution must plead the material facts of its case in the indictment.<sup>231</sup>

80. In this case, although the categories of subordinates designated in the Indictment are broad, Bizimungu would have clearly understood that it was alleged that he exercised authority over all soldiers of the Rwandan army and that they were alleged to have been the perpetrators of the crimes for which he was ultimately convicted. Furthermore, since Bizimungu was in a very senior position in the military hierarchy, and thus removed from the crimes charged, a lower degree of specificity was required in the pleading of the material facts underpinning the allegations against him. The Appeals Chamber therefore considers that Bizimungu's superior position and effective control over soldiers of the Rwandan army were adequately pleaded in the Indictment.<sup>232</sup> Additionally, the Appeals Chamber notes that the Prosecution's opening statement also emphasized that it was alleged that Bizimungu exercised authority over all soldiers of the Rwandan army.<sup>233</sup> Accordingly,

<sup>227</sup> Indictment, paras. 61 ("soldiers, gendarmes and *Interahamwe* and *Impuzamugambi* militiamen"), 78 ("soldiers under their command or civilians obeying their orders"), 109 ("soldiers under their command or militiamen obeying their orders"), 110 ("soldiers under their command or by civilians over whom they had authority"), 118 ("soldiers under their command or civilians over which they had authority"), 119 ("soldiers from the Rwandan Army, under their authority, in concert with militiamen").

<sup>228</sup> See Indictment, paras. 68 ("while Augustin Bizimungu was exercising his functions as Chief of Staff of the Rwandan Army, soldiers under his command"), 85 ("soldiers from the Rwandan Army"), 86 ("soldiers from the Rwandan Army and *Interahamwe*"), 87 ("soldiers from the Rwandan Army and militiamen"), 88 ("soldiers from the Rwandan Army"), 89 ("soldiers from the Rwandan Army and *Interahamwe*"), 91 ("soldiers from the Rwandan Army and *Interahamwe*"), 113 ("soldiers from the Rwandan Army and *Interahamwe* militiamen"), 114 ("soldiers from the Rwandan Army and militiamen"), 115 ("soldiers from the Rwandan Army and militiamen"), 116 ("soldiers from the Rwandan Army and *Interahamwe* militiamen"), 117 ("soldiers from the Rwandan Army and *Interahamwe*").

<sup>229</sup> *Hategikimana* Appeal Judgement, para. 166; *Bagosora and Nsengiyumva* Appeal Judgement, para. 196; *Renzaho* Appeal Judgement, paras. 64, 116; *Muvunyi I* Appeal Judgement, para. 55.

<sup>230</sup> *Bagosora and Nsengiyumva* Appeal Judgement, para. 196; *Renzaho* Appeal Judgement, paras. 64, 116. See also *Ntabakuze* Appeal Judgement, para. 107.

<sup>231</sup> *Nahimana et al.* Appeal Judgement, para. 324; *Ntagerura et al.* Appeal Judgement, para. 23.

<sup>232</sup> Cf. *Ntabakuze* Appeal Judgement, para. 107. In this regard, the Appeals Chamber considers that Bizimungu's reference to the *Halilović* Appeal Judgement is misplaced. That case concerned whether Halilović could be alternatively held responsible as a superior by reason of his role as Team Leader of the Inspection Team whereas the indictment pleaded his superior responsibility and effective control by reason of his position as Commander of the Operation. The fact of his *de jure* and *de facto* authority as Team Leader of the Inspection Team did not in itself indicate that this was the alleged source of his superior responsibility given the clear indication in that case that it arose from his position as Commander of the Operation. See *Halilović* Appeal Judgement, paras. 75-85.

<sup>233</sup> T. 20 September 2004 p. 52: "[Bizimungu's] meteoric rise from a regional commander to the high office of chief of staff in the context and during the period of the genocide made him the most influential serving army officer in

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the Appeals Chamber finds that Bizimungu has not shown that the Indictment fails to sufficiently identify his subordinates by merely referring to soldiers of the Rwandan army.

81. Turning to Bizimungu's notice of his alleged authority over the *Interahamwe*, the Appeals Chamber recalls that Bizimungu was convicted as a superior for crimes committed by *Interahamwe* as well as by soldiers in relation to: (i) the *École des sciences infirmières de Kabgayi* (ESI); (ii) the Musambira Commune office and dispensary; (iii) the Butare Prefecture office and EER; and (iv) the Cyangugu stadium.<sup>234</sup>

82. The Indictment does not explicitly state that Bizimungu exercised authority over the *Interahamwe* who perpetrated these crimes. Nonetheless, the Appeals Chamber is satisfied that the Indictment alleges that he exercised authority over the *Interahamwe* who committed crimes in concert with the soldiers under his command. When charging Bizimungu's responsibility pursuant to Article 6(3) of the Statute for murder as a crime against humanity, the Indictment refers in the *chapeau* paragraph of the count to "soldiers under [Bizimungu's] command or civilians obeying [his] orders",<sup>235</sup> while in respect of extermination as a crime against humanity it refers to "soldiers under [Bizimungu's] command or militiamen obeying [his] orders".<sup>236</sup> In relation to the other charges for the same events, the Article 6(3) allegations of the *chapeau* for each count simply refer to his "subordinates"; however, reference is made in the preceding *chapeau* paragraph to the crimes being committed by "soldiers, gendarmes and *Interahamwe*, and *Impuzamugambi* militiamen"<sup>237</sup> or "soldiers under their command or [...] civilians over whom they had authority".<sup>238</sup>

83. Additionally, when describing the specific incidents for which Bizimungu was convicted, the Indictment consistently refers to the crimes being perpetrated by "soldiers from the Rwandan Army and *Interahamwe*".<sup>239</sup> The Indictment further refers to Bizimungu having provided military

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Rwanda. [...] He had the burden, and he had the responsibility that an environment [*sic*] legality and discipline existed among the troops of the Rwandan armed forces. [...] By law, all officers and rank and file of these forces were answerable to the Accused, Major General Bizimungu. From the 16th of April, 1994, by virtue of his position and rank, the Accused was responsible for the conduct of the war and also for the comportment of members of the Rwandan army". See also Prosecution Pre-Trial Brief, para. 58*bis* ("The aforementioned crimes were all committed by persons under either the *de jure* authority of Augustin Bizimungu or the *de facto* command of his subordinates").

<sup>234</sup> Trial Judgement, paras. 2102-2106, 2127, 2128, 2145, 2153, 2162, 2163. The Appeals Chamber notes that paragraphs 68 and 69 of the Indictment charging genocide in relation to the incidents at *École des Sciences Infirmières de Kabgayi* (ESI), and the Musambira Commune office and dispensary make no reference to *Interahamwe*. However, the Appeals Chamber understands that the Trial Chamber did consider that Bizimungu was charged as a superior of the *Interahamwe* in relation to the count of genocide. See Trial Judgement, fn. 2118.

<sup>235</sup> Indictment, para. 78.

<sup>236</sup> Indictment, para. 109.

<sup>237</sup> Indictment, para. 61.

<sup>238</sup> Indictment, para. 110.

<sup>239</sup> Indictment, paras. 86, 89, 91, 113, 116, 117. With respect to the allegations regarding the Musambira commune office and dispensary, the Indictment refers to "soldiers from the Rwandan Army and militiamen". Indictment, paras. 87, 114. The Appeals Chamber also notes that the Indictment refers to the militiamen or civilians receiving orders from the soldiers, or acting in concert with them. See Indictment, paras. 78, 109, 119.

T 14

training and weapons to the *Interahamwe*.<sup>240</sup> The Appeals Chamber considers that, when read as a whole, the Indictment adequately informed Bizimungu that it was alleged that he exercised authority over the *Interahamwe* who participated in the crimes alleged.

84. Moreover, Bizimungu received further clarification on this point from the Prosecution's opening statement in which it was alleged that he was "at all times relevant to the indictment culpable of the worse [*sic*] kind of [...] dereliction of duty for refusing to exercise the powers vested in him to stop or punish the commission of various crimes by his soldiers and the militia [...]".<sup>241</sup> Similarly, the Prosecution Pre-Trial Brief states that: "although the Accused were military men at the time of the acts and their natural subordinates were soldiers, some of them did exercise effective control over the *Interahamwe* militia, who were civilians who had undergone military training in order to kill Tutsis".<sup>242</sup> It further consistently referred to the crimes being committed by "soldiers of the Rwandan Army and their *Interahamwe* accomplices"<sup>243</sup> and stated that the crimes were committed by "persons under either the *de jure* authority of Augustin Bizimungu or the *de facto* command of his subordinates".<sup>244</sup> The Appeals Chamber considers that, the Prosecution Pre-Trial Brief and the Prosecution's opening statement provided further clarity to the allegation in the Indictment that Bizimungu exercised *de facto* authority and effective control over the *Interahamwe*.

85. Additionally, the Appeals Chamber considers that Bizimungu's defence at trial confirms that he was adequately and timely informed that it was alleged that he had authority and effective control over the *Interahamwe*. In this regard, the Appeals Chamber notes that, in his Pre-Defence Brief, Bizimungu denied having a relationship with the *Interahamwe*, being responsible for their crimes, and training and arming them.<sup>245</sup> Moreover, in his closing arguments, counsel for Bizimungu stated that:

[t]he Prosecutor alleged, not only in his closing brief but throughout his case and even today in the course of his closing arguments, that Bizimungu exercised control over the militia. You are well aware of Bizimungu's position in this trial, which stated that, on the contrary, he did not exercise such control, that the militia did not in any way heed his orders.<sup>246</sup>

<sup>240</sup> Indictment, para. 27.

<sup>241</sup> T. 20 September 2004 p. 52.

<sup>242</sup> Prosecution Pre-Trial Brief, para. 331.

<sup>243</sup> Prosecution Pre-Trial Brief, paras. 58, 61. *See also* Prosecution Pre-Trial Brief, para. 64, *quoting* "soldiers of the Rwandan Army and *Interahamwe*".

<sup>244</sup> Prosecution Pre-Trial Brief, para. 58*bis*.

<sup>245</sup> Bizimungu Pre-Defence Brief, paras. 132, 135, 149, 160, 161.

<sup>246</sup> T. 24 June 2009 p. 57.

T M

Counsel for Bizimungu further referred to allegations in the Indictment concerning the *Interahamwe*<sup>247</sup> and argued at length that Bizimungu did not exercise authority and effective control over the *Interahamwe*.<sup>248</sup>

86. Accordingly, the Appeals Chamber finds that Bizimungu has failed to demonstrate that the Indictment failed to plead his superior position and effective control over soldiers of the Rwandan army and the *Interahamwe*.

(b) Criminal Acts of Bizimungu's Subordinates

87. Bizimungu submits that the Indictment does not provide sufficient information about the criminal acts for which he was held responsible and that neither the Prosecution Pre-Trial Brief nor the opening statement remedied this defect.<sup>249</sup> Specifically, he argues that the events at the *École des sciences infirmières de Kabgayi* (ESI) were not pleaded in the Indictment.<sup>250</sup> Bizimungu asserts that the Trial Chamber acknowledged this but erroneously found that the defect had been cured by the Prosecution during Ndindiliyimana's initial appearance on 27 April 2000, at which he was not present, and by the summary of Prosecution Witness EZ's expected testimony annexed to the Prosecution Pre-Trial Brief.<sup>251</sup> He claims that in the operative Indictment, as well as at his initial appearance on 30 April 2004 and in the Prosecution Pre-Trial Brief, reference was made to the Kabgayi primary school rather than the *École des sciences infirmières de Kabgayi* (ESI).<sup>252</sup> Accordingly, he contends that the Trial Chamber erred in finding that the defect in the Indictment had been cured.<sup>253</sup> Bizimungu also argues that the evidence adduced in support of this event was not pleaded in the Indictment.<sup>254</sup>

88. The Prosecution responds that Bizimungu makes only general unsupported assertions and that the Indictment adequately pleads the crimes for which he was convicted, in particular those committed at the *École des Sciences Infirmières de Kabgayi* (ESI).<sup>255</sup> It argues that, while the Indictment only refers to the Kabgayi primary school, the previous indictment, with which Bizimungu was served upon his arrest in August 2002, clearly stated that the Kabgayi primary school was previously known as the *École des sciences infirmières de Kabgayi* (ESI).<sup>256</sup>

<sup>247</sup> T. 24 June 2009 p. 62.

<sup>248</sup> T. 24 June 2009 pp. 57-62.

<sup>249</sup> Bizimungu Notice of Appeal, para. 99; Bizimungu Appeal Brief, para. 264.

<sup>250</sup> Bizimungu Notice of Appeal, para. 99; Bizimungu Appeal Brief, para. 247.

<sup>251</sup> Bizimungu Notice of Appeal, para. 99; Bizimungu Appeal Brief, para. 247. *See also* AT. 7 May 2013 p. 69.

<sup>252</sup> Bizimungu Notice of Appeal, para. 99; Bizimungu Appeal Brief, paras. 247-249. *See also* AT. 7 May 2013 p. 69.

<sup>253</sup> Bizimungu Appeal Brief, para. 249.

<sup>254</sup> Bizimungu Appeal Brief, para. 471.

<sup>255</sup> Prosecution Response Brief (Bizimungu), paras. 93, 94, 103-105.

<sup>256</sup> Prosecution Response Brief (Bizimungu), para. 94.

T M

Furthermore, according to the Prosecution, Bizimungu fully understood that the allegations related to the *École des sciences infirmières de Kabgayi* (ESI) and conducted his defence on that basis.<sup>257</sup>

89. With respect to Bizimungu's general contention that the Indictment does not provide sufficient information about the criminal acts for which he was convicted, the Appeals Chamber considers that Bizimungu fails to provide any support for his broad assertion or to demonstrate any defect in the Indictment. Accordingly, Bizimungu's general argument is dismissed.

90. Turning to Bizimungu's submissions regarding the events at the *École des sciences infirmières de Kabgayi* (ESI), the Appeals Chamber notes that paragraph 86 of the Indictment alleges, in relation to the count of murder as a crime against humanity, that:

Between April and June 1994, several persons sought refuge at Kabgayi primary school in Gitarama *préfecture*. Throughout this whole period, soldiers from the Rwandan Army and *Interahamwe* abducted and killed young boys who had sought refuge at that location.

Similarly, the allegations in relation to the counts of genocide and rape as a crime against humanity referred to crimes committed at the Kabgayi primary school but made no reference to the *École des sciences infirmières de Kabgayi* (ESI).<sup>258</sup>

91. In the Trial Judgement, the Trial Chamber noted that paragraph 69 of the Indictment refers to the Kabgayi primary school, rather than to the *École des sciences infirmières de Kabgayi* (ESI).<sup>259</sup> However, it concluded that "[h]aving carefully reviewed the Indictment, the Pre-Trial Brief and the transcripts of proceedings the [Trial] Chamber finds that Bizimungu had sufficient notice that the Prosecution would present evidence about killings and rapes committed by soldiers at ESI in Kabgayi".<sup>260</sup> In so finding, the Trial Chamber recalled that during the initial appearance of Nindiliyimana on 27 April 2000, the Prosecution had stated that "[b]etween April and June 1994, many people sought refuge in Kabgayi, the Gitarama *préfecture*. Most of the refugees were concentrated in Kabgayi Primary School, known previously as Kabgayi Nursing School, in short ESI, which is in fact adjacent to Kabgayi Nursing School".<sup>261</sup> It further noted that Witness EZ testified about events at the Kabgayi nursing school or the *École des sciences infirmières de Kabgayi* (ESI), but did not refer to crimes committed at the Kabgayi primary school and that the

<sup>257</sup> Prosecution Response Brief (Bizimungu), para. 94.

<sup>258</sup> Indictment, paras. 69 ("at Kabgayi Primary School, from April to June 1994"), 113 ("Between April and June 1994, several persons sought refuge at Kabgayi primary school in Gitarama *préfecture*. Throughout that period, soldiers from the Rwandan Army and *Interahamwe* militiamen selected and abducted Tutsi women and young girls that they took to the rooms reserved for injured soldiers or in nearby places and woods where they raped them").

<sup>259</sup> Trial Judgement, para. 1043.

<sup>260</sup> Trial Judgement, para. 1043.

<sup>261</sup> Trial Judgement, para. 1041, referring to T. 27 April 2000 p. 71.

T14



Prosecution Pre-Trial Brief referred to crimes at ESI in Kabgayi.<sup>262</sup> The Trial Chamber considered that the events about which Witness EZ testified related to the crimes at the Kabgayi primary school alleged at paragraphs 68 and 69 of the Indictment.<sup>263</sup> It further noted that Bizimungu did not object to Witness EZ's evidence and cross-examined Witness EZ extensively.<sup>264</sup>

92. The Appeals Chamber considers that Bizimungu has failed to demonstrate that the Trial Chamber erred in finding that he had sufficient notice that he was charged with killings and rapes at the *École des sciences infirmières de Kabgayi* (ESI). The Trial Chamber noted the discrepancy between the pleading of the incidents at the Kabgayi primary school and the evidence of the events at the *École des sciences infirmières de Kabgayi* (ESI) but reasonably considered that any defect in this respect had been cured.<sup>265</sup> As the Trial Chamber considered, the operative indictment at the time of Bizimungu's arrest, with which he was served, and which was read out to him at his initial appearance clarified that the allegations relating to the Kabgayi primary school were the same as those at the *École des sciences infirmières de Kabgayi* (ESI).<sup>266</sup> Additionally, as the Trial Judgement also noted, the summary of Witness EZ's expected testimony annexed to the Prosecution Pre-Trial Brief indicated that Witness EZ was expected to testify about events at the *École des sciences infirmières de Kabgayi* (ESI).<sup>267</sup> Similarly, in the Supporting Materials, a summary of Witness EZ's expected testimony listed under paragraph 5.57 of the indictment relating to the Kabgayi primary school referred to "Kabgayi (ESI)" and made no reference to the primary school.<sup>268</sup>

93. Furthermore, as the Trial Chamber reasonably considered, Bizimungu did not object to the introduction of Witness EZ's evidence and cross-examined her in relation to the events at the ESI complex.<sup>269</sup> In this regard, the Appeals Chamber notes that Bizimungu's defence counsel referred to the location Witness EZ testified about as "ESI", and questioned Witness EZ about aspects of the location but did not query the relationship between "ESI" and the primary school, despite Witness EZ having referred to the primary school at one point in her testimony, while referring to "ESI" or the nursing school in the majority of her testimony.<sup>270</sup>

<sup>262</sup> Trial Judgement, para. 1042.

<sup>263</sup> Trial Judgement, para. 1042.

<sup>264</sup> Trial Judgement, para. 1042.

<sup>265</sup> Trial Judgement, paras. 1041-1043.

<sup>266</sup> *The Prosecutor v. Augustin Bizimungu*, Case No. ICTR-2000-56-I, Indictment, 31 January 2000, para. 5.57 ("Most of the refugees were concentrated in Kabgayi Primary School, known previously as Kabgayi Nursing School, which in fact is adjacent to Kabgayi Nursing School"); T. 21 August 2002 pp. 3, 44.

<sup>267</sup> Prosecution Pre-Trial Brief, Annexure IV, p. 107.

<sup>268</sup> *The Prosecutor v. Augustin Bizimungu et al.*, Case No. ICTR-2000-56-I, Supporting Materials, 24 January 2000, p. 130 (confidential).

<sup>269</sup> See Trial Judgement, para. 1042.

<sup>270</sup> See Witness EZ, T. 5 October 2005 pp. 14, 60; T. 6 October 2005 pp. 25, 26, 28, 36.

T 14

94. Finally, the Appeals Chamber dismisses Bizimungu's argument that the Indictment does not plead the evidence relied upon in respect of the events at the *École des sciences infirmières de Kabgayi* (ESI). In this respect the Appeals Chamber recalls that the Prosecution must state the material facts underpinning the charges in the indictment, but not the evidence by which such facts are to be proven.<sup>271</sup>

95. In light of the foregoing, the Appeals Chamber finds that Bizimungu has failed to demonstrate that the Indictment does not provide sufficient information about the criminal acts underpinning the charges or that the Trial Chamber erred in finding that he had sufficient notice of the allegations relating to the crimes committed at the *École des sciences infirmières de Kabgayi* (ESI). These arguments are therefore dismissed.

(c) Knowledge of his Subordinates' Crimes

96. The Trial Chamber found that Bizimungu knew or had reason to know that his subordinates had committed or were about to commit the crimes for which he was convicted.<sup>272</sup> The Trial Chamber considered that numerous indicia supported the inference that Bizimungu must have known of these crimes as they were organized and systematic.<sup>273</sup> These indicia included *inter alia*: the *modus operandi* of the commission of the crimes; the wide-scale and frequency of the crimes; the number of people killed; and the fact that the crimes were committed against Tutsi civilians who had gathered in public locations which were not geographically remote.<sup>274</sup> The Trial Chamber further relied upon Bizimungu's testimony that he received situation reports from his units on a daily basis as well as exhibits indicating that he had meetings and conversations with representatives of the United States government and the United Nations.<sup>275</sup>

97. Bizimungu submits that the Indictment did not inform him of the material facts showing that he knew or had reason to know that crimes were about to be or had been committed.<sup>276</sup> He emphasizes that merely referring to the intelligence resources at his disposal and mentioning that he knew or had reason to know that his subordinates were about to commit crimes was too vague and general to provide him with notice.<sup>277</sup> Additionally, Bizimungu asserts that the Indictment did not plead the material fact of his telephone conversation on 13 May 1994 with Prudence Bushnell, the

<sup>271</sup> *Kanyarukiga* Appeal Judgement, para. 73; *Nahimana et al.* Appeal Judgement, para. 322.

<sup>272</sup> Trial Judgement, para. 1987. *See also* Trial Judgement, para. 1992.

<sup>273</sup> Trial Judgement, para. 1988.

<sup>274</sup> Trial Judgement, para. 1988. *See also* Trial Judgement, paras. 1990, 1991.

<sup>275</sup> Trial Judgement, paras. 1989, 1993. *See also* Trial Judgement, paras. 1990, 1991.

<sup>276</sup> Bizimungu Notice of Appeal, para. 100; Bizimungu Appeal Brief, paras. 265, 339, 342. *See also* Bizimungu Appeal Brief, para. 459.

<sup>277</sup> Bizimungu Notice of Appeal, para. 100; Bizimungu Appeal Brief, para. 265, quoting *Blaškić* Appeal Judgement, para. 228. *See also* Bizimungu Reply Brief, paras. 66, 67.

T 14

then-United States Deputy Assistant Secretary of State for African Affairs.<sup>278</sup> He adds that he was not aware of Prosecution Exhibit 191, which is a record of that conversation, until his cross-examination.<sup>279</sup> According to Bizimungu, neither the Prosecution Pre-Trial Brief nor the Prosecution's opening statement remedied these defects.<sup>280</sup>

98. The Prosecution responds that the Indictment adequately pleads the basis on which Bizimungu had knowledge of the crimes.<sup>281</sup> It adds that the Prosecution Pre-Trial Brief reinforced the notice provided by the Indictment.<sup>282</sup>

99. The Appeals Chamber is satisfied that, in respect of each count, the Indictment pleads that Bizimungu "knew or had reason to know" of the crimes of his subordinates.<sup>283</sup> While this formulation merely repeats language in Article 6(3) of the Statute and was therefore by itself insufficient to provide proper notice to Bizimungu,<sup>284</sup> the Appeals Chamber recalls 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."<sup>285</sup> Under the count of genocide, the Indictment alleges that he knew or had reason to know "in view of the intelligence resources at his disposal".<sup>286</sup> Furthermore, the Indictment refers to a request from the United States Department of State that Bizimungu put an end to the killings.<sup>287</sup> The Indictment also refers to widespread attacks and states that the attacks occurred in public locations where Tutsi civilians had taken refuge.<sup>288</sup> The Appeals Chamber considers that this information provided Bizimungu with sufficient notice regarding the basis on which he allegedly knew or had reason to know of his subordinates' crimes.

100. The Appeals Chamber also finds that Bizimungu has failed to demonstrate that his conversation with Bushnell, which the Trial Chamber relied upon in support of the inference that he knew of crimes in general, and of the situation at the Cyangugu stadium in particular, was not pleaded. In this regard, it recalls that paragraph 60 of the Indictment alleges that "[i]n May 1994, when the US State Department approached him, asking that he put an end to the killings, Augustin Bizimungu refused to take any action whatsoever". Furthermore, the Appeals Chamber finds no error in the Prosecution not having pleaded Prosecution Exhibit 191. In this respect, the Appeals

<sup>278</sup> Bizimungu Appeal Brief, paras. 442, 443.

<sup>279</sup> Bizimungu Appeal Brief, paras. 443, 444.

<sup>280</sup> Bizimungu Notice of Appeal, para. 101; Bizimungu Appeal Brief, para. 266. *See also* Bizimungu Reply Brief, paras. 65, 66.

<sup>281</sup> Prosecution Response Brief (Bizimungu), para. 106. *See also* Prosecution Response Brief (Bizimungu), paras. 107-110.

<sup>282</sup> Prosecution Response Brief (Bizimungu), para. 111.

<sup>283</sup> Indictment, paras. 61, 78, 109, 110, 118, 119.

<sup>284</sup> *Cf. Ntawukulilyayo* Appeal Judgement, para. 188; *Rukundo* Appeal Judgement, para. 30.

<sup>285</sup> *Mugenzi and Mugiraneza* Appeal Judgement, para. 71; *Ntabakuze* Appeal Judgement, para. 65.

<sup>286</sup> Indictment, para. 70. *See also* Prosecution Pre-Trial Brief, paras. 55, 58*ter*, 62, 66.

<sup>287</sup> Indictment, para. 60.

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Chamber recalls that the Prosecution must state the material facts underpinning the charges in the indictment, but not the evidence by which such facts are to be proven.<sup>289</sup> Additionally, Bizimungu fails to substantiate his assertion that the exhibit was not disclosed to him until cross-examination as the references he provides do not substantiate this claim.<sup>290</sup>

101. Accordingly, the Appeals Chamber dismisses Bizimungu's arguments concerning the pleading of his knowledge of his subordinates' crimes.

(d) Failure to Prevent or Punish his Subordinates

102. The Trial Chamber found that Bizimungu failed to prevent the crimes for which he was convicted or to punish his subordinates for their roles in these crimes.<sup>291</sup>

103. Bizimungu submits that the Indictment does not state how it could be inferred from his conduct that he failed to take the necessary and reasonable measures to prevent the crimes or punish his subordinates as it merely reproduced the wording of Article 6(3) of the Statute.<sup>292</sup> He asserts that neither the Prosecution Pre-Trial Brief nor its opening statement remedied this defect.<sup>293</sup> The Prosecution responds that Bizimungu's submissions lack merit.<sup>294</sup>

104. 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.<sup>295</sup> 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.<sup>296</sup> The Appeals Chamber finds the Indictment sufficient in this respect, particularly in light of the Indictment's further qualification that Bizimungu did not "use his statutory powers to punish the perpetrators or to institute proceedings against them".<sup>297</sup> Accordingly, this argument is dismissed.

<sup>288</sup> See Indictment, paras. 78, 85-89, 91, 109, 110, 113-117.

<sup>289</sup> *Kanyarukiga* Appeal Judgement, para. 73; *Nahimana et al.* Appeal Judgement, para. 322.

<sup>290</sup> Bizimungu Appeal Brief, paras. 443 (*referring to* Bizimungu, T. 12 December 2007 pp. 57, 58), 444 (*referring to The Prosecutor v. Augustin Bizimungu et al.*, Case No. ICTR-97-21-T, Prosecutor's Brief in Response to the Preliminary Motion Filed by Augustin Bizimungu's Counsel Pursuant to Rules 50(C) and 72 of the Rules of Procedure and Evidence, filed in French on 24 June 2004 and in English on 22 September 2004).

<sup>291</sup> Trial Judgement, para. 1994.

<sup>292</sup> Bizimungu Appeal Brief, para. 267. See also Bizimungu Reply Brief, paras. 70, 71.

<sup>293</sup> Bizimungu Appeal Brief, paras. 268, 269.

<sup>294</sup> Prosecution Response Brief (Bizimungu), paras. 113, 114.

<sup>295</sup> *Ntabakuze* Appeal Judgement, para. 123; *Renzaho* Appeal Judgement, paras. 54, 118; *Nahimana et al.* Appeal Judgement, para. 323.

<sup>296</sup> See *Ntabakuze* Appeal Judgement, para. 123.

<sup>297</sup> Indictment, para. 70. See also Indictment, paras. 59, 61, 78, 109, 110, 118, 119.

T/14

(e) Conclusion

105. In light of the foregoing, the Appeals Chamber finds that Bizimungu has failed to demonstrate that the Indictment does not adequately plead his superior responsibility for the crimes for which he was convicted.

2. Authority and Effective Control Over Soldiers and *Interahamwe*

106. The Trial Chamber found that the perpetrators of the criminal acts underlying Bizimungu's responsibility as a superior were soldiers of the Rwandan army and members of the *Interahamwe*.<sup>298</sup> It was also satisfied that Bizimungu exercised authority over soldiers and *Interahamwe* during the period when he served as the Chief of Staff of the Rwandan army.<sup>299</sup>

107. The Appeals Chamber considers in turn Bizimungu's arguments that the Trial Chamber erred in finding that a superior-subordinate relationship existed between him and soldiers of the Rwandan army and the *Interahamwe* who were the perpetrators of the criminal acts, and that he exercised effective control over them.

(a) Authority and Effective Control Over Soldiers of the Rwandan Army

108. The Trial Chamber found that, while Bizimungu was the Chief of Staff of the Rwandan army, from 19 April to mid-July 1994, he exercised *de jure* authority over the soldiers of the Rwandan army who were legally considered to be his subordinates.<sup>300</sup> Additionally, it found that Bizimungu exercised *de facto* authority over soldiers of the Rwandan army during this period.<sup>301</sup> The Trial Chamber concluded that soldiers of the Rwandan army under his effective control were responsible for the crimes.<sup>302</sup>

109. In finding that Bizimungu had *de facto* authority over soldiers of the Rwandan army, the Trial Chamber relied on a number of factors. These included the findings that Bizimungu: was a well-trained officer with substantial experience as a commander;<sup>303</sup> was held in high regard by soldiers;<sup>304</sup> represented the interim government in meetings with international representatives after the resumption of hostilities;<sup>305</sup> testified that he had the power to negotiate a ceasefire with the

<sup>298</sup> Trial Judgement, para. 1986. *See also* Trial Judgement, para. 1984.

<sup>299</sup> Trial Judgement, para. 1983.

<sup>300</sup> Trial Judgement, para. 1966.

<sup>301</sup> Trial Judgement, para. 1967. *See also* Trial Judgement, paras. 1977, 1978.

<sup>302</sup> Trial Judgement, para. 1984. *See also* Trial Judgement, para. 1986.

<sup>303</sup> Trial Judgement, paras. 1968, 1969, 1971.

<sup>304</sup> Trial Judgement, para. 1970.

<sup>305</sup> Trial Judgement, para. 1972.

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RPF;<sup>306</sup> was sought out by important people to assist in ending the massacres and in evacuating or exchanging refugees;<sup>307</sup> led combat operations; and was deferred to by the Minister of Defence in these operations.<sup>308</sup> On the basis of these indicia, the Trial Chamber concluded that Bizimungu had the material ability to prevent the Rwandan army soldiers from committing, or to punish them for having committed, the crimes forming the basis of his convictions.<sup>309</sup>

110. In so finding, the Trial Chamber did not find persuasive Bizimungu's submissions denying that civilians were massacred during his tenure as Chief of Staff of the Rwandan army and asserting that the crimes were not committed by soldiers under his command but rather by assailants purporting to be soldiers of the Rwandan army by dressing in uniforms.<sup>310</sup> It found that Bizimungu had adduced no evidence in support of his contentions seeking to absolve his subordinates.<sup>311</sup>

111. Bizimungu submits that the Trial Chamber relied on speculation and a misinterpretation of circumstantial evidence to conclude that soldiers were under his effective control.<sup>312</sup> In his view, the evidence demonstrates only that he had general influence over members of the Rwandan army which is insufficient to establish effective control.<sup>313</sup> He argues that very high-ranking officers do not have effective control over troops because their orders are channelled through a long chain of command.<sup>314</sup> In particular, Bizimungu claims that it is a customary rule of "a large number of armies in the world" that an accused cannot be held responsible for a crime committed by a subordinate who is more than two levels down the chain of command.<sup>315</sup> Bizimungu also asserts that the Trial Chamber failed to consider evidence of the chain of command or to identify the units of his alleged subordinates and their rank in relation to him.<sup>316</sup>

112. According to Bizimungu, the Trial Chamber also erred in its assessment of the indicators of his effective control.<sup>317</sup> He argues that the Trial Chamber erred in relying on his good reputation among the soldiers since the evidence it relied upon related to the period prior to his assumption of the position of Chief of Staff, whereas he had testified that after 6 April 1994 chaos had "swept away respect".<sup>318</sup> With respect to his power to negotiate a ceasefire, Bizimungu contends that the RPF rejected any negotiation with the government and instead negotiated directly with the

<sup>306</sup> Trial Judgement, para. 1973.

<sup>307</sup> Trial Judgement, paras. 1974, 1975.

<sup>308</sup> Trial Judgement, para. 1976.

<sup>309</sup> Trial Judgement, para. 1983.

<sup>310</sup> Trial Judgement, paras. 1985, 1986.

<sup>311</sup> Trial Judgement, para. 1986.

<sup>312</sup> Bizimungu Appeal Brief, para. 306. *See also* Bizimungu Appeal Brief, para. 290.

<sup>313</sup> Bizimungu Appeal Brief, para. 306. *See also* Bizimungu Appeal Brief, para. 290.

<sup>314</sup> Bizimungu Appeal Brief, paras. 282, 288, 289. *See also* Bizimungu Reply Brief, para. 73; AT. 7 May 2013 p. 58.

<sup>315</sup> Bizimungu Appeal Brief, paras. 289, 304.

<sup>316</sup> Bizimungu Appeal Brief, paras. 283-287. *See also* Bizimungu Reply Brief, para. 74.

<sup>317</sup> Bizimungu Notice of Appeal, paras. 110, 111; Bizimungu Appeal Brief, paras. 291-305.

T M

Rwandan army and that he ultimately did not participate in the negotiations.<sup>319</sup> Bizimungu also claims that the facts that he represented the interim government in meetings with foreign representatives and facilitated the evacuation of refugees do not prove that he had effective control over the military.<sup>320</sup> Furthermore, he submits that the Trial Chamber erred in relying on his leading role in combat operations to find that he had effective control because issuing orders is not synonymous with effective control over low-ranking officers.<sup>321</sup>

113. Bizimungu further challenges the Trial Chamber's finding that there was a superior-subordinate relationship between him and the perpetrators of the crimes.<sup>322</sup> He argues that the Trial Chamber erred in finding that he had effective control over all perpetrators wearing military uniforms.<sup>323</sup> He emphasizes that there was evidence that RPF soldiers would switch their uniforms for those of the Rwandan army, that there were gangs who wore Rwandan army uniforms, that there were desertions from the army, and that some Prosecution witnesses did not make a distinction between soldiers, gendarmes, and communal policemen.<sup>324</sup> Furthermore, according to Bizimungu, the Trial Chamber erroneously inferred the existence of a superior-subordinate relationship based on his supposed denial that civilians were killed while he served as the Chief of Staff and his testimony that gangs of criminals had taken advantage of government structures to commit crimes, as well as from the fact that RPF soldiers wore Rwandan army uniforms.<sup>325</sup> He contends that the Trial Chamber reversed the burden of proof by finding that he had not adduced any evidence in support of his arguments at trial that no civilians were massacred while he served as Chief of Staff of the Rwandan army and that, to the extent that crimes had been committed, they were not committed by his subordinates.<sup>326</sup>

114. The Prosecution responds that the Trial Chamber correctly found that Bizimungu had effective control over the soldiers who committed the crimes.<sup>327</sup> It asserts that Bizimungu's argument that his authority was limited to senior officers fails since superior responsibility does not

<sup>318</sup> Bizimungu Appeal Brief, para. 293. *See also* AT. 7 May 2013 p. 58.

<sup>319</sup> Bizimungu Appeal Brief, para. 296.

<sup>320</sup> Bizimungu Appeal Brief, paras. 299-301.

<sup>321</sup> Bizimungu Appeal Brief, paras. 302-305.

<sup>322</sup> Bizimungu Appeal Brief, para. 335.

<sup>323</sup> Bizimungu Appeal Brief, para. 331.

<sup>324</sup> Bizimungu Notice of Appeal, para. 146; Bizimungu Appeal Brief, para. 331, *referring to* Witnesses EZ, DBE, and TN. *See also* AT. 7 May 2013 pp. 61, 62.

<sup>325</sup> Bizimungu Notice of Appeal, paras. 139-142; Bizimungu Appeal Brief, paras. 330, 331 (*referring to* Witness KF, T. 17 January 2006 p. 76 (French), Ndindiliyimana, T. 19 June 2008 p. 22 (French), Witness Alpha-1, T. 1 July 2008 p. 77 (French), Witness AOG, T. 2 March 2006 p. 15 (French), Witness GLJ, T. 15 June 2005 p. 3), 332.

<sup>326</sup> Bizimungu Notice of Appeal, paras. 144, 145; Bizimungu Appeal Brief, paras. 333, 334. *See also* AT. 8 May 2013 pp. 60, 61.

<sup>327</sup> Prosecution Response Brief (Bizimungu), paras. 120, 128.

T M

require a direct or individualized relationship.<sup>328</sup> According to the Prosecution, the Trial Chamber reasonably relied on Bizimungu's background and reputation as indicators of effective control.<sup>329</sup>

115. With respect to Bizimungu's argument that he was too remote from low-ranking soldiers to exercise effective control over them, the Appeals Chamber recalls that whether effective control descends from the superior to the culpable subordinate through intermediary subordinates is immaterial as a matter of law.<sup>330</sup> Instead, what matters is whether the superior has the material ability to prevent or punish the subordinate's commission of a crime.<sup>331</sup> The question of whether the superior indeed possessed effective control is a matter of evidence.<sup>332</sup> As support for his assertion that an accused cannot be held responsible for the crimes of a subordinate who is more than two levels down the chain of command, Bizimungu refers to the *Strugar* Trial Judgement;<sup>333</sup> however, in that case, the same argument was raised but rejected by the Trial Chamber.<sup>334</sup> Furthermore, Pavle Strugar was ultimately convicted as a superior for the crimes perpetrated by subordinates who were more than two levels down the chain of command.<sup>335</sup> His conviction was upheld on appeal.<sup>336</sup>

116. Similarly, the Appeals Chamber recalls that in a number of cases it has affirmed findings of superior responsibility for persons accused of crimes committed by perpetrators who were not their immediate subordinates.<sup>337</sup> Bizimungu's reference to United States military field manuals<sup>338</sup> is insufficient to call this into question. Accordingly, the mere fact that Bizimungu was a high-ranking official did not preclude him from exercising effective control over soldiers. In this regard, the Appeals Chamber recalls that the Trial Chamber did not rely solely on Bizimungu's position as the Chief of Staff of the Rwandan army to find that he had effective control over soldiers of the Rwandan army, but relied on a number of factors demonstrating his *de facto* authority as well.<sup>339</sup>

117. Furthermore, the Appeals Chamber notes that, contrary to Bizimungu's submission, the Trial Chamber considered evidence of the structure of the Rwandan army and found that Bizimungu was legally authorized to exercise command over all soldiers of the Rwandan army.<sup>340</sup>

<sup>328</sup> Prosecution Response Brief (Bizimungu), para. 123. See also AT. 8 May 2013 p. 10.

<sup>329</sup> Prosecution Response Brief (Bizimungu), para. 124. See also AT. 8 May 2013 pp. 11, 12.

<sup>330</sup> See *Orić* Appeal Judgement, para. 20; *Blaškić* Appeal Judgement, para. 69.

<sup>331</sup> *Bagosora and Nsengiyumva* Appeal Judgement, para. 450; *Strugar* Appeal Judgement, para. 254; *Blaškić* Appeal Judgement, para. 69. See also *Orić* Appeal Judgement, para. 20.

<sup>332</sup> See *Orić* Appeal Judgement, para. 20; *Blaškić* Appeal Judgement, para. 69.

<sup>333</sup> Bizimungu Appeal Brief, fn. 402, referring to *Strugar* Trial Judgement, para. 361.

<sup>334</sup> *Strugar* Trial Judgement, paras. 361, 366.

<sup>335</sup> See *Strugar* Trial Judgement, paras. 391, 414, 446.

<sup>336</sup> *Strugar* Appeal Judgement, p. 146.

<sup>337</sup> See, e.g., *Bagosora and Nsengiyumva* Appeal Judgement, para. 742 and *Bagosora et al.* Trial Judgement, paras. 2135, 2258; *Renzaho* Appeal Judgement, para. 622 and *Renzaho* Trial Judgement, paras. 753, 789.

<sup>338</sup> Bizimungu Appeal Brief, fn. 403.

<sup>339</sup> See Trial Judgement, paras. 1967-1977.

<sup>340</sup> Trial Judgement, paras. 214-221, 1966.

7/14



In these circumstances, the Appeals Chamber is not convinced that the Trial Chamber erred by not identifying the specific units from which the soldiers came.

118. Turning to the indicators the Trial Chamber relied upon to find that Bizimungu exercised effective control over soldiers of the Rwandan army, the Appeals Chamber is not convinced that the Trial Chamber erred in taking into account that Bizimungu was held in high regard among soldiers because he was considered to be a good commander.<sup>341</sup> The Trial Chamber did not specifically address Bizimungu's testimony that in the context of "the situation in 1994, [...] the chaos had swept away respect".<sup>342</sup> The Trial Chamber did, however, rely on the evidence of numerous Defence witnesses who testified that he was considered to be a good commander,<sup>343</sup> as well as an excerpt from the book of James Gasana, the former Rwandan Minister of Defence, referring to him as a "highly respected officer, who distinguished himself at the front and who has the respect of the troops and the population".<sup>344</sup> In light of this evidence, the Appeals Chamber considers that it was reasonable for the Trial Chamber to have relied on Bizimungu's good reputation as a factor supporting its finding of effective control.

119. Bizimungu further fails to demonstrate any error in the Trial Chamber's consideration of his involvement in ceasefire negotiations with the RPF as an indicator of his *de facto* authority. The Trial Judgement did not address all the details of Bizimungu's testimony regarding how representatives of the Rwandan army came to be designated as the negotiators with the RPF rather than members of the interim government.<sup>345</sup> However, it correctly reflected Bizimungu's testimony that he participated in consultations with the Ministry of Defence to appoint officers of the Rwandan army to engage in ceasefire negotiations with the RPF.<sup>346</sup> It also accurately recalled his testimony that "[w]e had the full power to negotiate on the subject of the ceasefire" with the RPF.<sup>347</sup> Furthermore, the Appeals Chamber does not consider that the fact that Bizimungu ultimately did not participate in the negotiations undermines the role he played in designating the officers who participated in the negotiations or the Trial Chamber's finding that this supported its conclusion that he had effective control.

120. Similarly, the Appeals Chamber considers that the facts that Bizimungu represented the interim government in meetings with foreign representatives and that important personalities sought his assistance in the evacuation of refugees do not, on their own, demonstrate that he exercised

<sup>341</sup> See Trial Judgement, para. 1970.

<sup>342</sup> Bizimungu, T. 13 December 2007 p. 59.

<sup>343</sup> Trial Judgement, para. 1970, referring to Witnesses Gatambiye, DB15-6, DB8-19, and DE4-33.

<sup>344</sup> Trial Judgement, para. 1970, referring to T. 5 December 2007 pp. 51, 52.

<sup>345</sup> Trial Judgement, para. 1973.

<sup>346</sup> Bizimungu, T. 7 December 2007 p. 9. See Trial Judgement, para. 1973.

<sup>347</sup> See Trial Judgement, para. 1973; Bizimungu, T. 7 December 2007 p. 10.

T M

effective control over the military. However, it was reasonable for the Trial Chamber to find that these factors were indicative of the fact that he played a sufficiently prominent role in the Rwandan army to be trusted with high-level contacts and to be viewed as a representative and decision-maker of the Rwandan army.<sup>348</sup> Beyond merely disagreeing with these findings, Bizimungu does not demonstrate that no reasonable trier of fact could have relied on these factors, in conjunction with others, in support of the finding of his effective control.

121. Finally, the Appeals Chamber turns to Bizimungu's assertion that the Trial Chamber erred in relying on his leading role in combat operations to find that he had effective control because issuing orders is not synonymous with effective control over low-ranking officers. The Appeals Chamber recalls that a superior's authority to issue orders does not automatically establish that he had effective control over his subordinates, but is one of the indicators to be taken into account when establishing effective control.<sup>349</sup> Such orders have to be carefully assessed in light of the rest of the evidence in order to ascertain the degree of control over the perpetrators.<sup>350</sup>

122. In finding that Bizimungu took a leading role in combat operations, the Trial Chamber considered evidence that the Minister of Defence deferred to his recommendations.<sup>351</sup> In particular, the Trial Chamber noted that the Minister of Defence suspended a number of senior officers whom Bizimungu considered to be incompetent as they had failed to stabilize the situations under their authority and had failed to obey Bizimungu's operational instructions.<sup>352</sup> Similarly, it considered Bizimungu's evidence that, following reports that soldiers in Bugesera Sub-Prefecture had committed unlawful acts, he proposed that the officer in command be suspended and that the officer was in fact subsequently replaced.<sup>353</sup> The Trial Chamber reasonably considered that the evidence that Bizimungu could remove officers who were not performing as required indicated that Bizimungu had the ability to prevent and punish crimes.<sup>354</sup> Accordingly, the Appeals Chamber finds that the Trial Chamber's reliance on Bizimungu's leading role in combat operations as an indicator of his effective control was not unreasonable.

123. The Appeals Chamber is likewise not convinced by Bizimungu's argument that the Trial Chamber erred in finding that all those wearing uniforms were his subordinates because it disregarded evidence of RPF soldiers and *Interahamwe* wearing army uniforms. While the Trial Chamber did not specifically refer to the evidence cited by Bizimungu, it noted other evidence to

<sup>348</sup> Cf. *Bagosora and Nsengiyumva* Appeal Judgement, para. 452.

<sup>349</sup> *Strugar* Appeal Judgement, para. 253; *Halilović* Appeal Judgement, paras. 68, 70, 139.

<sup>350</sup> *Strugar* Appeal Judgement, para. 253; *Halilović* Appeal Judgement, para. 204.

<sup>351</sup> Trial Judgement, para. 1976.

<sup>352</sup> Trial Judgement, para. 1976. See also Trial Judgement, para. 1998.

<sup>353</sup> Trial Judgement, para. 1999.

<sup>354</sup> Trial Judgement, paras. 1998, 1999.

the effect that RPF soldiers and *Interahamwe* also wore military uniforms at times.<sup>355</sup> It was therefore aware of the fact that people other than Rwandan army soldiers occasionally wore military uniforms but nonetheless considered that this did not undermine its assessment.<sup>356</sup> Bizimungu has not demonstrated that no reasonable trier of fact could have so found.

124. In support of his argument that some Prosecution witnesses did not make a distinction between soldiers, gendarmes, and communal policemen, Bizimungu points to the evidence of Prosecution Witnesses EZ, DBE, and TN.<sup>357</sup> The Appeals Chamber notes that the Trial Chamber did not rely upon the evidence of Witness TN. With respect to Witness DBE, the Trial Chamber noted the basis on which she identified the perpetrators at TRAFIPRO as soldiers and her description of their uniforms.<sup>358</sup> Bizimungu does not challenge this evidence, but merely refers to a statement made by the Prosecution at trial rather than the witness's own evidence.<sup>359</sup> Finally, with respect to Witness EZ, the Appeals Chamber recalls that it dismisses Bizimungu's challenge to this aspect of Witness EZ's evidence in the section below addressing the crimes committed at the *École des sciences infirmières de Kabgayi* (ESI).<sup>360</sup> Accordingly, Bizimungu has failed to demonstrate that the Trial Chamber erred in relying on the Prosecution witnesses' identification of soldiers based on their uniforms.

125. Turning to whether the Trial Chamber reversed the burden of proof, the Trial Judgement states that Bizimungu failed to present evidence in support of his contentions that civilians were not massacred during his tenure as the army's Chief of Staff, that RPF soldiers wore Rwandan army uniforms, and that gangs of criminals had taken advantage of government structures to commit crimes.<sup>361</sup> In making these statements, the Appeals Chamber considers that the Trial Chamber was merely expressing that Bizimungu had not called into question the credible evidence demonstrating the existence of a superior-subordinate relationship between him and soldiers who committed criminal acts. Accordingly, Bizimungu has not demonstrated that the Trial Chamber reversed the burden of proof.

126. In light of the foregoing, the Appeals Chamber finds that Bizimungu has failed to demonstrate that the Trial Chamber erred in finding that he exercised authority and effective control over the soldiers of the Rwandan army who committed the crimes for which he was convicted.

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<sup>355</sup> See Trial Judgement, paras. 1134, 1146, 1985.

<sup>356</sup> See Trial Judgement, para. 1986.

<sup>357</sup> Bizimungu Appeal Brief, para. 331.

<sup>358</sup> Trial Judgement, para. 1117.

<sup>359</sup> Bizimungu Appeal Brief, para. 331, fn. 462, referring to T. 30 March 2005 p. 54 (French).

<sup>360</sup> See *infra* para. 259.

<sup>361</sup> Trial Judgement, paras. 1985, 1986.

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(b) Authority and Effective Control over *Interahamwe*

127. In concluding that Bizimungu had *de facto* authority over *Interahamwe*, the Trial Chamber relied on a number of indicia. These indicia included the Trial Chamber's findings that: the Rwandan army provided training and arms to civil defence programmes;<sup>362</sup> senior members of the Rwandan army explored the possibility of integrating the *Interahamwe* into the reorganized army;<sup>363</sup> Bizimungu served as an intermediary between national leaders of the *Interahamwe* and UNAMIR General Roméo Dallaire;<sup>364</sup> soldiers and members of the *Interahamwe* fought and manned roadblocks together;<sup>365</sup> and Bizimungu was able to restrain members of the *Interahamwe* from attacking refugees at the *Hôtel des Mille Collines*.<sup>366</sup> On the basis of these findings, the Trial Chamber concluded that Bizimungu had the material ability to prevent *Interahamwe* from committing the crimes at the *École des sciences infirmières de Kabgayi* (ESI), the Musambira Commune office and dispensary, the Butare Prefecture office and EER, and the Cyangugu stadium, or to punish them for having committed these crimes.<sup>367</sup>

128. Bizimungu argues that the evidence does not show that the only reasonable inference was that he had effective control over the *Interahamwe*.<sup>368</sup> He submits that there was no established link between the civil defence programmes, which the Trial Chamber found to have received military training and arms, and the *Interahamwe*.<sup>369</sup> In this regard, he asserts that the Trial Chamber confused civil defence with the *Interahamwe* and disregarded the evidence of Defence Witnesses Pascal Ndengejeho, DB15-6, DE4-31, DE4-16, DE11-4, and DB11-11.<sup>370</sup> He underscores that no evidence was adduced that the Rwandan army trained *Interahamwe* in Cyangugu, Butare, or Gitarama Prefectures.<sup>371</sup> He adds that, even if the army had trained and provided arms to civilians, this did not establish that he had effective control over *Interahamwe*.<sup>372</sup> Bizimungu highlights that the Trial Chamber did not find that the *Interahamwe* who had committed crimes were trained by him or his subordinates.<sup>373</sup>

<sup>362</sup> Trial Judgement, para. 1979.

<sup>363</sup> Trial Judgement, para. 1980.

<sup>364</sup> Trial Judgement, para. 1981.

<sup>365</sup> Trial Judgement, para. 1981.

<sup>366</sup> Trial Judgement, para. 1982.

<sup>367</sup> Trial Judgement, para. 1983.

<sup>368</sup> Bizimungu Notice of Appeal, paras. 118-120, 131, 136, 137; Bizimungu Appeal Brief, paras. 309, 327, 328.

<sup>369</sup> Bizimungu Notice of Appeal, paras. 121, 122; Bizimungu Appeal Brief, paras. 312, 313.

<sup>370</sup> Bizimungu Appeal Brief, para. 313.

<sup>371</sup> Bizimungu Notice of Appeal, para. 123; Bizimungu Appeal Brief, paras. 312, 314. *See also* Bizimungu Reply Brief, para. 75; AT. 8 May 2013 p. 25.

<sup>372</sup> Bizimungu Notice of Appeal, para. 123; Bizimungu Appeal Brief, para. 314.

<sup>373</sup> Bizimungu Notice of Appeal, para. 123; Bizimungu Appeal Brief, para. 314. *See also* Bizimungu Reply Brief, para. 75.

129. Similarly, Bizimungu asserts that the evidence of discussions about the possibility of incorporating the *Interahamwe* into the Rwandan army did not establish effective control because the exhibits relied on by the Trial Chamber post-date the genocide and, in any event, only relate to the possibility of recruiting *Interahamwe*.<sup>374</sup>

130. With respect to checkpoints being jointly manned, Bizimungu claims that Dallaire testified about “militiamen” not “*Interahamwe*” manning roadblocks.<sup>375</sup> Bizimungu also points to Dallaire’s evidence describing the *Interahamwe* as “obeying no authority”.<sup>376</sup> He asserts that even if soldiers did collaborate with the *Interahamwe*, this does not support a finding that he had effective control over them as the soldiers may have acted on their own and they were too far removed from him and there was no defined hierarchy among the *Interahamwe*.<sup>377</sup> Bizimungu also notes that he was not convicted of crimes committed at roadblocks and that Dallaire did not visit the locations related to the charges brought against him.<sup>378</sup> Bizimungu argues that he was not personally involved in organizing meetings between Dallaire and the *Interahamwe* leaders.<sup>379</sup> In this regard, he states that he testified that he was not personally involved in organizing those meetings and points to the fact that Dallaire could not name a specific occasion when he asked Bizimungu to organize a meeting with the *Interahamwe*.<sup>380</sup> Bizimungu also underscores that he was only able to intervene at *Hôtel des Mille Collines* by threatening the lives of the *Interahamwe*, showing that he did not have authority over them.<sup>381</sup>

131. Bizimungu also argues that the Trial Chamber erred in finding that there was a superior-subordinate relationship between him and the *Interahamwe* who committed the crimes.<sup>382</sup>

132. The Prosecution responds that the Trial Chamber correctly found that Bizimungu had effective control over the *Interahamwe* who committed the crimes for which he was convicted.<sup>383</sup> It argues that Bizimungu was able to effectively order the *Interahamwe* at *Hôtel des Mille Collines* to halt their attack.<sup>384</sup> In any event, it asserts that even if he had to threaten the *Interahamwe*, it does not show that his orders were not obeyed.<sup>385</sup> It adds that Bizimungu failed to demonstrate that the Trial Chamber erred in relying on his involvement in the training and distribution of weapons to

<sup>374</sup> Bizimungu Notice of Appeal, paras. 124-127; Bizimungu Appeal Brief, paras. 315, 317.

<sup>375</sup> Bizimungu Notice of Appeal, paras. 129, 130; Bizimungu Appeal Brief, paras. 318, 319.

<sup>376</sup> Bizimungu Appeal Brief, para. 319, referring to Witness Dallaire, T. 21 November 2006 p. 54 (French), T. 5 December 2006 pp. 15-17 (French). See also AT. 7 May 2013 p. 60.

<sup>377</sup> Bizimungu Notice of Appeal, paras. 123, 124; Bizimungu Appeal Brief, paras. 321, 322.

<sup>378</sup> Bizimungu Appeal Brief, para. 320.

<sup>379</sup> Bizimungu Notice of Appeal, paras. 134, 135; Bizimungu Appeal Brief, paras. 324, 325.

<sup>380</sup> Bizimungu Appeal Brief, para. 325.

<sup>381</sup> Bizimungu Appeal Brief, para. 326; AT. 7 May 2013 p. 60; AT. 8 May 2013 p. 25.

<sup>382</sup> Bizimungu Appeal Brief, para. 335.

<sup>383</sup> Prosecution Response Brief (Bizimungu), paras. 120, 128; AT. 8 May 2013 pp. 11, 12.

<sup>384</sup> Prosecution Response Brief (Bizimungu), para. 126; AT. 8 May 2013 p. 12.

T M

militias when he was commander of the Ruhengeri Operational Sector and on general evidence of military training and distribution of weapons to militias at a national level as indicators of effective control.<sup>386</sup>

133. The Appeals Chamber recalls that the material ability to prevent or punish can only amount to effective control over the perpetrators if it is premised upon a pre-existing superior-subordinate relationship between the accused and the perpetrators.<sup>387</sup> The Trial Chamber did not explicitly find the existence of a superior-subordinate relationship between Bizimungu and the *Interahamwe* who it found committed the criminal acts which formed the basis of his related convictions, that is, attacks at the *École des sciences infirmières de Kabgayi* (ESI), the Musambira Commune office and dispensary, the Butare Prefecture office and EER, or the Cyangugu stadium.<sup>388</sup> Nonetheless, the Appeals Chamber considers that the Trial Chamber implicitly found that there was a pre-existing hierarchical relationship based on the same factors it relied upon in establishing that the *Interahamwe* were under his effective control.<sup>389</sup> The Appeals Chamber will therefore consider Bizimungu's challenges to the Trial Chamber's assessment in the context of both Bizimungu's effective control of, and his superior-subordinate relationship with the *Interahamwe*.

134. The Appeals Chamber first turns to the Trial Chamber's reliance on the Rwandan army's training and arming of civil defence programmes as an indicator of Bizimungu's effective control over the *Interahamwe*. Specifically, the Trial Chamber found that:

Having considered the totality of the evidence, the [Trial] Chamber is convinced that Rwandan military and civilian authorities were arming and training civilians, many of whom were members of the *Interahamwe*, from late 1992 until mid-1994. The [Trial] Chamber is also convinced that Bizimungu played a key role in these activities, particularly in view of the scale and organisation of the *Interahamwe* training programmes in Ruhengeri *préfecture*, the role of Rwandan soldiers under Bizimungu's command in training the *Interahamwe* and the large number of weapons involved.<sup>390</sup>

The Appeals Chamber notes, however, that the Trial Chamber did not discuss any evidence suggesting that Bizimungu or soldiers under his authority trained or armed the *Interahamwe* who were involved in the attacks at the *École des sciences infirmières de Kabgayi* (ESI), the Musambira Commune office and dispensary, the Butare Prefecture office and EER, or the Cyangugu stadium in connection with which he was convicted. Indeed, the Appeals Chamber notes that the evidence relied upon by the Trial Chamber relates principally to the training and arming of civilians in

<sup>385</sup> Prosecution Response Brief (Bizimungu), para. 126; AT. 8 May 2013 p. 12.

<sup>386</sup> Prosecution Response Brief (Bizimungu), para. 127; AT. 8 May 2013 p. 12.

<sup>387</sup> See *Halilović* Appeal Judgement, para. 210.

<sup>388</sup> See Trial Judgement, paras. 1984-1986.

<sup>389</sup> See Trial Judgement, paras. 1978-1983.

<sup>390</sup> Trial Judgement, para. 348.

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Ruhengeri and Byumba Prefectures.<sup>391</sup> The Appeals Chamber considers that the Trial Chamber failed to explain how the training activities in Ruhengeri and Byumba Prefectures established that Bizimungu exercised effective control over the *Interahamwe* involved in attacks in Gitarama, Butare, or Cyangugu Prefectures where the relevant crimes were committed.<sup>392</sup> In this regard, the Appeals Chamber considers that no reasonable trier of fact could have relied on this evidence as an indicator of authority and effective control over the *Interahamwe* who were involved in the crimes which formed the basis of Bizimungu's convictions. The Appeals Chamber therefore need not address Bizimungu's related arguments that the Trial Chamber failed to establish a link between the civil defence programmes and the *Interahamwe* and that it failed to consider Defence evidence that no such training took place.

135. The Appeals Chamber likewise finds that the Trial Chamber erred in its assessment of evidence concerning the possibility of integrating the *Interahamwe* into the military when assessing Bizimungu's effective control over the *Interahamwe* involved in attacks at the *École des sciences infirmières de Kabgayi* (ESI), Musambira Commune office and dispensary, Butare Prefecture office and EER, and Cyangugu stadium.<sup>393</sup> Specifically, the Trial Chamber relied on Prosecution Exhibits 201 and 202, which are reports of meetings of senior officers of the Rwandan army held in Goma, in the former Zaire, as evidence that Bizimungu wielded authority over members of the *Interahamwe*. However, the Appeals Chamber notes that the Trial Chamber incorrectly stated that Prosecution Exhibit 201 referred to a meeting held between 29 March and 3 April 1994,<sup>394</sup> whereas the exhibit indicates that the meeting was held in 1995. Furthermore, Prosecution Exhibit 202 referred to a meeting held between 2 and 6 September 1994. Accordingly, both exhibits post-date the genocide and therefore do not reasonably demonstrate that steps to integrate the *Interahamwe* into the Rwandan army were taken prior to or during the genocide. Therefore, no reasonable trier of fact could have relied upon these exhibits to establish that Bizimungu exercised authority and effective control over the *Interahamwe* when they committed the criminal acts in connection with which Bizimungu was convicted.

136. Nonetheless, the Appeals Chamber does not find that the Trial Chamber misinterpreted Witness Dallaire's evidence in finding that he testified that the *Interahamwe* and soldiers of the Rwandan army fought alongside one another and manned checkpoints<sup>395</sup> as Witness Dallaire

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<sup>391</sup> Trial Judgement, paras. 288-324, 329-358.

<sup>392</sup> See Trial Judgement, paras. 288-358.

<sup>393</sup> Trial Judgement, para. 1980.

<sup>394</sup> Trial Judgement, para. 1980.

<sup>395</sup> See Trial Judgement, para. 1981.

T 14

referred interchangeably to the *Interahamwe* and militiamen in his evidence.<sup>396</sup> Likewise, the Appeals Chamber finds no error in the Trial Chamber's reliance on Witness Dallaire's evidence that many of his contacts with the *Interahamwe* were organized through Bizimungu.<sup>397</sup> While Bizimungu correctly points out that Witness Dallaire conceded that he was unable to pinpoint a specific occasion when Bizimungu facilitated a meeting with the *Interahamwe*,<sup>398</sup> Witness Dallaire was consistent in his assertion that Bizimungu assisted in arranging such meetings.<sup>399</sup>

137. With respect to Bizimungu's intervention at the *Hôtel des Mille Collines*, the Appeals Chamber observes that the Trial Chamber duly noted Bizimungu's testimony that he ordered the *Interahamwe* to stop their attack or he would shoot them.<sup>400</sup> The Trial Chamber considered that this indicated that he had the material ability to restrain members of the *Interahamwe*.<sup>401</sup> The Appeals Chamber is satisfied that this incident could reasonably provide some support for this proposition.

138. The Appeals Chamber finds that the Trial Chamber could reasonably have relied upon the cooperation between soldiers and *Interahamwe* when fighting and manning roadblocks as well as Bizimungu's role as an intermediary between Dallaire and the *Interahamwe* and Bizimungu's assistance in halting the attack by *Interahamwe* at *Hôtel des Mille Collines* as indicators of Bizimungu's authority and effective control over the *Interahamwe*. However, the Appeals Chamber is not convinced that these factors, taken on their own or together, were such that a reasonable trier of fact could have found that the only reasonable conclusion was that Bizimungu had a superior-subordinate relationship with and exercised effective control over the *Interahamwe* who participated in the criminal acts underpinning his convictions. Notably, the evidence about Bizimungu's ability to halt an attack by *Interahamwe* at the *Hôtel des Mille Collines* concerned the *Interahamwe* in Kigali Prefecture. Evidence of him facilitating meetings between *Interahamwe* and Dallaire is general as is evidence concerning coordination between *Interahamwe* and the military. To the extent this evidence is indicative of a superior-subordinate relationship and effective control, the Appeals Chamber notes that none of it specifically relates to the *Interahamwe* in Cyangugu, Butare, or Gitarama Prefectures, who committed the criminal acts upon which Bizimungu's liability

<sup>396</sup> Witness Dallaire, T. 21 November 2006 p. 54 ("Q. Last question on this point: Cooperation between the army and militia, that is, the military – cooperation between the military and the militia that you mentioned in paragraph 4 of your code cable, did you witness it? A. The cooperation we sought on a number of occasions where militia and military forces were deployed. These occasions were not in the front lines as such, except in Kigali where the *Interahamwe* fought beside or, side by side with the government forces when the city was under attack. Whenever we wanted to get through to the militia, we could do it through the army and – and also Colonel Bagosora. And when we conducted our exchanges of people, a number of points were manned by both military, army, and some gendarmerie, and by militia together").

<sup>397</sup> See Trial Judgement, para. 1981.

<sup>398</sup> Witness Dallaire, T. 5 December 2006 p. 14.

<sup>399</sup> Witness Dallaire, T. 5 December 2006 pp. 10-14.

<sup>400</sup> Trial Judgement, para. 1982.

<sup>401</sup> Trial Judgement, para. 1982.

T 14



under Article 6(3) of the Statute hinges. The Appeals Chamber considers that no reasonable trier of fact could find this evidence, without further evidence of authority and effective control over the specific perpetrators, sufficient to establish, as the only reasonable conclusion, that Bizimungu exercised such authority and effective control over the specific *Interahamwe* who committed the criminal acts underpinning his convictions as a superior.

139. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in finding that Bizimungu had authority and effective control over the *Interahamwe* who participated in the attacks at the *École des sciences infirmières de Kabgayi* (ESI), the Musambira Commune office and dispensary, the Butare Prefecture office and EER, and the Cyangugu stadium. Consequently, his convictions for these criminal acts, to the extent they were committed by *Interahamwe*, must be reversed. In light of this, the Appeals Chamber will only consider Bizimungu's remaining arguments in relation to his convictions for criminal acts committed by soldiers of the Rwandan army.

### 3. Bizimungu's Knowledge of the Crimes of his Subordinates

140. In finding that Bizimungu knew or had reason to know of the crimes for which he was held responsible as a superior, the Trial Chamber considered a number of factors in relation to each event.<sup>402</sup> It also considered a number of indicia which, though not specific to a particular event, reinforced its conclusion that he knew or had reason to know of these crimes.<sup>403</sup> The Trial Chamber took into account as general indicia the following: evidence that during his tenure as the Chief of Staff of the Rwandan army, Bizimungu received situation reports from his units on a daily basis;<sup>404</sup> Prosecution Exhibit 186, a press release by Anthony Lake, former National Security Advisor to the President of the United States, dated 22 April 1994, calling on Rwandan military leaders including Bizimungu to intervene to prevent mass killings of civilians;<sup>405</sup> Prosecution Exhibit 187, a press release by Human Rights Watch, dated 18 May 1994, documenting the significant role of soldiers in the massacres and identifying Bizimungu as someone who could halt them;<sup>406</sup> Prosecution Exhibits 191 and 192, declassified documents, dated 27 April and 12 May 1994, from the United States government referring to conversations between Prudence Bushnell and Bizimungu regarding the killings of civilians in 1994;<sup>407</sup> Prosecution Exhibit 193, a May 1994 United States Department of

<sup>402</sup> Trial Judgement, paras. 1201-1209, 1453-1458, 1524-1528, 1987, 1990-1992.

<sup>403</sup> Trial Judgement, paras. 1200, 1210-1220, 1988, 1989, 1993.

<sup>404</sup> Trial Judgement, paras. 1200, 1989.

<sup>405</sup> Trial Judgement, paras. 1211, 1993. The Trial Chamber referred to this exhibit as "P189". However, the correct exhibit number for this document is "P186".

<sup>406</sup> Trial Judgement, paras. 1211, 1993.

<sup>407</sup> Trial Judgement, paras. 1212, 1213, 1525, 1526, 1993.

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State internal memorandum referring to conversations between Bushnell and Bizimungu;<sup>408</sup> and Prosecution Exhibit 194, a report of a meeting between Bizimungu and José Ayala-Lasso, the then-United Nations High Commissioner for Human Rights, during Ayala-Lasso's visit to Rwanda on 11 and 12 May 1994.<sup>409</sup>

141. In this section, the Appeals Chamber considers Bizimungu's challenges to the general indicia of his knowledge relied upon by the Trial Chamber as support for its specific findings on Bizimungu's knowledge of individual events for which he was held responsible. The Appeals Chamber will address Bizimungu's challenges to his knowledge of specific events in the sections below relating to each individual event.

142. Bizimungu submits that the Trial Chamber erred in finding that he knew or had reason to know that his subordinates had committed or were about to commit crimes.<sup>410</sup> He asserts that nothing in the evidence shows that he had sufficient information to put him on notice.<sup>411</sup> With respect to the situation reports, Bizimungu argues that the Trial Chamber's findings were exclusively based on his own evidence which, he claims, the Trial Chamber misrepresented.<sup>412</sup> He notes that the Trial Chamber accorded weight to his admission that he received daily situation reports, although none was admitted into evidence, and found from this that he had notice of the crimes that had been committed or were about to be committed.<sup>413</sup> However, Bizimungu argues that no situation reports were disclosed to him which identified specific units or unit commanders in relation to the sites for which he was convicted.<sup>414</sup> Accordingly, Bizimungu asserts that no reasonable trier of fact could have concluded that he was informed that the crimes had been or were about to be committed.<sup>415</sup> He also emphasizes that several inferences could have been drawn from such circumstantial evidence and suggests that no commander who was involved in crimes would have sent a situation report denouncing himself.<sup>416</sup> He also asserts that the Trial Chamber treated the issue of the situation reports differently with respect to Ndindiliyimana.<sup>417</sup> Bizimungu further contends that the Trial Chamber erred in considering the means of communication available to him

<sup>408</sup> Trial Judgement, paras. 1214, 1993.

<sup>409</sup> Trial Judgement, paras. 1215-1218, 1993.

<sup>410</sup> Bizimungu Notice of Appeal, para. 151; Bizimungu Appeal Brief, para. 347.

<sup>411</sup> Bizimungu Notice of Appeal, para. 152; Bizimungu Appeal Brief, para. 340.

<sup>412</sup> Bizimungu Notice of Appeal, paras. 154, 155, 157; Bizimungu Appeal Brief, para. 341.

<sup>413</sup> Bizimungu Appeal Brief, para. 341. *See also* AT. 7 May 2013 p. 66.

<sup>414</sup> Bizimungu Appeal Brief, para. 343. *See also* AT. 7 May 2013 pp. 62, 67, 69, 70.

<sup>415</sup> Bizimungu Appeal Brief, para. 344.

<sup>416</sup> Bizimungu Appeal Brief, para. 346.

<sup>417</sup> AT. 7 May 2013 pp. 62, 63, *referring to* Trial Judgement, para. 1405.

T 14

as a factor establishing his knowledge whereas the Trial Chamber itself noted the existence of communication difficulties.<sup>418</sup>

143. Bizimungu argues that the Trial Chamber did not take into account his testimony with respect to Prosecution Exhibits 191 and 192, which it merely referred to without any further consideration.<sup>419</sup> Furthermore, with respect to Prosecution Exhibits 186, 187, 191, and 192, Bizimungu submits that the information contained therein was sourced from and “stage-managed” by Prosecution Witness Alison Des Forges and Monique Mujawamariya, who were lobbying American and European officials.<sup>420</sup> He asserts that Des Forges and Mujawamariya gave officials the names of some officers, including Bizimungu’s, whom they held responsible for what was happening in Rwanda and that this resulted in his name appearing arbitrarily in these documents.<sup>421</sup> According to Bizimungu, the Trial Chamber should have considered his explanation in this regard.<sup>422</sup> Bizimungu argues that his knowledge of crimes could not have been inferred from any of these Prosecution exhibits because he was not aware of these documents at the time and they were only disclosed to him in 2002 and 2007.<sup>423</sup> Moreover, according to Bizimungu, the Trial Chamber failed to consider that Prudence Bushnell’s calls “were of a general nature” and neither informed him that it was soldiers who engaged in killings nor where such crimes were being committed.<sup>424</sup> With respect to Prosecution Exhibit 194, Bizimungu maintains that the Trial Chamber misinterpreted his testimony because he did not acknowledge in his conversation with José Ayala-Lasso that soldiers had committed massacres, but simply referred to “the situation after 6 April 1994”.<sup>425</sup> He also points out that José Ayala-Lasso did not inform him of crimes by soldiers.<sup>426</sup>

144. The Prosecution responds that Bizimungu fails to demonstrate that no reasonable trier of fact could have arrived at the same conclusion as the Trial Chamber did.<sup>427</sup> It asserts that in view of

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<sup>418</sup> Bizimungu Notice of Appeal, para. 158; Bizimungu Appeal Brief, para. 340, referring to Trial Judgement, paras. 1992, 2182.

<sup>419</sup> Bizimungu Appeal Brief, paras. 353-355. See also AT. 8 May 2013 p. 25.

<sup>420</sup> Bizimungu Appeal Brief, para. 357. Bizimungu also refers to Prosecution Exhibit 189; however, the Trial Chamber did not rely on Prosecution Exhibit 189, although it erroneously referred to Prosecution Exhibit 186 as Prosecution Exhibit 189. See Trial Judgement, para. 1211. Accordingly, the Appeals Chamber understands that Bizimungu intends to refer to Prosecution Exhibit 186 given that he refers to Prosecution Exhibit 189 as a communiqué which was in fact Prosecution Exhibit 186. See Bizimungu Appeal Brief, paras. 357, 358.

<sup>421</sup> Bizimungu Appeal Brief, paras. 357, 358.

<sup>422</sup> Bizimungu Appeal Brief, para. 359.

<sup>423</sup> AT. 7 May 2013 p. 63.

<sup>424</sup> Bizimungu Appeal Brief, paras. 353, 354; AT. 8 May 2013 p. 25.

<sup>425</sup> Bizimungu Appeal Brief, paras. 350, 351.

<sup>426</sup> AT. 8 May 2013 p. 26.

<sup>427</sup> Prosecution Response Brief (Bizimungu), para. 140.

T M

the totality of the evidence the only reasonable inference was that Bizimungu knew or had reason to know that his subordinates had committed or were about to commit crimes.<sup>428</sup>

145. With respect to the situation reports, the Trial Chamber stated:

At the outset, the Chamber recalls that Bizimungu acknowledged in his testimony that between April and July 1994, he received situation reports (SITREPs) twice daily from all Rwandan Army units across the country. He further testified that those SITREPs contained information not only about the hostilities between the Rwandan Army and the RPF, but also about the security situation affecting the civilian population of the relevant area.<sup>429</sup>

146. The Appeals Chamber is not convinced that the Trial Chamber misrepresented Bizimungu's testimony regarding the situation reports. As the Trial Chamber noted, Bizimungu confirmed in his testimony that he received reports twice daily and that these situation reports contained information about the security situation affecting the civilian population.<sup>430</sup> Nonetheless, Bizimungu did not testify about details of specific incidents of which he was informed in the situation reports and the Prosecution presented no evidence at trial as to the content of the situation reports.<sup>431</sup> In this regard, the Appeals Chamber notes that none of the situation reports was tendered into evidence. Furthermore, as Bizimungu points out, the Trial Chamber declined to draw inferences from the fact that Ndindiliyimana received regular situation reports from his gendarmerie units given that these reports were not on the record.<sup>432</sup> The Appeals Chamber cannot discern from the reasoning in the Trial Judgement why the Trial Chamber followed a different approach with respect to Bizimungu. The Appeals Chamber considers that, in the absence of any evidence indicating that the situation reports provided Bizimungu with information relating to the specific incidents for which he was convicted, the Trial Chamber should not have placed any decisive weight on Bizimungu's receipt of these reports and should only have considered this evidence as general background.

147. The Appeals Chamber is not convinced by Bizimungu's assertion that the Trial Chamber erred in stating that, given the manner in which the crimes were committed and the means of communication available to him, it was "implausible that Bizimungu would not have been aware or at least had notice of the strong prospect that his subordinates were implicated in these crimes".<sup>433</sup> In the Appeals Chamber's view, the Trial Chamber simply expressed in this statement that it was satisfied that Bizimungu had sufficient information in his possession to know or have reason to know of his subordinates' crimes. However the Appeals Chamber observes that, with the exception of the above-mentioned situation reports, the Trial Judgement does not explain which means of

<sup>428</sup> Prosecution Response Brief (Bizimungu), para. 140. *See also* Prosecution Response Brief (Bizimungu), paras. 131-139; AT. 8 May 2013 pp. 14-16.

<sup>429</sup> Trial Judgement, para. 1200 (citation omitted).

<sup>430</sup> Bizimungu, T. 13 December 2007 pp. 29, 30.

<sup>431</sup> Trial Judgement, para. 1455.

<sup>432</sup> Trial Judgement, paras. 1368, 1405.

T M

communication Bizimungu had at his disposal. Moreover the Trial Chamber acknowledged in the sentencing section of the Trial Judgement that Bizimungu's command suffered from difficulties in communication.<sup>434</sup> Under these circumstances, the Appeals Chamber finds that the Trial Chamber erred in relying on unspecified means of communication in order to infer Bizimungu's knowledge of crimes.

148. Contrary to Bizimungu's submission, the Appeals Chamber observes that the Trial Chamber did not disregard Bizimungu's testimony with respect to Prosecution Exhibits 191 and 192. The Trial Chamber noted Bizimungu's testimony and considered that Bizimungu did not dispute that he had telephone conversations with Prudence Bushnell on the dates indicated in the exhibits.<sup>435</sup> Bizimungu's submission is therefore rejected.

149. Similarly, the Trial Chamber expressly noted Bizimungu's testimony that the views of the United States government officials "were based on the distorted views of the Rwandan crisis that they received from Monique Mujawamaria [*sic*] and Alison Des Forges, who were biased in favour of the RPF".<sup>436</sup> Although the Trial Chamber noted Bizimungu's claim to this effect in relation to Prosecution Exhibit 193 rather in relation to the exhibits to which Bizimungu refers on appeal, the Appeals Chamber considers that this demonstrates that the Trial Chamber was aware of Bizimungu's views but nonetheless chose to rely on these exhibits. Bizimungu fails to show any error by the Trial Chamber in this respect.

150. The Appeals Chamber observes that the Trial Chamber appears to have considered that Bizimungu was aware of the content of the documents admitted as Prosecution Exhibits 186, 187, 191 to 194 when the crimes for which he was convicted occurred.<sup>437</sup> However, neither Prosecution Exhibits 186 and 187 nor any other evidence referred to in the Trial Judgement indicate that Bizimungu was alerted to the press release by Anthony Lake or the Human Rights Watch report at the time.<sup>438</sup> Accordingly, the Appeals Chamber finds that the Trial Chamber erred in inferring that Bizimungu knew or had reason to know of the crimes for which he was convicted on the basis of Prosecution Exhibits 186 and 187.

151. By contrast, the Appeals Chamber notes that Bizimungu did not dispute at trial that he had conversations with Prudence Bushnell and José Ayala-Lasso in April and May 1994 and that the

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<sup>433</sup> Bizimungu Appeal Brief, para. 340, referring to Trial Judgement, para. 1992; AT. 7 May 2013 p. 63.

<sup>434</sup> Trial Judgement, para. 2182.

<sup>435</sup> Trial Judgement, para. 1213.

<sup>436</sup> Trial Judgement, para. 1214.

<sup>437</sup> See Trial Judgement, paras. 1211, 1219. See also Trial Judgement, para. 1993.

<sup>438</sup> See also Bizimungu, T. 12 December 2007 pp. 51-60, 65-69.

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content of these conversations was correctly reflected in Prosecution Exhibits 191, 192, and 194.<sup>439</sup> Moreover, the Trial Chamber relied on Prosecution Exhibit 193 only as corroboration of the content of Prosecution Exhibits 191 and 192.<sup>440</sup> Accordingly, it was not required to consider whether Bizimungu knew of these exhibits as such in 1994. Bizimungu's assertion that the Trial Chamber erred in this respect is therefore dismissed.

152. Regarding Bizimungu's argument that his phone conversations with Prudence Bushnell "were of a general nature", the Appeals Chamber notes that Prudence Bushnell referred to violence and killings of civilians in April and May 1994 and indicated that she was holding him accountable for whatever happened to those who took refuge from the massacres.<sup>441</sup> Although the exhibits do not indicate whether she identified soldiers under Bizimungu's authority as the perpetrators of such crimes, alerting Bizimungu to the killings of civilians and indicating that he would be held accountable should have given him reason to investigate whether his subordinates were involved in the crimes. The Appeals Chamber is not convinced that it was unreasonable for the Trial Chamber to take this general evidence into account in conjunction with other factors in assessing whether Bizimungu knew or had reason to know of the crimes for which he was convicted.

153. The Appeals Chamber finally turns to consider Bizimungu's submission that the Trial Chamber misinterpreted his testimony in relation to Prosecution Exhibit 194. According to this exhibit, Bizimungu acknowledged during the meeting with José Ayala-Lasso on 12 May 1994 that "massacres had been committed by forces linked to the Government which he termed as excesses ('débordements')".<sup>442</sup> In cross-examination, Bizimungu explained that this statement referred to the killings of the Prime Minister and the Belgian peacekeepers at Camp Kigali by Presidential Guard soldiers on 7 April 1994.<sup>443</sup> The Trial Chamber quoted the relevant parts of Bizimungu's testimony.<sup>444</sup> It also stated that Bizimungu had "expressly acknowledged that he knew on 12 May 1994 that his subordinates may have committed crimes against civilians" but that he suggested that crimes by soldiers of the Rwandan army were isolated incidents rather than widespread and systematic.<sup>445</sup> The Trial Judgement further acknowledges that Bizimungu insisted that soldiers of the Rwandan army had not been involved in the killing of civilians and that perpetrators dressed in military attire may have been disguised RPF elements.<sup>446</sup> The Appeals Chamber finds that Bizimungu has failed to demonstrate that the Trial Chamber misinterpreted his evidence or that it

<sup>439</sup> See Bizimungu, T. 11 December 2007 pp. 39-41, 52-54; Bizimungu, T. 12 December 2007 pp. 54, 55, 58-60, 65-67.

<sup>440</sup> Trial Judgement, para. 1214.

<sup>441</sup> Prosecution Exhibit 191, para. 3; Prosecution Exhibit 192, para. 1.

<sup>442</sup> Prosecution Exhibit 194, para. 21.

<sup>443</sup> Bizimungu, T. 12 December 2007 pp. 55-57.

<sup>444</sup> Trial Judgement, paras. 1216-1218.

<sup>445</sup> Trial Judgement, para. 1218.

<sup>446</sup> See Bizimungu, T. 11 December 2007 pp. 39-41; Bizimungu, T. 12 December 2007 pp. 49, 50, 54-57.

T M

was unreasonable for the Trial Chamber to take this evidence into account in conjunction with other factors when assessing Bizimungu's knowledge.

154. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber erred in relying on unspecified "means of communication" at Bizimungu's disposal as well as on Prosecution Exhibits 186 and 187 but dismisses the remainder of Bizimungu's challenges to the general indicia of his knowledge relied upon by the Trial Chamber. The Appeals Chamber will address Bizimungu's challenges to his knowledge of specific events in the sections below relating to each individual event.

#### 4. Failure to Prevent Crimes and Punish Culpable Subordinates

155. The Trial Chamber found that Bizimungu had the material ability to prevent and/or punish the crimes of his subordinates for which he was convicted but failed to do so.<sup>447</sup> In so finding, the Trial Chamber stated that it was not persuaded by Bizimungu's testimony that the ongoing war with the RPF negated his ability to prevent and punish the crimes and noted that not all troops were engaged in fighting the RPF.<sup>448</sup> As evidence that Bizimungu had the ability to prevent and punish crimes, the Trial Chamber considered that: Bizimungu had managed to suspend a number of senior officers of the Rwandan army while preventing another from being ousted;<sup>449</sup> representatives in the international community considered Bizimungu to be capable of halting the massacres in Rwanda;<sup>450</sup> and Bizimungu was able to intervene to stop attacks and to arrange the evacuation of civilians in certain instances.<sup>451</sup>

156. The Trial Chamber concluded that Bizimungu's failure to prevent and punish the crimes for which he was convicted could be explained by his culpable indifference to Tutsi lives and his decision to prioritise winning the war against the RPF over the protection of civilian lives.<sup>452</sup> Specifically, the Trial Chamber found that Bizimungu's evidence suggested that he refrained from taking disciplinary measures against his subordinates because of concerns that such action would have negative consequences for his efforts to fight the RPF.<sup>453</sup> The Trial Chamber considered that this was exemplified by Bizimungu's failure to take any action against Major Protais Mpiranya, the

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<sup>447</sup> Trial Judgement, paras. 1994, 2012.

<sup>448</sup> Trial Judgement, paras. 1996, 1997. *See also* Trial Judgement, paras. 2003, 2006.

<sup>449</sup> Trial Judgement, paras. 1998, 1999, 2002.

<sup>450</sup> Trial Judgement, para. 2000.

<sup>451</sup> Trial Judgement, para. 2001.

<sup>452</sup> Trial Judgement, para. 2003. *See also* Trial Judgement, paras. 2006, 2007.

<sup>453</sup> Trial Judgement, para. 2004.

T 14

commander of the Presidential Guard, whose subordinates were accused of having killed a number of high-profile Rwandan politicians.<sup>454</sup>

157. The Trial Chamber also considered the measures that Bizimungu claimed to have taken to stop the killings generally including: issuing a radio broadcast to soldiers and civilians calling for the maintenance of order; sending a letter to the Minister of Defence emphasizing the need to address the disturbances; asking the Prime Minister to intervene to get political parties to restrain their respective militias; and sending telegrams and written instructions to various army units emphasizing the maintenance of discipline.<sup>455</sup> However, the Trial Chamber concluded that these measures were insufficient to relieve him of criminal responsibility as a superior as they fell below what could be deemed necessary and reasonable given the means at Bizimungu's disposal.<sup>456</sup> In particular, the Trial Chamber was of the view that the insufficiency of the measures undertaken was demonstrated by the fact that none of the measures included disciplinary or punitive actions against his subordinates for their involvement in crimes.<sup>457</sup>

158. Bizimungu submits that the Trial Chamber erred in finding that he did not take necessary and reasonable measures to prevent and punish the crimes committed by his subordinates.<sup>458</sup> According to Bizimungu, the Trial Chamber misinterpreted his testimony that it was difficult for him to prevent and punish crimes due to the ongoing fighting with the RPF and that the situation was exacerbated by the lack of troops.<sup>459</sup> With respect to his concession in his testimony that there were troops in Cyangugu who were not engaged in combat, Bizimungu asserts that Cyangugu was not an operational camp because it sheltered wounded soldiers and soldiers' families.<sup>460</sup> He further claims that the war provoked chaos and that the Trial Chamber overlooked the fact that a ceasefire was an indispensable condition to the re-establishment of peace and that he continuously gave instructions to subordinates to fight all forms of violence.<sup>461</sup>

159. Bizimungu asserts that in order to find that he failed to discharge his obligation to prevent crimes and punish his subordinates, evidence of his material ability to do so should have been adduced.<sup>462</sup> He argues, however, that no evidence analysing the effectiveness of his orders was

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<sup>454</sup> Trial Judgement, para. 2005.

<sup>455</sup> Trial Judgement, para. 2008.

<sup>456</sup> Trial Judgement, para. 2010.

<sup>457</sup> Trial Judgement, para. 2011.

<sup>458</sup> Bizimungu Notice of Appeal, paras. 163, 174; Bizimungu Appeal Brief, para. 390.

<sup>459</sup> Bizimungu Appeal Brief, paras. 368, 369.

<sup>460</sup> Bizimungu Notice of Appeal, para. 160; Bizimungu Appeal Brief, para. 372. *See also* Bizimungu Reply Brief, para. 89.

<sup>461</sup> Bizimungu Notice of Appeal, paras. 161, 162; Bizimungu Appeal Brief, paras. 373, 374. *See also* Bizimungu Reply Brief, para. 82; AT, 7 May 2013 pp. 64, 65.

<sup>462</sup> Bizimungu Appeal Brief, paras. 387, 388.

T M



adduced.<sup>463</sup> With respect to the Trial Chamber's assessment of indicators showing that he had the ability to prevent or punish crimes, Bizimungu submits that the officers whom he recommended to be suspended from, or maintained in, their posts were his direct subordinates over whom he had authority.<sup>464</sup> He argues that this does not demonstrate that he failed to take reasonable measures to prevent crimes and punish unidentified soldiers from unidentified units.<sup>465</sup>

160. Bizimungu also contends that, by finding that it was "unlikely" that senior international officials would have viewed him as being able to intervene if he was not in fact capable of doing so, the Trial Chamber applied an incorrect standard as "[t]he notion of improbability is extraneous to criminal law".<sup>466</sup> He further argues that Human Rights Watch was not even in the country and that the Trial Chamber did not consider the fact that Des Forges did not know his whereabouts despite having put his name forward as someone who could have intervened.<sup>467</sup> With respect to the international authorities, Bizimungu emphasizes that he was not the only Rwandan with whom they met.<sup>468</sup> He adds that the Trial Chamber did not mention any specific meetings which would have established that he was able to intervene despite being in possession of several exhibits recording the meetings with international authorities.<sup>469</sup>

161. With respect to the disciplinary and punitive measures available to him, Bizimungu asserts that it was the duty of the unit commanders to take such measures and contends that evidence of these procedures was adduced at trial.<sup>470</sup> He further argues that no evidence was presented showing that he refused to take disciplinary or punitive measures for crimes of which he had knowledge.<sup>471</sup>

162. Turning to the Trial Chamber's finding that he prioritised winning the war and was indifferent to the protection of civilians, Bizimungu submits that an objective reading of his testimony could not lead to such a conclusion.<sup>472</sup> He also claims that the Trial Chamber's premise that he would have had to choose between protecting civilian lives and fighting the RPF is false as he was not confronted with such a stark choice.<sup>473</sup> Further, he argues that no evidence was adduced proving that he refused to provide assistance to civilians in danger whereas there was abundant evidence that he was not driven by ethnic considerations and was concerned for the lives of

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<sup>463</sup> Bizimungu Appeal Brief, para. 388.

<sup>464</sup> Bizimungu Notice of Appeal, para. 164; Bizimungu Appeal Brief, para. 377. *See also* Bizimungu Reply Brief, paras. 84, 85.

<sup>465</sup> Bizimungu Notice of Appeal, para. 164. *See also* Bizimungu Reply Brief, para. 85; AT. 7 May 2013 p. 58.

<sup>466</sup> Bizimungu Notice of Appeal, paras. 166, 167; Bizimungu Appeal Brief, para. 378. *See also* Bizimungu Reply Brief, para. 88.

<sup>467</sup> Bizimungu Notice of Appeal, para. 168.

<sup>468</sup> Bizimungu Appeal Brief, para. 169. *See also* AT. 7 May 2013 p. 59; AT. 8 May 2013 p. 26.

<sup>469</sup> Bizimungu Notice of Appeal, para. 169, *referring to* Defence Exhibits 158, 165, 252.

<sup>470</sup> Bizimungu Appeal Brief, paras. 385, 386. *See also* AT. 7 May 2013 p. 64.

<sup>471</sup> Bizimungu Appeal Brief, para. 389.

<sup>472</sup> Bizimungu Appeal Brief, paras. 391, 392. *See also* Bizimungu Reply Brief, para. 91.

T 14

civilians.<sup>474</sup> According to Bizimungu, the Trial Chamber should have considered that he always called for a ceasefire to enable the relief of the population.<sup>475</sup> Additionally, he contends that the Trial Chamber erred in finding that he did not take disciplinary measures against Major Mpiranya.<sup>476</sup> Bizimungu asserts that by finding that the protection of civilians could not be subjected to any other consideration such as military constraints, the Trial Chamber suggested that he should have “graciously handed over his country to the enemy”.<sup>477</sup> He adds that it was the duty of the gendarmerie to restore public order but that it was involved in fighting and therefore not available to restore public order and he was not empowered to make decisions about the allocation of resources.<sup>478</sup> He argues that the Trial Chamber’s finding that there was “no plausible explanation” for his failure to discharge his duties and that there was insufficient evidence to absolve him shifted the burden of proof.<sup>479</sup>

163. The Prosecution responds that the Trial Chamber correctly concluded that Bizimungu failed to prevent or punish the perpetrators of the crimes despite having the material ability to do so.<sup>480</sup> It submits that the totality of the evidence established that Bizimungu did not take necessary and reasonable measures to prevent and punish the crimes and that Bizimungu fails to demonstrate any error in the Trial Chamber’s assessment of the evidence.<sup>481</sup> In particular, the Prosecution contends that the Trial Chamber reasonably found that Bizimungu was indifferent to the loss of civilian lives and relied on this as a factor.<sup>482</sup>

164. The Appeals Chamber finds that the Trial Chamber did not misinterpret Bizimungu’s evidence in finding that he testified that, due to the ongoing fighting, it was difficult for him to prevent and punish the crimes of his subordinates.<sup>483</sup> The Appeals Chamber also dismisses

<sup>473</sup> Bizimungu Appeal Brief, para. 393.

<sup>474</sup> Bizimungu Notice of Appeal, para. 172; Bizimungu Appeal Brief, para. 395, *referring to* Witnesses DE4-16, Mukandoli, Greindl, FFTS, and DB2-13. *See also* AT. 7 May 2013 p. 65.

<sup>475</sup> Bizimungu Appeal Brief, para. 396. *See also* Bizimungu Reply Brief, para. 92.

<sup>476</sup> Bizimungu Appeal Brief, para. 397. *See also* Bizimungu Reply Brief, para. 93.

<sup>477</sup> Bizimungu Appeal Brief, para. 403.

<sup>478</sup> Bizimungu Appeal Brief, paras. 401-406. *See also* Bizimungu Reply Brief, para. 96.

<sup>479</sup> Bizimungu Appeal Brief, paras. 381-383. Bizimungu also argues that it was unreasonable for the Trial Chamber to find that his intervention at the *Hôtel des Mille Collines* established that he had the ability to end killings all over the country. *See* Bizimungu Notice of Appeal, para. 170; Bizimungu Appeal Brief, para. 379. The Appeals Chamber recalls that the incident involved Bizimungu’s intervention against the *Interahamwe* rather than soldiers. *See* Trial Judgement, para. 1982. It further recalls that it has found that the Trial Chamber erred in finding that Bizimungu had effective control over the *Interahamwe* and does not consider that this factor could reasonably have supported a finding that Bizimungu had the means to prevent the crimes or punish soldiers. *See supra* para. 139.

<sup>480</sup> Prosecution Response Brief (Bizimungu), paras. 141, 152. *See also* Prosecution Response Brief (Bizimungu), paras. 148, 149, 168-174.

<sup>481</sup> Prosecution Response Brief (Bizimungu), paras. 143-147, 150-152. *See also* AT. 8 May 2013 pp. 16, 17.

<sup>482</sup> Prosecution Response Brief (Bizimungu), paras. 154-167.

<sup>483</sup> Trial Judgement, para. 1996; Bizimungu, T. 13 December 2007 pp. 31, 32 (“The best case scenario would be one where I would have wished that there were no fighting at all. That – where I would have wished that there was no unrest at all. I would have wished for a situation of peace. That is the best case scenario. But what did we have? We had unrest. We had people who engaged in killing other people following the death of the president. People came out and

Bizimungu's argument that the Trial Chamber erred in relying on this evidence in assessing whether he took reasonable measures to prevent and punish the crimes of his subordinates since this evidence related to the re-establishment of order in the country. These two issues were interrelated, particularly given that Bizimungu himself argues on appeal that the war created chaos and that a ceasefire was necessary for him to be able to prevent and punish crimes.<sup>484</sup> Similarly, the Trial Judgement accurately reflects Bizimungu's testimony that the difficult situation was exacerbated by desertions, the lack of reserve troops, and the fact that the gendarmerie, which was normally responsible for the restoration of order, was deployed fighting the RPF.<sup>485</sup>

165. With respect to the Trial Chamber's observation that Bizimungu admitted that there were troops in Cyangugu who were not engaged in combat,<sup>486</sup> the Appeals Chamber notes that Bizimungu did, as he submits on appeal, testify that the Cyangugu military camp contained families and war-wounded and that as such "[p]ractically, you couldn't say it was an operational camp".<sup>487</sup> However, Bizimungu also testified that he requested that troops from the Cyangugu Battalion be put at the disposal of the gendarmerie to protect Cyangugu stadium,<sup>488</sup> which indicates that troops were available to be deployed and were not all engaged in fighting the RPF. Accordingly, the Appeals Chamber finds that the Trial Chamber did not err in relying on this evidence to support its conclusion that Bizimungu had the resources to prevent the crimes and punish the perpetrators despite the ongoing war against the RPF.

166. Turning to Bizimungu's argument that the Trial Chamber erred in relying on the fact that he was able to have officers suspended from or retained in their positions to demonstrate that he had the ability to prevent and punish crimes, the Appeals Chamber notes that Bizimungu merely asserts that the officers who were suspended were his direct subordinates. While Bizimungu's ability to

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murdered others for various reasons. It would have been my wish that the situation be promptly checked, or brought under control, in order to avoid war. But, unfortunately, there was the onset of war which may, I say, was presented from a different perspective. And instead of fixing things, the war made things worse. Under those circumstances I, being a soldier, and faced with that situation, what could I do? What was my mission? Under the best circumstances, my mission would have been to address those two situations. On the one hand, the war and on the other hand, participate within the limits of the law to the maintenance or re-establishment of law and order. But because of the war, I would be left with no choice for the reasons that I have extensively put forth".). *See also* Bizimungu, T. 12 December 2007 pp. 64-66.

<sup>484</sup> Bizimungu Appeal Brief, paras. 373, 374; AT. 7 May 2013 pp. 58, 59, 64, 65.

<sup>485</sup> Trial Judgement, para. 1996; Bizimungu, T. 12 December 2007 pp. 64, 66 ("I have no means; I don't have enough means to face up to this war, to handle the war. So, and there's also the gendarmerie which normally should handle the first situation, that of public safety or public insecurity. So, it is the gendarmerie to first and foremost, be available but most of the gendarmerie units were also involved in the war. [...] However, everyday the situation wasn't, and out in the field, not only other incidents of desertion – well, not only did I have no reservists, I shall not come back to the issue of the gendarmerie. Maybe somebody will embrace that subject, but in view of the fact that there are gendarmes who are fighting, and I am coordinating the fighting, if we had had to intervene for law and order, then the gendarmerie would have to coordinate these activities for law enforcement and maintenance of public order. The reservists were running out".).

<sup>486</sup> Trial Judgement, para. 1997.

<sup>487</sup> Bizimungu, T. 12 December 2007 p. 81.

T/14

have direct subordinates suspended does not necessarily mean that he had the ability to prevent all his subordinates from committing crimes or to punish those who did, the Appeals Chamber finds that it was reasonable for the Trial Chamber to have considered this as an indicator of such capacity.

167. The Appeals Chamber also finds that the Trial Chamber was not unreasonable in finding that the fact that representatives of the United Nations, the United States government, and Human Rights Watch considered Bizimungu capable of halting massacres supported its conclusion that he had the means to prevent or punish the crimes for which he was convicted. In this regard, Bizimungu fails to explain how Witness Des Forges's testimony that she did not know the exact date on which Bizimungu arrived in Kigali<sup>489</sup> undermines the Trial Chamber's consideration that international authorities viewed Bizimungu as being able to halt the massacres. The Appeals Chamber therefore finds no error in the Trial Chamber not having specifically addressed this aspect of Witness Des Forges's testimony. Furthermore, while the Trial Chamber did not refer to the specific evidence of meetings it relied upon in its legal findings section on his superior responsibility, it addressed the relevant evidence in another part of the Trial Judgement.<sup>490</sup>

168. The Appeals Chamber is not convinced that the Trial Chamber applied an incorrect legal standard in commenting that it was "unlikely that these high-profile representatives would have directed their requests for the cessation of the massacres against civilians to Bizimungu unless they thought he was capable of acting on their requests".<sup>491</sup> In this regard, the Trial Chamber was not making a factual finding, but merely commenting that international authorities considered him to be in a position to intervene in the massacres. While this would not have been sufficient on its own to sustain a finding that Bizimungu failed to take reasonable and necessary measures to prevent crimes or punish perpetrators, the Appeals Chamber recalls that it was only one of a number of factors which the Trial Chamber relied upon in making its finding.

169. With respect to Bizimungu's arguments that it was the unit commanders' duty to take disciplinary and punitive measures and the gendarmérie's duty to restore order, the Appeals Chamber recalls that the fact that it may also have been the duty of others to prevent and punish the crimes does not detract from Bizimungu's duty as the Chief of Staff of the Rwandan army to take necessary and reasonable measures to prevent and punish the crimes.<sup>492</sup> Furthermore, contrary to

<sup>488</sup> Bizimungu, T. 12 December 2007 p. 84.

<sup>489</sup> Witness Des Forges, T. 26 September 2006 p. 15.

<sup>490</sup> Trial Judgement, paras. 1210-1217.

<sup>491</sup> Trial Judgement, para. 2000.

<sup>492</sup> Cf. *Bagosora and Nsengiyumva* Appeal Judgement, para. 495.

T 12

Bizimungu's submission, the Trial Chamber noted that the maintenance of order was part of the gendarmerie's normal duties.<sup>493</sup> Accordingly, Bizimungu's submissions are rejected.

170. Additionally, the Appeals Chamber does not agree that the Trial Chamber misinterpreted Bizimungu's testimony that he did not take punitive action against Major Mpiranya as evidence that Bizimungu prioritised fighting the RPF over protecting civilians.<sup>494</sup> Bizimungu acknowledged that he knew of the allegations that Major Mpiranya and some of his troops had been involved in killings when he took up his post as the Chief of Staff of the Rwandan army but that he had not taken any action in light of the fact that Major Mpiranya was deployed at the front.<sup>495</sup> In any event, the Trial Chamber only considered this evidence to illustrate Bizimungu's expression of indifference to the plight of civilians in the context of finding that he prioritised fighting the RPF over protecting civilians.

171. In light of the foregoing, the Appeals Chamber finds that Bizimungu has failed to demonstrate that no reasonable trier of fact could have considered, as the Trial Chamber did, that Bizimungu refrained from adopting disciplinary measures against his subordinates because of concerns that such action would have undermined the effort to fight the RPF.<sup>496</sup> It was therefore not unreasonable for the Trial Chamber to have found that Bizimungu prioritised fighting the war over protecting civilians.<sup>497</sup> Bizimungu argues that the Trial Chamber erred in depicting it as a choice between the two whereas, he contends, he was not faced with such a stark choice.<sup>498</sup> However, the Appeals Chamber notes that Bizimungu himself relies on the fact that he was occupied with fighting the war as an explanation for why he was unable to prevent or punish the crimes.<sup>499</sup>

172. Finally, Bizimungu's arguments that there was no evidence that he refused to take punitive measures or refused to provide assistance to civilians likewise fail to demonstrate that no reasonable trier of fact could have found, as the Trial Chamber did, that the only reasonable inference available from the circumstantial evidence was that he failed to take reasonable and necessary measures.<sup>500</sup> In this regard, the Appeals Chamber is not convinced that the Trial Chamber reversed the burden of proof in stating that there was "no plausible explanation" for Bizimungu's failure to discharge his duties.<sup>501</sup> In so stating, the Trial Chamber was merely expressing that it did not find that Bizimungu's explanations for not having prevented the crimes or punished the perpetrators raised

<sup>493</sup> Trial Judgement, para. 1996.

<sup>494</sup> Trial Judgement, para. 2005.

<sup>495</sup> Bizimungu, T. 13 December 2007 pp. 24-27.

<sup>496</sup> See Trial Judgement, para. 2004.

<sup>497</sup> See Trial Judgement, para. 2004.

<sup>498</sup> Bizimungu Appeal Brief, para. 393.

<sup>499</sup> See Bizimungu Appeal Brief, paras. 368, 369, 397, 403.

<sup>500</sup> See Trial Judgement, paras. 1994-2012.

<sup>501</sup> Trial Judgement, para. 2006.

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reasonable doubt about the fact that he had failed to take necessary and reasonable measures to do so.

173. In light of the foregoing, the Appeals Chamber finds that Bizimungu has failed to demonstrate that the Trial Chamber erred in finding that he failed to take necessary and reasonable measures to prevent or punish the crimes of his subordinates for which he was convicted.

#### 5. Conclusion

174. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in finding that Bizimungu exercised authority and effective control over the *Interahamwe* who participated in the crimes committed at the *École des sciences infirmières de Kabgayi* (ESI), the Musambira Commune office and dispensary, the Butare Prefecture office and EER, and the Cyangugu stadium. The Appeals Chamber therefore grants Bizimungu's Ninth Ground of Appeal, in part. However, the Appeals Chamber dismisses the remainder of challenges raised in Bizimungu's Eighth through Thirteenth Grounds of Appeal as they relate to Bizimungu's superior responsibility over subordinate soldiers of the Rwandan army.

T 14

**D. Josephite Brothers Compound (Ground 14)**

175. The Trial Chamber convicted Bizimungu as a superior pursuant to Article 6(3) of the Statute of genocide and extermination as a crime against humanity based on the role of his subordinates in the killing of Tutsi refugees at the Josephite Brothers compound in Nyamirambo, Kigali.<sup>502</sup> In particular, the Trial Chamber found that following the death of the President on 6 April 1994, about 200 to 250 Tutsi civilians sought refuge at the Josephite Brothers compound.<sup>503</sup> Based on the evidence of Prosecution Witness DBJ, it further found that, on 7 June 1994, soldiers of the Rwandan army killed about 100 Tutsi civilians who had sought refuge at the compound.<sup>504</sup> The Trial Chamber concluded that Bizimungu knew or had reason to know of the crimes committed by his subordinates<sup>505</sup> and that he had the material ability to prevent and/or punish the crimes but failed to do so.<sup>506</sup>

176. Bizimungu submits that the Trial Chamber erred in finding him responsible for the killings at the Josephite Brothers compound.<sup>507</sup> In this section, the Appeals Chamber considers whether the Trial Chamber erred in: (i) its assessment of the evidence; (ii) finding that Bizimungu knew or had reason to know of the involvement of soldiers of the Rwandan army in the attack; and (iii) convicting Bizimungu of genocide for this event in light of its failure to provide a reasoned opinion.

1. Assessment of the Evidence

177. Witness DBJ was the only Prosecution witness to testify about the events at the Josephite Brothers compound.<sup>508</sup> The witness was a member of the Josephite Brothers religious order and testified about attacks on Tutsi civilians at the compound on 8 April and 7 June 1994.<sup>509</sup> Based on Witness DBJ's evidence the Trial Chamber concluded that Rwandan army soldiers killed about 100 Tutsi civilians at the compound on 7 June 1994.<sup>510</sup> The Trial Chamber found that Witness DBJ gave a first-hand and consistent account and concluded that it had "no doubt regarding the veracity of

<sup>502</sup> Trial Judgement, paras. 1147, 2115, 2120. The Trial Chamber also found Bizimungu responsible for murder as a crime against humanity for the killings at the Josephite Brothers compound on 7 June 1994 but it did not enter a conviction under that count as it was impermissibly cumulative with the conviction for extermination as a crime against humanity based on the same conduct. *See* Trial Judgement, paras. 2101, 2106, 2113, 2114.

<sup>503</sup> Trial Judgement, para. 1206. *See also* Trial Judgement, para. 1051.

<sup>504</sup> Trial Judgement, para. 1147. *See also* Trial Judgement, paras. 1206, 2100.

<sup>505</sup> Trial Judgement, paras. 1209, 1220, 1990.

<sup>506</sup> Trial Judgement, para. 2012.

<sup>507</sup> Bizimungu Notice of Appeal, paras. 192-194; Bizimungu Appeal Brief, paras. 407-429.

<sup>508</sup> Trial Judgement, paras. 1051-1061.

<sup>509</sup> Trial Judgement, paras. 1051-1061.

<sup>510</sup> Trial Judgement, para. 1147.

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[his] evidence that soldiers killed Tutsi civilians at the Josephite Brothers compound on 7 June 1994".<sup>511</sup>

178. Bizimungu submits that the Trial Chamber erred in relying on Witness DBJ's evidence, particularly to the effect that the attackers were soldiers and in relation to the criteria the assailants used to select the victims.<sup>512</sup> Bizimungu asserts that Witness DBJ's evidence was largely hearsay and, as such, should have been treated with caution.<sup>513</sup> He adds that the Trial Chamber failed to properly consider the contradictions in Witness DBJ's evidence.<sup>514</sup> In this regard, he argues that Witness DBJ contradicted himself about whether the soldiers checked identity cards when removing the Tutsis, and about the number of Tutsi brothers removed.<sup>515</sup> Bizimungu also claims that Witness DBJ's evidence was contradictory with respect to his ability to identify soldiers and the number of soldiers he purported to have seen.<sup>516</sup> According to Bizimungu, the Trial Chamber unreasonably disregarded his own testimony which provided alternative explanations about the identity of the perpetrators of the attack.<sup>517</sup>

179. The Prosecution responds that Bizimungu fails to demonstrate an error in the Trial Chamber's assessment of the evidence.<sup>518</sup> It asserts that the Trial Chamber took into account his submissions regarding the alleged inconsistencies in Witness DBJ's evidence and the fact that some of his evidence was hearsay.<sup>519</sup>

180. The Appeals Chamber recalls that a trial chamber has the discretion to cautiously consider and rely on hearsay evidence.<sup>520</sup> The Trial Chamber specifically considered that some of Witness DBJ's evidence was hearsay, but found that this did not discredit it.<sup>521</sup> Furthermore, it noted that it had undertaken a "careful review" of Witness DBJ's evidence<sup>522</sup> and the Trial Judgement reflects that it engaged in an extended discussion of Witness DBJ's testimony.<sup>523</sup> Accordingly, the Appeals Chamber finds that the Trial Chamber did not err in this respect.

<sup>511</sup> Trial Judgement, paras. 1143, 1145.

<sup>512</sup> Bizimungu Notice of Appeal, para. 192; Bizimungu Appeal Brief, paras. 407-415.

<sup>513</sup> Bizimungu Appeal Brief, para. 407. *See also* Bizimungu Reply Brief, paras. 98-100; AT. 7 May 2013 p. 65; AT. 8 May 2013 p. 26.

<sup>514</sup> Bizimungu Appeal Brief, paras. 408-415.

<sup>515</sup> Bizimungu Appeal Brief, paras. 409-411. *See also* AT. 7 May 2013 p. 65.

<sup>516</sup> Bizimungu Appeal Brief, paras. 413-415.

<sup>517</sup> Bizimungu Notice of Appeal, para. 194; Bizimungu Appeal Brief, para. 428.

<sup>518</sup> Prosecution Response Brief (Bizimungu), paras. 176, 185.

<sup>519</sup> Prosecution Response Brief (Bizimungu), paras. 178-180, 182-185.

<sup>520</sup> *Munyakazi* Appeal Judgement, para. 77; *Kalimanzira* Appeal Judgement, para. 96; *Karera* Appeal Judgement, para. 39.

<sup>521</sup> Trial Judgement, paras. 1144, 1145.

<sup>522</sup> Trial Judgement, para. 1145.

<sup>523</sup> Trial Judgement, paras. 1131-1147.

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181. The Trial Chamber noted that Witness DBJ inferred that the soldiers must have inspected the identity cards of the civilians at the Josephite Brothers compound since no Hutus were removed.<sup>524</sup> However, Bizimungu contends that the witness later stated that he did not know the criteria by which people were selected to be removed.<sup>525</sup> The Appeals Chamber is not convinced that this amounts to a contradiction that could undermine the Trial Chamber's assessment of Witness DBJ's credibility. In this regard, the Appeals Chamber notes that Witness DBJ was clear in his testimony that soldiers checked the identity cards of civilians at the compound and took away Tutsis.<sup>526</sup> The Appeals Chamber understands that Witness DBJ's statement that he did not know the criteria by which people were selected to be removed simply refers to the fact that he could not explain why the soldiers merely passed through his room without removing him, despite him being a Tutsi, but removed people from other rooms in the compound.<sup>527</sup>

182. Similarly, the Appeals Chamber is not convinced that there was a discrepancy in Witness DBJ's evidence regarding the number of Tutsi brothers who were removed from the compound. Bizimungu argues that the number of Tutsi brothers who were removed from the compound and who survived the attacks according to Witness DBJ's evidence did not add up to the total number of brothers present at the compound.<sup>528</sup> However, while Witness DBJ testified that there were 16 brothers at the compound upon his arrival there on 2 April 1994, he did not indicate how many were present on 7 June 1994.<sup>529</sup> Accordingly, since no evidence was adduced as to the total number of Josephite brothers present at the compound on 7 June 1994, Bizimungu's argument fails to demonstrate a discrepancy.

183. The Appeals Chamber also notes that in its assessment of the 8 April 1994 attack on the Josephite Brothers compound, the Trial Chamber addressed in detail the alleged contradictions in Witness DBJ's evidence regarding his ability to identify the assailants as soldiers, including the contradictions raised by Bizimungu on appeal relating to Witness DBJ's testimony in the *Bagosora*

<sup>524</sup> Trial Judgement, para. 1057.

<sup>525</sup> Bizimungu Appeal Brief, para. 411, referring to Witness DBJ, T. 31 August 2005 p. 49.

<sup>526</sup> Witness DBJ, T. 29 August 2005 pp. 27, 32. The Appeals Chamber further notes that Witness DBJ testified that a soldier and a member of the Presidential Guard had asked to see his identity card at the beginning of the attack but that he answered that he had lost it, and subsequently he was not asked again to show his identity card. See T. 29 August 2005 p. 32.

<sup>527</sup> Witness DBJ, T. 31 August 2005 pp. 48, 49 ("A: [...] I was in a room, it was open and the killers passed through that room. They saw the brothers that were with me. They went out. And the others were in the other rooms. They brought out people and killed them. [...] Q: And as you state, the killers passed through your room. They did not bother you. They went into other rooms. And it would appear that they hurt the others, but you wouldn't know why. You don't know why; is that correct? A: You are using words that cross purposes, Counsel, when you say that they hurt people which means that they didn't kill them. They passed through our room and they went into other rooms. But I did not know why or what criteria they used to take people out of the centre".).

<sup>528</sup> See Bizimungu Appeal Brief, para. 410.

<sup>529</sup> See Witness DBJ, T. 29 August 2005 pp. 8, 10; T. 30 August 2005 pp. 16, 17.

T 14

*et al.* case.<sup>530</sup> The Trial Chamber concluded that “[h]aving reviewed the entirety of his evidence, the [Trial] Chamber is satisfied that the witness could reliably distinguish soldiers from the young male assailants given the marked differences in their appearances”.<sup>531</sup> Bizimungu fails to point to any error in the Trial Chamber’s assessment of the evidence in this regard.

184. Likewise, the Appeals Chamber is not convinced that the Trial Chamber erred by not specifically addressing the alleged discrepancy in Witness DBJ’s evidence regarding the number of soldiers he saw on 7 June 1994. In this regard, it notes that Witness DBJ testified that “I believe that three or four soldiers came to my room and others went to other rooms”<sup>532</sup> which is not incompatible with his later testimony estimating that “there were about 15 or 20 assailants because they passed through the place where we were”.<sup>533</sup> When stating the number who entered his room, he specifically noted that there were other assailants and consistently emphasized that the numbers he provided were not exact.<sup>534</sup>

185. Finally, the Trial Chamber considered Bizimungu’s testimony suggesting alternative explanations for the events at the Josephite Brothers compound, but concluded that it was “not satisfied that [his] general remarks [...] raise[d] any doubts regarding Witness DBJ’s firsthand and detailed accounts of the events”.<sup>535</sup> Bizimungu merely asserts that the Trial Chamber’s assessment was unreasonable without demonstrating why and thus has not shown any error in the Trial Chamber’s consideration of his testimony.

186. Accordingly, the Appeals Chamber considers that Bizimungu has failed to demonstrate that the Trial Chamber erred in its assessment of the evidence regarding the events at the Josephite Brothers compound.

## 2. Bizimungu’s Knowledge

187. The Trial Chamber found that Bizimungu knew or had reason to know of the involvement of soldiers of the Rwandan army in the killings of Tutsi civilians at the Josephite Brothers compound on 7 June 1994.<sup>536</sup> In reaching this conclusion, the Trial Chamber relied upon a number of factors including: the fact that Bizimungu received situation reports from all Rwandan army units regarding hostilities as well as the security situation affecting the civilian population;<sup>537</sup> the scale of the

<sup>530</sup> Trial Judgement, paras. 1134-1136.

<sup>531</sup> Trial Judgement, para. 1136.

<sup>532</sup> Witness DBJ, T. 29 August 2005 p. 26.

<sup>533</sup> Witness DBJ, T. 31 August 2005 p. 48.

<sup>534</sup> Witness DBJ, T. 29 August 2005 p. 26; T. 31 August 2005 p. 48.

<sup>535</sup> Trial Judgement, para. 1146.

<sup>536</sup> Trial Judgement, paras. 1209, 1987. *See also* Trial Judgement, paras. 1219, 1992.

<sup>537</sup> Trial Judgement, paras. 1200, 1989.

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killings and the fact that they took place in Kigali where Bizimungu was based;<sup>538</sup> Bizimungu's evidence that he received information that civilians who had sought refuge at various religious centres in Kigali were attacked by people wearing military uniforms;<sup>539</sup> the organized nature of the attacks;<sup>540</sup> and reports from international officials containing information that should have alerted Bizimungu to the fact that his subordinates had committed or were about to commit crimes similar to those that occurred at the Josephite Brothers compound.<sup>541</sup>

188. Bizimungu submits that the Trial Chamber erred in finding that he knew or had reason to know that soldiers of the Rwandan army had participated in the killing of Tutsi civilians at the Josephite Brothers compound on 7 June 1994.<sup>542</sup> He asserts that the fact that he was in Kigali does not mean that he was close to Nyamirambo which, he contends, was difficult to access at the time, had an RPF presence, and suffered heavy casualties from RPF shelling.<sup>543</sup> He also challenges the Trial Chamber's finding that the attack at the compound was a systematic, organized operation.<sup>544</sup> He notes in this respect that the attackers were not in large numbers and emphasizes that the fact that there were two groups of assailants does not mean they were organized.<sup>545</sup> According to Bizimungu, the Trial Chamber relied on his hierarchical position and general information in his possession to infer that he was on notice of the crimes which, he asserts, were insufficient to establish his knowledge.<sup>546</sup> He argues that the Trial Chamber erred by finding that there was "a plausible basis" for inferring that soldiers committed the crime and "probative indication" that he knew of the crime.<sup>547</sup> He contends that this is not the correct standard for assessing circumstantial evidence.<sup>548</sup>

189. The Prosecution responds that Bizimungu's submissions on knowledge lack merit.<sup>549</sup>

190. The Appeals Chamber is satisfied that a reasonable trier of fact could have relied upon Bizimungu's presence in Kigali as an indicator of his knowledge of the crimes at the Josephite Brothers compound in light of his proximity to Nyamirambo. In this regard, the Appeals Chamber notes that Bizimungu acknowledged that, despite the RPF presence in the area, he received

<sup>538</sup> Trial Judgement, paras. 1206, 1988.

<sup>539</sup> Trial Judgement, paras. 1207, 1988, 1990.

<sup>540</sup> Trial Judgement, paras. 1208, 1988.

<sup>541</sup> Trial Judgement, paras. 1210-1219, 1993.

<sup>542</sup> Bizimungu Notice of Appeal, para. 193; Bizimungu Appeal Brief, paras. 416-427.

<sup>543</sup> Bizimungu Appeal Brief, para. 417. *See also* AT. 7 May 2013 p. 66.

<sup>544</sup> Bizimungu Appeal Brief, paras. 418-420.

<sup>545</sup> Bizimungu Appeal Brief, paras. 418, 419.

<sup>546</sup> Bizimungu Appeal Brief, paras. 425, 427. Bizimungu also argues that the Trial Chamber erroneously found that he must have been informed of the event from the situation reports whereas he asserts that he was not. *See* Bizimungu Appeal Brief, para. 421. These arguments have been addressed above. *See supra* para. 146.

<sup>547</sup> Bizimungu Appeal Brief, paras. 422-424.

<sup>548</sup> Bizimungu Appeal Brief, paras. 423, 426.

<sup>549</sup> Prosecution Response Brief (Bizimungu), paras. 176, 186-188.

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information suggesting that civilians who had sought refuge at various religious centres in Kigali were attacked and that some of the assailants were dressed in military uniforms.<sup>550</sup> While Bizimungu's proximity to Nyamirambo may not have been sufficient on its own to establish his knowledge of the crimes, the Appeals Chamber recalls that it was only one of a number of factors which the Trial Chamber relied upon in reaching its finding.<sup>551</sup>

191. Turning to the Trial Chamber's finding that the attack was an organized military operation, Bizimungu contends that it was not the only reasonable inference available from the evidence.<sup>552</sup> He asserts that, had it been a planned attack, the selection of the victims would have been more systematic and that the soldiers who participated in the attack and those who occupied the premises thereafter were not working together.<sup>553</sup> However, Bizimungu merely speculates about alternative inferences without demonstrating that no reasonable trier of fact could have found from the evidence that the only reasonable inference was that it was an organized attack. Accordingly, his arguments fail to show any error.

192. Furthermore, the Appeals Chamber dismisses Bizimungu's assertion that the Trial Chamber based its finding on his knowledge solely on his hierarchical position and general information. As noted above, the Trial Chamber considered that a number of indicators supported the finding on Bizimungu's knowledge including his own evidence that he was aware of reprisal attacks on civilians who had sought refuge at various religious centres in Kigali by assailants dressed in military uniforms in early June 1994.<sup>554</sup>

193. Finally, the Appeals Chamber finds that Bizimungu has failed to establish that the Trial Chamber applied the incorrect standard of proof in finding that he knew or had reason to know of the attack. The Trial Chamber's finding that "Witness DBJ's evidence in its entirety provides a plausible basis for the inference that soldiers killed Tutsi civilians at the Josephite Brothers compound on 7 June 1994"<sup>555</sup> does not reflect the applicable standard for drawing inferences from the evidence.<sup>556</sup> However, the Appeals Chamber is satisfied that the Trial Chamber was indeed convinced that this was the only reasonable inference available from the evidence in light of its subsequent finding that "[h]aving considered the entirety of Witness DBJ's evidence, the Chamber is satisfied that the Prosecution has established beyond reasonable doubt" that soldiers committed

<sup>550</sup> Trial Judgement, para. 1207.

<sup>551</sup> Trial Judgement, paras. 1206-1220, 1988-1990.

<sup>552</sup> Bizimungu Appeal Brief, para. 418.

<sup>553</sup> Bizimungu Appeal Brief, para. 418.

<sup>554</sup> See Trial Judgement, paras. 1200, 1206-1219, 1988-1990, 1993.

<sup>555</sup> Trial Judgement, para. 1145.

<sup>556</sup> See *Seromba* Appeal Judgement, para. 221; *Ntagerura et al.* Appeal Judgement, paras. 306, 399.

74

the crimes at the Josephite Brothers compound on 7 June 1994.<sup>557</sup> Similarly, while the Trial Chamber stated that Bizimungu's evidence regarding attacks at religious centres in Kigali in early June 1994 was "a probative indication of his knowledge or notice of those crimes",<sup>558</sup> the Appeals Chamber recalls that this was only one of the factors upon which the Trial Chamber relied in finding that he knew or had reason to know of the attacks. As such, it was merely stating that this factor supported its finding based on multiple indicia of his knowledge. The Appeals Chamber finds no error in this respect.

194. Accordingly, the Appeals Chamber considers that Bizimungu has failed to demonstrate that the Trial Chamber erred in finding that he knew or had reason to know that his subordinates were about to commit or had committed crimes at the Josephite Brothers compound on 7 June 1994.

### 3. Failure to Make Legal Findings

195. As discussed above in the section on the Trial Chamber's failure to make legal findings supporting Bizimungu's convictions,<sup>559</sup> the Appeals Chamber will consider in this section whether there were sufficient findings and evidence on the record to sustain Bizimungu's conviction for genocide in relation to the killings at the Josephite Brothers compound.

196. The Prosecution argues in its Additional Submissions, that Bizimungu's superior responsibility for genocide for the attacks at the Josephite Brothers compound was established beyond reasonable doubt.<sup>560</sup> In particular, it submits that the *actus reus* of genocide was established by the killing of Tutsis at the Josephite Brothers compound on 7 June 1994.<sup>561</sup> The Prosecution asserts that the evidence established that the Tutsis in the compound were specifically targeted because of their ethnicity, which establishes the *mens rea* for genocide.<sup>562</sup> It adds that Bizimungu bears superior responsibility for these killings because the perpetrators were his subordinates under his effective control, and because he knew of the attacks, but failed to take necessary and reasonable measures to prevent or punish them.<sup>563</sup>

197. In his Additional Submissions, Bizimungu largely repeats challenges raised in his appeal which have been addressed elsewhere in this Judgement. Bizimungu submits that no evidence established that he had a superior-subordinate relationship with the perpetrators of the crimes, that he knew or had reason to know of the crimes, or that he failed to take necessary or reasonable

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<sup>557</sup> Trial Judgement, para. 1147.

<sup>558</sup> Trial Judgement, para. 1990.

<sup>559</sup> See *supra* paras. 24, 37.

<sup>560</sup> Prosecution's Additional Submissions, para. 20.

<sup>561</sup> Prosecution's Additional Submissions, paras. 21, 22.

<sup>562</sup> Prosecution's Additional Submissions, paras. 23, 24.

<sup>563</sup> Prosecution's Additional Submissions, paras. 25-29.

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measures to prevent the crimes or punish the perpetrators.<sup>564</sup> With respect to the *actus reus* of genocide, he further argues that the Trial Chamber erred in relying on Witness DBJ's evidence and in finding that Tutsis were targeted at the Josephite Brothers compound.<sup>565</sup> Bizimungu further argues that there is no evidence that could establish the perpetrators' specific intent or that he was aware of it.<sup>566</sup>

198. The Trial Chamber did not make a legal finding that the *actus reus* of genocide had been fulfilled. However, it did find it proven that soldiers of the Rwandan army killed about 100 Tutsi civilians at the Josephite Brothers compound on 7 June 1994,<sup>567</sup> which is sufficient to support a finding of the *actus reus* of genocide.

199. The Trial Chamber also made no finding with respect to the *mens rea* for genocide. However, Witness DBJ, whose evidence the Trial Chamber accepted as credible,<sup>568</sup> testified that the soldiers selected Tutsis to be taken away after checking their identity cards.<sup>569</sup> The only reasonable inference available from this evidence, taken in conjunction with the widespread killing of Tutsis in Rwanda at the time,<sup>570</sup> was that the soldiers who participated in these killings acted with genocidal intent.<sup>571</sup> Furthermore, in light of the Trial Chamber's finding that Bizimungu knew or had reason to know of the involvement of soldiers of the Rwandan army in the killings of Tutsi civilians at the Josephite Brothers compound,<sup>572</sup> the only reasonable inference is that he also knew of their genocidal intent.<sup>573</sup>

200. Moreover, the Appeals Chamber has already rejected Bizimungu's challenges to the Trial Chamber's findings that he failed to take necessary and reasonable measures to prevent or punish

<sup>564</sup> Bizimungu's Additional Submissions, paras. 39-71, 77-84.

<sup>565</sup> Bizimungu's Additional Submissions, paras. 72, 73.

<sup>566</sup> Bizimungu's Additional Submissions, para. 76.

<sup>567</sup> Trial Judgement, paras. 1147, 1206.

<sup>568</sup> Trial Judgement, para. 1145.

<sup>569</sup> Witness DBJ, T. 29 August 2005 pp. 27, 32. *See also* Trial Judgement, para. 1057.

<sup>570</sup> Trial Judgement, para. 2090.

<sup>571</sup> *See Hategekimana* Appeal Judgement, para. 133 ("The Appeals Chamber recalls that, in the absence of direct evidence, a perpetrator's intent to commit genocide may be inferred from relevant facts and circumstances, including the general context of the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts"). *See also Ntabakuze* Appeal Judgement, paras. 237, 241.

<sup>572</sup> Trial Judgement, para. 1209.

<sup>573</sup> *See Ntabakuze* Appeal Judgement, paras. 228, 248, 250 (affirming the trial chamber's findings that Ntabakuze had knowledge of his subordinates' genocidal intent when assessing the defendant's knowledge for Article 6(3) of the Statute); *but cf. Delalić et al.* Appeal Judgement, para. 238 (stating that knowledge sufficient to establish liability under Article 6(3) of the Statute does not need to provide "specific information about unlawful acts committed or about to be committed").

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the crimes committed by his subordinate soldiers during the attack at the Josephite Brothers compound.<sup>574</sup>

201. In light of the foregoing, the Appeals Chamber finds that despite the Trial Chamber's failure to make legal findings, it did not err in convicting Bizimungu as a superior of genocide in relation to the killings at the Josephite Brothers compound.

#### 4. Conclusion

202. Consequently, the Appeals Chamber dismisses Bizimungu's Fourteenth Ground of Appeal.

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<sup>574</sup> See *supra* paras. 70, 173, 174. See also Trial Judgement, para. 2012.

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**E. Cyangugu Stadium (Ground 15)**

203. The Trial Chamber convicted Bizimungu as a superior pursuant to Article 6(3) of the Statute of murder as a crime against humanity based on the role of soldiers and *Interahamwe* in the killing of Tutsi civilians removed from the Cyangugu stadium during April and May 1994.<sup>575</sup> It also convicted Bizimungu as a superior of rape as a crime against humanity and rape as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for the rape of women by soldiers at the Cyangugu stadium during April and May 1994.<sup>576</sup> In particular, the Trial Chamber found that following the death of the President on 6 April 1994, approximately 4,000 to 5,000 Tutsi civilians sought refuge at the Cyangugu stadium.<sup>577</sup> Based on the evidence of Prosecution Witnesses LBC, LAV, and DEA, the Trial Chamber found that numerous male Tutsi refugees were removed from the stadium by soldiers and then killed by soldiers and *Interahamwe*.<sup>578</sup> Furthermore, based on the evidence of Witnesses LBC and LAV, it found that soldiers raped a number of Tutsi women at the Cyangugu stadium in April and May 1994.<sup>579</sup> The Trial Chamber concluded that Bizimungu knew or had reason to know of the crimes committed by his subordinates at the Cyangugu stadium<sup>580</sup> and that he had the material ability to prevent the crimes and/or punish the perpetrators but failed to do so.<sup>581</sup>

204. Bizimungu submits that the Trial Chamber erred in finding him responsible for the crimes committed at the Cyangugu stadium.<sup>582</sup> The Appeals Chamber recalls that it has already found that the Trial Chamber erred in holding Bizimungu liable for crimes committed by the *Interahamwe*.<sup>583</sup> Thus, in this section the Appeals Chamber will consider Bizimungu's arguments that the Trial Chamber erred in: (i) failing to take into account relevant findings in the *Ntagerura et al.* Trial and Appeal Judgements with respect to the crimes committed at the Cyangugu stadium; and (ii) finding Prosecution Witnesses LBC, LAV, and DEA credible.<sup>584</sup>

**1. Failure to Consider the *Ntagerura et al.* Case**

205. Bizimungu submits that the Trial Chamber erred by failing to consider the *Ntagerura et al.* case in which Lieutenant Samuel Imanishimwe, Bizimungu's subordinate, was acquitted of the

<sup>575</sup> Trial Judgement, paras. 2104-2106.

<sup>576</sup> Trial Judgement, paras. 2127, 2128, 2162.

<sup>577</sup> Trial Judgement, para. 1509.

<sup>578</sup> Trial Judgement, para. 1516.

<sup>579</sup> Trial Judgement, para. 1519.

<sup>580</sup> Trial Judgement, paras. 1528, 1991, 1992.

<sup>581</sup> Trial Judgement, paras. 1528, 2012.

<sup>582</sup> Bizimungu Notice of Appeal, paras. 195-197; Bizimungu Appeal Brief, paras. 430-456.

<sup>583</sup> See *supra* para. 139.



crimes committed at the Cyangugu stadium.<sup>585</sup> Bizimungu argues that the Prosecution failed to disclose to him all of the evidence given by the witnesses in the *Ntagerura et al.* trial.<sup>586</sup> Furthermore, he contends that, since the Prosecution knew that Samuel Imanishimwe had been acquitted of the crimes committed at the Cyangugu stadium, it could not claim that Bizimungu was responsible for these crimes.<sup>587</sup> In particular, he asserts that the Trial Chamber erred in relying on the testimonies of Witnesses LBC, LAV, and DEA, given that Witness DEA, who testified in the *Ntagerura et al.* case, was not found credible in that case, and Witnesses LBC and LAV did not testify in that case.<sup>588</sup> According to Bizimungu, the Prosecution case regarding the crimes at the Cyangugu stadium collapsed when the Appeals Chamber upheld the *Ntagerura et al.* Trial Judgement.<sup>589</sup>

206. With respect to his knowledge of the crimes committed at the Cyangugu stadium, Bizimungu asserts that the Trial Chamber erred in relying on Prosecution Exhibit 191, which is a record of a conversation between Bizimungu and Prudence Bushnell, the then-United States Deputy Assistant Secretary of State for African Affairs, on 13 May 1994, in which Bushnell specifically warned Bizimungu that he would be held responsible for whatever happened to those taking refuge in the Cyangugu stadium.<sup>590</sup> Bizimungu submits that the Trial Chamber should have considered that, according to the *Ntagerura et al.* Trial Judgement, the conversation took place after the displaced persons from the Cyangugu stadium had already been transferred to Nyarushishi on 11 May 1994.<sup>591</sup> Consequently, he argues that Prosecution Exhibit 191 could not support a finding that he knew what was happening at the stadium.<sup>592</sup> Bizimungu further challenges the Trial Chamber's reliance on Prosecution Exhibit 187, a report by Human Rights Watch dated May 1994, on the basis that it stated that "[o]n May 11, militia and military began transferring the hostages to a former refugee camp some thirteen kilometers from the town of Cyangugu, where they could torture or kill them without drawing attention".<sup>593</sup> He points to the *Ntagerura et al.* case where it was found that the refugees were transferred to the Nyarushishi camp where they were protected.<sup>594</sup> Finally, Bizimungu argues that the Trial Chamber erred in labelling the events at the Cyangugu

<sup>584</sup> Bizimungu argues that the Indictment failed to properly plead the identity of his alleged subordinates, his effective control over them as well as conduct demonstrating *mens rea*. Bizimungu Appeal Brief, paras. 430-433, 442-444. These arguments have been addressed elsewhere in the Judgement. See *supra* paras. 72-86, 96-101, 105.

<sup>585</sup> Bizimungu Notice of Appeal, para. 197; Bizimungu Appeal Brief, paras. 434-441, 445-450. See also AT. 7 May 2013 p. 66; AT. 8 May 2013 p. 28.

<sup>586</sup> Bizimungu Appeal Brief, para. 434.

<sup>587</sup> Bizimungu Appeal Brief, para. 435. See also AT. 7 May 2013 p. 66.

<sup>588</sup> Bizimungu Appeal Brief, paras. 436-438. See also Bizimungu Appeal Brief, paras. 439, 440.

<sup>589</sup> Bizimungu Appeal Brief, para. 441.

<sup>590</sup> Bizimungu Notice of Appeal, para. 196; Bizimungu Appeal Brief, paras. 442, 445. See also AT. 7 May 2013 p. 67.

<sup>591</sup> Bizimungu Notice of Appeal, para. 196; Bizimungu Appeal Brief, para. 446.

<sup>592</sup> Bizimungu Appeal Brief, para. 445. Bizimungu refers to "13 April 1994"; however, the Appeals Chamber understands that he intended to refer to 13 May 1994.

<sup>593</sup> Bizimungu Appeal Brief, para. 448. See also Prosecution Exhibit 187, p. 5.

stadium “systematic” without first considering the *Ntagerura et al.* Trial Judgement, particularly given that the Appeals Chamber in that case subsequently confirmed that there were no large-scale attacks after 16 April 1994.<sup>595</sup>

207. The Prosecution responds that the facts that Samuel Imanishimwe was not held responsible for the events at the Cyangugu stadium and that the Prosecution did not pursue the same charges in *Ntagerura et al.* are irrelevant.<sup>596</sup> It recalls that two chambers may reach different reasonable conclusions on the credibility of witnesses and that the finding of one does not bind the other.<sup>597</sup> The Prosecution adds that the Trial Chamber was aware of the findings in the *Ntagerura et al.* case with regard to Witness DEA, but nonetheless found him credible.<sup>598</sup> In particular, the Prosecution notes that, in contrast to the present case, Witness DEA’s evidence in the *Ntagerura et al.* case was not corroborated.<sup>599</sup> It also recalls that Prosecution Exhibit 191 was only one of several factors that the Trial Chamber took into account in finding that Bizimungu was aware of the events at the Cyangugu stadium and asserts that, in any event, Bizimungu admitted that he was aware of the situation.<sup>600</sup>

208. The Appeals Chamber recalls that a chamber may only consider facts found in another proceeding before the Tribunal in accordance with the procedure set forth in Rules 94(A) and 94(B) of the Rules.<sup>601</sup> A review of the Trial Judgement reveals that the Trial Chamber did not take judicial notice of any of the findings made in the *Ntagerura et al.* case in accordance with either provision of Rule 94 of the Rules. Moreover, the Appeals Chamber is not satisfied that Bizimungu has demonstrated that the fact that the refugees held at the stadium were transferred to Nyarushishi on 11 May 1994, that refugees were protected at Nyarushishi camp, and that no large-scale killings were committed at the Cyangugu stadium after 16 April 1994 can be qualified as facts of common knowledge under Rule 94(A) of the Rules. Therefore, the Trial Chamber could only have taken judicial notice of these relevant parts of the *Ntagerura et al.* Trial and Appeal Judgements pursuant to Rule 94(B) of the Rules. However, none of the parties sought judicial notice of these facts.<sup>602</sup> Accordingly, the Appeals Chamber finds no error on the part of the Trial Chamber in not taking into account the findings in the *Ntagerura et al.* case.

<sup>594</sup> Bizimungu Appeal Brief, para. 449.

<sup>595</sup> Bizimungu Appeal Brief, para. 450. *See also* AT. 7 May 2013 pp. 66, 67.

<sup>596</sup> Prosecution Response Brief (Bizimungu), para. 203.

<sup>597</sup> Prosecution Response Brief (Bizimungu), para. 195.

<sup>598</sup> Prosecution Response Brief (Bizimungu), para. 195.

<sup>599</sup> Prosecution Response Brief (Bizimungu), para. 195.

<sup>600</sup> Prosecution Response Brief (Bizimungu), para. 201.

<sup>601</sup> *See Setako* Appeal Judgement, paras. 198, 200.

<sup>602</sup> The Appeals Chamber notes that Bizimungu only raised the *Ntagerura et al.* case in connection with the credibility of Witness DEA which is addressed below. *See* T. 28 September 2005 pp. 36, 37.

209. The Appeals Chamber is also not convinced that the Trial Chamber erred in convicting Bizimungu for the crimes committed at the Cyangugu stadium despite the fact that Samuel Imanishimwe was acquitted of charges relating to events at the Cyangugu stadium in the *Ntagerura et al.* case. In this regard, the Appeals Chamber recalls that the *Ntagerura et al.* Trial and Appeal Judgements resulted from a separate proceeding against different accused, and that, as a result, the factual findings in that case are neither binding nor authoritative in this case.<sup>603</sup> Furthermore, the Appeals Chamber notes that, while Witness LBC referred to Samuel Imanishimwe in her evidence,<sup>604</sup> the Trial Chamber's findings in this case were not based on Samuel Imanishimwe's involvement in the crimes at the Cyangugu stadium.<sup>605</sup> Rather, the Trial Chamber found that soldiers and *Interahamwe* were involved in the killings and that soldiers committed the rapes without making more specific findings as to the identities of the perpetrators.<sup>606</sup>

210. Turning to Bizimungu's submission that the Trial Chamber erred in relying on the evidence of Witness DEA given that he was not found to be credible in the *Ntagerura et al.* case, the Appeals Chamber recalls that the probative value of evidence may be assessed differently in different cases, depending on the circumstances.<sup>607</sup> Indeed, "two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence".<sup>608</sup> The Trial Chamber noted Bizimungu's submissions that Witness DEA had not been found credible in the *Ntagerura et al.* case.<sup>609</sup> However, it considered that his testimony in this case was corroborated in important respects by the evidence of Witnesses LBC and LAV, whereas Witness DEA's evidence in the *Ntagerura et al.* case was not corroborated.<sup>610</sup> Bizimungu fails to demonstrate that no reasonable trier of fact could have so found. Similarly, Bizimungu fails to show how the fact that Witnesses LBC and LAV did not testify in the *Ntagerura et al.* case could undermine the Trial Chamber's finding that their testimonies in this case were credible.

211. Accordingly, Bizimungu has failed to demonstrate that the Trial Chamber erred by not taking into account the findings made in the *Ntagerura et al.* Trial and Appeal Judgements with respect to the crimes committed at the Cyangugu stadium.

<sup>603</sup> Cf. *Renzaho* Appeal Judgement, para. 469.

<sup>604</sup> See Trial Judgement, paras. 1482-1484, 1486.

<sup>605</sup> Trial Judgement, paras. 1510-1528.

<sup>606</sup> Trial Judgement, paras. 1516, 1519.

<sup>607</sup> See *Simba* Appeal Judgement, para. 132. See also *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR73.17, Decision on Joseph Nzirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts, 29 May 2009, para. 16.

<sup>608</sup> *Kayishema and Ruzindana* Appeal Judgement, para. 143. See also *Lukić and Lukić* Appeal Judgement, para. 396; *Rutaganda* Appeal Judgement, paras. 22, 534; *Tadić* Appeal Judgement, para. 64.

<sup>609</sup> Trial Judgement, para. 1515.

<sup>610</sup> Trial Judgement, para. 1514, fn. 2714.

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2. Assessment of the Credibility of Prosecution Witnesses

212. The Trial Chamber found the evidence of Prosecution Witnesses LBC, LAV, and DEA regarding the removal of Tutsi men from the Cyangugu stadium to be largely consistent, and it found them to be credible.<sup>611</sup> It further found that Witnesses LBC and LAV provided consistent and credible evidence concerning the rapes committed by soldiers at the stadium.<sup>612</sup>

213. Bizimungu submits that the Trial Chamber erred in finding these witnesses credible.<sup>613</sup> He argues that Witness LAV's evidence about rapes was hearsay.<sup>614</sup> Bizimungu adds that Witness LAV testified about an escape attempt during which several people were killed which did not appear in her prior statement of 9 August 1999.<sup>615</sup> With respect to Witness LBC, Bizimungu notes that she did not mention that she had been raped in her prior statement of 22 July 1999 and recalls that he had requested to have her testimony set aside on the basis that it completely contradicted her prior statement but that the request was denied.<sup>616</sup> Bizimungu further contends that the Trial Chamber erred in finding that the testimonies of Witnesses LBC and LAV corroborated that of Witness DEA.<sup>617</sup> He asserts that Witness DEA's evidence was not found to be *prima facie* credible and that, as such, the Trial Chamber erroneously tried to boost his credibility with the testimonies of Witnesses LBC and LAV.<sup>618</sup>

214. The Prosecution responds that Bizimungu fails to demonstrate any error that warrants appellate intervention.<sup>619</sup>

215. With respect to Witness LAV's evidence, the Appeals Chamber notes that part of her testimony with respect to being told by other women that they had been raped was hearsay evidence.<sup>620</sup> Nonetheless, it was within the discretion of the Trial Chamber to accept this evidence, particularly given that it was supported by Witness LAV's own observations of women when they returned to the stadium after having been taken away by soldiers.<sup>621</sup> Furthermore, it was corroborated by the evidence of Witness LBC, specifically with respect to the name of one of the rape victims.<sup>622</sup>

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<sup>611</sup> Trial Judgement, para. 1510.

<sup>612</sup> Trial Judgement, para. 1519.

<sup>613</sup> Bizimungu Notice of Appeal, para. 195; Bizimungu Appeal Brief, para. 451.

<sup>614</sup> Bizimungu Appeal Brief, para. 452.

<sup>615</sup> Bizimungu Appeal Brief, para. 452.

<sup>616</sup> Bizimungu Appeal Brief, para. 453. *See also* AT. 7 May 2013 p. 67.

<sup>617</sup> Bizimungu Appeal Brief, para. 454.

<sup>618</sup> Bizimungu Appeal Brief, para. 454.

<sup>619</sup> Prosecution Response Brief (Bizimungu), paras. 196-200, 204.

<sup>620</sup> *See* Trial Judgement, para. 1490.

<sup>621</sup> *See* Trial Judgement, para. 1489.

<sup>622</sup> Trial Judgement, paras. 1518, 1519.

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216. With regard to Bizimungu's assertion that Witness LAV's statement of 9 August 1999 did not refer to the attempt by refugees to flee the stadium to which she testified at trial,<sup>623</sup> the Appeals Chamber notes that the statement was not admitted into evidence and that this alleged discrepancy was not raised in cross-examination.<sup>624</sup> Bizimungu therefore fails to establish the existence of a discrepancy. The Appeals Chamber notes, however, that in Witness LAV's testimony about this attempt to flee, reference was made to a statement which included a reference to this attempt to flee.<sup>625</sup> In any event, the Appeals Chamber notes that this aspect of the witness's testimony was corroborated by Witness LBC.<sup>626</sup> Accordingly, Bizimungu has not demonstrated that the Trial Chamber acted unreasonably.

217. Turning to Bizimungu's challenge to Witness LBC's credibility on the basis that she did not mention that she had been raped in her prior statement of 22 July 1999, the Appeals Chamber notes that the Trial Chamber did not specifically address this alleged discrepancy in its assessment of her evidence on the rapes at the Cyangugu stadium.<sup>627</sup> Nonetheless, the Appeals Chamber recalls that as a general rule, a trial chamber is not required to articulate every step of its reasoning for each finding it makes.<sup>628</sup> Nor is it required to set out in detail why it accepted or rejected a particular testimony.<sup>629</sup> The Appeals Chamber notes that when Witness LBC was cross-examined on this point at trial she explained that at the time she gave her statement she was not brave enough to tell the investigators about her rape.<sup>630</sup> The Appeals Chamber considers that as this evidence was on the record the Trial Chamber was aware of it, in particular because the Trial Chamber, in discussing Witness LBC's credibility, cited the relevant transcript page concerning defence counsel's question to the witness on this point.<sup>631</sup> Bizimungu fails to demonstrate that no reasonable trier of fact could have found Witness LBC credible notwithstanding this inconsistency.<sup>632</sup>

218. The Appeals Chamber further finds that Bizimungu fails to demonstrate that the Trial Chamber erred in relying on Witness DEA's evidence given its corroboration by the evidence of Witnesses LBC and LAV. The Trial Chamber noted that "Witness DEA tended to exaggerate some

<sup>623</sup> Witness LAV, T. 27 June 2005 pp. 11, 19. *See also* Trial Judgement, paras. 1493, 1494.

<sup>624</sup> Witness LAV, T. 27 June 2005; T. 28 June 2005.

<sup>625</sup> Witness LAV, T. 27 June 2005 pp. 10, 11 ("Madam Witness, I was relating one of your earlier statements whereby you mentioned that you were in detention at the stadium and since you, as refugees, considered yourselves in detention, did you, at any point, attempt to flee? A. Yes, we did attempt that".).

<sup>626</sup> *See* Trial Judgement, para. 1517.

<sup>627</sup> *See* Trial Judgement, paras. 1518-1520.

<sup>628</sup> *See, e.g., Ntabakuze* Appeal Judgement, para. 161; *Bagosora and Nsengiyumva* Appeal Judgement, para. 269; *Nchamihigo* Appeal Judgement, para. 165.

<sup>629</sup> *See, e.g., Ntabakuze* Appeal Judgement, para. 161; *Bagosora and Nsengiyumva* Appeal Judgement, para. 269; *Nchamihigo* Appeal Judgement, para. 165.

<sup>630</sup> Witness LBC, T. 10 October 2005 pp. 69, 70.

<sup>631</sup> *See* Trial Judgement, para. 1519, fn. 2726, *citing* Witness LBC, T. 10 October 2005 p. 69.

<sup>632</sup> *Ntawukulilyayo* Appeal Judgement, para. 73 ("The presence of inconsistencies in the evidence does not, *per se*, require a reasonable trier of fact to reject it as unreliable".).

aspects of his testimony”.<sup>633</sup> However, it further found that “in view of [the] strong corroboration of Witness DEA’s evidence, the [...] embellishment of some aspects of his account does not in itself impair the overall credibility of his testimony”.<sup>634</sup> Accordingly, contrary to Bizimungu’s assertion, the Trial Chamber did not find that Witness DEA’s evidence lacked *prima facie* credibility, but only that some aspects had been exaggerated. Furthermore, the Appeals Chamber notes that the Trial Chamber only relied on Witness DEA’s evidence to the extent that it was corroborated by Witnesses LBC and/or LAV, both of whom the Trial Chamber found to be credible.<sup>635</sup> The Trial Chamber further detailed numerous aspects of Witness DEA’s evidence which were corroborated by the testimonies of Witnesses LBC and/or LAV, including: the use of lists to select Tutsi men who were then removed from the stadium; that refugees telephoned the Cyangugu Bishop who then came to the stadium and that the telephone was subsequently disconnected; and that the men who were removed did not return to the stadium.<sup>636</sup> Bizimungu does not challenge this reasoning beyond asserting that it did not amount to corroboration.

219. Accordingly, Bizimungu has failed to demonstrate any error in the Trial Chamber’s assessment of the evidence in relation to the crimes committed at the Cyangugu stadium.

### 3. Conclusion

220. In light of the foregoing, the Appeals Chamber dismisses Bizimungu’s Fifteenth Ground of Appeal and upholds his convictions for murder and rape as crimes against humanity and rape as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the crimes committed at the Cyangugu stadium.

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<sup>633</sup> Trial Judgement, para. 1514.

<sup>634</sup> Trial Judgement, para. 1514.

<sup>635</sup> See Trial Judgement, paras. 1510-1517. See also Trial Judgement, para. 1519.

<sup>636</sup> See Trial Judgement, para. 1514.

**F. Butare Prefecture Office and the Episcopal Church of Rwanda (EER) (Ground 16)**

221. The Trial Chamber convicted Bizimungu as a superior pursuant to Article 6(3) of the Statute of murder and rape as crimes against humanity as well as rape as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for the role of his subordinates in crimes at the Butare Prefecture office and the Episcopal Church of Rwanda (“EER”).<sup>637</sup> In particular, the Trial Chamber found that soldiers and *Interahamwe* killed and raped Tutsi refugees at these locations in April and May 1994.<sup>638</sup> The Trial Chamber further concluded that the perpetrators were Bizimungu’s subordinates acting under his control,<sup>639</sup> and that Bizimungu knew or had reason to know of their crimes,<sup>640</sup> but failed to prevent the crimes and/or punish the perpetrators.<sup>641</sup>

222. Bizimungu submits that the Trial Chamber erred in finding him responsible for the killings and rapes at the Butare Prefecture office and the EER.<sup>642</sup> The Appeals Chamber recalls that it has already found that the Trial Chamber erred in holding Bizimungu liable for crimes committed by the *Interahamwe*.<sup>643</sup> Thus, in this section, the Appeals Chamber only considers whether the Trial Chamber erred in: (i) its assessment of evidence regarding the involvement of soldiers of the Rwandan army in killings and rapes at the Butare Prefecture office and the EER; and (ii) finding that Bizimungu knew or had reason to know of these crimes.<sup>644</sup>

1. Involvement of Soldiers in the Crimes

(a) Killings

223. The Trial Chamber found that Tutsi refugees at the Butare Prefecture office and the EER were abducted and killed by soldiers and *Interahamwe*.<sup>645</sup> With respect to the Butare Prefecture office, the Trial Chamber based this conclusion on: (i) Prosecution Witness XY’s testimony that she saw soldiers and *Interahamwe* take away her friend Marie and other refugees from that location and that when Marie returned she told her that the other refugees had been killed;<sup>646</sup> and (ii) Prosecution Witness QBP’s testimony that Minister Pauline Nyiramasuhuko instructed soldiers and

<sup>637</sup> Trial Judgement, paras. 1449, 1452, 1458, 1895, 1899, 1909, 2106, 2128, 2162.

<sup>638</sup> See Trial Judgement, paras. 1448, 1449, 1452.

<sup>639</sup> Trial Judgement, paras. 1966, 1967, 1978, 1983, 1984, 1986.

<sup>640</sup> Trial Judgement, paras. 1458, 1987.

<sup>641</sup> Trial Judgement, paras. 1458, 2012.

<sup>642</sup> Bizimungu Notice of Appeal, paras. 198-205; Bizimungu Appeal Brief, paras. 458-469.

<sup>643</sup> See *supra* para. 139.

<sup>644</sup> Bizimungu alleges that the Indictment failed to provide sufficient notice of the identity of Bizimungu’s subordinates and conduct supporting his *mens rea*. Bizimungu Appeal Brief, paras. 458, 459. These arguments have been addressed elsewhere in this Judgement. See *supra* paras. 72-86, 96-101, 105.

<sup>645</sup> Trial Judgement, para. 1449.

<sup>646</sup> Trial Judgement, para. 1449.

*Interahamwe* at the prefecture office to rape female Tutsi refugees, that, on this occasion, three daughters of the witness's neighbour were taken to their parents' house and killed, and that other refugees were also taken away to be killed.<sup>647</sup> With respect to the EER, the Trial Chamber considered that Witnesses XY and QBP both saw soldiers and *Interahamwe* take away male Tutsi refugees and that, at one point, Witness QBP observed soldiers kill seven male refugees.<sup>648</sup>

224. Bizimungu submits that the Trial Chamber erred in finding him responsible for the killings at the Butare Prefecture office and the EER.<sup>649</sup> He contends that the only eye-witness account of those events came from Witness QBP, whose evidence that soldiers killed seven people was challenged by the Defence at trial for lack of notice.<sup>650</sup> Regarding Witness XY, Bizimungu asserts that her trial testimony was inconsistent "in several ways" with her previous statements.<sup>651</sup>

225. The Prosecution responds that Witness QBP's pre-trial statement referred to killings of refugees by soldiers and *Interahamwe* and that the witness merely provided further details on these incidents during her trial testimony.<sup>652</sup> In relation to Witness XY, the Prosecution contends that a trial chamber enjoys broad discretion in assessing evidence and is not required to reject a witness's testimony because of inconsistencies.<sup>653</sup>

226. The Appeals Chamber notes that Witness QBP did not mention the commission of crimes at the EER in her May 1999 statement to Tribunal investigators,<sup>654</sup> which was disclosed to Bizimungu in 2002.<sup>655</sup> The Prosecution Pre-Trial Brief repeated the allegation made in the Indictment<sup>656</sup> that Bizimungu was responsible for killings by soldiers and *Interahamwe* at the EER.<sup>657</sup> However, the summary of Witness QBP's anticipated trial testimony attached to the Prosecution Pre-Trial Brief only indicated that she would give evidence about "attacks including rape and other degrading treatments against the Tutsi refugees at various locations in Butare Prefecture", including the Butare Prefecture office.<sup>658</sup> It did not refer to the EER, killings, or the fact that Witness QBP's testimony

<sup>647</sup> Trial Judgement, paras. 1440, 1449.

<sup>648</sup> Trial Judgement, paras. 1438, 1449.

<sup>649</sup> Bizimungu Appeal Brief, para. 461.

<sup>650</sup> Bizimungu Notice of Appeal, para. 200; Bizimungu Appeal Brief, para. 461, referring to Witness QBP, T. 5 September 2005 pp. 42, 43. See also Bizimungu Reply Brief, para. 106; AT. 7 May 2013 p. 67. In his notice of appeal, Bizimungu further contends that Witness QBP's credibility was "strongly called into question" and that her evidence was not sufficiently corroborated. See Bizimungu Notice of Appeal, para. 201. However, since Bizimungu does not address and expand on this argument in his Appeal Brief, it is summarily dismissed.

<sup>651</sup> Bizimungu Appeal Brief, para. 461, referring to Witness XY, T. 14 March 2006. See also Bizimungu Reply Brief, para. 107.

<sup>652</sup> Prosecution Response Brief (Bizimungu), para. 209.

<sup>653</sup> Prosecution Response Brief (Bizimungu), para. 212.

<sup>654</sup> Defence Exhibit 54.

<sup>655</sup> *The Prosecutor v. Augustin Ndingiyimana et al.*, Case No. ICTR-00-56-I, Bizimungu, Augustin Disclosure, 16 September 2002, pp. 6420-6426 (Registry pagination).

<sup>656</sup> Indictment, para. 89.

<sup>657</sup> Prosecution Pre-Trial Brief, para. 58.

<sup>658</sup> Prosecution Pre-Trial Brief, p. 86.

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was related to the charge of murder.<sup>659</sup> Significantly, it designated Ndindiliyimana as the only accused to whom Witness QBP's evidence would be relevant.<sup>660</sup>

227. When Witness QBP stated during her examination-in-chief that soldiers killed seven people at the EER, Bizimungu's defence counsel requested the exclusion of this evidence for lack of prior notice, arguing, in particular, that he had not been able to prepare for cross-examination because he was unaware that Witness QBP was going to testify about the event.<sup>661</sup> The Trial Chamber observed that killings at the EER were charged in the Indictment and alleged in the Prosecution Pre-Trial Brief, but that the Prosecution had not mentioned the word "killing" in the summary of Witness QBP's anticipated trial testimony.<sup>662</sup> The Trial Chamber therefore allowed the continued examination of Witness QBP, allotted the Defence three months to conduct investigations, and stated that it would recall the witness, if necessary, based on a motion to be filed by the Defence.<sup>663</sup>

228. The Appeals Chamber recalls that a trial chamber enjoys discretion to decide on the general conduct of the proceedings.<sup>664</sup> In particular, a trial chamber may admit any relevant evidence which it deems to have probative value, provided that the fair trial rights of the accused are respected.<sup>665</sup> In this instance, the Trial Chamber's ruling reflects that it found the evidence relevant and probative of the charges in the Indictment. Likewise, it considered that a remedy could be granted if the witness's evidence prejudiced Bizimungu based on the Prosecution's failure to provide notice before Witness QBP's appearance in court that she would testify about killings by soldiers at the EER.

229. Bizimungu's arguments fail to demonstrate any legal error or prejudice suffered. A review of the trial record shows that counsel for Bizimungu cross-examined Witness QBP on the events at the EER, including the killing of Tutsi refugees by soldiers there.<sup>666</sup> While the Trial Chamber concluded the cross-examination even though Bizimungu's counsel objected that he was not yet finished,<sup>667</sup> Bizimungu neither at that point nor in his Closing Brief<sup>668</sup> argued that he needed more time to challenge the witness's evidence about killings at the EER. Moreover, Bizimungu did not file a motion seeking to recall Witness QBP. Accordingly, Bizimungu does not demonstrate that the

<sup>659</sup> Prosecution Pre-Trial Brief, p. 86.

<sup>660</sup> Prosecution Pre-Trial Brief, p. 86.

<sup>661</sup> Witness QBP, T. 5 September 2005 pp. 42-44, 53, 54, 57-65, 67, 68.

<sup>662</sup> Witness QBP, T. 5 September 2005 p. 70.

<sup>663</sup> Witness QBP, T. 5 September 2005 p. 70.

<sup>664</sup> Cf. *Kanyarukiga* Appeal Judgement, para. 52; *Rukundo* Appeal Judgement, para. 147.

<sup>665</sup> Rules 89(B) and (C) of the Rules.

<sup>666</sup> Witness QBP, T. 6 September 2005 pp. 82-85, 88-92.

<sup>667</sup> Witness QBP, T. 7 September 2005 p. 43.

<sup>668</sup> Bizimungu Closing Brief, paras. 1046-1061.

T 14

Trial Chamber erred in relying on Witness QBP's evidence in support of its finding that soldiers killed Tutsi refugees at the EER.<sup>669</sup>

230. With respect to Witness XY, the Appeals Chamber notes that Bizimungu does not point to any specific discrepancy in her trial testimony.<sup>670</sup> Moreover, while Witness XY provided a statement to Tribunal investigators in 1997,<sup>671</sup> this statement was not admitted into evidence in this case. The Appeals Chamber is therefore unable to assess Bizimungu's claim that Witness XY's testimony was inconsistent with her prior statement. Consequently, the Appeals Chamber finds that Bizimungu does not demonstrate that the Trial Chamber erred in relying on the evidence of this witness.

231. Accordingly, the Appeals Chamber concludes that Bizimungu has failed to show that the Trial Chamber erred in finding that soldiers were involved in the killing of Tutsi refugees at the Butare Prefecture office and the EER.

(b) Rapes

232. Based on the testimonies of Prosecution Witnesses XY, QBP, and LN, the Trial Chamber found that female refugees at the Butare Prefecture office and the EER were raped.<sup>672</sup> In reaching this conclusion, the Trial Chamber considered that: Witness XY testified that soldiers and *Interahamwe* came daily to the prefecture office to take away refugees, that the female refugees subsequently returned and reported being raped, and that she saw soldiers and *Interahamwe* take away her friend Marie and that when Marie returned she told the witness that soldiers had raped her; Witness QBP testified that assailants came to the prefecture office at night to commit rapes and that, on the instructions of Nyiramasuhuko, soldiers and *Interahamwe* raped a number of refugees; and Witness LN testified that he observed the rape of a young female refugee in broad daylight in full view of a number of soldiers.<sup>673</sup>

233. Regarding the EER, the Trial Chamber relied upon the testimony of Witness XY that soldiers and *Interahamwe* raped a number of female refugees and that she herself was raped by a

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<sup>669</sup> The Appeals Chamber notes that the Trial Chamber only referred to a prior statement given by Witness QBP when discussing her evidence about Nyiramasuhuko's presence at the Butare Prefecture office and the removal and killing of refugees by soldiers and *Interahamwe*. See Trial Judgement, para. 1440, 1449, fns. 2518-2521, 2546. Notwithstanding, the Appeals Chamber observes that Witness QBP also testified about these events in court. See Witness QBP, T. 5 September 2005 pp. 52, 53, 71-74, 78; T. 7 September 2005 p. 34. Bizimungu does not challenge that the Trial Chamber does not cite to her in-court testimony.

<sup>670</sup> Bizimungu Appeal Brief, para. 461, referring to Witness XY, T. 14 March 2006. See also Bizimungu Reply Brief, para. 107.

<sup>671</sup> Witness XY, T. 13 March 2006 pp. 26, 27.

<sup>672</sup> Trial Judgement, paras. 1450-1452.

<sup>673</sup> Trial Judgement, para. 1450.

soldier.<sup>674</sup> It also considered the evidence of Witness QBP that she saw soldiers and *Interahamwe* take young female refugees from the EER and that, when the refugees returned, they were “in a pitiful state” and had difficulty walking.<sup>675</sup>

234. Bizimungu submits that the Trial Chamber erred in finding him responsible for rapes at the Butare Prefecture office and the EER.<sup>676</sup> He contends that Witnesses XY, QBP, and LN did not corroborate each other.<sup>677</sup> In relation to the Butare Prefecture office, he further maintains that: (i) Witness XY merely provided hearsay evidence; (ii) Witness QBP “testified about the instructions supposedly given in the night by Minister Nyiramasuhuko to the *Interahamwe* and the soldiers, not otherwise identified, who were not wearing berets”, whereas, in the *Nyiramasuhuko et al.* case, the witness claimed that she could not identify the people who accompanied Nyiramasuhuko because there was no light; (iii) the militiamen who committed the rape observed by Witness LN were not Bizimungu’s subordinates and were not acting on orders from soldiers or in the presence of senior army officers.<sup>678</sup> He adds that the Butare Prefecture office was guarded by gendarmes at the time.<sup>679</sup> With respect to the EER, Bizimungu submits that the only eye-witness account came from Witness XY and that she and Witness QBP did not testify about the same rapes, leaving their testimonies uncorroborated.<sup>680</sup>

235. The Prosecution responds that Witnesses XY, QBP, and LN provided consistent evidence.<sup>681</sup> It further asserts that, even if Witness QBP’s evidence on rapes at the EER amounted to uncorroborated hearsay, the Trial Chamber was allowed to rely on it.<sup>682</sup>

236. Regarding Bizimungu’s submission that Witness XY’s account of rapes at the Butare Prefecture office was based on hearsay, the Appeals Chamber recalls that trial chambers have the discretion to cautiously consider and rely on hearsay evidence.<sup>683</sup> A review of the trial record shows that Witness XY gave specific testimony about the rape of Marie. In particular, Witness XY stated that Marie was her friend, that she saw her being taken away by soldiers and *Interahamwe*, and that Marie confided in her about having been raped by soldiers.<sup>684</sup> Bearing in mind that the Trial

<sup>674</sup> Trial Judgement, paras. 1451, 1452.

<sup>675</sup> Trial Judgement, para. 1451.

<sup>676</sup> Bizimungu Appeal Brief, para. 462. *See also* AT. 7 May 2013 p. 68.

<sup>677</sup> Bizimungu Appeal Brief, para. 464.

<sup>678</sup> Bizimungu Appeal Brief, para. 462. *See also* Bizimungu Notice of Appeal, para. 202; AT 7 May 2013 p. 68.

<sup>679</sup> Bizimungu Appeal Brief, para. 462.

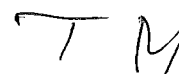
<sup>680</sup> Bizimungu Notice of Appeal, para. 202; Bizimungu Appeal Brief, para. 464.

<sup>681</sup> Prosecution Response Brief (Bizimungu), paras. 210, 211, 214-216.

<sup>682</sup> Prosecution Response Brief (Bizimungu), para. 211.

<sup>683</sup> *Munyakazi* Appeal Judgement, para. 77; *Kalimanzira* Appeal Judgement, para. 96; *Karera* Appeal Judgement, para. 39.

<sup>684</sup> Witness XY, T. 13 March 2006 p. 12; T. 15 March 2006 pp. 4-9.



Chamber found Witness XY credible, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to rely on this part of Witness XY's evidence.

237. However, the Appeals Chamber is not convinced that it was reasonable to rely on Witness XY's more general testimony that during her three-week stay at the Butare Prefecture office, assailants constantly picked up young girls to rape and that there were soldiers among the assailants.<sup>685</sup> Other than the incident involving Marie, the witness provided no details about regular attacks, particularly by soldiers, and was not asked for any further clarification by the Prosecution.<sup>686</sup> Moreover, during cross-examination, she acknowledged that she did not see any rape take place, did not know the victims, and was not told by the victims what happened.<sup>687</sup> In these circumstances, the Appeals Chamber considers that no reasonable trier of fact could have relied on this more general aspect of Witness XY's hearsay testimony and that the Trial Chamber erred in doing so.<sup>688</sup>

238. Bizimungu's arguments in relation to Witness QBP's evidence about rapes at the Butare Prefecture office are not entirely clear. To the extent that he submits that Witness QBP did not consistently implicate soldiers in the rapes committed on Nyiramasuhuko's orders, the Appeals Chamber notes that, in the present case, the witness testified that she saw Nyiramasuhuko come to the Butare Prefecture office together with, *inter alia*, soldiers.<sup>689</sup> She maintained that these soldiers were not wearing berets.<sup>690</sup> She further stated that other soldiers who had been present at this location prior to Nyiramasuhuko's visit participated in the ensuing rapes.<sup>691</sup> In the *Nyiramasuhuko et al.* case, Witness QBP acknowledged that she was unable to see who accompanied Nyiramasuhuko to the Butare Prefecture office because it was at night and there was insufficient light.<sup>692</sup> However, at trial, the witness denied having made this statement in the *Nyiramasuhuko et al.* case.<sup>693</sup>

239. The Trial Chamber did not expressly address the apparent contradictions in Witness QBP's successive testimonies before the Tribunal or her explanation for them. However, the Appeals Chamber is not persuaded that the Trial Chamber erred in this respect, as the variances between the witness's evidence were not so material as to prevent a reasonable trier of fact from relying on her

<sup>685</sup> Witness XY, T. 13 March 2006 p. 11.

<sup>686</sup> See Witness XY, T. 13 March 2006 pp. 11-13. See also Trial Judgement, para. 1450.

<sup>687</sup> See Witness XY, T. 14 March 2006 pp. 39, 44; T. 15 March 2006 p. 4.

<sup>688</sup> Cf. *Kalimanzira* Appeal Judgement, paras. 76-79; *Muvunyi I* Appeal Judgement, paras. 68-70.

<sup>689</sup> Witness QBP, T. 5 September 2005 pp. 49, 52; T. 7 September 2005 pp. 36-40.

<sup>690</sup> Witness QBP, T. 7 September 2005 p. 37.

<sup>691</sup> See Witness QBP, T. 5 September 2005 pp. 49, 52, 53, 72-75; T. 7 September 2005 pp. 36-40. See also Trial Judgement, para. 1440.

<sup>692</sup> Defence Exhibit 53 (*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Witness QBP, T. 28 October 2002 p. 81).

other evidence that soldiers already present at the Butare Prefecture office committed rapes on Nyiramasuhuko's orders.<sup>694</sup> Furthermore, the Appeals Chamber is also not persuaded that this evidence is called into question by Bizimungu's claim that the Butare Prefecture office was guarded by gendarmes.

240. With respect to Bizimungu's assertion that the rape observed by Witness LN was not committed upon orders from soldiers or in the presence of senior army officers,<sup>695</sup> the Appeals Chamber observes that the Trial Chamber did not make such a finding.<sup>696</sup> Rather, the Trial Chamber simply noted that Witness LN testified that he witnessed the rape of a young female refugee at the Butare Prefecture office by a man who, in his view, may have been a member of the *Interahamwe* and that "[n]o one expressed disapproval or sought to prevent the man from raping the girl, including the soldiers who were present at the scene of the attack".<sup>697</sup> Nonetheless, as there is no indication from Witness LN's testimony that soldiers were involved in the crime,<sup>698</sup> and the Appeals Chamber has found that the Trial Chamber erred in finding him responsible as a superior for the crimes of *Interahamwe*,<sup>699</sup> the Appeals Chamber will disregard this evidence.

241. Turning to Bizimungu's submission that Witnesses XY and QBP did not sufficiently corroborate each other, the Appeals Chamber recalls that trial chambers have discretion to decide, in the circumstances of each case, whether corroboration of evidence is necessary and to rely on uncorroborated, but otherwise credible, witness testimony.<sup>700</sup> It is also well established that two testimonies corroborate one another when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or a sequence of linked facts.<sup>701</sup> The testimonies in question need not be identical in all aspects or describe the same fact in the same way.<sup>702</sup> The Trial Chamber considered that the testimonies of Witnesses XY and QBP about rapes by soldiers at the Butare Prefecture office and the EER were broadly consistent and credible.<sup>703</sup> It

<sup>693</sup> See Witness QBP, T. 7 September 2005 pp. 37-40.

<sup>694</sup> For the same reason, the Appeals Chamber considers irrelevant Bizimungu's arguments that forces other than soldiers and gendarmes protected ministers at the time and that the Appeals Chamber found in the *Bagosora and Nsengiyumva* case that soldiers of the Rwandan army and gendarmes wore similar uniforms except for their berets. See Bizimungu Appeal Brief, para. 462.

<sup>695</sup> Bizimungu Appeal Brief, para. 462. See also Bizimungu Notice of Appeal, para. 202.

<sup>696</sup> See Trial Judgement, paras. 1436, 1450.

<sup>697</sup> Trial Judgement, para. 1436. See also Trial Judgement, para. 1450.

<sup>698</sup> See Trial Judgement, para. 1436. See also Witness LN, T. 12 September 2005 pp. 82, 83; T. 13 September 2005 p. 85.

<sup>699</sup> See *supra* para. 139.

<sup>700</sup> *Ntawukulilyayo* Appeal Judgement, para. 21; *Milošević* Appeal Judgement, para. 215; *Karera* Appeal Judgement, para. 45.

<sup>701</sup> *Kanyarukiga* Appeal Judgement, para. 177; *Bikindi* Appeal Judgement, para. 81; *Karera* Appeal Judgement, paras. 173, 192.

<sup>702</sup> *Ntawukulilyayo* Appeal Judgement, para. 24; *Munyakazi* Appeal Judgement, para. 103; *Bikindi* Appeal Judgement, para. 81.

<sup>703</sup> Trial Judgement, para. 1452.

T12

also took into account, *inter alia*, that Witness XY testified about her own rape by a soldier at the EER.<sup>704</sup> Since Bizimungu does not advance any further argument as to how the Trial Chamber abused its discretion by accepting the evidence of Witnesses XY and QBP, the Appeals Chamber rejects his claim that their evidence lacked corroboration.<sup>705</sup>

242. In light of the foregoing, the Appeals Chamber concludes that Bizimungu has failed to show that the Trial Chamber erred in finding that soldiers were involved in the rape of refugees at the Butare Prefecture office and the EER.

## 2. Bizimungu's Knowledge

243. The Trial Chamber found that Bizimungu knew or had reason to know that his subordinates were about to commit or had committed killings and rapes against refugees at the Butare Prefecture office and the EER.<sup>706</sup> In support of this conclusion, the Trial Chamber took into account that Bizimungu: was alerted to the dire situation in Rwanda as well as crimes against Tutsi civilians in other parts of the country;<sup>707</sup> received situation reports from all Rwandan army units regarding hostilities and the security situation affecting the civilian population;<sup>708</sup> and, in particular, testified that he was informed about "disturbances" that occurred in Butare.<sup>709</sup> In addition, the Trial Chamber observed that the crimes at the Butare Prefecture office and the EER were committed on an organized and systematic basis and that the fact that Nyiramasuhuko, a government minister, incited soldiers to commit rapes during one incident indicated that the crimes at these locations were part of a coordinated series of events.<sup>710</sup>

244. Bizimungu submits that the Trial Chamber erred in finding that he knew or had reason to know of the crimes committed at the Butare Prefecture office and the EER.<sup>711</sup> He contends that the Trial Chamber applied an incorrect standard for the assessment of circumstantial evidence as it found that he "must have known" of the crimes in question or "certainly possessed" sufficiently alarming information.<sup>712</sup> Bizimungu further claims that his awareness of the general situation prevailing in Rwanda did not mean that he knew of crimes at the Butare Prefecture office and the

<sup>704</sup> Trial Judgement, para. 1451.

<sup>705</sup> In respect of Witness XY's testimony about her own rape, the Appeals Chamber recalls that Rule 96(i) of the Rules stipulates that in cases of sexual assault no corroboration of the victim's testimony shall be required.

<sup>706</sup> Trial Judgement, para. 1987. *See also* Trial Judgement, para. 1458.

<sup>707</sup> Trial Judgement, para. 1454. *See also* Trial Judgement, para. 1993.

<sup>708</sup> Trial Judgement, paras. 1455, 1989.

<sup>709</sup> Trial Judgement, paras. 1455, 1458, 1990.

<sup>710</sup> Trial Judgement, paras. 1457, 1988.

<sup>711</sup> Bizimungu Appeal Brief, para. 466.

<sup>712</sup> Bizimungu Appeal Brief, para. 468, *referring to* Trial Judgement, para. 1458.

EER.<sup>713</sup> He also asserts that while reports to him mentioned “disturbances” in Butare, they neither pertained to specific events nor implicated soldiers in crimes.<sup>714</sup> In this context he also contends that, due to the ongoing fighting at the time, Kigali was isolated from Butare, communication was difficult, and no reasonable trier of fact could therefore have considered that he was informed of the commission of crimes in Butare.<sup>715</sup> Finally, Bizimungu argues that the Trial Chamber erred in holding that the crimes at the Butare Prefecture office and the EER were coordinated, given that: Witness XY testified that the attacks at the Butare Prefecture office were not systematic and organized, but sporadic;<sup>716</sup> and the Trial Chamber acknowledged that the Prosecution had failed to prove that the alleged murders were committed on a large scale.<sup>717</sup>

245. The Prosecution responds that Bizimungu fails to demonstrate an error in the Trial Chamber’s conclusion that the crimes committed at the Butare Prefecture office and the EER were coordinated.<sup>718</sup> It also contends that, based on the totality of the evidence, the Trial Chamber correctly found that Bizimungu knew or had reason to know of the involvement of his subordinates in these crimes.<sup>719</sup>

246. Regarding Bizimungu’s argument that the Trial Chamber applied an incorrect legal standard by finding that he “must have known” of or that he “certainly possessed” sufficient information about killings and rapes at the Butare Prefecture office and the EER,<sup>720</sup> the Appeals Chamber recalls that inferences drawn from circumstantial evidence must be the only reasonable inference available.<sup>721</sup> The Trial Chamber was cognizant of this standard.<sup>722</sup> While the contested language is not entirely clear, the Appeals Chamber is not persuaded that it demonstrates an incorrect application of this standard. Rather, the Trial Chamber’s overall reasoning shows that it was convinced that the only inference to be drawn from the evidence before it was that Bizimungu knew or had reason to know of the crimes committed at the Butare Prefecture office and the EER.<sup>723</sup>

247. Turning to the question of whether the Trial Chamber reached reasonable conclusions based on the available evidence, the Appeals Chamber recalls its finding elsewhere in this Judgement that the Trial Chamber did not err in taking into account Bizimungu’s awareness of the general situation

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<sup>713</sup> Bizimungu Appeal Brief, para. 466, referring to Trial Judgement, paras. 1454, 1455, *Bagilishema* Appeal Judgement, para. 42.

<sup>714</sup> Bizimungu Appeal Brief, paras. 466, 467.

<sup>715</sup> AT. 7 May 2013 p. 68.

<sup>716</sup> Bizimungu Appeal Brief, para. 463, referring to Witness XY, T. 15 March 2006 p. 3.

<sup>717</sup> Bizimungu Appeal Brief, para. 463, referring to Trial Judgement, para. 2117. See also AT. 7 May 2013 p. 69.

<sup>718</sup> Prosecution Response Brief (Bizimungu), para. 217.

<sup>719</sup> Prosecution Response Brief (Bizimungu), para. 219. See also AT. 8 May 2013 p. 16.

<sup>720</sup> See Trial Judgement, para. 1458.

<sup>721</sup> *Bagosora and Nsengiyumva* Appeal Judgement, para. 278; *Rukundo* Appeal Judgement, para. 235; *Ntagerura et al.* Appeal Judgement, para. 306.

<sup>722</sup> See Trial Judgement, para. 108.

prevailing in Rwanda in 1994 in considering whether Bizimungu had sufficient knowledge of the crimes for which he was convicted.<sup>724</sup> However, with respect to Bizimungu's information about "disturbances" in Butare, upon which the Trial Chamber relied,<sup>725</sup> the Appeals Chamber observes that there is no indication that he was notified of any incidents at the Butare Prefecture office or the EER. To the contrary, according to Bizimungu's testimony, his information pertained to events around the time when he took up office as Chief of Staff of the Rwandan army in mid-April 1994,<sup>726</sup> whereas the crimes to which Witnesses XY and QBP testified occurred in May or June 1994.<sup>727</sup> Moreover, the Trial Judgement does not refer to evidence that the reports submitted to Bizimungu about Butare implicated soldiers in crimes. In fact, Bizimungu testified that, when he replaced Gatsinzi as Chief of Staff of the Rwandan army in mid-April 1994, the latter did not inform him about any complaints that soldiers had committed reprehensible acts.<sup>728</sup> Bizimungu also emphasized that he never received reports about rapes.<sup>729</sup>

248. The Appeals Chamber further observes that the Trial Chamber did not explain why it considered that killings at the Butare Prefecture office and the EER were committed by soldiers on a systematic and coordinated basis.<sup>730</sup> As indicated above, Witness QBP described only one incident at the Butare prefecture office, where Pauline Nyiramasuhuko addressed soldiers and *Interahamwe*, after which they took away a number of refugees and killed them elsewhere.<sup>731</sup> Although this may evince coordination between these persons on this occasion, no reasonable trier of fact could have extrapolated this single occurrence into proof of "a coordinated series of events",<sup>732</sup> particularly because Witness QBP did not implicate Nyiramasuhuko in any other event. The Appeals Chamber is also not persuaded that this conclusion was reasonable based on the fact that Witness XY testified about another incident, in which her friend Marie and refugees were taken away by soldiers and *Interahamwe* and the other refugees were killed.<sup>733</sup>

249. Witness QBP also described a separate, single incident at the EER during which soldiers killed seven people.<sup>734</sup> In addition, the Trial Chamber relied on the evidence of Witnesses XY and

<sup>723</sup> See Trial Judgement, paras. 1454-1458, 1987.

<sup>724</sup> See *supra* paras. 145-154.

<sup>725</sup> Trial Judgement, paras. 1455, 1458, 1990.

<sup>726</sup> See Bizimungu, T. 14 December 2007 p. 24.

<sup>727</sup> See Trial Judgement, paras. 1437-1440, 1442-1447.

<sup>728</sup> Bizimungu, T. 14 December 2007 p. 25.

<sup>729</sup> Bizimungu, T. 14 December 2007 p. 24.

<sup>730</sup> Trial Judgement, para. 1457.

<sup>731</sup> See Trial Judgement, paras. 1440, 1449.

<sup>732</sup> Trial Judgement, para. 1457.

<sup>733</sup> See Trial Judgement, paras. 1444, 1449. Witness XY also testified that soldiers and *Interahamwe* came every day and night to pick up male and female refugees but did not specify what became of these refugees except that the women were raped. Although she referred to people dying, she did not specify that they were killed by the assailants and also referred to having nothing to eat and drink. Witness XY, T. 13 March 2006 p. 11.

<sup>734</sup> See Trial Judgement, paras. 1438, 1449.

T 14



QBP that they saw soldiers and *Interahamwe* take away male refugees from the EER.<sup>735</sup> However, while Witness QBP initially testified that “soldiers came to carry out killings” and that there were “killings and rapes perpetrated by [*Interahamwe*] and soldiers” at the EER,<sup>736</sup> she specified upon further questioning that there was only one killing, namely that of the seven people.<sup>737</sup> Similarly, Witness XY’s testimony is not clear as to whether refugees at the EER were killed by soldiers and she did not give evidence about any specific incident.<sup>738</sup>

250. The Appeals Chamber therefore considers that no reasonable trier of fact could have found that soldiers were involved in killings at the EER other than that of the seven people as testified to by Witness QBP. The Appeals Chamber further finds that no reasonable trier of fact could have concluded on this basis alone that soldiers were involved in systematic and organized killings at the EER.

251. With respect to rapes by soldiers, the Appeals Chamber finds that, while the Trial Chamber could have reasonably regarded Pauline Nyiramasuhuko’s incitement of rapes in one incident at the Butare Prefecture office as an indication of the coordination of this particular event, no reasonable trier of fact could have inferred from this circumstance alone that other rapes at the prefecture office or the EER were coordinated rather than opportunistic crimes. Furthermore, while Witnesses XY and QBP implicated soldiers in rapes committed on a regular basis at the EER,<sup>739</sup> there was insufficient evidence to support such a conclusion in relation to the rapes at the Butare Prefecture office. As indicated above, Witnesses XY and QBP testified about two specific incidents at this location.<sup>740</sup> The Appeals Chamber is not persuaded that a reasonable trier of fact could have inferred from these two incidents that soldiers were involved in rapes at the prefecture office on a regular basis. While the Trial Chamber additionally relied on Witness XY’s evidence that soldiers and *Interahamwe* came to the Butare Prefecture office day and night to commit rapes,<sup>741</sup> the Appeals Chamber has already found above that the Trial Chamber erred in taking this evidence into account.<sup>742</sup> The Trial Chamber also referred to Witness QBP’s testimony that “assailants” came to the prefecture office at night to rape refugees.<sup>743</sup> However, Witness QBP did not testify about any particular incident and, more importantly, did not specify who the “assailants” were.<sup>744</sup> Accordingly, the Appeals Chamber finds that no reasonable trier of fact could have relied on this

<sup>735</sup> See Trial Judgement, para. 1449.

<sup>736</sup> Witness QBP, T. 5 September 2005 pp. 41, 42.

<sup>737</sup> Witness QBP, T. 5 September 2005 p. 44.

<sup>738</sup> See Witness XY, T. 13 March 2006 p. 14; T. 14 March 2006 pp. 44, 45.

<sup>739</sup> See Trial Judgement, paras. 1439, 1446, 1447, 1451.

<sup>740</sup> See *supra* paras. 236-239.

<sup>741</sup> See Trial Judgement, para. 1450.

<sup>742</sup> See *supra* para. 237.

<sup>743</sup> See Trial Judgement, para. 1450.

<sup>744</sup> See Witness QBP, T. 7 September 2005 p. 34.

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part of Witness QBP's evidence to find that soldiers were responsible for regular rapes at the Butare Prefecture office.

252. Overall, there is no evidence that reports to Bizimungu about "disturbances" in Butare mentioned the events at the Butare Prefecture office and the EER or implicated soldiers in crimes at these locations. Similarly, there is limited support for the Trial Chamber's finding that killings and rapes by soldiers were committed on a systematic and coordinated basis. The Appeals Chamber therefore considers that no reasonable trier of fact could have inferred that the only reasonable conclusion to be drawn from the evidence was that Bizimungu knew or had reason to know of such crimes. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in concluding that Bizimungu knew or had reason to know of rapes and killings by soldiers at the Butare Prefecture office and the EER.

### 3. Conclusion

253. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber erred in convicting Bizimungu for killings and rapes at the Butare Prefecture office and the EER. The Appeals Chamber therefore grants Bizimungu's Sixteenth Ground of Appeal and reverses his convictions for murder and rape as crimes against humanity, as well as rape as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, based on the events at the Butare Prefecture office and the EER.

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G. École des sciences infirmières de Kabgayi (ESI) (Ground 17)

254. The Trial Chamber convicted Bizimungu as a superior pursuant to Article 6(3) of the Statute of genocide, murder and rape as crimes against humanity, and murder and rape as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II for the role of soldiers in the crimes committed at the *École des sciences infirmières de Kabgayi* (“ESI”).<sup>745</sup> Based on the testimony of Prosecution Witness EZ, the Trial Chamber found that soldiers killed a number of refugees within the ESI compound while other refugees were removed by soldiers who either killed them outside the ESI or handed them over to the *Interahamwe* who killed them.<sup>746</sup> It further concluded that soldiers raped a number of Tutsi refugee women at the ESI and in the nearby woods during April and May 1994.<sup>747</sup> The Trial Chamber found that Bizimungu knew or had reason to know of the crimes committed by his subordinates at the ESI but that he failed to take necessary and reasonable measures to prevent the crimes or punish the perpetrators.<sup>748</sup>

255. Bizimungu submits that the Trial Chamber erred in finding him responsible for the killings and rapes at the ESI.<sup>749</sup> The Appeals Chamber recalls that it has already found that the Trial Chamber erred in holding Bizimungu responsible for crimes committed by *Interahamwe* at the ESI.<sup>750</sup> In this section, the Appeals Chamber considers whether the Trial Chamber erred in: (i) finding that Bizimungu had effective control over the soldiers who participated in the attack; (ii) failing to consider Defence Witness DA5-2’s evidence; (iii) finding that Bizimungu knew or had reason to know of the crimes; and (iv) convicting Bizimungu of genocide and murder and rape as crimes against humanity for this event in light of its failure to provide a reasoned opinion.<sup>751</sup>

1. Effective Control Over the Perpetrators

256. In connection with the events at the ESI, the Trial Chamber found that soldiers and *Interahamwe* killed refugees and that soldiers raped Tutsi refugees.<sup>752</sup> The Trial Chamber further

<sup>745</sup> Trial Judgement, paras. 2145, 2153, 2160-2163. *See also* Trial Judgement, paras. 16, 30, 59, 67.

<sup>746</sup> Trial Judgement, para. 1181.

<sup>747</sup> Trial Judgement, para. 1184.

<sup>748</sup> Trial Judgement, paras. 1205, 1220.

<sup>749</sup> Bizimungu Notice of Appeal, paras. 206-210; Bizimungu Appeal Brief, paras. 471-481.

<sup>750</sup> *See supra* para. 139.

<sup>751</sup> Bizimungu also argues that the crimes committed at the ESI were not pleaded in the Indictment. *See* Bizimungu Notice of Appeal, para. 206; Bizimungu Appeal Brief, para. 471. These arguments have been addressed above. *See supra* paras. 87-95. In his notice of appeal, Bizimungu also argues that the Trial Chamber could not, on the basis of Witness EZ’s testimony, reasonably have found that the soldiers raped several refugees at the ESI. *See* Bizimungu Notice of Appeal, para. 208. As Bizimungu fails to develop the argument in his notice of appeal and does not raise it in his Appeal Brief, the Appeals Chamber considers that he has abandoned the argument.

<sup>752</sup> Trial Judgement, paras. 1181, 1184.

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found that Bizimungu exercised authority over soldiers and *Interahamwe* during the period when he served as the Chief of Staff of the Rwandan army.<sup>753</sup>

257. Bizimungu submits that the Trial Chamber erred in finding that he had effective control over the perpetrators of the crimes committed at the ESI.<sup>754</sup> He argues that Witness EZ could not tell the difference between military uniforms and that there was confusion about whether the people in military uniform described by the witness were members of the Rwandan army.<sup>755</sup>

258. The Prosecution responds that Bizimungu fails to demonstrate that the Trial Chamber erred in relying on Witness EZ's uncorroborated testimony to conclude that soldiers of the Rwandan army committed acts of murder and rape against refugees at the ESI.<sup>756</sup> It adds that Witness EZ provided a consistent description of those whom she identified as soldiers.<sup>757</sup>

259. The Appeals Chamber does not accept Bizimungu's argument that Witness EZ lacked an adequate basis for identifying the assailants at the ESI as soldiers. Although the Trial Chamber did not expressly address this issue, the Appeals Chamber notes that when asked to describe how the perpetrators, whom she identified as soldiers, were dressed, Witness EZ stated:

They wore military uniform, berets the same colour as their uniforms. They also wore military boots. However, some of them would sometimes not wear berets, but would wear the uniform. They would therefore wear the uniform and the boots. Some of them wore berets and boots, red in colour – red berets. But what I did notice at one point is that a soldier who told us he was in charge of the gendarmes, who was called Major Karangwa, would come in the morning and would count the bodies.<sup>758</sup>

The Appeals Chamber does not consider that Witness EZ's testimony indicates that she could not tell the difference between military uniforms. To the contrary, she clearly described the uniforms, while acknowledging that sometimes not all parts of the uniform were worn. While Witness EZ described the perpetrators as wearing berets the same colour as their uniforms, she also noted that some of those involved wore red berets.<sup>759</sup> While this evidence indicates that some who committed crimes at the ESI may have been gendarmes, it does not undermine her identification of soldiers as being among the perpetrators. The Appeals Chamber finds that Bizimungu has failed to

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<sup>753</sup> Trial Judgement, para. 1983. The Appeals Chamber recalls that it has found elsewhere in this Judgement that the Trial Chamber erred in finding that Bizimungu exercised authority and effective control over the *Interahamwe*. See *supra* para. 139. Consequently, the Appeals Chamber will not address Bizimungu's arguments insofar as they relate to his responsibility for crimes committed by *Interahamwe*.

<sup>754</sup> Bizimungu Appeal Brief, para. 473.

<sup>755</sup> Bizimungu Notice of Appeal, para. 206; Bizimungu Appeal Brief, para. 472, referring to Witness EZ, T. 5 October 2005 pp. 14, 15. See also Bizimungu Appeal Brief, para. 331; AT. 7 May 2013 p. 70; AT. 8 May 2013 p. 27.

<sup>756</sup> Prosecution Appeal Brief (Bizimungu), para. 224.

<sup>757</sup> Prosecution Appeal Brief (Bizimungu), para. 225. See also AT. 8 May 2013 p. 13.

<sup>758</sup> Witness EZ, T. 5 October 2005 p. 15.

<sup>759</sup> Witness EZ, T. 5 October 2005 p. 15.

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demonstrate that no reasonable trier of fact could have concluded on the basis of Witness EZ's testimony that soldiers perpetrated the crimes committed at the ESI.

## 2. Failure to Consider Witness DA5-2's Evidence

260. Bizimungu submits that the Trial Chamber erred in failing to consider the evidence of Defence Witness DA5-2, who was stationed at the Gitarama military camp, that he was not aware of crimes committed at the ESI.<sup>760</sup> He asserts that, in light of Witness DA5-2's evidence, the Trial Chamber should have required corroboration for Witness EZ's evidence.<sup>761</sup>

261. The Prosecution responds that the Trial Chamber was not required to set out why it accepted or rejected a particular testimony and that in any event the fact that it did not address Witness DA5-2's evidence does not mean that it did not take it into account.<sup>762</sup>

262. Witness DA5-2 testified that during his tenure at the Gitarama military camp he was not aware of any killings or rapes perpetrated by soldiers at the ESI.<sup>763</sup>

263. The Trial Chamber did not address in the Trial Judgement Witness DA5-2's evidence in relation to the crimes committed at the ESI. The Appeals Chamber recalls, however, that, as a general rule, a trial chamber is not required to articulate every step of its reasoning for each finding it makes.<sup>764</sup> Nor is it required to set out in detail why it accepted or rejected a particular testimony,<sup>765</sup> or to refer to the testimony of every witness or every piece of evidence on the trial record.<sup>766</sup> The Trial Chamber addressed Witness DA5-2's evidence in relation to the alleged crimes committed at Remera-Rukoma Hospital in May 1994.<sup>767</sup> Although the Trial Chamber found his evidence in relation to those alleged crimes credible in part, it did not accept one aspect of his testimony and ultimately found that the testimony, together with other Defence evidence, did not raise reasonable doubt in the Prosecution's case against Bizimungu.<sup>768</sup> The Appeals Chamber therefore considers that the Trial Chamber was seised of Witness DA5-2's evidence but preferred to rely on the first-hand, credible evidence of Witness EZ.

<sup>760</sup> Bizimungu Appeal Brief, paras. 477, 478. *See also* Bizimungu Reply Brief, para. 112.

<sup>761</sup> Bizimungu Appeal Brief, para. 477. *See also* AT, 7 May 2013 p. 69.

<sup>762</sup> Prosecution Response Brief (Bizimungu), para. 226.

<sup>763</sup> Witness DA5-2, T. 23 May 2007 p. 84; T. 24 May 2007 pp. 2, 5.

<sup>764</sup> *See, e.g.,* Ntabakuze Appeal Judgement, para. 161; *Musema* Appeal Judgement, para. 18.

<sup>765</sup> *See, e.g.,* Ntabakuze Appeal Judgement, para. 161; *Bagosora and Nsengiyumva* Appeal Judgement, para. 269.

<sup>766</sup> *See, e.g.,* Ntabakuze Appeal Judgement, para. 161; *Rukundo* Appeal Judgement, para. 102. 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.,* Ntabakuze Appeal Judgement, fn. 357; *Bagosora and Nsengiyumva* Appeal Judgement, fn. 625.

<sup>767</sup> Trial Judgement, paras. 849-851, 855, 856.

<sup>768</sup> Trial Judgement, paras. 855, 856 (The Trial Chamber found credible Witness DA5-2's evidence regarding Bizimungu's movements on 21 May 1994 but did not find his explanation that helicopters could not fly from Kigali to be plausible.).

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264. Accordingly, the Appeals Chamber finds that Bizimungu has failed to demonstrate that the Trial Chamber did not consider Witness DA5-2's evidence or erred in relying on Witness EZ's evidence absent any corroboration.

3. Bizimungu's Knowledge

265. The Trial Chamber found that Bizimungu knew or had reason to know of the crimes committed by his subordinates at the ESI.<sup>769</sup> In so finding, the Trial Chamber considered that the fact that the crimes were committed on a regular basis, that local officials such as Akayesu were involved, and that lists were used to identify particular refugees strongly suggested that the crimes were organized and systematic.<sup>770</sup> In light of the scale and regularity of the crimes, the Trial Chamber found that the crimes would have been brought to Bizimungu's attention in the daily situation reports that he admitted receiving from his troops in the area.<sup>771</sup> It further considered that the crimes were committed in Gitarama town rather than in the "remote hinterland" and that Bizimungu conceded that he knew that a large number of civilians had sought refuge in various locations in Gitarama during April and May 1994.<sup>772</sup> This, in the view of the Trial Chamber, "heighten[ed] the possibility" that Bizimungu knew of the crimes.<sup>773</sup> The Trial Chamber also found that Bizimungu received communications about massacres in Rwanda that should have alerted him to the prospect that his subordinates had committed or were about to commit crimes.<sup>774</sup>

266. Bizimungu submits that the Trial Chamber erred in finding that he knew or had reason to know of the crimes committed at the ESI.<sup>775</sup> He argues that, given Witness EZ's testimony that she did not report having been raped, he could not have known or had reason to know that the rape had occurred.<sup>776</sup> He further asserts that the Trial Chamber erred in finding that the crimes committed at the ESI were committed on a regular, organized, and systematic basis because of the involvement of local authorities and the use of lists.<sup>777</sup> Bizimungu claims that such an inference does not meet the standard for assessment of circumstantial evidence.<sup>778</sup> Bizimungu further argues that given that

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<sup>769</sup> Trial Judgement, para. 1205.

<sup>770</sup> Trial Judgement, para. 1202.

<sup>771</sup> Trial Judgement, para. 1202.

<sup>772</sup> Trial Judgement, para. 1205.

<sup>773</sup> Trial Judgement, para. 1205.

<sup>774</sup> Trial Judgement, paras. 1210, 1219. These communications included complaints from representatives of the United States government, including Anthony Lake and Prudence Bushnell, the then-United Nations High Commissioner for Human Rights José Ayala-Lasso, and Human Rights Watch. *See* Trial Judgement, paras. 1211-1218, *referring to* Prosecution Exhibits 186 (incorrectly referred to as Exhibit 189 in the Trial Judgement), 187, 191-194. The Appeals Chamber recalls that it has found that the Trial Chamber erred in relying on Prosecution Exhibits 186 and 187 in support of Bizimungu's knowledge of the crimes. *See supra* para. 150.

<sup>775</sup> Bizimungu Notice of Appeal, para. 209; Bizimungu Appeal Brief, para. 470.

<sup>776</sup> Bizimungu Notice of Appeal, para. 208. *See also* Bizimungu Appeal Brief, para. 475.

<sup>777</sup> Bizimungu Appeal Brief, para. 479. *See also* AT. 8 May 2013 p. 27.

<sup>778</sup> Bizimungu Appeal Brief, para. 479. *See also* Bizimungu Reply Brief, para. 113.

Witness DA5-2 was not aware of crimes committed at the ESI, he could not have sent any situation reports to Bizimungu alerting him to such crimes.<sup>779</sup>

267. The Prosecution responds that the Trial Chamber relied on a number of factors in finding that Bizimungu knew or had reason to know of the crimes committed at the ESI.<sup>780</sup> It adds that Bizimungu fails to demonstrate that the Trial Chamber erred in finding that the crimes were committed in a regular, organized, and systematic manner.<sup>781</sup>

268. The Appeals Chamber considers that Bizimungu has failed to demonstrate that no reasonable trier of fact could have concluded that the crimes committed at the ESI were organized and systematic. In this regard, the Trial Chamber reasonably considered that the evidence that officials accompanied by soldiers went to the ESI with lists and selected refugees on the basis of these lists demonstrated that the crimes were organized and systematic.<sup>782</sup> Furthermore, the Trial Chamber reasonably found that the crimes were committed regularly on the basis of Witness EZ's testimony that soldiers came to the ESI on a regular basis and took refugees away and killed and/or raped them.<sup>783</sup> The fact that Witness EZ did not report her rape is immaterial and does not call into question the organized and systematic nature of the crimes. In any event, the Appeals Chamber recalls, as noted above, that the Trial Chamber relied not only on the organized and systematic nature of the crimes committed at the ESI but also on other factors in finding that Bizimungu knew or had reason to know of these crimes.<sup>784</sup>

269. With respect to Bizimungu's argument that Witness DA5-2 testified that he did not know of the crimes committed at the ESI and therefore could not have sent Bizimungu any situation reports about them, the Appeals Chamber recalls that the Trial Chamber made no finding that Witness DA5-2 sent situation reports to Bizimungu.<sup>785</sup> Bizimungu's argument therefore fails to show any error in the Trial Chamber's reasoning.

270. Accordingly, the Appeals Chamber finds that Bizimungu has failed to demonstrate that the Trial Chamber erred in finding that he knew or had reason to know of the crimes committed by soldiers at the ESI.

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<sup>779</sup> Bizimungu Appeal Brief, para. 477.

<sup>780</sup> Prosecution Response Brief (Bizimungu), para. 227.

<sup>781</sup> Prosecution Response Brief (Bizimungu), para. 228.

<sup>782</sup> See Trial Judgement, para. 1202. See also Trial Judgement, para. 1096.

<sup>783</sup> Trial Judgement, para. 1202. See also Trial Judgement, paras. 1095, 1098, 1099, 1180.

<sup>784</sup> See *supra* para. 265. Given the variety of factors relied on by the Trial Chamber to infer Bizimungu's knowledge, the Appeals Chamber is satisfied that the evidence related to Bizimungu's receipt of situation reports was not a decisive consideration. See *supra* para. 146.

<sup>785</sup> See *supra* para. 146.

4. Failure to Make Legal Findings

271. As discussed above in the section on the Trial Chamber's failure to make legal findings supporting Bizimungu's convictions,<sup>786</sup> the Appeals Chamber will consider in this section whether there were sufficient findings and evidence on the record to sustain Bizimungu's conviction for genocide and murder and rape as crimes against humanity in relation to the killings and rapes perpetrated at the ESI.

(a) Genocide

272. The Prosecution argues in its Additional Submissions that Bizimungu was properly held responsible as a superior for the killings and rapes at the ESI.<sup>787</sup> In particular, it submits that the *actus reus* of genocide was established by the killing and rapes of Tutsis.<sup>788</sup> The Prosecution asserts that the evidence that the Tutsis were killed and raped at the ESI, taken together with the evidence that Tutsis throughout Rwanda were being targeted at the time and that Witness EZ testified to seeking refuge at a number of locations prior to going to the ESI where Tutsis were targeted, establishes the *mens rea* for genocide.<sup>789</sup> It adds that Bizimungu bears superior responsibility for these killings because the perpetrators were his subordinates under his effective control, and because he knew of the attacks, but failed to take necessary and reasonable measures to prevent or punish them.<sup>790</sup>

273. In his Additional Submissions, Bizimungu largely repeats challenges raised in his appeal which have been addressed elsewhere in this Judgement. Bizimungu submits that no evidence established that he had a superior-subordinate relationship with the perpetrators of the crimes, who were not properly identified, that he knew or had reason to know of the crimes, and that he failed to take necessary or reasonable measures to prevent the crimes or punish the perpetrators.<sup>791</sup> With respect to the *actus reus* of genocide, Bizimungu argues that the Trial Chamber's findings that killings and rapes occurred regularly during April and May 1994 are not supported by the evidence.<sup>792</sup> Bizimungu asserts that the Trial Chamber made no finding on the specific intent of the perpetrators of the crimes committed at the ESI or his awareness of such intent and that the

<sup>786</sup> See *supra* paras. 24, 32, 37.

<sup>787</sup> Prosecution's Additional Submissions, paras. 30, 31.

<sup>788</sup> Prosecution's Additional Submissions, paras. 31, 32.

<sup>789</sup> Prosecution's Additional Submissions, paras. 33-35.

<sup>790</sup> Prosecution's Additional Submissions, paras. 36-40.

<sup>791</sup> Bizimungu's Additional Submissions, paras. 90-99.

<sup>792</sup> Bizimungu's Additional Submissions, paras. 85, 88. Bizimungu further argues that Witness EZ's testimony fails to establish that she was at the ESI in April 1994 and that the Trial Chamber could therefore not have relied upon her evidence. Bizimungu's Additional Submissions, paras. 86, 87. Since Bizimungu raises these arguments relating to the assessment of the evidence for the first time in his Additional Submissions, the Appeals Chamber will not consider them.

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Prosecution merely points to general evidence alleging that at the time Tutsis were blamed for the death of the President.<sup>793</sup>

274. The Trial Chamber did not make a legal finding that the *actus reus* of genocide had been established in relation to this event. However, it did find that soldiers of the Rwandan army killed refugees at and outside the ESI, that soldiers handed others over to *Interahamwe* who killed them, and that soldiers raped a number of refugee women at the ESI or in the nearby woods during April and May 1994.<sup>794</sup> It found that these crimes were perpetrated against Tutsi refugees.<sup>795</sup> These findings are sufficient to support the *actus reus* of genocide.

275. The Trial Chamber also made no finding with respect to the *mens rea* for genocide. However, the Trial Chamber considered the testimony of Witness EZ, whose evidence it accepted as credible,<sup>796</sup> that Jean-Paul Akayesu, the bourgmestre of Taba Commune, and Sixbert Ndayambaje, the former bourgmestre of Runda Commune, visited the ESI bearing lists of names and that Akayesu removed some refugees whose names featured on those lists.<sup>797</sup> This evidence, when taken together with the regular and repeated nature of the crimes<sup>798</sup> and the finding that Tutsis were victims, indicates that the killings and rapes were targeted against Tutsis. The Appeals Chamber finds that the only reasonable inference available from this evidence, taken in conjunction with the widespread killing of Tutsis in Rwanda at the time,<sup>799</sup> was that the soldiers who participated in these killings and rapes acted with genocidal intent.<sup>800</sup> Furthermore, in light of the Trial Chamber's finding that Bizimungu knew or had reason to know of the involvement of soldiers of the Rwandan army in the killings and rapes of Tutsi civilians at the ESI,<sup>801</sup> the Appeals Chamber finds that the only reasonable inference is that he also knew of their genocidal intent.<sup>802</sup>

<sup>793</sup> Bizimungu's Additional Submissions, para. 89.

<sup>794</sup> Trial Judgement, paras. 1181, 1184.

<sup>795</sup> Trial Judgement, paras. 1184, 1202.

<sup>796</sup> Trial Judgement, para. 1181.

<sup>797</sup> Trial Judgement, para. 1202.

<sup>798</sup> Trial Judgement, paras. 1182, 1202.

<sup>799</sup> Trial Judgement, para. 2090.

<sup>800</sup> See *Hategekimana* Appeal Judgement, para. 133 ("The Appeals Chamber recalls that, in the absence of direct evidence, a perpetrator's intent to commit genocide may be inferred from relevant facts and circumstances, including the general context of the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts."). See also *Ntabakuze* Appeal Judgement, paras. 237, 241.

<sup>801</sup> Trial Judgement, para. 1205.

<sup>802</sup> See *Ntabakuze* Appeal Judgement, paras. 228, 248, 250 (affirming the trial chamber's findings that Ntabakuze had knowledge of his subordinates' genocidal intent when assessing the defendant's knowledge for Article 6(3) of the Statute); but cf. *Delalić et al.* Appeal Judgement, para. 238 (stating that knowledge sufficient to establish liability under Article 6(3) of the Statute does not need to provide "specific information about unlawful acts committed or about to be committed").

276. Moreover, the Appeals Chamber has already rejected Bizimungu's challenges to the Trial Chamber's findings that he failed to take necessary and reasonable measures to prevent or punish the crimes committed by his subordinate soldiers during the attack at the ESI.<sup>803</sup>

277. In light of the foregoing, the Appeals Chamber finds that despite the Trial Chamber's failure to make legal findings, it did not err in convicting Bizimungu as a superior of genocide in relation to the killings and rapes perpetrated at the ESI.

(b) Murder and Rape as Crimes Against Humanity

278. The Prosecution argues in its Additional Submissions that the killings and rapes at the ESI formed part of widespread and systematic attacks directed against the Tutsi population and that the perpetrators knew that their actions formed part of this broader attack on Tutsis.<sup>804</sup> It adds that Bizimungu was held responsible as a superior for the crimes at the ESI.<sup>805</sup>

279. In Bizimungu's Additional Submissions, he asserts that there was no evidence adduced that the crimes committed at the ESI were perpetrated in the context of a widespread or systematic attack against the civilian population and that the Trial Chamber made no legal finding in relation to this count.<sup>806</sup>

280. The Trial Chamber stated in its general section on crimes against humanity that it considered the totality of the evidence, including evidence concerning the ethnic composition of individuals who were killed and sought refuge at various locations in Rwanda.<sup>807</sup> It concluded that widespread and systematic attacks were launched against members of the civilian population in Rwanda on ethnic and political grounds following the death of President Habyarimana.<sup>808</sup> It considered generally that as a high-ranking military officer and given the highly organised and broad-based nature of the attacks on civilians, it was inconceivable that Bizimungu and the principal perpetrators did not know that their actions formed part of the larger attacks.<sup>809</sup>

281. The Trial Chamber did not specifically apply these findings to the crimes committed at the ESI or find that the crimes there were committed in the context of a widespread or systematic attack against the civilian population in Rwanda on ethnic and political grounds. Nonetheless, the Appeals Chamber considers that the attacks at the ESI fit within the Trial Chamber's reference to attacks on

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<sup>803</sup> See *supra* paras. 70, 173, 174. See also Trial Judgement, para. 2012.

<sup>804</sup> Prosecution's Additional Submissions, paras. 74-76.

<sup>805</sup> Prosecution's Additional Submissions, para. 77.

<sup>806</sup> Bizimungu's Additional Submissions, paras. 129, 130.

<sup>807</sup> Trial Judgement, para. 2090.

<sup>808</sup> Trial Judgement, para. 2090.

<sup>809</sup> Trial Judgement, para. 2090.

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individuals who had sought refuge at various locations in Rwanda. Furthermore, given the Trial Chamber's findings that the attacks at the ESI were repeated, regular, systematic, and organised,<sup>810</sup> the Appeals Chamber is convinced that the only reasonable inference is that the killings and rapes perpetrated at the ESI were committed as part of the widespread and systematic attacks against members of the civilian population in Rwanda on ethnic and political grounds following the death of President Habyarimana and that the perpetrators were aware that their actions formed part of these larger attacks.

282. The Trial Chamber found it established that killings and rapes were perpetrated at the ESI<sup>811</sup> which fulfils the *actus reus* of murder and rapes as crimes against humanity. As noted above in relation to the genocide charge, it further found that soldiers under Bizimungu's command committed the crimes at the ESI,<sup>812</sup> and that Bizimungu knew of the crimes and had the material ability to prevent and punish his culpable subordinates but failed to do so.<sup>813</sup>

283. In light of the foregoing, the Appeals Chamber finds that despite the Trial Chamber's failure to make legal findings, it did not err in convicting Bizimungu as a superior of murder and rape as crimes against humanity in relation to the killings and rapes perpetrated at the ESI.

## 5. Conclusion

284. Consequently, the Appeals Chamber dismisses Bizimungu's Seventeenth Ground of Appeal.

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<sup>810</sup> Trial Judgement, paras. 1182, 1202.

<sup>811</sup> Trial Judgement, paras. 1181, 1184.

<sup>812</sup> Trial Judgement, para. 1197.

<sup>813</sup> Trial Judgement, para. 1220.

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**H. Musambira Commune Office and Dispensary (Ground 18)**

285. The Trial Chamber convicted Bizimungu as a superior pursuant to Article 6(3) of the Statute for genocide, murder and rape as crimes against humanity, and murder and rape as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II for the role of soldiers in crimes committed at the Musambira Commune office and dispensary.<sup>814</sup> In particular, the Trial Chamber found that soldiers and *Interahamwe* committed killings and rapes at these locations during April and May 1994.<sup>815</sup> It further held that Bizimungu knew or had reason to know of the crimes in question,<sup>816</sup> and failed to prevent the crimes and/or punish the perpetrators.<sup>817</sup>

286. Bizimungu submits that the Trial Chamber erred in finding him responsible for the killings and rapes at the Musambira Commune office and dispensary.<sup>818</sup> The Appeals Chamber recalls that it has already found that the Trial Chamber erred in holding Bizimungu responsible as a superior for crimes committed by the *Interahamwe* at Musambira Commune office and dispensary.<sup>819</sup> In this section, the Appeals Chamber considers whether the Trial Chamber erred in: (i) its assessment of the Prosecution evidence; (ii) failing to consider Defence evidence; (iii) its conclusion that Bizimungu knew or had reason to know of the involvement of soldiers in crimes at the Musambira Commune office and dispensary; and (iv) convicting Bizimungu of genocide and murder and rape as crimes against humanity for this event in light of its failure to provide a reasoned opinion.

1. Assessment of Prosecution Evidence

287. The Trial Chamber found that soldiers were involved in killings and rapes of Tutsi refugees at the Musambira Commune office and dispensary during late April and May 1994.<sup>820</sup> This conclusion was based on the evidence of: Prosecution Witness DBH, who testified about the killing of a large number of male Tutsi refugees in an attack by soldiers and *Interahamwe* at the Musambira Commune office as well as subsequent rapes, including her own, by soldiers at the Musambira dispensary,<sup>821</sup> and Prosecution Witness DBB, according to whom soldiers, in concert

<sup>814</sup> Trial Judgement, paras. 2145, 2153, 2160, 2162, 2163. *See also* Trial Judgement, paras. 16, 30, 59, 64, 65, 67, 72, 73.

<sup>815</sup> Trial Judgement, paras. 1192, 1197.

<sup>816</sup> Trial Judgement, paras. 1205, 1987, 1992.

<sup>817</sup> Trial Judgement, paras. 1994, 2012.

<sup>818</sup> Bizimungu Notice of Appeal, paras. 211-216; Bizimungu Appeal Brief, paras. 482-490.

<sup>819</sup> *See supra* para. 139.

<sup>820</sup> Trial Judgement, para. 1192. *See also* Trial Judgement, paras. 1185-1190.

<sup>821</sup> Trial Judgement, paras. 1103-1105, 1188. The Appeals Chamber notes that, according to paragraph 118 of the Trial Judgement, Witness DBH testified that she and others were raped by soldiers at the Musambira Commune office. However, Witness DBH placed these events at the dispensary. *See* Witness DBH, T. 20 June 2005 pp. 8-14; T. 22 June 2005 pp. 1, 2.

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with *Interahamwe*, killed a large number of Tutsi refugees from the Musambira dispensary in a yard near the Musambira Commune office on one occasion.<sup>822</sup>

288. Bizimungu submits that the Trial Chamber erred in convicting him for the crimes committed at Musambira because Witnesses DBH and DBB were not credible and contradicted each other.<sup>823</sup> He argues that the Trial Chamber should have assessed the evidence of Witness DBH with greater caution because she was a member of the IBUKA organization and inflated the number of victims at the Musambira Commune office.<sup>824</sup> Regarding Witness DBB, Bizimungu contends that her credibility was called into question when she wrongly denied knowing Witness DBH.<sup>825</sup> In his view, the Trial Chamber committed an error in stating that it was not satisfied that the acquaintance of the two witnesses meant that they had colluded to fabricate false testimony because all it needed was “reasonable doubt about collusion”.<sup>826</sup> Bizimungu further asserts that the Trial Chamber should have disregarded Witness DBH’s evidence as it was doubtful whether the crimes she described occurred after he became Chief of Staff of the Rwandan army.<sup>827</sup> Finally, he maintains that the Trial Chamber erred in holding him responsible for killings at the Musambira Commune office because it accepted the evidence of Witness DBB that those crimes were committed by *Interahamwe* and police, not by soldiers.<sup>828</sup>

289. The Prosecution responds that the Trial Chamber considered and reasonably rejected all of Bizimungu’s challenges to the credibility of Witnesses DBH and DBB.<sup>829</sup> It further contends that Witness DBH described crimes which occurred “after her arrival” at the Musambira Commune office and that the Trial Chamber’s statement that the witness arrived there “on or about 14 April” 1994 was only an estimate.<sup>830</sup>

290. The Appeals Chamber observes that the Trial Chamber expressly considered and rejected Bizimungu’s assertions that Witness DBH’s credibility was undermined by her membership in the IBUKA organization and that Witness DBB’s initial denial of knowing Witness DBH was evidence

<sup>822</sup> Trial Judgement, paras. 1109, 1190.

<sup>823</sup> Bizimungu Notice of Appeal, para. 216; Bizimungu Appeal Brief, paras. 482, 486.

<sup>824</sup> Bizimungu Notice of Appeal, para. 213; Bizimungu Appeal Brief, para. 483. *See also* Bizimungu Reply Brief, para. 115. In his notice of appeal, Bizimungu also maintained that several parts of Witness DBH’s testimony did not support a finding that the perpetrators she described as soldiers belonged to the Rwandan army. *See* Bizimungu Notice of Appeal, para. 213. However, Bizimungu did not expand on this argument in his appeal brief and did not provide any references in support of his claim. The Appeals Chamber therefore understands that he has abandoned this argument.

<sup>825</sup> Bizimungu Notice of Appeal, para. 214; Bizimungu Appeal Brief, para. 487.

<sup>826</sup> Bizimungu Notice of Appeal, para. 214; Bizimungu Appeal Brief, para. 487. *See also* Bizimungu Reply Brief, para. 117.

<sup>827</sup> Bizimungu Appeal Brief, para. 484. *See also* Bizimungu Reply Brief, para. 116; AT. 8 May 2013 p. 27. While Bizimungu did not raise this argument in his notice of appeal, the Appeals Chamber exercises its discretion to consider it in the interests of justice. In this regard, the Appeals Chamber notes that the Prosecution responded to this argument.

<sup>828</sup> Bizimungu Appeal Brief, para. 485.

<sup>829</sup> Prosecution Response Brief (Bizimungu), paras. 231, 232, 235.

<sup>830</sup> Prosecution Response Brief (Bizimungu), para. 233, *referring to* Trial Judgement, para. 1188.

T14

of collusion between the two witnesses.<sup>831</sup> The Trial Chamber also took into account that Witness DBH exaggerated the number of victims at the Musambira Commune office.<sup>832</sup> Beyond repeating these arguments on appeal and maintaining that the Trial Chamber should have reached a different conclusion, Bizimungu does not advance any argument to show that the Trial Chamber erred in its assessment. His argument that the Trial Chamber's finding on collusion rested on the application of an incorrect standard of proof is unsubstantiated.<sup>833</sup> Accordingly, these submissions are dismissed.

291. With respect to Bizimungu's submission on the timing of the crimes observed by Witness DBH, the Appeals Chamber notes that the Trial Chamber inferred from Witness DBH's trial testimony that she arrived at the Musambira Commune office on or around 14 April 1994.<sup>834</sup> The Appeals Chamber observes that nothing in the Trial Judgement or the evidence of Witness DBH, relied on by the Trial Chamber, indicates that she arrived at the Musambira Commune office after 14 April 1994.<sup>835</sup> Furthermore, the witness testified that, immediately upon her arrival, *Interahamwe* under the leadership of Abdulhamane started attacking and killing the Tutsi refugees assembled there.<sup>836</sup> While she maintained that "[l]ater on, the soldiers came" and also killed people,<sup>837</sup> it is clear that she was referring to the same attack.<sup>838</sup> Witness DBH was unable to specify whether this attack continued the day after her arrival at the commune office.<sup>839</sup> She further stated that, right after the attack, she and other survivors were taken to the Musambira dispensary; she stayed at that location for two days; and, during that time, soldiers came and took her and other female Tutsi refugees away to rape them.<sup>840</sup>

292. The Appeals Chamber considers that nothing in Witness DBH's trial testimony indicates that soldiers were involved in the killing of Tutsi refugees after about 14 April 1994. Furthermore, it appears that the rapes to which Witness DBH testified occurred between on or around 14 and 16 April 1994. The killings and rapes described by Witness DBH thus took place before Bizimungu

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<sup>831</sup> Trial Judgement, paras. 1189, 1191.

<sup>832</sup> Trial Judgement, para. 1188.

<sup>833</sup> Bizimungu Appeal Brief, para. 487; Bizimungu Reply Brief, para. 117.

<sup>834</sup> See Trial Judgement, para. 1188.

<sup>835</sup> Witness DBH stated that, following the death of President Habyarimana, of which she heard on 7 April 1994, she hid in a banana plantation for one week and then went to the Musambira commune office. See Witness DBH, T. 20 June 2005 pp. 4, 5, 45; T. 23 June 2005 p. 22.

<sup>836</sup> Witness DBH, T. 20 June 2005 pp. 5, 6; T. 21 June 2005 p. 11.

<sup>837</sup> Witness DBH, T. 20 June 2005 p. 6.

<sup>838</sup> See Witness DBH, T. 20 June 2005 pp. 6-8; T. 21 June 2005 pp. 25, 26, 30.

<sup>839</sup> See, in particular, Witness DBH, T. 21 June 2005 p. 33, where the witness was expressly asked how long the killings lasted approximately and did not answer this question. See also Witness DBH, T. 21 June 2005 p. 35, where the witness was asked how long it took her and other survivors to bury the victims of the attack and stated that she could not give any specific time.

<sup>840</sup> Witness DBH, T. 20 June 2005 pp. 8-14; T. 22 June 2005 pp. 1, 2.

assumed his position as Chief of Staff of the Rwandan army on 19 April 1994.<sup>841</sup> The Appeals Chamber therefore concludes that Bizimungu could not have been held responsible for these crimes as a superior pursuant to Article 6(3) of the Statute and that the Trial Chamber erred in finding otherwise.<sup>842</sup>

293. The Appeals Chamber notes that Witness DBH's testimony was the only evidence adduced in support of the allegations that soldiers were involved in rapes at Musambira and killings at the Musambira Commune office.<sup>843</sup> Accordingly, the Appeals Chamber reverses Bizimungu's conviction to this extent. However, Bizimungu's conviction related to killings of Tutsi refugees from the Musambira dispensary in late April 1994, based on the testimony of Witness DBB,<sup>844</sup> remains undisturbed.

## 2. Failure to Consider Defence Evidence

294. Bizimungu submits that the Trial Chamber unjustifiably ignored Defence evidence, namely his own testimony and that of Witness DA5-2.<sup>845</sup>

295. The Prosecution responds that the Trial Chamber made reference to Defence arguments when assessing the events at Musambira and reached its conclusions based on the totality of the evidence.<sup>846</sup>

296. The Appeals Chamber observes that, in respect of the present submission, Bizimungu refers to his evidence and that of Witness DA5-2 in its entirety, without providing specific references or advancing any argument as to which aspect of this evidence was relevant to the events at Musambira. According to the accepted standard of appellate review, parties are expected to provide precise references.<sup>847</sup> Mere assertions unsupported by evidence generally are subject to summary

<sup>841</sup> See Trial Judgement, para. 90, where the Trial Chamber observed that Bizimungu was appointed to this position on 16 April 1994 and assumed office on 19 April 1994.

<sup>842</sup> Cf. *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 ("*Hadžihasanović et al.* Appeal Decision of 16 July 2003"), paras. 40-56. The Appeals Chamber recalls that it has affirmed the principle enunciated in the *Hadžihasanović et al.* Appeal Decision of 16 July 2003 elsewhere in this Judgement. See *infra* paras. 369, 370. Having found that the Trial Chamber erred in relying on the evidence of this witness, the Appeals Chamber does not consider it necessary to address Bizimungu's assertion that, according to Witness DBB, the killings at the Musambira Commune office were carried out by *Interahamwe* and police.

<sup>843</sup> See Trial Judgement, paras. 1107-1109, 1187-1192.

<sup>844</sup> See Trial Judgement, paras. 1109, 1190.

<sup>845</sup> Bizimungu Appeal Brief, para. 488. See also Bizimungu Reply Brief, para. 118. Bizimungu did not raise this argument in his notice of appeal. Nonetheless, since the Prosecution responded to the challenge, the Appeals Chamber exercises its discretion to consider the argument.

<sup>846</sup> Prosecution Response Brief (Bizimungu), para. 236, referring to Trial Judgement, paras. 1189, 1191, 1192.

<sup>847</sup> Practice Direction on Formal Requirements for Appeals from Judgement, 15 June 2007, para. 4(b)(ii). See also *Hategemana* Appeal Judgement, para. 11; *Kanyarukiga* Appeal Judgement, para. 12; *Ntabakuze* Appeal Judgement, para. 15.

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dismissal.<sup>848</sup> In any case, the Appeals Chamber is not convinced that the Trial Chamber erred in failing to consider the testimonies of Witness DA5-2 and Bizimungu in relation to the events at Musambira. A trial chamber is not required to set out in detail why it accepted or rejected a particular testimony,<sup>849</sup> or to refer to the testimony of every witness or every piece of evidence on the trial record.<sup>850</sup> While Witness DA5-2's trial testimony contains some remarks in relation to Musambira, the Appeals Chamber considers that none of his evidence could have called into question the reasonableness of the Trial Chamber's finding that soldiers were involved in the killing of refugees at this location.

297. Witness DA5-2 testified that, during his tenure at the Gitarama military camp, he was not aware of the killing of between 7,000 and 8,000 people at the Musambira Commune office.<sup>851</sup> This statement was made in response to Witness DBH's evidence,<sup>852</sup> which, as the Appeals Chamber has already found, should not have been relied on by the Trial Chamber to enter convictions because it related to crimes that took place before Bizimungu assumed his position as Chief of Staff of the Rwandan army.<sup>853</sup>

298. Witness DA5-2 was further asked whether there were any soldiers at the Musambira dispensary and he replied that, to his knowledge, no soldiers of the Gitarama military camp "had any mission to carry out in Musambira".<sup>854</sup> The Appeals Chamber considers that whether soldiers stationed at the Gitarama military camp had official tasks to perform at Musambira is irrelevant to the question of whether soldiers – from this camp or elsewhere – were involved in the killing of refugees taken from the Musambira dispensary as described by Witness DBB.<sup>855</sup>

299. The Appeals Chamber is also unable to discern anything in Bizimungu's trial testimony which would be specifically relevant to this event. Bizimungu's assertion that the Trial Chamber erred in failing to consider his or Witness DA5-2's evidence is therefore dismissed.

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<sup>848</sup> *Renzaho* Appeal Judgement, para. 468; *Haradinaj et al.* Appeal Judgement, para. 13; *Boškoski and Tarčulovski* Appeal Judgement, para. 18.

<sup>849</sup> See, e.g., *Ntabakuze* Appeal Judgement, para. 161; *Bagosora and Nsengiyumva* Appeal Judgement, para. 269.

<sup>850</sup> See, e.g., *Ntabakuze* Appeal Judgement, para. 161; *Rukundo* Appeal Judgement, para. 102. 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., *Ntabakuze* Appeal Judgement, fn. 357; *Bagosora and Nsengiyumva* Appeal Judgement, fn. 625.

<sup>851</sup> Witness DA5-2, T. 23 May 2007 p. 35.

<sup>852</sup> See Trial Judgement, paras. 1104, 1188.

<sup>853</sup> See *supra* para. 292. For the same reason, the Appeals Chamber considers irrelevant Witness DA5-2's evidence that he was not aware of any incidents of rape in Gitarama or complaints of rape made by civilians against soldiers. See Witness DA5-2, T. 23 May 2007 pp. 34, 37.

<sup>854</sup> Witness DA5-2, T. 23 May 2007 p. 34.

<sup>855</sup> See Trial Judgement, para. 1109.

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3. Bizimungu's Knowledge

300. The Trial Chamber found that Bizimungu knew or had reason to know that soldiers were about to commit or had committed killings of Tutsi refugees at Musambira.<sup>856</sup> In support of this conclusion, the Trial Chamber took into account that: these crimes were committed in an organized manner, on a large scale, and at places of public significance;<sup>857</sup> Bizimungu received situation reports from all Rwandan army units across the country regarding hostilities and the security situation affecting the civilian population at the time;<sup>858</sup> and he was alerted by various international reports about the general situation in Rwanda as well as about crimes against the Tutsi civilian population.<sup>859</sup> In particular, the Trial Chamber stated that it found it difficult to believe that crimes of the scale and frequency as those committed at Musambira would not have been brought to Bizimungu's attention through the daily situation reports he received from his units.<sup>860</sup> In light of these facts, the Trial Chamber considered it "highly unlikely" that these crimes would have eluded Bizimungu's notice.<sup>861</sup> It further noted that the Musambira Commune office and dispensary were located in Gitarama Town rather than in the "remote hinterland" of Gitarama Prefecture and that Bizimungu conceded at trial that he was aware that a large number of civilians had sought refuge in various locations in Gitarama Prefecture in April and May 1994, which "heighten[ed] the possibility" that Bizimungu knew of the crimes in question.<sup>862</sup>

301. Bizimungu submits that the Trial Chamber erred in finding that he was aware of the crimes committed at Musambira.<sup>863</sup> He asserts that the Trial Chamber misapplied the standard and burden of proof when it stated that it considered it "highly unlikely" that these crimes would have eluded his notice.<sup>864</sup> In addition, Bizimungu points out that the Musambira Commune office was not located in Gitarama town.<sup>865</sup>

302. The Prosecution responds that the Trial Chamber's conclusion that Bizimungu knew or had reason to know about the crimes at Musambira was based on the totality of the evidence.<sup>866</sup>

303. The Appeals Chamber recalls that the Trial Chamber erred in relying on the evidence of Witness DBH to enter convictions in relation to crimes that took place before Bizimungu assumed

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<sup>856</sup> Trial Judgement, paras. 1205, 1987, 1992.

<sup>857</sup> Trial Judgement, para. 1203. The Trial Chamber also considered that the crimes were committed on a regular basis. See Trial Judgement, paras. 1988, 1991.

<sup>858</sup> Trial Judgement, paras. 1205, 1455, 1989.

<sup>859</sup> Trial Judgement, para. 1993.

<sup>860</sup> Trial Judgement, paras. 1203, 1991.

<sup>861</sup> Trial Judgement, para. 1205.

<sup>862</sup> Trial Judgement, para. 1205.

<sup>863</sup> Bizimungu Notice of Appeal, para. 215; Bizimungu Appeal Brief, para. 489.

<sup>864</sup> Bizimungu Appeal Brief, para. 489, referring to Trial Judgement, para. 1205.

<sup>865</sup> Bizimungu Notice of Appeal, para. 215; Bizimungu Appeal Brief, para. 485.

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his position as Chief of Staff of the Rwandan army.<sup>867</sup> Thus, the Appeals Chamber only considers whether the Trial Chamber erred in finding that Bizimungu knew or had reason to know of the killing of refugees from the Musambira dispensary by soldiers as described by Witness DBB.

304. The Appeals Chamber observes that the Trial Chamber's statements that it was "highly unlikely" that the crimes at Musambira would have escaped Bizimungu's attention and that the location where these crimes were committed "heighten[ed] the possibility" that he was aware of them do not reflect the applicable standard for the assessment of circumstantial evidence.<sup>868</sup> Nonetheless, the Appeals Chamber is not convinced by Bizimungu's claim that this erroneous language demonstrates that the Trial Chamber applied an incorrect legal standard and reversed the burden of proof. When setting out the general principles governing the assessment of evidence in the Trial Judgement, the Trial Chamber correctly stated that the guilt of the accused must be proved beyond reasonable doubt and that an inference of guilt drawn from circumstantial evidence must be the only reasonable inference available.<sup>869</sup> Furthermore, as indicated above, the Trial Chamber relied on a number of factors in concluding that Bizimungu knew or had reason to know of the involvement of his subordinates in crimes at Musambira.<sup>870</sup> The Appeals Chamber therefore considers that the Trial Chamber was ultimately convinced beyond reasonable doubt that the only reasonable inference to be drawn from the entirety of the evidence before it was that Bizimungu possessed the *mens rea* required under Article 6(3) of the Statute.

305. The Appeals Chamber further recalls that Witness DBB testified about a single incident in late April 1994 where Tutsi refugees were removed from the Musambira dispensary and killed.<sup>871</sup> Accordingly, it was not reasonable for the Trial Chamber to find that crimes were committed regularly throughout April and May 1994 at Musambira.

306. Moreover, a review of a map of Rwanda clearly shows that Musambira is situated approximately 15 kilometres from Gitarama Town.<sup>872</sup> Accordingly, the Trial Chamber erred in considering Musambira's location in Gitarama Town as an indicator supporting Bizimungu's awareness of the killings at the Musambira dispensary.<sup>873</sup>

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<sup>866</sup> Prosecution Response Brief (Bizimungu), para. 237.

<sup>867</sup> See *supra* para. 292.

<sup>868</sup> See *Mugenzi and Mugiraneza* Appeal Judgement, para. 88; *Bagosora and Nsengiyumva* Appeal Judgement, para. 278; *Rukundo* Appeal Judgement, para. 235.

<sup>869</sup> Trial Judgement, paras. 107, 108.

<sup>870</sup> See Trial Judgement, paras. 1203, 1204, 1210, 1219, 1991, 1993. Given the variety of factors relied on by the Trial Chamber to infer Bizimungu's knowledge, the Appeals Chamber is satisfied that the evidence related to Bizimungu's receipt of situation reports was not a decisive consideration. See *supra* para. 146.

<sup>871</sup> See Trial Judgement, para. 1109.

<sup>872</sup> See Prosecution Exhibit 120.

<sup>873</sup> See Trial Judgement, para. 1205.

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307. Nonetheless, none of these errors occasioned a miscarriage of justice. The Appeals Chamber finds that a reasonable trier of fact could conclude that the only inference to be drawn from the evidence before it was that Bizimungu knew or had reason to know of the killing of refugees from the Musambira dispensary by soldiers as described by Witness DBB.<sup>874</sup> Specifically, according to Witness DBB, the attack she observed was carried out by soldiers, acting in concert with *Interahamwe*, and led to the death of many refugees who were buried in three large pits.<sup>875</sup> Thus, the Trial Chamber reasonably concluded that this was a large scale attack.<sup>876</sup> Furthermore, Witness DBB testified that a soldier initially requested the refugees assembled at the Musambira dispensary to gather in a yard near the Musambira Commune office, that immediately afterwards the refugees were attacked by *Interahamwe*, and that those attempting to flee were shot by soldiers.<sup>877</sup> This evidence indicates that the attack was orchestrated by soldiers and members of the *Interahamwe* and thus that the Trial Chamber reasonably considered it to have been organized. The Appeals Chamber concludes that this evidence, taken in conjunction with the fact that the Musambira dispensary was a place of public significance, as well as Bizimungu's knowledge of similar crimes against Tutsi refugees throughout Rwanda, was sufficient for a reasonable trier of fact to have found that the only reasonable inference was that Bizimungu knew or had reason to know of the involvement of soldiers in the killings committed at this location. Accordingly, Bizimungu's submissions are dismissed.

#### 4. Failure to Make Legal Findings

308. As discussed above in the section on the Trial Chamber's failure to make legal findings supporting Bizimungu's convictions, the Appeals Chamber will consider in this section whether there were sufficient findings and evidence on the record to sustain Bizimungu's conviction for genocide and murder as a crime against humanity in relation to the killings committed at the Musambira dispensary.<sup>878</sup>

##### (a) Genocide

309. The Prosecution argues in its Additional Submissions that Bizimungu was properly held responsible as a superior for the killings and rapes at the Musambira Commune office and dispensary.<sup>879</sup> In particular, it submits that the *actus reus* of genocide was established by the killing

<sup>874</sup> See Trial Judgement, paras. 108, 1203, 1205, 1992.

<sup>875</sup> See Trial Judgement, para. 1109.

<sup>876</sup> See Trial Judgement, para. 1203.

<sup>877</sup> See Trial Judgement, para. 1109.

<sup>878</sup> See *supra* paras. 24, 32, 37. The Appeals Chamber will not consider the rapes at Musambira or the killings at the Musambira Commune office as it has found that the Trial Chamber erred in finding Bizimungu responsible for these crimes. See *supra* para. 293.

<sup>879</sup> Prosecution's Additional Submissions, para. 41.

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and rapes of Tutsis at the Musambira Commune office and dispensary by soldiers in April and May 1994.<sup>880</sup> The Prosecution asserts that the evidence established that Tutsis were killed and raped repeatedly at the Musambira Commune office and dispensary which, taken together with the evidence that Tutsis in Rwanda were being targeted at the time, establishes the *mens rea* for genocide.<sup>881</sup> It adds that Bizimungu bears superior responsibility for these killings because the perpetrators were his subordinates under his effective control, and because he knew of the attacks, but failed to take necessary and reasonable measures to prevent or punish them.<sup>882</sup>

310. In his Additional Submissions, Bizimungu largely repeats challenges raised in his appeal which have been addressed elsewhere in this Judgement. Bizimungu submits that the evidence did not establish that he had a superior-subordinate relationship with the perpetrators of the crimes who were not properly identified, that he knew or had reason to know of the crimes, or that he failed to take necessary or reasonable measures to prevent the crimes or punish the perpetrators.<sup>883</sup> Bizimungu argues that the *actus reus* of genocide was not established as the evidence concerned events which occurred before he took office.<sup>884</sup> Bizimungu asserts that the Trial Chamber made no finding on the specific intent of the perpetrators of the crimes or his awareness of such intent and that the evidence does not support such a finding.<sup>885</sup>

311. The Trial Chamber did not make a legal finding with respect to the *actus reus* of genocide. However, the Trial Chamber found, on the basis of Witness DBB's credible testimony, that soldiers were involved in the killing of refugees at Musambira dispensary.<sup>886</sup> The Trial Chamber did not find that the refugees killed at Musambira dispensary were Tutsis, and Witness DBB did not expressly testify to this effect.<sup>887</sup> Nonetheless, Witness DBB testified to extensive targeting of Tutsis in Musambira Commune following the killing of the President, including: a meeting which was held to plan the killing of Tutsis; the burning of Tutsi houses; the killing of Tutsis at roadblocks; the killing of Tutsis who had sought refuge at Musambira Commune office; the directing of refugees toward roadblocks where they would have been killed; and an attack on refugees who had sought refuge in Musambira church.<sup>888</sup> In this context, the only reasonable inference available from Witness DBB's testimony is that the refugees who were killed at the Musambira dispensary were killed as part of the targeting of Tutsis in Musambira Commune and

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<sup>880</sup> Prosecution's Additional Submissions, paras. 42-44.

<sup>881</sup> Prosecution's Additional Submissions, paras. 45-47.

<sup>882</sup> Prosecution's Additional Submissions, paras. 48-51.

<sup>883</sup> Bizimungu's Additional Submissions, paras. 106-116.

<sup>884</sup> Bizimungu's Additional Submissions, paras. 100-104.

<sup>885</sup> Bizimungu's Additional Submissions, para. 105, referring to Bizimungu's Additional Submissions, paras. 58-65.

<sup>886</sup> Trial Judgement, paras. 1190, 1192.

<sup>887</sup> See Trial Judgement, paras. 1109, 1190, 1192; Witness DBB, T. 26 January 2006 p. 35.

<sup>888</sup> Witness DBB, T. 26 January 2006 pp. 23-32.

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that the victims were predominantly Tutsis. Accordingly, the *actus reus* of genocide was established.

312. In the same vein, in light of the widespread targeting of Tutsis in Musambira Commune following the killing of the President, taken in conjunction with the widespread killing of Tutsis in Rwanda generally at the time,<sup>889</sup> the only reasonable inference available from Witness DBB's evidence was that the soldiers who participated in the crimes acted with genocidal intent. Furthermore, in light of the Trial Chamber's conclusion that Bizimungu knew or had reason to know of the involvement of soldiers in the killings of Tutsi civilians at the Musambira dispensary,<sup>890</sup> the only reasonable inference is that he also knew of their genocidal intent.<sup>891</sup>

313. Moreover, the Appeals Chamber has already rejected Bizimungu's challenges to the Trial Chamber's findings that he failed to take necessary and reasonable measures to prevent or punish the crimes committed by his subordinate soldiers during the attack at the Musambira dispensary.<sup>892</sup>

314. In light of the foregoing, the Appeals Chamber finds that despite the Trial Chamber's failure to make legal findings, it did not err in convicting Bizimungu as a superior of genocide in relation to the killings perpetrated by soldiers at the Musambira dispensary.

(b) Murder as a Crime Against Humanity

315. The Prosecution argues in its Additional Submissions that the crimes committed at Musambira Commune office and dispensary were part of attacks on locations of refuge following the killing of the President and that the perpetrators knew that their actions formed part of this broader attack against Tutsis.<sup>893</sup> It adds that Bizimungu was held responsible as a superior for the crimes committed at Musambira Commune office and dispensary.<sup>894</sup>

316. In Bizimungu's Additional Submissions, he asserts that there was no evidence adduced that the crimes committed at Musambira Commune office and dispensary were perpetrated in the context of a widespread or systematic attack against the civilian population and that the Trial

<sup>889</sup> Trial Judgement, para. 2090.

<sup>890</sup> Trial Judgement, paras. 1205, 1987, 1992.

<sup>891</sup> See *Ntabakuze* Appeal Judgement, paras. 228, 248, 250 (affirming the trial chamber's findings that Ntabakuze had knowledge of his subordinates' genocidal intent when assessing the defendant's knowledge for Article 6(3) of the Statute); *but cf. Delalić et al.* Appeal Judgement, para. 238 (stating that knowledge sufficient to establish liability under Article 6(3) of the Statute does not need to provide "specific information about unlawful acts committed or about to be committed").

<sup>892</sup> See *supra* paras. 70, 173, 174. See also Trial Judgement, para. 2012.

<sup>893</sup> Prosecution's Additional Submissions, paras. 71, 72.

<sup>894</sup> Prosecution's Additional Submissions, para. 73.

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Chamber made no legal finding on the crimes committed at Musambira Commune office and dispensary in relation to this count.<sup>895</sup>

317. The Trial Chamber stated in a general section on crimes against humanity that it considered the totality of the evidence, including evidence concerning the ethnic composition of individuals who were killed and sought refuge at various locations in Rwanda.<sup>896</sup> It concluded that widespread and systematic attacks were launched against members of the civilian population in Rwanda on ethnic and political grounds following the death of President Habyarimana.<sup>897</sup> It considered generally that as a high-ranking military officer and given the highly organised and broad-based nature of the attacks on civilians, it was inconceivable that Bizimungu and the principal perpetrators did not know that their actions formed part of the larger attacks.<sup>898</sup>

318. The Trial Chamber did not specifically apply these findings to the crimes committed at the Musambira dispensary or find that they were committed in the context of a widespread or systematic attack against the civilian population in Rwanda on ethnic and political grounds. Nonetheless, the Appeals Chamber considers that the killings at the Musambira dispensary fit within the Trial Chamber's reference to attacks on individuals who had sought refuge at various locations in Rwanda. Furthermore, given Witness DBB's testimony regarding the widespread attacks on Tutsis in Musambira Commune following the killing of the President,<sup>899</sup> the Appeals Chamber is convinced that the only reasonable inference is that the killings perpetrated at the Musambira dispensary were committed as part of the widespread and systematic attacks against members of the civilian population in Rwanda on ethnic and political grounds following the death of President Habyarimana and that the perpetrators were aware that their actions formed part of these larger attacks.

319. The Trial Chamber found it established that killings were perpetrated at the Musambira dispensary<sup>900</sup> which fulfils the *actus reus* of murder as a crime against humanity. As noted above in relation to the genocide charge, it further found that soldiers under Bizimungu's command committed the killings at the Musambira dispensary,<sup>901</sup> and that Bizimungu knew of the crimes and had the material ability to prevent and punish his culpable subordinates but failed to do so.<sup>902</sup>

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<sup>895</sup> Bizimungu's Additional Submissions, paras. 129, 130.

<sup>896</sup> Trial Judgement, para. 2090.

<sup>897</sup> Trial Judgement, para. 2090.

<sup>898</sup> Trial Judgement, para. 2090.

<sup>899</sup> Witness DBB, T. 26 January 2006 pp. 23-32.

<sup>900</sup> Trial Judgement, para. 1192.

<sup>901</sup> Trial Judgement, paras. 1190, 1192.

<sup>902</sup> Trial Judgement, paras. 1205, 1220.

T M

320. In light of the foregoing, the Appeals Chamber finds that despite the Trial Chamber's failure to make legal findings, it did not err in convicting Bizimungu as a superior of murder as a crime against humanity in relation to the killings perpetrated at the Musambira dispensary.

#### 5. Conclusion

321. In light of the foregoing, the Appeals Chamber grants Bizimungu's Eighteenth Ground of Appeal, in part, and reverses Bizimungu's convictions for rape as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. The Appeals Chamber further reverses his convictions for 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 in relation to the killings perpetrated at Musambira Commune office. However, the Appeals Chamber has dismissed Bizimungu's arguments in relation to the Trial Chamber's assessment of evidence on killings of refugees by soldiers at the Musambira dispensary and Bizimungu's knowledge of these crimes. Accordingly, Bizimungu's convictions as a superior for 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 in relation to the killings at Musambira dispensary remain undisturbed.

T/12

## I. TRAFIPRO (Ground 19)

322. The Trial Chamber convicted Bizimungu as a superior pursuant to Article 6(3) of the Statute for genocide, murder and rape as crimes against humanity and murder and rape as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II for the role of soldiers of the Rwandan army in crimes committed at the TRAFIPRO Centre (“TRAFIPRO”) in Kabgayi, Gitarama Prefecture.<sup>903</sup> In particular, the Trial Chamber found that soldiers committed systematic acts of killings and rapes against Tutsi refugees at this location during April and May 1994.<sup>904</sup> It further held that Bizimungu knew or had reason to know of the crimes in question,<sup>905</sup> and failed to prevent the crimes and/or punish the perpetrators.<sup>906</sup>

323. Bizimungu submits that the Trial Chamber erred in finding him responsible for the killings and rapes committed at TRAFIPRO.<sup>907</sup> In this section, the Appeals Chamber considers whether the Trial Chamber erred in: (i) its assessment of the underlying evidence; (ii) its conclusion that Bizimungu knew or had reason to know of the involvement of soldiers of the Rwandan army in the crimes committed at TRAFIPRO; and (iii) convicting Bizimungu of genocide and murder and rape as crimes against humanity for this event in light of its failure to provide a reasoned opinion.

### 1. Assessment of Evidence

324. The Trial Chamber found that soldiers were involved in systematic acts of killings and rapes of Tutsi refugees at TRAFIPRO.<sup>908</sup> This conclusion was based on the evidence of Prosecution Witnesses DBB, DBE, and DBD, all of whom had sought refuge at TRAFIPRO at the time and testified about several incidents where soldiers and *Interahamwe* killed Tutsi refugees as well as about repeated rapes to which the witnesses and other Tutsi women were subjected by soldiers.<sup>909</sup>

325. Bizimungu submits that the Trial Chamber erred in finding him responsible for the crimes committed at TRAFIPRO because Witnesses DBB, DBE, and DBD did not corroborate each other.<sup>910</sup> He also challenges the credibility of these witnesses because they never reported their rapes.<sup>911</sup> He further asserts that there were serious contradictions between Witness DBD’s

<sup>903</sup> Trial Judgement, paras. 2145, 2153, 2160, 2162, 2163. *See also* Trial Judgement, paras. 16, 30, 59, 64, 65, 67, 72, 73.

<sup>904</sup> Trial Judgement, paras. 1193-1196.

<sup>905</sup> Trial Judgement, paras. 1205, 1987, 1992.

<sup>906</sup> Trial Judgement, paras. 1994, 2012.

<sup>907</sup> Bizimungu Notice of Appeal, paras. 217-221; Bizimungu Appeal Brief, paras. 491-498.

<sup>908</sup> Trial Judgement, para. 1196.

<sup>909</sup> *See* Trial Judgement, paras. 1110, 1111, 1113-1118, 1121-1123, 1194.

<sup>910</sup> Bizimungu Notice of Appeal, para. 218; Bizimungu Appeal Brief, paras. 492, 495.

<sup>911</sup> Bizimungu Notice of Appeal, para. 218; Bizimungu Appeal Brief, paras. 492, 494. The Appeals Chamber notes that, in his notice of appeal, Bizimungu advances this argument only in relation to Witness DBB whereas, in his Appeal Brief, he refers to Witnesses DBE and DBD.

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testimony at trial and her prior statements, in particular regarding whether those who raped her were soldiers or *Interahamwe*.<sup>912</sup> Bizimungu adds that Witness DBB also contradicted herself since, in court, she only implicated soldiers in the rapes, whereas her previous statement also mentioned the *Interahamwe*.<sup>913</sup> Finally, Bizimungu maintains that Witness DBE was not able to distinguish between soldiers and gendarmes and that her evidence suffered from major inconsistencies.<sup>914</sup>

326. The Prosecution responds that Witnesses DBB, DBE, and DBD sufficiently corroborated each other and that the Trial Chamber correctly considered all matters raised by Bizimungu.<sup>915</sup>

327. The Appeals Chamber recalls that corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony.<sup>916</sup> The Trial Chamber found that Witnesses DBB, DBE, and DBD provided corroborating evidence about killings and rapes of Tutsi refugees by soldiers at TRAFIPRO.<sup>917</sup> Since Bizimungu does not advance any argument as to why this finding was erroneous and the Appeals Chamber cannot discern a reason for concluding that the testimonies of Witnesses DBB, DBE, and DBD were incompatible, Bizimungu's assertion that the witnesses did not corroborate each other is dismissed.

328. The Appeals Chamber is also not convinced by Bizimungu's submission that the Trial Chamber erred in relying on the evidence of Witnesses DBB, DBE, and DBD given that they did not report the rapes which they suffered at TRAFIPRO. The Trial Chamber noted that Bizimungu had raised this argument in relation to Witness DBD and rejected it "[f]or the reasons outlined above in relation to Witness EZ".<sup>918</sup> The Appeals Chamber recalls that Witness EZ testified about events, including her own rape by soldiers at the ESI.<sup>919</sup> In concluding that Witness EZ's failure to report being raped did not undermine her credibility, the Trial Chamber took into account: that there are many reasons why a victim might fail to report a crime; the chaotic situation prevailing at the ESI and in Rwanda at large at the time; the fact that the perpetrators remained at the ESI along with the witness; and the physical and psychological damage suffered by rape victims.<sup>920</sup> Bizimungu does not advance any argument as to why this reasoning was erroneous and does not equally apply

<sup>912</sup> Bizimungu Notice of Appeal, para. 218; Bizimungu Appeal Brief, para. 493; Bizimungu Reply Brief, para. 121.

<sup>913</sup> Bizimungu Appeal Brief, para. 493. Bizimungu additionally refers to his challenges to Witness DBB's credibility under Ground 18 of his appeal. See Bizimungu Appeal Brief, para. 497. The Appeals Chamber has already dismissed these challenges elsewhere in this Judgement. See *supra* paras. 290, 307.

<sup>914</sup> AT. 7 May 2013 p. 70. See also Bizimungu Appeal Brief, para. 331.

<sup>915</sup> Prosecution Response Brief (Bizimungu), paras. 240-243.

<sup>916</sup> *Ntawukulilyayo* Appeal Judgement, para. 24; *Munyakazi* Appeal Judgement, para. 71; *Setako* Appeal Judgement, para. 31.

<sup>917</sup> Trial Judgement, para. 1194.

<sup>918</sup> Trial Judgement, para. 1195.

<sup>919</sup> See Trial Judgement, paras. 1098, 1099, 1182.

<sup>920</sup> Trial Judgement, para. 1183.

T M

to Witness DBD. For the same reason, the Appeals Chamber dismisses Bizimungu's argument in relation to Witnesses DBB and DBE.

329. Regarding Bizimungu's contention that Witness DBD provided inconsistent explanations as to whether *Interahamwe* or soldiers raped her, the Appeals Chamber notes that the witness testified that she was raped by soldiers at TRAFIPRO on two occasions.<sup>921</sup> The Appeals Chamber understands that Bizimungu takes issue with Witness DBD's account of her second rape, asserting that she claimed at trial to have been raped by soldiers, whereas, in her prior written statement, she stated that *Interahamwe* raped her.<sup>922</sup> The Trial Chamber considered this submission and found that it did not undermine Witness DBD's credibility because she "was consistent both in her pre-trial statements and her in-court testimony that soldiers raped Tutsi refugees, including herself, at TRAFIPRO", and "[t]he fact that the witness also implicated *Interahamwe* in these rapes does not diminish the credibility of her evidence in relation to soldiers' participation in these rapes".<sup>923</sup> While this reasoning is not entirely clear, the Appeals Chamber understands that the Trial Chamber found that, although there may have been an inconsistency in Witness DBD's evidence as to the identity of the perpetrators of her second rape,<sup>924</sup> this did not amount to a material discrepancy which casts doubt on her overall credibility and account of other crimes, including her first rape by soldiers at TRAFIPRO. The Appeals Chamber finds that Bizimungu fails to demonstrate that this conclusion was unreasonable.<sup>925</sup>

330. The Appeals Chamber notes that the Trial Chamber did not address the alleged inconsistency between Witness DBB's testimony at trial and her prior statement regarding whether she only implicated soldiers in rapes, or also mentioned *Interahamwe*. At trial, Witness DBB testified that the rapes at TRAFIPRO were committed by soldiers and that she did not know if *Interahamwe* were also involved, whereas her prior statement indicated that both soldiers and

<sup>921</sup> See Trial Judgement, para. 1123.

<sup>922</sup> Bizimungu Appeal Brief, para. 493, referring to Witness DBD, T. 5 March 2005 p. 30 (French). The Appeals Chamber notes that Bizimungu's reference is incorrect and understands that Bizimungu intended to refer to T. 5 April 2005. See also Bizimungu Closing Brief, para. 1016; Witness DBD, T. 5 April 2005 pp. 31, 32.

<sup>923</sup> Trial Judgement, para. 1195.

<sup>924</sup> See Witness DBD, T. 5 April 2005 pp. 31, 32 ("Q. [...] When you mentioned that, again, with respect to the – your – your presence at TRAFIPRO, you mention in your deposition yesterday that you were called upon on two different occasions. You were raped on the first occasion, and you were raped on the second occasion. And with respect to that second occasion, you specifically pointed out yesterday that the *Interahamwes* never raped you on that second occasion. You remember saying that? A. I remember it was a soldier who took me. The *Interahamwe* just beat me but did not rape me. Q. Well, you say in your statement, madam – I'll read this to you, page 5, the last paragraph, and line 4 you say the following: 'Once we got to the forest, one of the *Interahamwe* was beating me with a piece of wood. He ordered me to throw away my clothes. I hesitated, and he threw them away. The ones he threw away were my kitenge and my underskirt. He raped me while the other one was watching and pointing his gun at me.' You specifically mention in your statement on this very important element that it was the *Interahamwe* who raped you the second time, not the soldier. And you specifically said yesterday in your statement that no, it's not the *Interahamwe*. What is it? A. I was never raped by an *Interahamwe*. It was the soldiers who raped me. And I never said I had been raped by an *Interahamwe*".).

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*Interahamwe* committed rapes at this location.<sup>926</sup> However, the Appeals Chamber observes that the main focus of Witness DBB's testimony was on her own rapes and that she consistently maintained that the perpetrators were soldiers.<sup>927</sup> The Appeals Chamber is therefore not convinced that the inconsistency referred to by Bizimungu was such that no reasonable trier of fact could have relied upon Witness DBB's evidence.

331. Finally, the Appeals Chamber observes that Bizimungu provides no references to the trial record to support his claim that Witness DBE's testimony was inconsistent. With respect to her alleged inability to distinguish between soldiers and gendarmes, Bizimungu merely refers to a statement of the Prosecution which was made in response to an objection by counsel for Ndingilyimana against the witness's evidence that she was attacked by a gendarme at Shyogwe.<sup>928</sup> These submissions are therefore dismissed.

332. Accordingly, the Appeals Chamber finds that Bizimungu has failed to demonstrate that the Trial Chamber erred in the assessment of evidence that soldiers of the Rwandan army were involved in crimes committed at TRAFIPRO.

## 2. Bizimungu's Knowledge

333. The Trial Chamber found that Bizimungu knew or had reason to know that soldiers were about to commit or had committed killings and rapes of Tutsi refugees at TRAFIPRO.<sup>929</sup> In support of this conclusion, the Trial Chamber held that these crimes were committed on a regular basis and that this, together with the fact that a large number of Tutsi civilians at TRAFIPRO were killed by soldiers and *Interahamwe* in the immediate aftermath of a visit by Prime Minister Jean Kambanda, suggested that the crimes were organized.<sup>930</sup> The Trial Chamber further took into account that Bizimungu received daily situation reports from all Rwandan army units regarding hostilities and the security situation affecting the civilian population at the time<sup>931</sup> and was alerted by various international reports about the general situation in Rwanda and crimes against the Tutsi civilian

<sup>925</sup> Cf. *Ntawukulilyayo* Appeal Judgement, para. 76.

<sup>926</sup> Witness DBB, T. 30 January 2006 p. 26; Defence Exhibit 81, p. 4.

<sup>927</sup> See Defence Exhibit 81, p. 4; Witness DBB, T. 26 January 2006 pp. 41-43, 47, 48.

<sup>928</sup> See Witness DBE, T. 30 March 2005 pp. 49, 50 ("Mr. Tambadou: My Lords, I concede to my learned friend that his client has not been charged with a rape or any degrading treatment, but the witness is explaining what happened to her on her way to wherever she was going. And in the course of that explanation, she has the right to tell her story. Unfortunately, in the statement it is recorded as 'soldier.' She met soldiers on her way. Here the witness is giving clarification and saying that it was a *gendarme*. I mean, these are laypeople. They call soldiers '*gendarmes*,' whoever is carrying a gun and has a uniform, soldiers. I believe it is in that context that the witness gave a statement."). The Appeals Chamber notes that Bizimungu erroneously refers to Witness DBE, T. 30 March 2005 p. 54. See Bizimungu Appeal Brief, fn. 462.

<sup>929</sup> Trial Judgement, paras. 1205, 1987, 1992.

<sup>930</sup> Trial Judgement, paras. 1204, 1991. See also Trial Judgement, para. 1988.

<sup>931</sup> Trial Judgement, paras. 1205, 1989.

T M

population.<sup>932</sup> In particular, the Trial Chamber stated that it found it difficult to believe that crimes of the scale and frequency as those committed at TRAFIPRO would not have been brought to Bizimungu's attention through the daily situation reports he received from his units.<sup>933</sup> In light of these facts, the Trial Chamber considered it "highly unlikely" that these crimes would have eluded Bizimungu's notice.<sup>934</sup> It further noted that TRAFIPRO was located in Gitarama Town rather than in the "remote hinterland" of Gitarama Prefecture and that Bizimungu conceded at trial that he was aware that a large number of civilians had sought refuge in various locations in Gitarama in April and May 1994, which "heighten[ed] the possibility" that Bizimungu knew of the crimes in question.<sup>935</sup>

334. Bizimungu submits that the Trial Chamber erred in finding that he was aware of the crimes committed at TRAFIPRO.<sup>936</sup> He asserts that the Trial Chamber misapplied the standard and burden of proof when it stated that it considered it "highly unlikely" that these crimes would have eluded his notice.<sup>937</sup> In addition, he argues that since Witnesses DBB, DBE, and DBD never reported the crimes at TRAFIPRO, he could not have been aware of them.<sup>938</sup>

335. The Prosecution responds that the Trial Chamber's conclusion that Bizimungu knew or had reason to know about the crimes at TRAFIPRO was properly based on the totality of the evidence.<sup>939</sup>

336. The Appeals Chamber has already found that the language employed by the Trial Chamber that it was "highly unlikely" that crimes would have escaped Bizimungu's attention and that the locations where these crimes were committed "heighten[ed] the possibility" that he was aware of them does not reflect the accepted standard for the assessment of circumstantial evidence.<sup>940</sup> However, as explained above, the Trial Chamber correctly recalled the applicable standard and burden of proof in the Trial Judgement.<sup>941</sup> Since the Trial Chamber relied on a number of factors in finding that Bizimungu knew or had reason to know of the involvement of his subordinates in crimes at TRAFIPRO, the Appeals Chamber considers that the Trial Chamber was ultimately convinced beyond reasonable doubt that this conclusion was the only reasonable inference available

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<sup>932</sup> Trial Judgement, para. 1993.

<sup>933</sup> Trial Judgement, para. 1991.

<sup>934</sup> Trial Judgement, para. 1205.

<sup>935</sup> Trial Judgement, para. 1205.

<sup>936</sup> Bizimungu Notice of Appeal, para. 220; Bizimungu Appeal Brief, para. 496.

<sup>937</sup> Bizimungu Notice of Appeal, para. 219; Bizimungu Appeal Brief, paras. 489, 497, *referring to* Trial Judgement, para. 1205.

<sup>938</sup> Bizimungu Notice of Appeal, para. 218; Bizimungu Appeal Brief, para. 496; Bizimungu Reply Brief, para. 122. *See also* AT. 7 May 2013 p. 71.

<sup>939</sup> Prosecution Response Brief (Bizimungu), para. 244.

<sup>940</sup> *See supra* para. 304.

<sup>941</sup> *See* Trial Judgement, paras. 107, 108, and *supra* para. 304.

T M

from the evidence.<sup>942</sup> Bizimungu's submission that the Trial Chamber applied an incorrect legal standard and reversed the burden of proof is therefore dismissed.

337. However, the Trial Chamber erred in asserting that TRAFIPRO is situated in Gitarama Town whereas it is located in Kabgayi.<sup>943</sup> While a review of the map of Rwanda indicates that Kabgayi is only a few kilometres away from Gitarama Town, the Appeals Chamber finds that the Trial Chamber erred in considering TRAFIPRO's location in Gitarama Town as an indicator supporting Bizimungu's awareness of the crimes committed there.<sup>944</sup>

338. Nonetheless, these errors did not occasion a miscarriage of justice. As noted above, the Trial Chamber took into account Bizimungu's testimony that he was aware that refugees had gathered in Gitarama.<sup>945</sup> The Appeals Chamber observes that Bizimungu specifically mentioned that he knew that there were refugees assembled in Kabgayi.<sup>946</sup>

339. Furthermore, the Appeals Chamber considers that, based on the evidence of Witnesses DBB, DBE, and DBD,<sup>947</sup> the Trial Chamber reasonably concluded that soldiers regularly killed and raped Tutsi refugees at TRAFIPRO and that this suggested that the crimes "were organised rather than random or sporadic acts of errant soldiers".<sup>948</sup> In this context, the Trial Chamber also took into account that one attack by soldiers and *Interahamwe*, which resulted in many casualties among the refugees, was launched after Prime Minister Kambanda's visit at TRAFIPRO.<sup>949</sup> Bizimungu does not challenge the Trial Chamber's finding that the crimes at TRAFIPRO were organized and occurred regularly and the Appeals Chamber discerns no error in the Trial Chamber's reasoning.

340. The Appeals Chamber concludes that Bizimungu has failed to show that no reasonable trier of fact could have found that, in light of the scope and frequency of the crimes committed at TRAFIPRO, taken in conjunction with Bizimungu's acknowledgement that he was aware of the gathering of Tutsi refugees in Kabgayi, Gitarama Prefecture, and that he was alerted to similar crimes against Tutsis throughout Rwanda by international reports, it was the only reasonable inference that he knew or had reason to know of the involvement of soldiers in killings and rapes at

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<sup>942</sup> Given the variety of factors relied on by the Trial Chamber to infer Bizimungu's knowledge, the Appeals Chamber is satisfied that the evidence related to Bizimungu's receipt of situation reports was not a decisive consideration. *See supra* para. 146.

<sup>943</sup> *See* Witness DBB, T. 26 January 2006 p. 38; Witness DBE, T. 30 March 2005 p. 57; Witness DBD, T. 4 April 2005 p. 70.

<sup>944</sup> *See* Prosecution Exhibit 120.

<sup>945</sup> Trial Judgement, para. 1205.

<sup>946</sup> Bizimungu, T. 13 December 2007 pp. 17, 34.

<sup>947</sup> *See* Trial Judgement, paras. 1110, 1111, 1113-1118, 1121-1123, 1194.

<sup>948</sup> Trial Judgement, para. 1204.

<sup>949</sup> Trial Judgement, para. 1204. *See also* Trial Judgement, paras. 1118, 1122.

T M

TRAFIPRO. The Appeals Chamber therefore considers it immaterial whether these events were reported by Witnesses DBB, DBE, and DBD.

341. For the foregoing reasons, the Appeals Chamber dismisses Bizimungu's submissions that the Trial Chamber erred in finding that he knew or had reason to know of killings and rapes committed by soldiers at TRAFIPRO.

### 3. Failure to Make Legal Findings

342. As discussed above in the section on the Trial Chamber's failure to make legal findings supporting Bizimungu's convictions, the Appeals Chamber will consider in this section whether there were sufficient findings and evidence on the record to support Bizimungu's conviction for genocide and murder and rape as crimes against humanity in relation to the killings committed at TRAFIPRO.<sup>950</sup>

#### (a) Genocide

343. The Prosecution argues in its Additional Submissions that Bizimungu was properly held responsible for genocide as a superior for the killings and rapes at TRAFIPRO.<sup>951</sup> In particular, it submits that the *actus reus* of genocide was established by the killing and rapes of Tutsi refugees at TRAFIPRO by soldiers.<sup>952</sup> The Prosecution asserts that the evidence established that Tutsis were regularly selected and systematically killed and raped at TRAFIPRO and that these attacks occurred on a large scale which, taken together with the evidence that Tutsis in Rwanda were being targeted at the time, establishes the *mens rea* for genocide.<sup>953</sup> It adds that Bizimungu bears superior responsibility for these killings because the perpetrators were his subordinates under his effective control, and because he knew of the attacks, but failed to take necessary and reasonable measures to prevent or punish them.<sup>954</sup>

344. In his Additional Submissions, Bizimungu largely repeats challenges raised in his appeal which have been addressed elsewhere in this Judgement. Bizimungu submits that the evidence did not establish that he had a superior-subordinate relationship with the perpetrators of the crimes who were not properly identified or effective control over them, that he knew or had reason to know of the crimes, or that he failed to take necessary or reasonable measures to prevent the crimes or

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<sup>950</sup> See *supra* paras. 24, 32, 37.

<sup>951</sup> Prosecution's Additional Submissions, paras. 52, 65.

<sup>952</sup> Prosecution's Additional Submissions, paras. 53-56.

<sup>953</sup> Prosecution's Additional Submissions, paras. 57-60.

<sup>954</sup> Prosecution's Additional Submissions, paras. 61-65.

T M

punish the perpetrators.<sup>955</sup> Bizimungu argues that the *actus reus* of genocide was not established.<sup>956</sup> Bizimungu asserts that the Trial Chamber made no finding on the specific intent of the perpetrators of the crimes or his awareness of such intent and that the evidence does not support such a finding.<sup>957</sup>

345. The Trial Chamber made no finding on the *actus reus* of genocide in relation to the events at TRAFIPRO. Nonetheless, it found that soldiers of the Rwandan army killed and raped a large number of Tutsis at TRAFIPRO during April and May 1994,<sup>958</sup> which is sufficient to establish the *actus reus* of genocide.

346. Regarding the *mens rea* for genocide, the Appeals Chamber finds that the only reasonable inference to be drawn from the systematic nature of the acts of violence committed against Tutsis at TRAFIPRO, including the selection and removal of Tutsi refugees,<sup>959</sup> taken in conjunction with the widespread killing of Tutsis in Rwanda at the time,<sup>960</sup> was that the soldiers who participated in the crimes acted with genocidal intent.<sup>961</sup> In further support of this, the Appeals Chamber notes the evidence of Witness DBE, whose evidence the Trial Chamber found credible,<sup>962</sup> that there were only Tutsi refugees at TRAFIPRO.<sup>963</sup> Witness DBE also testified that, on one occasion when she and other women were raped by soldiers, one soldier told her that the “God of the Tutsi” had abandoned them, that Tutsi women were “not dying like the men because you have something to offer men”, and that they should go back to their “home, Abyssinia”.<sup>964</sup> Similarly, Witness DBD, whose evidence the Trial Chamber found credible,<sup>965</sup> testified that soldiers and *Interahamwe* who were involved in raping her told her “Why are you here? Why didn’t you go and join your brothers, the *Inkotanyi*?”<sup>966</sup> The Appeals Chamber further finds that, in light of the Trial Chamber’s finding that Bizimungu knew or had reason to know of the crimes committed by his subordinates at

<sup>955</sup> Bizimungu’s Additional Submissions, paras. 119-124.

<sup>956</sup> Bizimungu’s Additional Submissions, para. 117, referring to Bizimungu’s Additional Submissions, paras. 66-71 and Bizimungu Appeal Brief, Ground 11.

<sup>957</sup> Bizimungu’s Additional Submissions, para. 118, referring to Bizimungu’s Additional Submissions, paras. 58-65 and Bizimungu Appeal Brief, Ground 10 and para. 496.

<sup>958</sup> Trial Judgement, para. 1196.

<sup>959</sup> Trial Judgement, paras. 1194, 1196.

<sup>960</sup> Trial Judgement, para. 2090.

<sup>961</sup> See *Hategekimana* Appeal Judgement, para. 133 (“The Appeals Chamber recalls that, in the absence of direct evidence, a perpetrator’s intent to commit genocide may be inferred from relevant facts and circumstances, including the general context of the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts”). See also *Ntabakuze* Appeal Judgement, paras. 237, 241.

<sup>962</sup> Trial Judgement, para. 1194.

<sup>963</sup> See Witness DBE, T. 30 March 2005 pp. 61, 70; T. 31 March 2005 pp. 29, 30.

<sup>964</sup> See Witness DBE, T. 30 March 2005 pp. 65, 66; T. 4 April 2005 pp. 8, 9.

<sup>965</sup> Trial Judgement, paras. 1194, 1195.

<sup>966</sup> See Witness DBD, T. 4 April 2005 p. 73.

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TRAFIPRO,<sup>967</sup> the only reasonable inference is that he also knew of the genocidal intent of the perpetrators.<sup>968</sup>

347. Moreover, the Appeals Chamber has already rejected Bizimungu's challenges to the Trial Chamber's findings that he failed to take necessary and reasonable measures to prevent or punish the crimes committed by his subordinate soldiers at TRAFIPRO.<sup>969</sup>

348. In light of the foregoing, the Appeals Chamber finds that despite the Trial Chamber's failure to make legal findings, it did not err in convicting Bizimungu as a superior of genocide in relation to the killings and rapes perpetrated at TRAFIPRO.

(b) Murder and Rape as Crimes Against Humanity

349. The Prosecution argues in its Additional Submissions that the crimes committed at TRAFIPRO were part of attacks on locations of refuge following the killing of the President and that the perpetrators knew that their actions formed part of this broader attack on Tutsis.<sup>970</sup> It adds that Bizimungu was held responsible as a superior for the crimes at TRAFIPRO.<sup>971</sup>

350. In Bizimungu's Additional Submissions, he asserts that there was no evidence adduced that the crimes committed at TRAFIPRO were perpetrated in the context of a widespread or systematic attack against the civilian population and that the Trial Chamber made no legal finding in relation to this count.<sup>972</sup>

351. The Trial Chamber stated in a general section on crimes against humanity that it had considered the totality of the evidence, including evidence concerning the ethnic composition of individuals who were killed and sought refuge at various locations in Rwanda.<sup>973</sup> It concluded that it was satisfied that widespread and systematic attacks were launched against members of the civilian population in Rwanda on ethnic and political grounds following the death of President Habyarimana.<sup>974</sup> The Trial Chamber considered generally that, as a high-ranking military officer, and given the highly organized and broad-based nature of the attacks on civilians, it was

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<sup>967</sup> Trial Judgement, para. 1205.

<sup>968</sup> See *Ntabakuze Appeal Judgement*, paras. 228, 248, 250 (affirming the trial chamber's findings that Ntabakuze had knowledge of his subordinates' genocidal intent when assessing the defendant's knowledge for Article 6(3) of the Statute); *but cf. Delalić et al. Appeal Judgement*, para. 238 (stating that knowledge sufficient to establish liability under Article 7(3) of the ICTY Statute does not need to provide "specific information about unlawful acts committed or about to be committed").

<sup>969</sup> See *supra* paras. 70, 173, 174. See also Trial Judgement, para. 2012.

<sup>970</sup> Prosecution's Additional Submissions, para. 78.

<sup>971</sup> Prosecution's Additional Submissions, para. 79.

<sup>972</sup> Bizimungu's Additional Submissions, paras. 129, 130.

<sup>973</sup> Trial Judgement, para. 2090.

<sup>974</sup> Trial Judgement, para. 2090.

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inconceivable that Bizimungu and the principal perpetrators did not know that their actions formed part of the larger attacks.<sup>975</sup> The Trial Chamber did not specifically apply these findings to the crimes committed at TRAFIPRO or find that they were committed in the context of a widespread or systematic attack against the civilian population in Rwanda on ethnic and political grounds. Nonetheless, the Appeals Chamber considers that the killings and rapes at TRAFIPRO fit within the Trial Chamber's reference to attacks on individuals who had sought refuge at various locations in Rwanda. The Appeals Chamber is convinced that the only reasonable inference is that the killings and rapes perpetrated at TRAFIPRO were committed as part of the widespread and systematic attack against members of the civilian population in Rwanda on ethnic and political grounds following the death of President Habyarimana and that the perpetrators were aware that their actions formed part of these larger attacks.

352. The Trial Chamber found that killings and rapes of Tutsi refugees were perpetrated at TRAFIPRO,<sup>976</sup> which fulfils the *actus reus* of murder and rape as crimes against humanity. As noted above in relation to the genocide charge, it further found that soldiers under Bizimungu's command committed the killings and rapes at TRAFIPRO,<sup>977</sup> that Bizimungu knew of the crimes, and that he had the material ability to prevent and punish his culpable subordinates but failed to do so.<sup>978</sup>

353. In light of the foregoing, the Appeals Chamber finds that despite the Trial Chamber's failure to make legal findings, it did not err in convicting Bizimungu as a superior of murder and rape as crimes against humanity in relation to the killings and rapes perpetrated at TRAFIPRO.

#### 4. Conclusion

354. Consequently, the Appeals Chamber dismisses Bizimungu's Nineteenth Ground of Appeal.

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<sup>975</sup> Trial Judgement, para. 2090.

<sup>976</sup> Trial Judgement, para. 1196.

<sup>977</sup> Trial Judgement, para. 1196.

<sup>978</sup> Trial Judgement, paras. 1205, 1220.

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**IV. APPEAL OF THE PROSECUTION**

**A. Rwankeri Sector (Ground 1)**

355. The Trial Chamber found that, on the night of 6 to 7 April 1994, Bizimungu attended a meeting of national and local authorities at the home of Joseph Nzirorera's mother, where he gave a speech calling for the killing of Tutsis in Ruhengeri.<sup>979</sup> The Trial Chamber concluded that, shortly after the meeting, a number of officials emerged from the house and urged members of the *Interahamwe* gathered at the nearby Byangabo market to kill Tutsis in the area.<sup>980</sup> The Trial Chamber observed that there was "a close link between the anti-Tutsi remarks made by the authorities, including Bizimungu, during the meeting" and the killings of Tutsis by *Interahamwe* that followed in Rwankeri Sector that day.<sup>981</sup> Consequently, the Trial Chamber found that Bizimungu aided and abetted the killings at Rwankeri Sector.<sup>982</sup>

356. The Prosecution submits that the Trial Chamber erred in not assessing and characterizing Bizimungu's conduct in relation to the killings in Rwankeri Sector as ordering and/or instigating genocide, in addition to aiding and abetting genocide.<sup>983</sup> The Appeals Chamber recalls that the Trial Chamber erred in its assessment of Witness GAP's evidence and has concluded that no reasonable trier of fact could have relied on the uncorroborated testimony of this witness to establish Bizimungu's presence at the home of Joseph Nzirorera's mother on the evening of 6 to 7 April 1994.<sup>984</sup> Because Bizimungu's participation in this meeting would be essential to establishing that he aided and abetted, or that he ordered or instigated, the killing of Tutsis in Rwankeri Sector, the Appeals Chamber dismisses the Prosecution's First Ground of Appeal.

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<sup>979</sup> Trial Judgement, paras. 910, 911, 920, 924. *See also* Trial Judgement, para. 2065.

<sup>980</sup> Trial Judgement, paras. 925, 926.

<sup>981</sup> Trial Judgement, paras. 925, 926, 931, 2177.

<sup>982</sup> The Trial Chamber expressly found that Bizimungu aided and abetted the killings in Rwankeri Sector and entered a conviction against him for genocide. *See* Trial Judgement, paras. 8, 72, 73, 926, 931, 2163, 2177.

<sup>983</sup> Prosecution Notice of Appeal, paras. 1-6; Prosecution Appeal Brief, paras. 15-34.

<sup>984</sup> *See supra* paras. 65, 67.

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**B. Busogo Parish (Ground 2)**

357. Based on the same conduct on which the Trial Chamber relied in finding that Bizimungu aided and abetted the killings in Rwankeri Sector,<sup>985</sup> the Prosecution, at trial, also sought to hold Bizimungu responsible for genocide or complicity in genocide based on the subsequent attack against Tutsis at Busogo Parish on 7 April 1994.<sup>986</sup> The Trial Chamber found that *Interahamwe* and soldiers participated in an attack on Busogo Parish on 7 April 1994.<sup>987</sup> However, the Trial Chamber concluded that the Prosecution had not adduced sufficient evidence proving that Bizimungu's remarks at the home of Nzirorera's mother had a significant bearing on the conduct of the assailants at Busogo Parish and dismissed this charge.<sup>988</sup>

358. The Prosecution submits that the Trial Chamber erred by not finding that Bizimungu ordered, instigated and/or aided and abetted the killings at Busogo Parish.<sup>989</sup> It asserts that Bizimungu's responsibility for this incident is "based on the same factual findings of the Trial Chamber" regarding the circumstances surrounding the killings in Rwankeri Sector on 7 April 1994 and that "[t]he killings at Rwankeri and Busogo formed part of the same criminal transactions that flowed from the meeting at Nzirorera's mother's house".<sup>990</sup>

359. The Appeals Chamber recalls that the Trial Chamber erred in its assessment of Witness GAP's evidence and has concluded that no reasonable trier of fact could have relied on the uncorroborated testimony of this witness to establish Bizimungu's presence at the home of Joseph Nzirorera's mother on the evening of 6 to 7 April 1994.<sup>991</sup> Because Bizimungu's participation in this meeting would be essential to establishing his criminal responsibility for the killing of Tutsis in Rwankeri Sector and the subsequent attack against Tutsis at Busogo Parish on 7 April 1994, the Appeals Chamber dismisses the Prosecution's Second Ground of Appeal.

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<sup>985</sup> See *supra* para. 355.

<sup>986</sup> Indictment, paras. 55, 61, 63.

<sup>987</sup> Trial Judgement, paras. 928, 929. See also Trial Judgement, para. 930.

<sup>988</sup> Trial Judgement, paras. 930, 931. See also Trial Judgement, paras. 8, 929.

<sup>989</sup> Prosecution Notice of Appeal, paras. 7-12; Prosecution Appeal Brief, paras. 35-51.

<sup>990</sup> Prosecution Appeal Brief, paras. 35, 36. See also Prosecution Appeal Brief, para. 40.

<sup>991</sup> See *supra* paras. 65, 67.

**C. Charles Lwanga Church (Ground 3)**

360. The Prosecution sought to hold Bizimungu responsible as a superior for the attack against Tutsis at the Charles Lwanga church in Kigali on 9 or 10 June 1994.<sup>992</sup> Based on the evidence of Prosecution Witness DBJ, the Trial Chamber concluded that, on either 9 or 10 June 1994, *Interahamwe* attacked and killed civilians at the Charles Lwanga church and abducted Tutsi women and children.<sup>993</sup> The Trial Chamber further noted that, while Witness DBJ described soldiers coming to the church, his evidence failed to demonstrate that soldiers “participated [in] or supported the attack”.<sup>994</sup> Consequently, the Trial Chamber concluded that the evidence did not support the conclusion that soldiers under Bizimungu’s command were “implicated” in the crimes committed at the Charles Lwanga church on 9 or 10 June 1994.<sup>995</sup>

361. The Prosecution submits that the Trial Chamber erred in not finding, based on the evidence it accepted, that Bizimungu was responsible as a superior for the failure of soldiers present at the Charles Lwanga church to prevent the attack there.<sup>996</sup> Specifically, the Prosecution argues that the Trial Chamber only considered whether the soldiers committed crimes at the church based on direct physical perpetration.<sup>997</sup> According to the Prosecution, the record demonstrates that the soldiers aided and abetted the killings through their tacit approval of the attacks at the church and their criminal omissions of failing to protect the civilians despite their legal duty to do so.<sup>998</sup> The Prosecution further submits that evidence relied upon by the Trial Chamber also establishes that Bizimungu is liable as a superior pursuant to Article 6(3) of the Statute for this conduct.<sup>999</sup> Accordingly, the Prosecution requests the Appeals Chamber to convict Bizimungu for genocide based on his superior responsibility and increase his sentence.<sup>1000</sup>

362. Bizimungu responds that the Indictment does not provide notice that the Prosecution sought to hold him responsible for omissions of soldiers during the attacks at the Charles Lwanga church.<sup>1001</sup> Bizimungu further submits that the record fails to establish that any omissions by

<sup>992</sup> Indictment, paras. 61, 68-70, 78, 84.

<sup>993</sup> Trial Judgement, para. 1126.

<sup>994</sup> Trial Judgement, paras. 1127-1129.

<sup>995</sup> Trial Judgement, para. 1129.

<sup>996</sup> Prosecution Notice of Appeal, paras. 14-18; Prosecution Appeal Brief, paras. 52-76.

<sup>997</sup> Prosecution Appeal Brief, para. 52.

<sup>998</sup> Prosecution Appeal Brief, paras. 52, 54-66.

<sup>999</sup> Prosecution Appeal Brief, paras. 66-75.

<sup>1000</sup> Prosecution Notice of Appeal, paras. 17, 18; Prosecution Appeal Brief, para. 76.

<sup>1001</sup> Bizimungu Response Brief, paras. 86-92.

T14

soldiers at the Charles Lwanga church constituted a crime<sup>1002</sup> or that Bizimungu could be held responsible as a superior for such conduct.<sup>1003</sup>

363. The Appeals Chamber recalls that, in reaching its judgement, a trial chamber can only convict the accused of crimes that are charged in the indictment.<sup>1004</sup> The relevant Indictment paragraphs refer only to acts of direct physical participation by Bizimungu's subordinates in the alleged crimes, namely committing the crimes.<sup>1005</sup> The Indictment does not plead that the soldiers aided and abetted the crimes at the Charles Lwanga church through their tacit approval or failure to prevent the crimes. The Appeals Chamber further observes that the Prosecution has made no submissions indicating how Bizimungu would have had notice of the basis of the conviction that it requests on appeal. In this context, even if the Appeals Chamber were to find that Bizimungu's subordinates committed crimes in the fashion the Prosecution contends, the Appeals Chamber is not satisfied that it would be permissible to enter a conviction against Bizimungu on this basis.<sup>1006</sup> Accordingly, the Prosecution has not demonstrated that the Trial Chamber erred in not doing so.

364. For the foregoing reasons, the Appeals Chamber dismisses the Prosecution's Third Ground of Appeal.

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<sup>1002</sup> Bizimungu Response Brief, paras. 93-112, 116-122, 135.

<sup>1003</sup> Bizimungu Response Brief, paras. 123-136.

<sup>1004</sup> *Rukundo* Appeal Judgement, para. 29; *Muvunyi I* Appeal Judgement, para. 18; *Nahimana et al.* Appeal Judgement, para. 326; *Ntagerura et al.* Appeal Judgement, para. 28; *Kvočka et al.* Appeal Judgement, para. 33.

<sup>1005</sup> See Indictment, paras. 61 (“[...] Augustin Bizimungu [...] [was] responsible for killing and causing serious bodily or mental harm, committed by soldiers, gendarmes and *Interahamwe* and *Impuzamugambi* militiamen [...]”), 68 (“[...] [F]rom mid-April to late June 1994, while Augustin Bizimungu was exercising his functions as Chief of Staff of the Rwandan Army, soldiers under his command committed murders and caused serious bodily or mental harm to many Tutsi [...]”), 69 (“*Such acts of violence* were specifically observed at Charles Lwanga church on 8 and 10 June 1994 [...]”), 84 (“On 10 June 1994, at Charles Lwanga church in Kigali, soldiers from the Rwandan army and militiamen forced the refugees hiding there into trucks. They took the refugees in the direction of Rwampara and executed them along the way”). (emphasis added).

<sup>1006</sup> Cf. *Rukundo* Appeal Judgement, paras. 35-37.

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**D. École technique officielle (ETO) Complex and Nyanza Hill (Ground 4)**

365. The Prosecution sought to hold Bizimungu responsible as a superior for an attack committed by soldiers of the Rwandan army against Tutsis at the *École technique officielle* (“ETO”) Complex and Nyanza Hill in Kigali on 11 April 1994.<sup>1007</sup> Based on the evidence of Prosecution Witnesses AR and Roméo Dallaire, the Trial Chamber found that the Prosecution proved beyond reasonable doubt the allegation that soldiers of the Rwandan army committed killings of Tutsis at the ETO Complex and Nyanza Hill on 11 April 1994.<sup>1008</sup> However, the Trial Chamber did not hold Bizimungu responsible as a superior under Article 6(3) of the Statute for this attack since it took place before Bizimungu’s appointment as Chief of Staff of the Rwandan army.<sup>1009</sup>

366. The Trial Chamber found that Bizimungu “knew or had reason to know” that his subordinates had committed crimes at the ETO Complex and Nyanza Hill.<sup>1010</sup> Nevertheless, based on jurisprudence from the ICTY Appeals Chamber in the *Hadžihasanović et al.* case, the Trial Chamber considered itself “precluded” from finding Bizimungu responsible as a superior for failing to punish the perpetrators in view of the absence of “temporal coincidence between a superior’s exercise of effective control, or lack thereof, and the time when the crimes in relation to which he is charged were committed”.<sup>1011</sup>

367. The Prosecution submits that the Trial Chamber erred in failing to find Bizimungu responsible as a superior for not punishing the soldiers who perpetrated the crimes committed at the ETO Complex and Nyanza Hill.<sup>1012</sup> It contends that the Trial Chamber erred in concluding that it was bound by the “divided decision” of the ICTY Appeals Chamber in the *Hadžihasanović et al.* Appeal Decision of 16 July 2003.<sup>1013</sup> In the alternative, the Prosecution argues that there are cogent reasons to depart from the *Hadžihasanović et al.* Appeal Decision of 16 July 2003.<sup>1014</sup> It requests the Appeals Chamber to find Bizimungu liable as a superior for the crimes committed by his subordinates at the ETO Complex and Nyanza Hill and increase his sentence to life imprisonment.<sup>1015</sup>

<sup>1007</sup> Indictment, paras. 61, 68-70, 82.

<sup>1008</sup> Trial Judgement, paras. 1155, 1156, 1959, 1960.

<sup>1009</sup> Trial Judgement, paras. 1157, 1959, 1961.

<sup>1010</sup> Trial Judgement, para. 1960.

<sup>1011</sup> Trial Judgement, para. 1961, *referring to Hadžihasanović et al.* Appeal Decision of 16 July 2003.

<sup>1012</sup> Prosecution Notice of Appeal, paras. 19-26; Prosecution Appeal Brief, paras. 77-146.

<sup>1013</sup> Prosecution Appeal Brief, paras. 79, 81-111, 144; AT. 9 May 2013 pp. 52, 53.

<sup>1014</sup> Prosecution Appeal Brief, paras. 112-143, 145; AT. 9 May 2013 pp. 54, 56-61. *See also* AT. 10 May 2013 pp. 20, 21.

<sup>1015</sup> Prosecution Appeal Brief, para. 146; AT. 9 May 2013 p. 54.

T 14

368. Bizimungu responds that the Trial Chamber was correct in finding that he was not responsible as superior for the events at the ETO Complex and Nyanza Hill since it was bound by the precedent set out in the *Hadžihasanović et al.* Appeal Decision of 16 July 2003.<sup>1016</sup>

369. The Appeals Chamber considers that the Prosecution has not demonstrated any error in the Trial Chamber's conclusion that it was bound by the *Hadžihasanović et al.* Appeal Decision of 16 July 2003 in its consideration of Bizimungu's liability pursuant to Article 6(3) of the Statute. Article 6(3) of the Statute reflects *verbatim* the language of Article 7(3) of the Statute of the ICTY, and the Appeals Chambers of both the ICTR and ICTY have taken a consistent approach to interpreting the provisions.<sup>1017</sup>

370. In addition, the Appeals Chamber is not satisfied that the Prosecution has demonstrated cogent reasons for departing from the principle set forth in the *Hadžihasanović et al.* Appeal Decision of 16 July 2003. In this respect, the Prosecution points principally to criticism of the majority position in the *Hadžihasanović et al.* Appeal Decision of 16 July 2003 in the dissenting opinions of that decision as well as declaratory statements attached to the *Orić* Appeal Judgement. However, the Appeals Chamber recalls that once the law applicable to a particular issue has been determined on appeal, it should in principle be followed, in the interests of certainty and predictability of the law.<sup>1018</sup> Moreover, the Prosecution fails to appreciate that the Appeals Chambers of the ICTR and ICTY have consistently applied the principle that a commander is only responsible for the crimes of his subordinates if he has effective control over them at the time of commission.<sup>1019</sup>

371. Accordingly, the Appeals Chamber dismisses the Prosecution's Fourth Ground of Appeal.

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<sup>1016</sup> Bizimungu Response Brief, paras. 140-209. *See also* AT. 10 May 2013 pp. 1-5.

<sup>1017</sup> *See, e.g., Nahimana et al.* Appeal Judgement, paras. 485, 486; *Kayishema and Ruzindanda* Appeal Judgement, para. 294. Divergences in the jurisprudence of the Appeals Chambers of the ICTY and ICTR result primarily from differences between Rules or the Statutes of the ICTY or ICTR. Where such differences are not present, the jurisprudence of the Appeals Chambers of the ICTR and ICTY has developed consistently. *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 414 (adopting ICTY Appeals Chamber jurisprudence in determining whether persecution and murder as crimes against humanity possess materially distinct elements); *Karera* Appeal Judgement, para. 24 (interpreting Rule 90(G)(ii) of the Rules consistent with the interpretation by the ICTY Appeals Chamber of similarly worded Rule 90(H)(ii) of the ICTY Rules of Procedure and Evidence); *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. 6 (following the approach of the ICTY Appeals Chamber in relation to the reconsideration of final judgements); *Niyitegeka* Appeal Judgement, paras. 193-199, 201 (stating the law on notice principles in a manner consistent with preceding jurisprudence from the ICTY Appeals Chamber); *Musema* Appeal Judgement, paras. 185, 186 (adopting the standard of review applicable to evidence admitted on appeal as stated by the ICTY Appeals Chamber).

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## V. SENTENCING APPEALS

372. In this section, the Appeals Chamber considers the sentencing appeals of Bizimungu and the Prosecution. The Appeals Chamber recalls 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 accused and the gravity of the crime.<sup>1020</sup> As a rule, the Appeals Chamber will revise a sentence only if the appealing party demonstrates that the Trial Chamber committed a discernible error in exercising its sentencing discretion or that it failed to follow the applicable law.<sup>1021</sup>

373. The Trial Chamber sentenced Bizimungu to a single sentence of 30 years of imprisonment for his convictions for genocide (Count 2), murder, extermination, and rape as crimes against humanity (Counts 4, 5, and 6, respectively), as well as murder and rape as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Counts 7 and 8, respectively).<sup>1022</sup> Bizimungu and the Prosecution have appealed this sentence.

### A. Bizimungu's Sentencing Appeal (Ground 20)

374. Bizimungu submits that the Trial Chamber erred in sentencing him to 30 years of imprisonment and requests that the Appeals Chamber reduce the sentence.<sup>1023</sup> In this section, the Appeals Chamber considers whether the Trial Chamber erred in assessing aggravating and mitigating factors in sentencing Bizimungu.

#### 1. Aggravating Factors

375. In assessing the aggravating factors in relation to Bizimungu's sentence, the Trial Chamber stated:

The Chamber finds that the influence that Bizimungu derived from his position and status in Rwanda made it likely that others would follow his example. Had Bizimungu used his influence to reign in the troops under his control, this would have substantially mitigated the slaughter taking

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<sup>1018</sup> *Rutaganda* Appeal Judgement, para. 26; *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision, 31 May 2000, originally filed in French, English translation filed on 4 July 2001, para. 92, fn. 125, citing *Aleksovski* Appeal Judgement, paras. 107-109.

<sup>1019</sup> See, e.g., *Ntabakuze* Appeal Judgement, para. 174; *Blagojević and Jokić* Appeal Judgement, para. 303.

<sup>1020</sup> See, e.g., *Gatete* Appeal Judgement, para. 268; *Ntabakuze* Appeal Judgement, para. 264; *Kanyarukiga* Appeal Judgement, para. 270; *Hategekimana* Appeal Judgement, para. 288.

<sup>1021</sup> See, e.g., *Gatete* Appeal Judgement, para. 268; *Ntabakuze* Appeal Judgement, para. 264; *Kanyarukiga* Appeal Judgement, para. 270; *Hategekimana* Appeal Judgement, para. 288.

<sup>1022</sup> Trial Judgement, paras. 73, 79, 2106, 2128, 2153, 2162, 2163, 2266.

<sup>1023</sup> Bizimungu Notice of Appeal, paras. 222-232; Bizimungu Appeal Brief, paras. 499-507; Bizimungu Reply Brief, para. 123.



place in Rwanda. The Chamber finds that Bizimungu's failure to take action to halt the killing of Tutsi civilians, as required by his superior position, is an aggravating factor.<sup>1024</sup>

The Chamber notes that following Bizimungu's promotion to Chief of Staff, the killings in Rwanda did not slow down, but actually accelerated in certain regions of the country. This acceleration could be explained, at least in part, by his refusal to address the killings. It is clear from Bizimungu's own evidence that he was focused on waging war against the RPF and was not concerned about the killings of civilians. His obstinate refusal to stop the killings is further evidenced by his failure to heed the persistent calls on him from representatives of foreign governments and international organisations to take action to protect the Tutsi. His indifference to the killings was so extreme that one might reasonably conclude that he saw the killings of Tutsi to be an extension of the war against the RPF.<sup>1025</sup>

376. Bizimungu argues that the Trial Chamber erroneously assessed the extent of his superior authority and submits that his function in the Rwandan army was to protect the territorial integrity of the country, not to maintain public order and ensure the security of the population.<sup>1026</sup> He maintains that he was not in a position to take action on the calls from foreign governments and international organizations.<sup>1027</sup> Moreover, he contends that no evidence was presented to prove his refusal to stop the killings of civilians and that the Trial Chamber's discussion of his indifference to the killing of Tutsis is unsupported.<sup>1028</sup> To the contrary, Bizimungu points to evidence of specific actions he took to "stabilize the situation".<sup>1029</sup> Finally, Bizimungu contends that the record does not support the Trial Chamber's finding that killings accelerated after he was appointed Chief of Staff and highlights evidence indicating the opposite.<sup>1030</sup>

377. The Prosecution responds that Bizimungu has failed to demonstrate that the Trial Chamber failed to follow applicable sentencing principles or abused its discretion.<sup>1031</sup> It argues that Bizimungu merely repeats submissions from other grounds of appeal.<sup>1032</sup>

378. The Appeals Chamber observes that the conclusions in paragraphs 2179 and 2180 of the Trial Judgement are made without reference to the record. The "killings" referred to in these paragraphs are not specified nor are Bizimungu's failures to heed calls to take action to protect Tutsis. Similarly, the paragraphs point to no findings that Bizimungu had the capacity to "address" or "stop" the unspecified "killings" referred to by the Trial Chamber.

<sup>1024</sup> Trial Judgement, para. 2179 (internal citation omitted).

<sup>1025</sup> Trial Judgement, para. 2180.

<sup>1026</sup> Bizimungu Appeal Brief, paras. 499-501.

<sup>1027</sup> Bizimungu Appeal Brief, paras. 499-502. Bizimungu also refers to his arguments that the record failed to establish that he exercised effective control over perpetrators who committed crimes which supported a finding of Bizimungu's superior responsibility. Bizimungu Appeal Brief, para. 500. The Appeals Chamber addresses these arguments elsewhere. *See supra* Section III.C.2.

<sup>1028</sup> Bizimungu Appeal Brief, paras. 501, 503.

<sup>1029</sup> Bizimungu Appeal Brief, para. 506.

<sup>1030</sup> Bizimungu Appeal Brief, para. 501.

<sup>1031</sup> Prosecution Response Brief (Bizimungu), para. 248.

<sup>1032</sup> Prosecution Response Brief (Bizimungu), para. 247.

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379. Notwithstanding, the Appeals Chamber observes that the Trial Chamber elsewhere made specific conclusions relating to killings throughout Rwanda, the calls on Bizimungu from representatives of foreign governments and international organizations to take action, as well as Bizimungu's failure to take actions to halt them. Specifically, the Trial Chamber concluded that, despite having a material ability to do so, Bizimungu failed to exercise his authority to address certain crimes committed in Kigali, Butare, Cyangugu, and Gitarama Prefectures during his tenure as Chief of Staff of the Rwandan army.<sup>1033</sup> Bizimungu was found to have sufficient knowledge of these crimes, in part, due to his discussions with representatives of the United States government and the United Nations.<sup>1034</sup> In this regard, the Trial Chamber entered convictions pursuant to Article 6(3) of the Statute in relation to killings that were proven to have been committed by his subordinates at various locations in these prefectures.<sup>1035</sup>

380. In this context, the Appeals Chamber notes that the Trial Chamber considered that Bizimungu's failure to take action to halt or address killings, which served as the *actus reus* of Bizimungu's liability pursuant to Article 6(3) of the Statute, also appears to have constituted an aggravating factor in determining his sentence.<sup>1036</sup> Likewise, the Trial Chamber considered evidence pertaining to Bizimungu's "failure to heed persistent calls on him from representatives of foreign governments and international organisations to take action to protect the Tutsi"<sup>1037</sup> to establish Bizimungu's *mens rea* under Article 6(3) of the Statute as well as an aggravating circumstance.<sup>1038</sup> In this respect, the Appeals Chamber recalls that a trial chamber may not double-count elements necessary for establishing a superior's responsibility pursuant to Article 6(3) of the Statute as both an element of the offence and an aggravating factor in sentencing.<sup>1039</sup>

381. Further, to the extent that the Trial Chamber found as aggravating Bizimungu's omissions with respect to killings generally in Rwanda, rather than his omissions in relation to killings for which he was convicted, the Appeals Chamber recalls that a trial chamber may only consider, as aggravating, circumstances pleaded in the Indictment.<sup>1040</sup> While the Indictment alleges Bizimungu's criminal responsibility with respect to several killings that occurred throughout Rwanda during the genocide, it does not provide sufficient notice that he was charged with responsibility for *any* and *all* killings. Indeed, the Trial Chamber expressly found that the Indictment failed to provide

<sup>1033</sup> See Trial Judgement, paras. 860, 861. See also Trial Judgement, paras. 1983, 2012.

<sup>1034</sup> See Trial Judgement, paras. 860, 1211-1219, 1993.

<sup>1035</sup> See Trial Judgement, paras. 16, 30, 32, 72, 73, 1147, 1181, 1184, 1192, 1196, 1197, 1205, 1209, 1220, 2106, 2113-2115, 2120, 2153, 2162.

<sup>1036</sup> See Trial Judgement, para. 2179.

<sup>1037</sup> Trial Judgement, para. 2180.

<sup>1038</sup> See Trial Judgement, paras. 1211-1219, 1993, 2180.

<sup>1039</sup> Cf. *Naletilić and Martinović* Appeal Judgement, paras. 610, 613, 626. See also *Ndindabahizi* Appeal Judgement, para. 137.

<sup>1040</sup> *Renzaho* Appeal Judgement, para. 615, citing *Simba* Appeal Judgement, para. 82, fn. 178.

sufficient notice with respect to unspecified crimes (including “murder”) committed by Bizimungu’s alleged subordinates in April, May, and June 1994 in Butare, Gisenyi, Cyangugu, Kibuye, and Ruhengeri Prefectures.<sup>1041</sup> Consequently, to the extent the Trial Chamber concluded that Bizimungu’s failure to generally halt killings throughout Rwanda was an aggravating factor, such a finding would fall outside the scope of the Indictment and constitute a legal error.<sup>1042</sup>

382. In this context, the Trial Chamber’s conclusion that Bizimungu abused his authority through his failure to “stop” or “address” killings throughout Rwanda amounts to a legal error, as it double counts elements of the offence as aggravating factors and relies on factors not pleaded in the Indictment in aggravation. Bizimungu’s inaction was the central aggravating circumstance. Furthermore it was a pre-condition to the only other aggravating circumstance clearly identified by the Trial Chamber, namely that killings accelerated after Bizimungu took up his post.<sup>1043</sup> To the extent that the Trial Chamber considered that “one might reasonably conclude” that Bizimungu perceived the killings of Tutsis as part of the war against the RPF,<sup>1044</sup> the Appeals Chamber observes that this falls short of proof beyond reasonable doubt, and thus could not have been considered in aggravation.

383. As a consequence, the Appeals Chamber must set aside the entirety of the Trial Chamber’s conclusions as they relate to aggravating factors in Bizimungu’s sentence. The Appeals Chamber shall discuss below what impact, if any, this error has on Bizimungu’s sentence.

## 2. Mitigating Factors

384. In sentencing Bizimungu, the Trial Chamber noted that he failed to make specific sentencing submissions. Nonetheless, it observed that he submitted that he had made concerted efforts to prevent killings and restore peace, made requests to halt the conflict between the ethnic groups, undertook dangerous missions to save lives, and collaborated with UNAMIR to restore peace.<sup>1045</sup>

385. When considering mitigating factors, the Trial Chamber concluded that “several” had “not been proved on the balance of probabilities”.<sup>1046</sup> However, the Trial Chamber noted that Bizimungu

<sup>1041</sup> Trial Judgement, paras. 154-162, 1036.

<sup>1042</sup> In reaching this conclusion, the Appeals Chamber recalls that there was only one genocide that was committed in Rwanda between 6 April 1994 and 17 July 1994 and that proven acts in furtherance of this genocide may be considered in aggravation. See *Ndindabahizi* Appeal Judgement, paras. 138-141.

<sup>1043</sup> See Trial Judgement, para. 2180. Bizimungu contests that killings accelerated after his appointment, highlighting evidence to the contrary. See Bizimungu Appeal Brief, para. 501, fn. 646. In light of the Appeals Chamber’s conclusion, this argument need not be addressed.

<sup>1044</sup> Trial Judgement, para. 2180.

<sup>1045</sup> Trial Judgement, para. 2171.

<sup>1046</sup> Trial Judgement, para. 2181.

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exercised command in “a context marked by understaffing, desertions and difficulties in communication” and highlighted evidence of Bizimungu’s lack of experience necessary to run the General Staff of the Rwandan army.<sup>1047</sup> The Trial Chamber further considered that the testimonies of character witnesses, along with “his marriage and children [...] lend credence to the possibility of rehabilitation if released”.<sup>1048</sup>

386. Bizimungu submits that the Trial Chamber erred in its application of the burden of proof.<sup>1049</sup> Bizimungu also contends that the Trial Chamber erred in its assessment of his intervention at the *Hôtel des Mille Collines*, which put his personal safety at risk and saved many refugees.<sup>1050</sup> Bizimungu also argues that the Trial Chamber did not give sufficient weight to mitigating evidence and failed to consider evidence reflecting efforts he made to prevent violence.<sup>1051</sup>

387. The Prosecution responds that Bizimungu’s assertions about his actions aimed at preventing violence are raised for the first time on appeal, and that in any event the Trial Chamber considered them.<sup>1052</sup> Furthermore, the Prosecution argues that Bizimungu’s “selective assistance” at the *Hôtel des Mille Collines* could only be given limited weight as a mitigating factor.<sup>1053</sup>

388. The Appeals Chamber observes that the Trial Chamber correctly stated that mitigating factors need only be proven on the balance of probabilities.<sup>1054</sup> Furthermore, in arguing that the Trial Chamber did not properly assess the evidence it considered in mitigation, Bizimungu has failed to particularize any error made by the Trial Chamber, and, consequently, to substantiate his claim.

389. Finally, to the extent that Bizimungu argues that the Trial Chamber failed to consider evidence relating to his actions to prevent violence, the Appeals Chamber recalls that the Defence bears the burden of proving mitigating factors at trial.<sup>1055</sup> In this regard, Rule 86(C) of the Rules directs the accused to raise sentencing submissions during closing arguments and to identify any mitigating circumstances in the trial record.<sup>1056</sup> Bizimungu opted not to address sentencing factors in his Closing Brief<sup>1057</sup> nor did his oral closing submissions expressly put forward the evidence he

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<sup>1047</sup> Trial Judgement, para. 2182.

<sup>1048</sup> Trial Judgement, para. 2182.

<sup>1049</sup> Bizimungu Appeal Brief, para. 504.

<sup>1050</sup> Bizimungu Appeal Brief, para. 505.

<sup>1051</sup> Bizimungu Appeal Brief, paras. 504, 506. *See also* AT. 10 May 2013 pp. 7-9.

<sup>1052</sup> Prosecution Response Brief (Bizimungu), para. 249.

<sup>1053</sup> Prosecution Response Brief (Bizimungu), para. 249.

<sup>1054</sup> *Compare* Trial Judgement, para. 2181, with *Kajelijeli* Appeal Judgement, para. 294. *See also* *Bikindi* Appeal Judgement, para. 165 (referring to the same standard with the term “by a preponderance of evidence”).

<sup>1055</sup> *Bikindi* Appeal Judgement, para. 165.

<sup>1056</sup> *See also* *Karera* Appeal Judgement, para. 388.

<sup>1057</sup> Bizimungu Closing Brief, paras. 1174-1177. *See also* Trial Judgement, para. 2170.

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now highlights as mitigating circumstances to be considered in sentencing.<sup>1058</sup> Consequently, Bizimungu cannot raise the argument for the first time on appeal.<sup>1059</sup> The Trial Chamber was not under an obligation to seek out information that counsel did not put before it at the appropriate time.<sup>1060</sup> This aspect of Bizimungu's appeal is dismissed.

### 3. Conclusion

390. Based on the foregoing, the Appeals Chamber grants Bizimungu's Twentieth Ground of Appeal in part and finds that the Trial Chamber erred in its assessment of the aggravating factors. The impact of this error, if any, will be discussed below. The remainder of Bizimungu's submissions in this ground is dismissed.

#### **B. Prosecution's Sentencing Appeal (Ground 5)**

391. The Prosecution submits that the Trial Chamber abused its discretion and imposed a manifestly inadequate penalty by sentencing Bizimungu to 30 years of imprisonment.<sup>1061</sup> In this section, the Appeals Chamber considers whether the Trial Chamber abused its discretion when assessing the relevant sentencing considerations and whether it erred in its application of the Tribunal's sentencing practices.

##### 1. Relevant Sentencing Considerations

392. The Prosecution submits that the Trial Chamber gave insufficient weight to the gravity of Bizimungu's crimes and the aggravating factors.<sup>1062</sup> It highlights the numerous and extensive crimes for which he was convicted,<sup>1063</sup> the nature of his participation in them,<sup>1064</sup> and his successive roles as the highest military authority in Ruhengeri Prefecture and in the Rwandan army.<sup>1065</sup> It further notes Bizimungu's influence and power,<sup>1066</sup> his abuse of authority,<sup>1067</sup> and that his persistent

<sup>1058</sup> See T. 24 June 2009 pp. 55-77; T. 25 June 2009 pp. 1-11; T. 26 June 2009 pp. 22-27.

<sup>1059</sup> See *Bikindi* Appeal Judgement, para. 165; *Nahimana et al.* Appeal Judgement, para. 1049; *Muhimana* Appeal Judgement, para. 231; *Kamuhanda* Appeal Judgement, para. 354.

<sup>1060</sup> See *Bikindi* Appeal Judgement, para. 165; *Nahimana et al.* Appeal Judgement, para. 1049; *Muhimana* Appeal Judgement, para. 231; *Kamuhanda* Appeal Judgement, para. 354.

<sup>1061</sup> Prosecution Notice of Appeal, paras. 27-30; Prosecution Appeal Brief (Bizimungu), paras. 224, 249; AT. 9 May 2013 p. 68.

<sup>1062</sup> Prosecution Appeal Brief (Bizimungu), paras. 232-237.

<sup>1063</sup> Prosecution Appeal Brief (Bizimungu), paras. 225, 230, 232.

<sup>1064</sup> Prosecution Appeal Brief (Bizimungu), paras. 230, 232.

<sup>1065</sup> Prosecution Appeal Brief (Bizimungu), paras. 230, 234.

<sup>1066</sup> Prosecution Appeal Brief (Bizimungu), paras. 229, 234, 235.

<sup>1067</sup> Prosecution Appeal Brief (Bizimungu), paras. 234, 235.

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indifference to crimes exacerbated their severity.<sup>1068</sup> The Prosecution also submits that the Trial Chamber erred by not finding in aggravation that Bizimungu was an “architect” of the genocide.<sup>1069</sup>

393. Finally, the Prosecution posits that the Trial Chamber erred in considering as a mitigating factor Witness Dallaire’s testimony that Bizimungu lacked sufficient experience to run the General Staff of the Rwandan army.<sup>1070</sup> In light of the foregoing, as well as the absence of any significant mitigating factors, the Prosecution argues that the Trial Chamber abused its discretion in not imposing a sentence of life imprisonment.<sup>1071</sup>

394. Bizimungu responds that the Prosecution shows no error in the Trial Chamber’s reasoning that would support an increased sentence.<sup>1072</sup>

395. The Appeals Chamber notes that, in discussing the gravity of Bizimungu’s offences, the Trial Chamber recalled each of the crimes for which Bizimungu had been convicted as well as the modes of participation in each crime.<sup>1073</sup> Significantly, it recalled that Bizimungu had aided and abetted killings in Rwankeri Sector,<sup>1074</sup> and that soldiers and *Interahamwe* under Bizimungu’s effective control “killed a large number of Tutsi in various parts of Rwanda” and were involved in “multiple instances of rapes of Tutsi women”.<sup>1075</sup> The Trial Chamber found that Bizimungu’s multiple failures to prevent and punish atrocities throughout Rwanda constituted “grave breaches of his superior responsibility”.<sup>1076</sup>

396. Moreover, the Appeals Chamber recalls that the Trial Chamber erred in its assessment of aggravating factors in determining Bizimungu’s sentence.<sup>1077</sup> Consequently, the Prosecution’s reliance on the Trial Chamber’s conclusions in that regard is misplaced.

397. The Appeals Chamber also observes that the Trial Chamber expressly considered the gravity of Bizimungu’s crimes, which the Prosecution claims justifies a sentence of life imprisonment. The Appeals Chamber recalls, however, that each case is examined on its own facts.<sup>1078</sup> The Appeals Chamber further recalls that, “[j]ust as there is no category of cases within the jurisdiction of the

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<sup>1068</sup> Prosecution Appeal Brief (Bizimungu), paras. 232, 233, 238, 239, 244.

<sup>1069</sup> Prosecution Appeal Brief (Bizimungu), para. 238.

<sup>1070</sup> Prosecution Appeal Brief (Bizimungu), paras. 244-246.

<sup>1071</sup> Prosecution Appeal Brief (Bizimungu), paras. 241, 247.

<sup>1072</sup> Bizimungu Response Brief, paras. 216-237. *See also* AT. 10 May 2013 pp. 6, 9.

<sup>1073</sup> *See* Trial Judgement, paras. 2177, 2178. *See also* Trial Judgement, para. 2183.

<sup>1074</sup> Trial Judgement, para. 2177.

<sup>1075</sup> Trial Judgement, para. 2178. The Appeals Chamber recalls that it has found that the Trial Chamber erred in finding that Bizimungu exercised effective control over the *Interahamwe*. *See supra* para. 139.

<sup>1076</sup> Trial Judgement, para. 2178. The Trial Chamber also concluded that, notwithstanding Bizimungu’s “exemplary education and military background”, he not only failed to “halt the killings of Tutsi, but in fact endorsed and actively encouraged the genocide in 1994”. Trial Judgement, para. 2183.

<sup>1077</sup> *See supra* para. 383.

<sup>1078</sup> *Munyakazi* Appeal Judgement, para. 186; *Rukundo* Appeal Judgement, para. 260.

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Tribunal where the imposition of life imprisonment is *per se* barred, there is also no category of cases where it is *per se* mandated”.<sup>1079</sup>

398. The Appeals Chamber notes that, in deciding on Bizimungu’s sentence, the Trial Chamber sought guidance from cases, which reflect that the most senior members of a command structure, that is, the leaders and planners of a particular conflict, should bear heavier criminal responsibility.<sup>1080</sup> Likewise, it correctly noted the limitations of comparing sentences, given that each case contains a multitude of variables, ranging from the number and type of crimes committed to the personal circumstances of the accused.<sup>1081</sup> In these circumstances, the Prosecution has not demonstrated that the Trial Chamber committed a discernible error by not imposing a sentence of life imprisonment based on the Trial Chamber’s conclusions regarding the gravity of Bizimungu’s crimes.<sup>1082</sup>

399. Furthermore, the Prosecution’s argument that the Trial Chamber failed to consider that Bizimungu was the “architect” of the genocide as an aggravating factor is without merit. The Prosecution points to no finding in the Trial Judgement that Bizimungu was an “architect” of the genocide. Of greater significance, the Prosecution supports its position that Bizimungu was an “architect” of the genocide based on his role in sparking killings in Rwankeri Sector on 7 April 1994 at the beginning of the genocide.<sup>1083</sup> The Appeals Chamber has acquitted Bizimungu for any responsibility for these crimes.<sup>1084</sup> Consequently, these arguments are moot.

400. Finally, the Appeals Chamber finds no error in the Trial Chamber’s consideration of Dallaire’s testimony that Bizimungu lacked sufficient experience to run the General Staff of the Rwandan army as mitigation. The Prosecution argues that this consideration was irrelevant and should be accorded little weight. However, it was well within the Trial Chamber’s discretion to assess Prosecution evidence reflecting limitations to Bizimungu’s ability to exercise authority in his position as the Rwandan army’s Chief of Staff, particularly because several of his convictions pertain to crimes he committed in that capacity.<sup>1085</sup> Furthermore, the Prosecution fails to appreciate that the Trial Chamber concluded that the gravity of Bizimungu’s crimes, along with the

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<sup>1079</sup> *Rukundo* Appeal Judgement, para. 260. See also *Munyakazi* Appeal Judgement, para. 186.

<sup>1080</sup> Trial Judgement, para. 2175, citing *Musema* Appeal Judgement, para. 383.

<sup>1081</sup> Trial Judgement, para. 2175, citing *Kvočka et al.* Appeal Judgement, para. 681. See also *Rukundo* Appeal Judgement, para. 263; *Simba* Appeal Judgement, para. 336.

<sup>1082</sup> The Prosecution also appears to suggest that convictions for perpetrating genocide that have not resulted from a guilty plea warrant a life sentence. Prosecution Appeal Brief, para. 241. This simply is not the case. See, e.g., *Bagosora and Nsengiyumva* Appeal Judgement, paras. 429, 430, 740, 741. Indeed, such a sentence is not mandated even when, for example, aggravating factors outweigh mitigating circumstances. See, e.g., *Ntakirutimana* Appeal Judgement, paras. 563, 564.

<sup>1083</sup> Prosecution Appeal Brief, para. 238.

<sup>1084</sup> See *supra* para. 69.

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aggravating factors, greatly outweighed any mitigating circumstances.<sup>1086</sup> This aspect of the Prosecution's appeal is dismissed.

## 2. Application of the Tribunal's Sentencing Practices

401. The Prosecution argues that the Trial Chamber took insufficient account of the principle of gradation.<sup>1087</sup> It suggests that, in light of the crimes committed by Bizimungu, which led to large numbers of Tutsi deaths, his conduct is among the most extreme in the scale of gradation and warrants a sentence of life imprisonment.<sup>1088</sup> Bizimungu does not expressly respond to this argument.

402. The Appeals Chamber recalls that the principle of gradation in sentencing dictates that leaders and planners should bear heavier criminal responsibility than those further down the scale, subject to the proviso that the gravity of the offence is the primary consideration for a trial chamber in imposing a sentence.<sup>1089</sup>

403. The Appeals Chamber observes that, when setting forth relevant sentencing principles, the Trial Chamber recalled that "a sentence of life imprisonment is generally reserved for those who planned and ordered atrocities as well as the most senior authorities".<sup>1090</sup> The Trial Chamber further recalled that Bizimungu had aided and abetted killings in Rwankeri Sector, and that soldiers and *Interahamwe* under Bizimungu's effective control "killed a large number of Tutsi in various parts of Rwanda" and were involved in "multiple instances of rapes of Tutsi women".<sup>1091</sup> The Trial Chamber found that Bizimungu's multiple failures to prevent and punish atrocities throughout Rwanda constituted "grave breaches of his superior responsibility".<sup>1092</sup> After considering all individual sentencing considerations, the Trial Chamber concluded that the "gravity of Bizimungu's crimes and the aggravating factors greatly outweigh any mitigating factors".<sup>1093</sup>

404. The Appeals Chamber observes that the Trial Chamber did not expressly refer to the principle of gradation in sentencing. However, having considered the sentencing principles

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<sup>1085</sup> See Trial Judgement, paras. 16, 30, 32, 72, 73, 1147, 1181, 1184, 1192, 1196, 1197, 1205, 1209, 1220, 2106, 2113, 2115, 2120, 2153, 2162.

<sup>1086</sup> Trial Judgement, para. 2183.

<sup>1087</sup> See Prosecution Appeal Brief (Bizimungu), para. 242, quoting *Ndindabahizi* Trial Judgement, para. 500.

<sup>1088</sup> Prosecution Appeal Brief (Bizimungu), paras. 243, 249.

<sup>1089</sup> *Kanyarukiga* Appeal Judgement, para. 280; *Kalimanziira* Appeal Judgement, para. 236. See also *Setako* Appeal Judgement, para. 280; *Nshogoza* Appeal Judgement, para. 98. See also Article 23 of the Statute.

<sup>1090</sup> See Trial Judgement, para. 2175.

<sup>1091</sup> Trial Judgement, paras. 2177, 2178. The Appeals Chamber recalls that it has found that the Trial Chamber erred in finding that Bizimungu exercised effective control over the *Interahamwe*. See *supra* para. 139.

<sup>1092</sup> Trial Judgement, para. 2178. The Trial Chamber also concluded that, notwithstanding Bizimungu's "exemplary education and military background", he not only failed to "halt the killings of Tutsi, but in fact endorsed and actively encouraged the genocide in 1994". Trial Judgement, para. 2183.

<sup>1093</sup> Trial Judgement, para. 2183.

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articulated by the Trial Chamber,<sup>1094</sup> its assessment of the gravity of Bizimungu's crimes, as well as the mitigating circumstances, the Appeals Chamber finds no merit in the Prosecution's assertion that the Trial Chamber took insufficient account of this principle. This aspect of the Prosecution appeal is therefore dismissed.

### 3. Conclusion

405. Based on the foregoing, the Appeals Chamber dismisses the Prosecution's Fifth Ground of Appeal.

#### **C. Impact of the Appeals Chamber's Findings on Bizimungu's Sentence**

406. The Appeals Chamber recalls that it has reversed Bizimungu's conviction for genocide in relation to crimes committed in Rwankeri Sector. It has reversed his convictions for murder and rape as crimes against humanity, as well as rape as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to crimes committed at the Butare Prefecture office and the Episcopal Church of Rwanda in April and May 1994. It has reversed his convictions for genocide and rape as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to rapes committed at the Musambira Commune office and dispensary. It has also reversed his convictions for genocide, murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to killings committed at the Musambira Commune office. It has further reversed his convictions to the extent that they are based on his responsibility as a superior for criminal acts committed by *Interahamwe* at the ESI, Musambira Commune office and dispensary, Butare Prefecture office and Episcopal Church of Rwanda, and Cyangugu stadium. Additionally, it has found that the Trial Chamber erred with respect to the assessment of aggravating factors.

407. The Appeals Chamber notes, however, that it has affirmed Bizimungu's convictions as a superior for: (i) genocide and extermination as a crime against humanity in relation to killings at the Josephite Brothers compound on 7 June 1994; (ii) murder and rape as crimes against humanity and rape as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to crimes committed at Cyangugu stadium during April and May 1994; (iii) genocide, murder and rape as crimes against humanity and as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to crimes committed by soldiers of the Rwandan army at the ESI during April and May 1994; (iv) genocide and murder

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<sup>1094</sup> See Trial Judgement, paras. 2175, 2176.

as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for the killings by soldiers against refugees at the Musambira dispensary in late April 1994; and (v) genocide, murder and rape as crimes against humanity and as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to crimes committed by soldiers of the Rwandan army at the TRAFIPRO in April and May 1994.

408. The Appeals Chamber notes that the reversal of very serious crimes in some instances provides a reason to review and to reduce the sentence. The Appeals Chamber considers, however, that Bizimungu remains convicted of extremely serious crimes including genocide, extermination, murder, and rape as crimes against humanity, and murder and rape as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. In the circumstances of this case, the Appeals Chamber considers that the reversals do not impact the sentence imposed by the Trial Chamber. As a consequence, the Appeals Chamber affirms the sentence of 30 years of imprisonment.

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**VI. DISPOSITION**

409. 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 7 to 10 May 2013;

**SITTING** in open session;

**GRANTS** Bizimungu's Second, Fourth, and Sixth Grounds of Appeal and **REVERSES** his conviction pursuant to Article 6(1) of the Statute for aiding and abetting the killings in Rwankeri Sector on 7 April 1994;

**GRANTS** Bizimungu's Ninth Ground of Appeal, in part, and **REVERSES** his convictions to the extent that they are based on his responsibility as a superior for criminal acts committed by *Interahamwe* at the *École des sciences infirmières de Kabgayi*, Musambira Commune office and dispensary, Butare Prefecture office and Episcopal Church of Rwanda, and Cyangugu stadium;

**GRANTS** Bizimungu's Sixteenth Ground of Appeal, in part, and **REVERSES** his convictions for murder and rape as crimes against humanity as well as rape as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to crimes committed at the Butare Prefecture office and the Episcopal Church of Rwanda in April and May 1994;

**GRANTS** Bizimungu's Eighteenth Ground of Appeal, in part, and **REVERSES** his convictions for genocide and murder and rape as crimes against humanity and murder and rape as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to crimes committed at the Musambira Commune office;

**GRANTS** Bizimungu's Eighteenth Ground of Appeal, in part, and **REVERSES** his convictions for genocide and rape as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to rapes committed at the Musambira dispensary;

**GRANTS** Bizimungu's Twentieth Ground of Appeal, in part;

**DISMISSES** Bizimungu's appeal in all other respects;

**AFFIRMS** Bizimungu's convictions as a superior for:

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- genocide and murder as a crime against humanity and as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for the killings of refugees by soldiers at the Musambira dispensary in late April 1994;

- murder and rape as crimes against humanity as well as rape as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for crimes committed by soldiers of the Rwandan army at the Cyangugu stadium during April and May 1994;

- genocide and murder and rape as crimes against humanity and as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to crimes committed by soldiers of the Rwandan army at the *École des sciences infirmières de Kabgayi* during April and May 1994;

- genocide and murder and rape as crimes against humanity and as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to crimes committed by soldiers of the Rwandan army at the TRAFIPRO in April and May 1994;

- genocide and extermination as a crime against humanity in relation to the attack by soldiers of the Rwandan army at the Josephite Brothers compound on 7 June 1994;

**AFFIRMS** the sentence of 30 years of imprisonment imposed by the Trial Chamber, 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 2 August 2002;

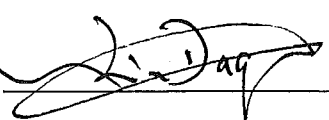
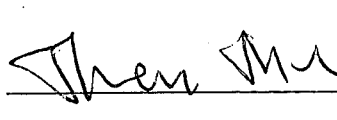
**DISMISSES** the Prosecution's appeal in its entirety;

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

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

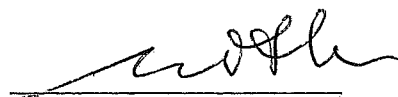
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Done in English and French, the English text being authoritative.



Theodor Meron

Liu Daqun



Carmel Agius

Presiding Judge

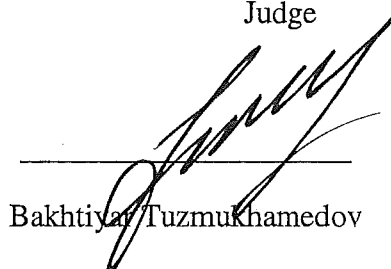
Judge

Judge



Khalida Rachid Khan

Judge



Bakhtiyar Tuzmukhamedov

Judge

Judge Liu appends a separate declaration.

Done this 30th day of June 2014 at Arusha, Tanzania.



[Seal of the Tribunal]

## VII. SEPARATE DECLARATION OF JUDGE LIU

1. While I am in full agreement with the findings of the Appeal Judgement and its disposition, I append this separate declaration in order to present my views with respect to successor command liability as part of superior responsibility pursuant to Article 6(3) of the Tribunal's Statute.

2. Based on jurisprudence from the ICTY Appeals Chamber in the *Hadžihasanović et al.* Appeal Decision,<sup>1</sup> the Trial Chamber declined to find Bizimungu responsible as a superior for failing to punish the crimes committed at the ETO Complex and Nyanza Hill.<sup>2</sup> In its appeal, the Prosecution contends that the Trial Chamber erred in doing so.<sup>3</sup> More particularly, the Prosecution argues that: (i) the Trial Chamber erred in concluding that it was bound by the "divided decision" of the ICTY Appeals Chamber;<sup>4</sup> or, in the alternative (ii) there were cogent reasons to depart from the *Hadžihasanović et al.* Appeal Decision.<sup>5</sup> Considering that the Prosecution has not demonstrated any error in the Trial Chamber's reliance on the *Hadžihasanović et al.* Appeal Decision nor the existence of any cogent reasons for departing from this decision, the Appeal Judgement dismisses the Prosecution's arguments and upholds Bizimungu's acquittal in this respect.<sup>6</sup> In the same vein, the Appeal Judgement finds that the Trial Chamber erred in finding Bizimungu responsible as a superior for the killings at the Musambira Commune office and rapes at Musambira because the evidence establishes that these crimes were committed before Bizimungu assumed his position as Chief of Staff of the Rwandan army.<sup>7</sup>

3. In the *Hadžihasanović et al.* Appeal Decision, the ICTY Appeals Chamber held, by majority, that a superior can only incur criminal responsibility if the underlying crimes were committed at a time when the said superior had effective control over the perpetrators.<sup>8</sup> Consequently, according to the *Hadžihasanović et al.* Appeal Decision's reasoning, a superior has no duty to punish subordinates for crimes that they have committed before he assumed command, even if he has knowledge of them.

4. I respectfully, but strongly, disagree with this limitation on the scope of superior responsibility. In a declaration appended to the *Orić* Appeal Judgement, I expressed the reasons underlying my divergence with the *Hadžihasanović et al.* Appeal Decision. In my view, the

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<sup>1</sup> *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 ("*Hadžihasanović et al.* Appeal Decision").

<sup>2</sup> Trial Judgement, paras 1960-1961, 1963.

<sup>3</sup> Prosecution Notice of Appeal, paras 19-26; Prosecution Appeal Brief, paras 77-146.

<sup>4</sup> Prosecution Appeal Brief, paras 79, 81-111, 144; AT. 9 May 2013 pp. 52, 53.

<sup>5</sup> Prosecution Appeal Brief, paras 112-143, 145; AT. 9 May 2013 pp. 54, 56-61. *See also* AT. 10 May 2013 pp. 20, 21.

<sup>6</sup> Appeal Judgement, paras 365-371.

<sup>7</sup> Appeal Judgement, paras 292-293.

<sup>8</sup> *Hadžihasanović et al.* Appeal Decision, para. 51.

Majority in the *Hadžihasanović et al.* Appeal Decision erred in finding that customary international law excludes such mode of successor command liability.<sup>9</sup> Rather, there are indications that support the existence of a customary rule establishing criminal responsibility of commanders for crimes committed by a subordinate prior to the commander's assumption of command over that subordinate.<sup>10</sup> Such indications stem, on the one hand, from a plain reading of the relevant provisions of the ICTY and ICTR statutes and, on the other hand, from an analysis of the objects and purpose of command responsibility. As worded, Article 6(3) of the Tribunal's Statute – which covers situations where the subordinate “was about to commit” any of the acts referred to in Articles 2 to 4 of the Statute or “had done so” – does not distinguish between crimes committed before and after assumption of duties.<sup>11</sup> Furthermore, the very nature of superior responsibility does not support a distinction between crimes committed before assumption of office and those committed subsequently.<sup>12</sup> Indeed, superior responsibility is meant to ensure that commanders comply with the laws and customs of war and international humanitarian law generally.<sup>13</sup> Confining the scope of the duty to punish to crimes perpetrated after assumption of office would leave a “gaping hole” in the protection provided by international humanitarian law to victims of crimes committed contrary to that law.<sup>14</sup> For the foregoing reasons, I am of the view that there exists a framework which allows a commander to be held responsible for his failure to punish crimes committed before his assumption of command over the subordinates.

5. The restrictive approach adopted in the *Hadžihasanović et al.* Appeal Decision, which is followed in this Appeal Judgement, may very well defeat the objective of command responsibility and may have far-reaching consequences on international humanitarian law, notably on its enforcement. In the event that the previous superior cannot himself be prosecuted, the criminal conduct of the subordinates would remain unpunished. Such absence of sanction would

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<sup>9</sup> *Orić* Appeal Judgement, Partially Dissenting Opinion and Declaration of Judge Liu, paras 14-28. See also *Orić* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Schomburg, paras 5-21.

<sup>10</sup> *Orić* Appeal Judgement, Partially Dissenting Opinion and Declaration of Judge Liu, paras 29-32, and references therein.

<sup>11</sup> Cf. *Orić* Appeal Judgement, Partially Dissenting Opinion and Declaration of Judge Liu, para. 29.

<sup>12</sup> *Orić* Appeal Judgement, Partially Dissenting Opinion and Declaration of Judge Liu, paras 30-32.

<sup>13</sup> *Orić* Appeal Judgement, Partially Dissenting Opinion and Declaration of Judge Liu, para. 30; and references therein.

<sup>14</sup> *Hadžihasanović et al.* Appeal Decision, Dissenting Opinion of Judge Hunt, para. 22. The case against Japanese General Yasutsugu Okamura – who was tried in the late 1940s before a special military tribunal of Shanghai for *inter alia* “tolerating the massacre of Chinese civilians and burning of houses by Japanese troops and other crimes” – resulted in such a “gaping hole”. Okamura was appointed to the commander's post in China only 8 months before V-J Day. The prosecutor nevertheless contended that responsibility for the deaths and the destruction of property of Chinese civilians rested on Okamura's shoulders. The special military tribunal ultimately acquitted Okamura on the basis of a “lack of evidence”. The tribunal also ruled that: (i) merely being the nominal head of the Japanese army could not in itself constitute a war crime; and (ii) that Okamura could not be held accountable for violations perpetrated by subordinates before he assumed command over them. The acquittal drew immediate and strident criticism from the Chinese people. Cf. Philip R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945-1951*, University of Texas Press, 1979, pp. 166-167.

undoubtedly create a climate of impunity, which in turn would enable the unpunished subordinates to further their criminal conduct.

6. Provided that the basic requirements of command responsibility are established, more particularly the effective control and the knowledge requirements, I consider that a commander should be held responsible for his failure to punish subordinates' commission of crimes even if those crimes were committed prior to his assumption of command over the subordinates at issue. In my opinion, it is not necessary that a temporal concurrence exist between the commission of the crime forming the basis of the charge and the superior-subordinate relationship between the accused and the physical perpetrator. Rather, in order for liability to arise, such concurrence should be between the time at which the immediate successor exercised effective control over the perpetrator and the time at which the said successor is considered to have failed to exercise his powers to punish. Individuals cannot use their promotion to a position of command as an excuse to escape from their duty to punish crimes committed by subordinates prior to succession.

7. In the present case, the Appeals Chamber follows the *Hadžihasanović et al.* Appeal Decision with respect to successor command responsibility, and thereby finds Bizimungu not responsible for failing to punish the killings at the Musambira Commune office and rapes at Musambira and the crimes committed at the ETO Complex and Nyanza Hill,<sup>15</sup> since they were committed before Bizimungu assumed his position as Chief of Staff of the Rwandan army. Although I maintain my disagreement with the legal principle underlying these findings, I nonetheless recognize that the *Hadžihasanović et al.* Appeal Decision in this regard has been consistently followed and applied by chambers of both the ICTY and the ICTR and has become part of both Tribunals' settled jurisprudence.<sup>16</sup> Therefore, despite my different view of the law of successor command liability as part of superior responsibility and after careful consideration, I do not dissent from the Appeal Judgement in relation to these findings in the interests of certainty and predictability of the law.<sup>17</sup>

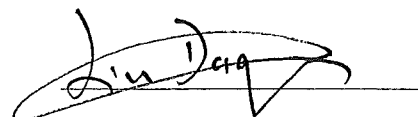
<sup>15</sup> Appeal Judgement, paras 292-293, 365-371.

<sup>16</sup> See, e.g., *Orić* Appeal Judgement, paras 165-167; *Nsengimana* Trial Judgement, para. 807. This view was also adopted in decisions which preceded the *Hadžihasanović et al.* Appeal Decision: *Aleksovski* Appeal Judgement, para. 76 (“[t]his necessarily implies that a superior must have such powers prior to his failure to exercise them”); *Kunarac et al.* Trial Judgement, para. 399 (“[t]o be held liable for the acts of men who operated under him on an *ad hoc* or temporary basis, it must be shown that, at the time when the acts charged in the Indictment were committed, these persons were under the effective control of that particular individual”) (emphasis in the original).

<sup>17</sup> See generally *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-AR65.2, Decision on Mićo Stanišić's Appeal Against Decision on his Motion for Provisional Release, 29 August 2011, Declaration of Judge Liu, para. 2; *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision, 31 May 2000, originally filed in French, English translation filed on 4 July 2001, para. 92, fn. 125, citing *Aleksovski* Appeal Judgement, paras 107-109.



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

  
Judge Liu Daqun

Done this 30th day of June 2014,

At Arusha, Tanzania.



**[Seal of the Tribunal]**

## **VIII. ANNEX A – PROCEDURAL HISTORY**

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

### **A. Notices of Appeal and Briefs**

2. Trial Chamber II of the Tribunal rendered the judgement in the case against Augustin Ndingilimimana, Augustin Bizimungu, François-Xavier Nzuwonemeye, and Innocent Sagahutu on 17 May 2011 and issued its written Trial Judgement in English on 17 June 2011. The French translation of the Trial Judgement was filed on 14 December 2011.<sup>1</sup>

#### **1. Bizimungu’s Appeal**

3. On 11 July 2011, the Pre-Appeal Judge denied Bizimungu’s request for an extension of time to file his notice of appeal after the filing of the French translation of the Trial Judgement, but granted him leave to file his appeal brief no later than 40 days from the date of the filing of the French translation of the Trial Judgement.<sup>2</sup> On 15 July 2011, the Pre-Appeal Judge granted Bizimungu’s request and ordered that he file his notice of appeal no later than 20 July 2011.<sup>3</sup>

4. Bizimungu filed his initial notice of appeal on 20 July 2011.<sup>4</sup> On 19 January 2012, the Appeals Chamber granted Bizimungu’s request to amend his initial notice of appeal and accepted the proposed amended version of his notice of appeal.<sup>5</sup> On 20 January 2012, the Pre-Appeal Judge granted Bizimungu’s request to file an appellant’s brief not exceeding 40,000 words.<sup>6</sup> On 23 January 2012, Bizimungu filed his appeal brief.<sup>7</sup> The Prosecution filed its respondent’s brief to Bizimungu’s appeal on 5 March 2012.<sup>8</sup> The Pre-Appeal Judge denied Bizimungu’s request for an extension of time to file his reply brief on 8 March 2012.<sup>9</sup> On 20 March 2012, Bizimungu filed his reply brief.<sup>10</sup>

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<sup>1</sup> *Jugement portant condamnation*, 14 December 2011.

<sup>2</sup> Decision on Motions for Extension of Time.

<sup>3</sup> Decision on Request for Reconsideration of Motions for Extension of Time.

<sup>4</sup> *Acte d’appel en vertu de l’appel 24 du statut et 108 du règlement de procédure et de preuve*, 20 July 2011.

<sup>5</sup> Decision on Augustin Bizimungu’s Motion for Leave to Amend his Notice of Appeal, 19 January 2012.

<sup>6</sup> Decision on Bizimungu’s and Nzuwonemeye’s Motions for Extensions of the Word Limits for their Appellant’s Briefs, 20 January 2012 (“Decision on Bizimungu’s and Nzuwonemeye’s Motions for Extension of Word Limits”). The Pre-Appeal Judge further granted the Prosecution a 10,000-word extension to respond to Bizimungu’s appeal.

<sup>7</sup> *Mémoire d’appel du Général Augustin Bizimungu*, 23 January 2012. The English translation of the French original was filed on 4 June 2012.

<sup>8</sup> Prosecution’s Respondent’s Brief in Response to Augustin Bizimungu’s Appellant’s Brief, 5 March 2012.

<sup>9</sup> Decision on Bizimungu’s Motion for Extension of Time to File his Reply Brief, 8 March 2012.

<sup>10</sup> *Mémoire du Général Augustin Bizimungu en réplique au « Prosecution’s Respondent’s Brief in Response to Augustin Bizimungu’s Appellant’s Brief »*, 20 March 2012. The English translation of the French original was filed on 5 July 2012.

## 2. Prosecution's Appeal

5. On 11 July 2011, the Pre-Appeal Judge denied the Prosecution's request for an extension of time to file its notice of appeal.<sup>11</sup> The Prosecution filed its initial notice of appeal on 20 July 2011<sup>12</sup> and its appeal brief on 3 October 2011.<sup>13</sup> On 21 September 2011, the Pre-Appeal Judge granted Bizimungu's and Nzuwonemeye's motions for leave to file their respondent's briefs no later than 20 and 15 days, respectively, after the filing of the French translation of the Trial Judgement and the Prosecution's appellant's brief.<sup>14</sup> On 26 October 2011, the Pre-Appeal Judge granted, in part, Sagahutu's motion for an extension of time to file his respondent's brief and ordered him to file it no later than 30 days after the filing of the French translation of the Trial Judgement and the Prosecution's appeal brief, whichever was later.<sup>15</sup> The Pre-Appeal Judge dismissed Nzuwonemeye's motion to dismiss or strike out the Prosecution's Appeal Brief on 30 November 2011.<sup>16</sup>

6. Ndindiliyimana filed his respondent's brief on 11 November 2011.<sup>17</sup> Nzuwonemeye filed his respondent's brief on 16 April 2012.<sup>18</sup> Bizimungu filed his respondent's brief on 23 April 2012.<sup>19</sup> Sagahutu filed his respondent's brief on 30 April 2012.<sup>20</sup> The Prosecution filed its reply to Ndindiliyimana's respondent's brief on 28 November 2011.<sup>21</sup> The Prosecution did not file a reply to the respondent's briefs of Bizimungu, Nzuwonemeye, or Sagahutu.

### **B. Assignment of Judges**

7. On 16 June 2011, the Presiding Judge of the Appeals Chamber assigned the following Judges to hear the appeals in this case: Judge Patrick Robinson (Presiding), Judge Liu Daqun, Judge Andréia Vaz, Judge Theodor Meron, and Judge Carmel Agius.<sup>22</sup> On 8 July 2011, the Presiding Judge assigned himself as Pre-Appeal Judge.<sup>23</sup> On 17 November 2011, Judge Theodor Meron became the Presiding Judge of the Appeals Chamber and accordingly replaced Judge Patrick Robinson as Presiding Judge in this case. On 30 November 2011, Judge Theodor Meron assigned

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<sup>11</sup> Decision on Motions for Extension of Time.

<sup>12</sup> Prosecutor's Notice of Appeal, 20 July 2011.

<sup>13</sup> Prosecution's Consolidated Appellant's Brief, 3 October 2011.

<sup>14</sup> Decision on Bizimungu's and Nzuwonemeye's Motions for Extension of Time to File their Respondent's Briefs, 21 September 2011.

<sup>15</sup> Decision on Sagahutu's Motion for Extension of Time to File his Respondent's Brief, 26 October 2011.

<sup>16</sup> Decision on Nzuwonemeye's Motion to Dismiss the Prosecution's Sentencing Appeal, 30 November 2011.

<sup>17</sup> Respondent's Brief, Augustin Ndindiliyimana, 11 November 2011.

<sup>18</sup> Nzuwonemeye Respondent's Brief, 16 April 2012.

<sup>19</sup> *Mémoire de l'intimé en réponse au mémoire d'appel du Procureur*, 23 April 2012.

<sup>20</sup> *Mémoire de l'intimé Innocent Sagahutu en réponse au mémoire d'appel global du Procureur*, 30 April 2012. The English translation of the French original was filed on 5 September 2012.

<sup>21</sup> Prosecution's Brief in Reply to Augustin Ndindiliyimana's Respondent's Brief, 28 November 2011.

<sup>22</sup> Order Assigning Judges to a Case before the Appeals Chamber, 16 June 2011.

<sup>23</sup> Order Assigning a Pre-Appeal Judge, 8 July 2011.

himself as Pre-Appeal Judge.<sup>24</sup> On 7 March 2012, he replaced Judge Carmel Agius with Judge Khalida Rachid Khan on the Bench in this case.<sup>25</sup> On 28 February 2013, he replaced Judge Patrick Robinson with Judge Bakhtiyar Tuzmukhamedov on the Bench in this case.<sup>26</sup> On 19 March 2013, Judge Theodor Meron replaced Judge Andréia Vaz with Judge Carmel Agius on the Bench in this case.<sup>27</sup>

### **C. Motion for the Admission of Additional Evidence on Appeal**

8. On 11 June 2012, the Appeals Chamber declared that Bizimungu's Rule 92*bis* motion had been withdrawn and denied his Rule 115 motion requesting the admission of additional evidence on appeal.<sup>28</sup>

### **D. Other Issues**

9. On 20 March 2012, the Appeals Chamber denied the request by IBUKA and Survivors Fund (SURF) for leave to make submissions as *amici curiae* in connection with the Prosecution's sentencing appeals.<sup>29</sup>

### **E. Appeal Hearing**

10. The Appeals Chamber issued a Scheduling Order for the hearing of the appeals in this case on 2 April 2013.<sup>30</sup> The parties' oral arguments were heard at the appeal hearing held from 7 to 10 May 2013 in Arusha, Tanzania.

### **F. Severance**

11. On 7 February 2014, the Appeals Chamber ordered the severance of Bizimungu's appeal and that of the Prosecution pertaining to him from the appeals of Ndindiliyimana, Nzuwonemeye, and Sagahutu, and the Prosecution appeal pertaining to Ndindiliyimana, Nzuwonemeye, and Sagahutu and ordered further submissions from the Prosecution and Bizimungu.<sup>31</sup>

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<sup>24</sup> Order Assigning a Pre-Appeal Judge, 30 November 2011.

<sup>25</sup> Order Replacing a Judge in a Case before the Appeals Chamber, 7 March 2012.

<sup>26</sup> Order Replacing a Judge in a Case before the Appeals Chamber, 28 February 2013.

<sup>27</sup> Order Replacing a Judge in a Case before the Appeals Chamber, 19 March 2013.

<sup>28</sup> Decision on Augustin Bizimungu's Rule 92*bis* Motion and on his Rule 115 Motion for Additional Evidence on Appeal, 11 June 2012.

<sup>29</sup> Decision on Request by IBUKA and Survivor's Fund (SURF) for Leave to File *Amici Curiae* Submissions Regarding the Prosecution's Sentencing Appeals, 20 March 2012.

<sup>30</sup> Scheduling Order, 2 April 2013.

<sup>31</sup> Order for Further Submissions and Severance, 7 February 2014.

**IX. ANNEX B – CITED MATERIALS AND DEFINED TERMS****A. Jurisprudence****1. Tribunal****BAGILISHEMA, Ignace**

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

**BAGOSORA, Théoneste and NSENGIYUMVA, Anatole (“MILITARY I”)**

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

**BIKINDI, Simon**

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

**MUGENZI, Justin and MUGIRANEZA, Prosper (“GOVERNMENT II”)**

*Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor*, Case No. ICTR-99-50-A, Judgement, 4 February 2013 (“*Mugenzi and Mugiraneza* Appeal Judgement”).

**GATETE, Jean-Baptiste**

*Jean-Baptiste Gatete v. The Prosecutor*, Case No. ICTR-00-61-A, Judgement, 9 October 2012 (“*Gatete* Appeal Judgement”).

**HATEGEKIMANA, Ildephonse**

*Ildephonse Hategekimana v. The Prosecutor*, Case No. ICTR-00-55B-A, Judgement, 8 May 2012 (“*Hategekimana* 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”).

**KAMUHANDA, Jean de Dieu**

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

**KANYARUKIGA, Gaspard**

*Gaspard Kanyarukiga v. The Prosecutor*, Case No. ICTR-02-78-A, Judgement, 8 May 2012 (“*Kanyarukiga Appeal Judgement*”).

**KAREMERA, Édouard and NGIRUMPATSE, Matthieu (“GOVERNMENT P”)**

*Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR73.17, Decision on Joseph Nzirorera’s Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts, 29 May 2009.

**KARERA, François**

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

**KAYISHEMA, Clément and RUZINDANA, Obed**

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

**MUHIMANA, Mikaeli**

*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, 29 August 2008 (“*Muvunyi I Appeal Judgement*”).

**NAHIMANA, Ferdinand et al. (“MEDIA”)**

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

**NCHAMIHIGO, Siméon**

*Siméon Nchamihigo v. The Prosecutor*, Case No. ICTR-01-63-A, Judgement, 18 March 2010 (“*Nchamihigo Appeal Judgement*”).

**NDINDABAHIZI, Emmanuel**

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

*The Prosecutor v. Emmanuel Ndindabahizi*, Case No. ICTR-01-71-T, Judgement and Sentence, 15 July 2004 (“Ndindabahizi Trial Judgement”).

**NDINDILYIMANA, Augustin et al. (“MILITARY II”)**

*Augustin Ndindilyimana et al. v. The Prosecutor*, Case No. ICTR-00-56-A, Judgement, 11 February 2014 (“Ndindilyimana et al. Appeal Judgement”).

**NIYTEGEKA, Eliézer**

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

**NSHOGOZA, Léonidas**

*Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-07-91-A, Judgement, 15 March 2010 (“Nshogoza Appeal Judgement”).

**NTABAKUZE, Aloys**

*Aloys Ntabakuze v. The Prosecutor*, Case No. ICTR-98-41A-A, Judgement, 8 May 2012 (“Ntabakuze Appeal Judgement”).

**NTAGERURA, André et al.**

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

**NTAKIRUTIMANA, Elizaphan and Gérard**

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

**NTAWUKULILYAYO, Dominique**

*Dominique Ntawukulilyayo v. The Prosecutor*, Case No. ICTR-05-82-A, Judgement, 14 December 2011 (“Ntawukulilyayo Appeal Judgement”).

**RENZAHO, Tharcisse**

*Tharcisse Renzaho v. The Prosecutor*, Case No. ICTR-97-31-A, Judgement, 1 April 2011 (“Renzaho Appeal Judgement”).

*The Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31-T, Judgement and Sentence, 14 July 2009 (“Renzaho Trial Judgement”).

**RUKUNDO, Emmanuel**

*Emmanuel Rukundo v. The Prosecutor*, Case No. ICTR-2001-70-A, Judgement, 20 October 2010 (“Rukundo Appeal Judgement”).

**RUTAGANDA, Georges Anderson Nderubumwe**

*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.

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

**SEMANZA, Laurent**

*Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision, 31 May 2000.

**SEROMBA, Athanase**

*The Prosecutor v. Athanase Seromba*, Case No. ICTR-01-66-A, Judgement, 12 March 2008 (“*Seromba Appeal Judgement*”).

**SETAKO, Ephrem**

*Ephrem Setako v. The Prosecutor*, Case No. ICTR-04-81-A, Judgement, 28 September 2011 (“*Setako Appeal Judgement*”).

**SIMBA, Aloys**

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

2. International Criminal Tribunal for the Former Yugoslavia

**ALEKSOVSKI, Zlatko**

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

**BLAGOJEVIĆ, Vidoje and JOKIĆ, Dragan**

*Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Judgement, 9 May 2007 (“*Blagojević and Jokić Appeal Judgement*”).

**BLAŠKIĆ, Tihomir**

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

**BOŠKOSKI, Ljube and TARČULOVSKI, Johan**

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

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

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**GOTOVINA, Ante and MARKAČ, Mladen**

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**HARADINAJ, Ramush et al.**

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**KORDIĆ, Dario and ČERKEZ, Mario**

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

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*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Judgement, 17 March 2009 (“*Krajišnik Appeal Judgement*”).

**KRSTIĆ, Radislav**

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

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*Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Judgement, 12 November 2009 (“*Milošević Appeal Judgement*”).

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*Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgement, 31 January 2005 (“*Strugar Trial Judgement*”).

**TADIĆ, Duško**

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**B. Defined Terms and Abbreviations****AT.**

Transcript from the appeal hearing in the present case. All references are to the official English transcript, unless otherwise indicated

**Bizimungu Appeal Brief**

*Mémoire d'appel du Général Augustin Bizimungu*, 23 January 2012 (English translation filed on 4 June 2012)

**Bizimungu Closing Brief**

*Mémoire du Général Augustin Bizimungu déposé en conformité avec l'article 86(B) du Règlement de procédure et de preuve*, 31 March 2009 (English translation filed on 10 June 2009)

**Bizimungu Notice of Appeal**

*Acte d'appel amendé en vertu de l'article 24 du Statut et de l'article 108 du Règlement de procédure et de preuve*, 21 November 2011 (filed as an annex to *Requête du Général Augustin Bizimungu en autorisation d'amender son acte d'appel conformément à l'article 108 du Règlement de procédure et de preuve*, 21 November 2011) (English translation filed on 28 May 2012)

**Bizimungu Pre-Defence Brief**

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**Bizimungu Reply Brief**

*Mémoire du Général Augustin Bizimungu en réplique au « Prosecution's Respondent's Brief in Response to Augustin Bizimungu's Appellant's Brief »*, 20 March 2012 (English translation filed on 5 July 2012)

**Bizimungu Response Brief**

*Mémoire de l'intimé en réponse au mémoire d'appel du Procureur*, 23 April 2012 (English translation filed on 5 September 2012)

**Bizimungu's Additional Submissions**

*Soumissions supplémentaires du Général Augustin Bizimungu en conformité avec « Order for Further Submissions and Severance » du 7 février 2014, 4 April 2014 (English translation filed on 9 May 2014 and Corrigendum filed on 19 June 2014)*

**EER**

Episcopal Church of Rwanda, Butare Prefecture

**ESI**

*École des sciences infirmières de Kabgayi*

**ESM**

*École supérieure militaire (Kigali)*

**ETO**

*École technique officielle*

**fn. (fns.)**

footnote (footnotes)

**Indictment**

*The Prosecutor v. Augustin Bizimungu et al.*, Case No. ICTR-2000-56-I, Amended Indictment (Joinder), 23 August 2004

**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

**MRND**

*Mouvement révolutionnaire national pour la démocratie et le développement* (prior to 5 July 1991) and *Mouvement républicain national pour la démocratie et le développement* (from 5 July 1991)

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**Prosecution**

Office of the Prosecutor

**Prosecution Appeal Brief**

Prosecution's Consolidated Appellant's Brief, 3 October 2011 (French translation filed on 2 April 2012)

**Prosecution Closing Brief**

*The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Prosecutor's Closing Brief (confidential), 31 March 2009

**Prosecution Notice of Appeal**

Prosecutor's Notice of Appeal, 20 July 2011 (French translation filed on 1 March 2012)

**Prosecution Pre-Trial Brief**

*The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-T, *Mémoire de l'Accusation Préalable au Procès*, 17 June 2004 (English translation filed on 1 September 2004)

**Prosecution Response Brief (Bizimungu)**

Prosecution's Respondent's Brief in Response to Augustin Bizimungu's Appellant's Brief, 5 March 2012

**Prosecution's Additional Submissions**

Prosecution's Additional Submissions Pursuant to the Appeals Chamber's 7 February 2014 Order, 7 March 2014

**RPF**

Rwandan (also Rwandese) Patriotic Front

**Rules**

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

**Statute**

Statute of the International Criminal Tribunal for Rwanda established by Security Council Resolution 955 (1994)

**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 II of the Tribunal

**Trial Judgement**

*The Prosecutor v. Augustin Ndindiliyimana*, Case No. ICTR-00-56-T, Judgement and Sentence, pronounced on 17 May 2011, filed in writing on 17 June 2011

**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

**UN**

United Nations

**UNAMIR**

United Nations Assistance Mission for Rwanda