UNITED NATIONS

Mechanism for International Criminal Tribunals

Case No. MICT-12-29-A
Date: 18 December 2014
Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Bakone Justice Moloto
Judge Christoph Flügge
Judge Burton Hall
Judge Liu Daqun

Registrar: **Mr. John Hocking**

Judgement of: **18 December 2014**

AUGUSTIN NGIRABATWARE

v.

THE PROSECUTOR

PUBLIC

JUDGEMENT

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James J. Arguin
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1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals ("Appeals Chamber" and "Mechanism", respectively) is seised of the appeal of Augustin Ngirabatware against the Judgement in the case of *The Prosecutor v. Augustin Ngirabatware*, which was pronounced on 20 December 2012 and issued in writing on 21 February 2013 ("Trial Judgement") by Trial Chamber II 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 ("Trial Chamber" and "ICTR", respectively).

I. INTRODUCTION

A. Background

2. Ngirabatware was born in 1957 in Nyamyumba Commune, Gisenyi Prefecture, Rwanda.[1] In July 1990, he was appointed Minister of Planning, a position he retained as part of the Interim Government in April 1994.[2] Ngirabatware was also member of the Prefecture Committee of the MRND political party in Gisenyi Prefecture, the National Committee of the MRND, and the technical committee of Nyamyumba Commune.[3]

3. The Trial Chamber convicted Ngirabatware of direct and public incitement to commit genocide based on his speech at a roadblock on the Cyanika-Gisa road in Nyamyumba Commune on 22 February 1994.[4] It also found him guilty of instigating and aiding and abetting genocide based on his role in distributing weapons and his statements at the Bruxelles and Gitsimbi/Cotagirwa roadblocks in Nyamyumba Commune on 7 April 1994.[5] The Trial Chamber also convicted Ngirabatware, under the extended form of joint criminal enterprise, of rape as a crime against humanity.[6] It sentenced Ngirabatware to a single sentence of 35 years of imprisonment.[7]

[1] Trial Judgement, para. 3.
[2] Trial Judgement, paras. 5, 7.
[3] Trial Judgement, para. 6.
[4] Trial Judgement, paras. 1366-1369, 1394.
[5] Trial Judgement, paras. 869-870, 1341, 1394.
[6] Trial Judgement, paras. 1392-1394.
[7] Trial Judgement, paras. 1419-1420.

B. The Appeal

4. Ngirabatware presents seven grounds of appeal challenging his convictions and sentence.[8] He requests the Appeals Chamber to vacate each of his convictions and enter a judgement of acquittal.[9] Alternatively, Ngirabatware requests a significant reduction of his sentence to time served.[10] The Prosecution responds that Ngirabatware's appeal should be dismissed in its entirety.[11]

5. The Appeals Chamber heard oral submissions of the parties regarding the appeal on 30 June 2014.[12]

[8] Notice of Appeal, paras. 8-56; Appeal Brief, pp. 8-136.
[9] Notice of Appeal, paras. 5-7, 9, 14, 22-23, 27, 35, 43, 56; Appeal Brief, paras. 30, 65, 76, 146, 171, 186, 210, 216, 232, 239, 263, 271, 275, p. 136.
[10] Notice of Appeal, paras. 47-56; Appeal Brief, paras. 276-282.
[11] Response Brief, paras. 4, 361.
[12] Scheduling Order for Appeal Hearing, 16 June 2014. *See also* T. 30 June 2014 pp. 1-51.

II. STANDARDS OF APPELLATE REVIEW

6. The Appeals Chamber recalls that the Mechanism was established pursuant to United Nations Security Council Resolution 1966 (2010) and continues the material, territorial, temporal, and personal jurisdiction of the ICTR.[13] The Statute and the Rules of the Mechanism reflect normative continuity with the Statutes and Rules of the ICTR and ICTY.[14] The Appeals Chamber considers that it is bound to interpret its Statute and Rules in a manner consistent with the jurisprudence of the ICTR and ICTY.[15] Likewise, where the respective Rules or Statutes of the ICTR or ICTY are at issue, the Appeals Chamber is bound to consider the relevant precedent of these tribunals when interpreting them.[16]

7. 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.[17] These criteria are set forth in Article 23 of the Statute and are well established in the jurisprudence of both the ICTR and the ICTY.[18]

8. A party alleging an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the decision.[19] An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.[20] However, even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may find for other reasons that there is an error of law.[21] It is necessary for any appellant claiming an error of law on the basis of the lack of a reasoned opinion to identify the

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[13] United Nations Security Council Resolution 1966, U.N. Doc. S/RES/1966, 22 December 2010 ("Security Council Resolution 1966"), paras. 1, 4, Annex 1, Statute of the Mechanism ("Statute"), Preamble, Article 1. *See also* Security Council Resolution 1966, Annex 2.

[14] *See Phénéas Munyarugarama* v. *Prosecutor*, Case No. MICT-12-09-AR14, Decision on Appeal Against the Referral of Phénéas Munyarugarama's Case to Rwanda and Prosecution Motion to Strike, 5 October 2012 ("*Munyarugarama* Decision"), para. 5.

[15] *See Munyarugarama* Decision, para. 6.

[16] *See Munyarugarama* Decision, para. 6.

[17] *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 13; *Bizimungu* Appeal Judgement, para. 8; *Ndindiliyimana et al.* Appeal Judgement, para. 8; *Đorđević* Appeal Judgement, para. 13; *Šainović et al.* Appeal Judgement, para. 19; *Perišić* Appeal Judgement, para. 7.

[18] *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 13; *Bizimungu* Appeal Judgement, para. 8; *Ndindiliyimana et al.* Appeal Judgement, para. 8; *Đorđević* Appeal Judgement, para. 13; *Šainović et al.* Appeal Judgement, para. 19; *Perišić* Appeal Judgement, para. 7.

[19] *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 14, *citing Ntakirutimana* Appeal Judgement, para. 11; *Bizimungu* Appeal Judgement, para. 9; *Đorđević* Appeal Judgement, para. 14; *Šainović et al.* Appeal Judgement, para. 20; *Perišić* Appeal Judgement, para. 8, *citing Lukić and Lukić* Appeal Judgement, para. 11.

[20] *See, e.g., Đorđević* Appeal Judgement, para. 14; *Šainović et al.* Appeal Judgement, para. 20; *Perišić* Appeal Judgement, para. 8, *citing Lukić and Lukić* Appeal Judgement, para. 11.

[21] *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 14, *citing Ntakirutimana* Appeal Judgement, para. 11; *Bizimungu* Appeal Judgement, para. 9; *Đorđević* Appeal Judgement, para. 14; *Šainović et al.* Appeal Judgement, para. 20; *Perišić* Appeal Judgement, para. 8, *citing Lukić and Lukić* Appeal Judgement, para. 11.

specific issues, factual findings, or arguments that the appellant submits the trial chamber omitted to address and to explain why this omission invalidates the decision.[22]

9. 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.[23] 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.[24]

10. When considering alleged errors of fact, the Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[25] The Appeals Chamber applies the same standard of reasonableness to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[26] It is not any error of fact that will cause the Appeals Chamber to overturn a decision by a trial chamber, but only one that has caused a miscarriage of justice.[27] In determining whether a trial chamber's finding was reasonable, the Appeals Chamber will not lightly overturn findings of fact made by a trial chamber.[28]

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

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[22] *See, e.g., Đorđević* Appeal Judgement, para. 14; *Šainović et al.* Appeal Judgement, para. 20; *Perišić* Appeal Judgement, para. 9.
[23] *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 15; *Bizimungu* Appeal Judgement, para. 10; *Ndindiliyimana et al.* Appeal Judgement, para. 10; *Đorđević* Appeal Judgement, para. 15; *Šainović et al.* Appeal Judgement, para. 21; *Perišić* Appeal Judgement, para. 9.
[24] *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 15; *Bizimungu* Appeal Judgement, para. 10; *Ndindiliyimana et al.* Appeal Judgement, para. 10; *Đorđević* Appeal Judgement, para. 15; *Šainović et al.* Appeal Judgement, para. 21; *Perišić* Appeal Judgement, para. 9.
[25] *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 16; *Bizimungu* Appeal Judgement, para. 11; *Ndindiliyimana et al.* Appeal Judgement, para. 11; *Đorđević* Appeal Judgement, para. 16; *Šainović et al.* Appeal Judgement, para. 22; *Perišić* Appeal Judgement, para. 10.
[26] *See, e.g., Đorđević* Appeal Judgement, para. 16; *Šainović et al.* Appeal Judgement, para. 22; *Lukić and Lukić* Appeal Judgement, para. 13.
[27] *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 16, *citing Krstić* Appeal Judgement, para. 11; *Bizimungu* Appeal Judgement, para. 11; *Ndindiliyimana et al.* Appeal Judgement, para. 11, *citing Krstić* Appeal Judgement, para. 40; *Đorđević* Appeal Judgement, para. 16; *Šainović et al.* Appeal Judgement, para. 22; *Perišić* Appeal Judgement, para. 10, *citing Lukić and Lukić* Appeal Judgement, para. 13.
[28] *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 16; *Bizimungu* Appeal Judgement, para. 11; *Ndindiliyimana et al.* Appeal Judgement, para. 11; *Đorđević* Appeal Judgement, para. 17, *citing Kupreškić et al.* Appeal Judgement, para. 30; *Šainović et al.* Appeal Judgement, para. 23; *Perišić* Appeal Judgement, para. 10.
[29] *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 17; *Bizimungu* Appeal Judgement, para. 12; *Ndindiliyimana et al.* Appeal Judgement, para. 12; *Đorđević* Appeal Judgement, para. 20; *Šainović et al.* Appeal Judgement, para. 27; *Perišić* Appeal Judgement, para. 11.

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

12. In order for the Appeals Chamber to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.[31] Moreover, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.[32] Finally, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and it will dismiss arguments which are evidently unfounded without providing detailed reasoning.[33]

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[30] *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 17; *Bizimungu* Appeal Judgement, para. 12; *Ndindiliyimana et al.* Appeal Judgement, para. 12; *Perišić* Appeal Judgement, para. 11. *See also Đorđević* Appeal Judgement, para. 20; *Šainović et al.* Appeal Judgement, para. 27; *Lukić and Lukić* Appeal Judgement, para. 15.

[31] Practice Direction on Requirements and Procedures for Appeals (MICT/10), 6 August 2013, para. 5(b). *See also, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 18; *Bizimungu* Appeal Judgement, para. 13; *Ndindiliyimana et al.* Appeal Judgement, para. 13; *Šainović et al.* Appeal Judgement, para. 26; *Perišić* Appeal Judgement, para. 12.

[32] *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 18; *Bizimungu* Appeal Judgement, para. 13; *Ndindiliyimana et al.* Appeal Judgement, para. 13; *Perišić* Appeal Judgement, para. 12. *See also Đorđević* Appeal Judgement, para. 20; *Šainović et al* Appeal Judgement, para. 27; *Lukić and Lukić* Appeal Judgement, para. 15.

[33] *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 18; *Bizimungu* Appeal Judgement, para. 13; *Ndindiliyimana et al.*Appeal Judgement, para. 13; *Đorđević* Appeal Judgement, para. 19, *citing D. Milošević* Appeal Judgement, para. 16; *Šainović et al.* Appeal Judgement, para. 26; *Perišić* Appeal Judgement, para. 12.

III. RULE 98*BIS* MOTION (GROUND 6)

13. On 7 September 2010, Ngirabatware filed a motion under Rule 98*bis* of the ICTR Rules requesting a judgement of acquittal in relation to 45 paragraphs of the Indictment.[34] In its response to the Rule 98*bis* Motion, the Prosecution sought the Trial Chamber's permission to withdraw certain paragraphs of the Indictment, including paragraphs 10 to 12 in relation to Count 1 (conspiracy to commit genocide) of the Indictment and paragraphs 54 and 56 to 59 in relation to Count 5 (extermination as a crime against humanity) of the Indictment.[35] The Prosecution, nonetheless, maintained that the evidence was sufficient to sustain a conviction on each count.[36] In a decision of 14 October 2010, the Trial Chamber denied the Rule 98*bis* Motion, granted the Prosecution's request to withdraw certain paragraphs of the Indictment, and declared that Ngirabatware had no case to answer with respect to those paragraphs.[37] On 11 November 2010, the Trial Chamber denied Ngirabatware's request for certification to appeal the Rule 98*bis* Decision.[38]

14. Subsequently, Ngirabatware proposed an initial list of 96 defence witnesses.[39] The Trial Chamber repeatedly urged Ngirabatware to examine his witness list and include only witnesses essential to his defence.[40] On 26 August 2011, the Trial Chamber ordered Ngirabatware to reduce his witness list to a total of 35 witnesses.[41] On 20 February 2012, the ICTR Appeals Chamber confirmed that the Trial Chamber had the authority to order the reduction of the number of witnesses and found that Ngirabatware had not demonstrated that, in doing so, the Trial Chamber abused its discretion.[42]

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[34] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Defence Motion Requesting Acquittal Pursuant to Rules 54 and 98*bis* of the Rules of Procedure and Evidence, 7 September 2010 (confidential) ("Rule 98*bis* Motion"), para. 253.

[35] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Prosecution's Response to Defence Motion for Acquittal Under Rule 98(bis) of the Rules of Procedure and Evidence, 15 September 2010 (confidential) ("Rule 98*bis* Response"), para. 11.

[36] Rule 98*bis* Response, paras. 17, 20, 57, 91, 107.

[37] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion for Judgement of Acquittal, 14 October 2010 ("Rule 98*bis* Decision"), p. 12. The Trial Chamber granted the Prosecution's request to withdraw the following paragraphs of the Indictment: 10-12, 15, 31-32, 34, 37-38, 47, 54, 56-59. *See also* Trial Judgement, para. 16.

[38] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion for Certification to Appeal the Decision on Defence Motion for Judgement of Acquittal, 11 November 2010, p. 6. *See also The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Defence Motion for Certification to Appeal the Trial Chamber Decision Dated 15th October 2010 Pursuant to Rule 98*bis* of the Rules of Procedure and Evidence, 21 October 2010.

[39] *See* Pre-Defence Brief, para. 5.

[40] *See Augustin Ngirabatware v. The Prosecutor*, Case No. ICTR-99-54-AR73(C), Decision on Ngirabatware's Appeal of the Decision Reducing the Number of Defence Witnesses, 20 February 2012 ("Appeal Decision of 20 February 2012"), paras. 2-3.

[41] Appeal Decision of 20 February 2012, paras. 5, 14

[42] Appeal Decision of 20 February 2012, para. 19.

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15. During closing arguments, the Prosecution announced that it "cautiously dropped" Count 1 (conspiracy to commit genocide) of the Indictment.[43] Accordingly, the Trial Chamber did not make factual or legal findings on Count 1 of the Indictment in the Trial Judgement and considered it as withdrawn.[44] The Prosecution, however, maintained Count 5 of the Indictment charging extermination as a crime against humanity.[45] Having examined the evidence presented by the Prosecution in support of the remaining paragraphs underpinning Count 5 of the Indictment,[46] the Trial Chamber was not satisfied that the Prosecution had established these allegations beyond reasonable doubt.[47]

16. Ngirabatware submits that the Trial Chamber erred in dismissing, in its entirety, his Rule 98*bis* Motion.[48] In particular, he argues that the evidence in relation to Counts 1 and 5 and with regard to a number of individual paragraphs under other counts of the Indictment was insufficient to sustain a conviction.[49] In addition, he claims that the Trial Chamber failed to exercise its discretion to dismiss individual paragraphs of the Indictment, as opposed to whole counts.[50] Ngirabatware argues that the Trial Chamber's error is demonstrated by its finding in the Trial Judgement that the Prosecution had failed to prove the charge of extermination under Count 5 and to present any evidence in relation to individual paragraphs under other counts of the Indictment.[51] Ngirabatware claims that he suffered prejudice as a result of the Trial Chamber's error as he was compelled to present evidence in relation to allegations which were "irrelevant or unproven", was "denied clarity of material facts to identify what evidence to call", and was subsequently precluded from calling witnesses on allegations for which he had a case to answer.[52]

17. In response, the Prosecution submits that the Trial Chamber applied the correct legal standard in dismissing Ngirabatware's Rule 98*bis* Motion.[53] It adds that calling evidence on allegations which are ultimately found to be unproven does not amount to prejudice and that the

[43] Closing Arguments, T. 25 July 2012 p. 56. *See also* Trial Judgement, para. 17.
[44] Trial Judgement, paras. 17, 1394.
[45] Prosecution Closing Brief, paras. 2, 159-196.
[46] *See* Trial Judgement, paras. 883-920, 1055-1062, 1244-1259.
[47] Trial Judgement, para. 1378.
[48] Notice of Appeal, para. 44; Appeal Brief, para. 272.
[49] Appeal Brief, para. 273. *See also* Appeal Brief, Annex L; Reply Brief, para. 106. Ngirabatware also argues that the Trial Chamber erred in failing to provide a reasoned opinion in dismissing his request for a judgement of acquittal in relation to Count 5. *See* Reply Brief, para. 106(ii).
[50] Appeal Brief, para. 273; Reply Brief, para. 106(iii).
[51] Appeal Brief, para. 273, *referring to* Trial Judgement, paras. 1387-1389. *See also* Appeal Brief, Annex L, *referring to* Trial Judgement, paras. 216-217, 348, 350-351, 363-365, 373-377, 888, 900-901, 955, 1027, 1069, 1072, 1258-1259, 1274, 1285-1286. In addition, Ngirabatware argues that the Prosecution impermissibly proceeded in relation to Count 1 which it knew to be unproven and which it withdrew only during the presentation of its closing arguments. *See* Appeal Brief, para. 273, *referring to* Closing Arguments, T. 25 July 2012 p. 56.
[52] Appeal Brief, para. 273. Ngirabatware submits that, as a remedy, he would seek the admission of additional evidence on appeal. *See* Notice of Appeal, para. 45; Appeal Brief, para. 274.
[53] Response Brief, paras. 341-344.

evidence called by Ngirabatware on some of the unproven paragraphs of the Indictment was also related to other allegations.[54]

18. The Appeals Chamber recalls that, pursuant to Rule 98*bis* of the ICTR Rules, a judgement of acquittal shall be entered if after the close of the Prosecution's case-in-chief "the evidence is insufficient to sustain a conviction on one or more counts charged in the indictment". The test to be applied by the trial chamber is "whether there is evidence (if accepted) upon which a reasonable [trier] of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question", not whether an accused's guilt has been established beyond reasonable doubt.[55] The Appeals Chamber further recalls that a trial chamber may find at the close of the Prosecution case-in-chief that the "evidence is sufficient to sustain a conviction beyond reasonable doubt and yet, even if no defence evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond reasonable doubt."[56]

19. The Appeals Chamber notes that, in its Rule 98*bis* Decision, the Trial Chamber correctly recalled the applicable law.[57] With respect to Counts 1 and 5 of the Indictment, the Trial Chamber found that there was "evidence which, if accepted, could satisfy a reasonable trier of fact of Ngirabatware's guilt beyond a reasonable doubt".[58] In the Trial Judgement, the Trial Chamber granted the Prosecution's request to withdraw the charge of conspiracy to commit genocide under Count 1,[59] and acquitted Ngirabatware of extermination as a crime against humanity under Count 5 of the Indictment.[60] In arguing that this is indicative of an error in the standard of proof applied by the Trial Chamber in its Rule 98*bis* Decision, Ngirabatware conflates the various evidentiary thresholds. As recalled above, a judgement of acquittal shall only be entered pursuant to Rule 98*bis* of the ICTR Rules if the evidence is insufficient to sustain a conviction. At that stage a trial chamber is required to "assume that the prosecution's evidence [is] entitled to credence unless incapable of belief" and "take the evidence at its highest".[61] In contrast, pursuant to Rule 87 of the ICTR Rules, at the end of the trial a trial chamber may reach a finding of guilt only if it is satisfied that the guilt of the accused has been proved beyond reasonable doubt.

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[54] Response Brief, paras. 344-345.
[55] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR98bis.1, Judgement, 11 July 2013 ("*Karadžić* Rule 98*bis* Judgement"), para. 9 (emphasis in the original), *citing Delalić et al.* Appeal Judgement, para. 434.
[56] *Jelisić* Appeal Judgement, para. 37.
[57] Rule 98*bis* Decision, paras. 22-23, 25.
[58] Rule 98*bis* Decision, paras. 32, 46.
[59] Trial Judgement, para. 17.
[60] Trial Judgement, para. 1379.
[61] *Karadžić* Rule 98*bis* Judgement, para. 21, *citing Jelisić* Appeal Judgement, para. 55.

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20. The standard "'beyond reasonable doubt' connotes that the evidence establishes a particular point and it is beyond dispute that any reasonable alternative is possible."[62] It requires that the trial chamber be satisfied that there is no reasonable explanation of the evidence other than the guilt of the accused.[63] Accordingly, a dismissal of a request for a judgement of acquittal on a particular count at the close of the Prosecution case-in-chief is not incompatible with an acquittal of the accused on that same count at the end of the trial. In the same vein, a Prosecution's decision to withdraw a charge at the end of the trial does not demonstrate that the evidence was insufficient to sustain a conviction in relation to that charge at the close of the Prosecution case-in-chief.[64] Ngirabatware thus fails to show that the Trial Chamber erred in law or fact in failing to grant his Rule 98*bis* Motion in relation to Counts 1 and 5 of the Indictment.[65]

21. The Trial Chamber also explicitly considered Ngirabatware's request for a judgement of acquittal in relation to individual paragraphs of the Indictment.[66] Having considered that Rule 98*bis* of the ICTR Rules expressly refers to "counts" and that focusing on individual paragraphs of the Indictment would entail "un unwarranted substantive evaluation of the quality of much of the Prosecution evidence", the Trial Chamber decided to address the counts in their entirety.[67] Ngirabatware fails to address the Trial Chamber's reasoning but merely repeats his trial submissions[68] without showing that their rejection by the Trial Chamber constituted an error warranting the intervention of the Appeals Chamber.[69]

22. In light of the above, the Appeals Chamber finds that the Trial Chamber did not err in dismissing Ngirabatware's Rule 98*bis* Motion in its entirety. As a consequence, Ngirabatware has not shown that the Trial Chamber's decision forced him to divert his limited resources to defending against allegations that were not supported by evidence which, if accepted, could establish his guilt. In any event, even if the Trial Chamber had erred in dismissing relevant portions of the Rule 98*bis* Motion, Ngirabatware has not identified a single witness whom he would not have called nor has he pointed to any witness whom he was forced to remove from his list or explained why that potential

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[62] *Mrkšić and Šljivančanin* Appeal Judgement, para. 220.
[63] *D. Milošević* Appeal Judgement, para. 20, *citing Mrkšić and Šljivančanin* Appeal Judgement, para. 220. *See also Martić* Appeal Judgement, para. 61.
[64] Concerning Ngirabatware's submission that the Prosecution impermissibly proceeded in relation to Count 1 (*See* Appeal Brief, para. 273), the Appeals Chamber notes that Ngirabatware fails to show that the Prosecution did not intend to prove this count in the course of the trial. *See Ntakirutimana* Appeal Judgement, para. 43.
[65] The Appeals Chamber need not address Ngirabatware's submission that the Trial Chamber erred in the Rule 98*bis* Decision by failing to provide a reasoned opinion in relation to Count 5 of the Indictment, as the alleged error does not impact on Ngirabatware's conviction. *See* Reply Brief, para. 106(ii).
[66] Rule 98*bis* Decision, paras. 27-29.
[67] Rule 98*bis* Decision, paras. 27-29, *citing The Prosecutor v. Théoneste Bagosora et al.*, Case No. IT-98-41-T, Decision on Motions for Judgement of Acquittal, 2 February 2005, para. 9.
[68] *See* Rule 98*bis* Motion, paras. 18-48; *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Defence Reply to Prosecution Response to Defence Motion for Acquittal Under Rule 98*bis* of the Rules of Procedure and Evidence, 23 September 2010 (confidential), paras. 18-22, 67.

witness would have been essential to the proper presentation of his case.[70] In addition, Ngirabatware has not demonstrated with any degree of specificity how the 35 witnesses that he was permitted to call were insufficient to mount a fair and effective defence.[71]

23. In view of the foregoing, the Appeals Chamber dismisses Ngirabatware's Sixth Ground of Appeal.

[69] *See supra* para. 11.
[70] *Cf.* Appeal Decision of 20 February 2012, para. 15.
[71] *Cf.* Appeal Decision of 20 February 2012, para. 15.

IV. DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE (GROUND 5)

24. The Trial Chamber convicted Ngirabatware for direct and public incitement to commit genocide based on his speech at a roadblock on the Cyanika-Gisa road in Nyamyumba Commune on 22 February 1994.[72] Specifically, the Trial Chamber found that, following the murder of Martin Bucyana, the chairman of the CDR political party, Ngirabatware told a crowd of as many as 150 to 250 people assembled at the roadblock to kill Tutsis.[73] Ngirabatware submits that the Trial Chamber erred in convicting him of this crime.[74] In this section, the Appeals Chamber considers whether the Trial Chamber erred in assessing: (i) the notice Ngirabatware received of the charge; (ii) the time he had to prepare for the cross-examination of a Prosecution witness; (iii) the legal elements of the crime; and (iv) the evidence.

A. Notice

25. Ngirabatware argues that the Trial Chamber erred in finding that he had received sufficient notice of the charge of direct and public incitement to commit genocide.[75] Ngirabatware challenges the pleading of his criminal conduct,[76] the date and location of the commission of the crime,[77] and the presence of a large group of people at the roadblock.[78]

1. Criminal Conduct

26. Ngirabatware argues that the Indictment failed to plead with sufficient specificity his criminal conduct.[79] In particular, he submits that, although paragraphs 41 and 49 of the Indictment contained two distinct allegations, in the Trial Judgement the Trial Chamber joined and examined

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[72] Trial Judgement, paras. 1366-1370.
[73] Trial Judgement, para. 1366.
[74] Notice of Appeal, paras. 36-43; Appeal Brief, paras. 217-271.
[75] Appeal Brief, paras. 218- 228(i), 231-232.
[76] Appeal Brief, para. 228(iii).
[77] Appeal Brief, paras. 217-228(i). *See also* T. 30 June 2014 pp. 3-7, 12-13.
[78] Appeal Brief, para. 228(ii), (iv). The Appeals Chamber notes Ngirabatware's argument that the Trial Chamber erred in dismissing his challenges in relation to paragraphs 41 and 49 of the Indictment on the basis that he had "waived" his right to raise notice issues at an advanced stage of the proceedings. *See* Appeal Brief, para. 230, *citing* Trial Judgement, para. 227. The Appeals Chamber notes that, in addressing Ngirabatware's challenges in this respect, the Trial Chamber observed that he had failed to provide any reason for raising additional notice issues in his closing submissions *and* to demonstrate any prejudice suffered by the alleged lack of notice. In fact, the Trial Chamber explicitly found that Ngirabatware had not suffered any prejudice in this regard. *See* Trial Judgement, para. 227. In addition, the Trial Chamber explicitly considered and addressed Ngirabatware's arguments that he received insufficient notice as to the location of the roadblock. *See* Trial Judgement, para. 228. The Appeals Chamber therefore considers that Ngirabatware misrepresents the Trial Judgement by arguing that his challenges in relation to paragraphs 41 and 49 of the Indictment were dismissed on the basis that he had "waived" his right to raise a defect in the Indictment at an advanced stage of the proceedings. As to Ngirabatware's similar submission in relation to paragraph 48 of the Indictment, the Appeals Chamber notes that Ngirabatware was acquitted of the allegation contained in that paragraph. *See* Trial Judgement, paras. 1363, 1365.

these as a single incident.[80] The Prosecution responds that the Indictment provided sufficient notice as to Ngirabatware's conduct, namely that he had incited people gathered at the Cyanika-Gisa roadblock to commit genocide.[81]

27. The Appeals Chamber notes that paragraph 41 of the Indictment alleges that, in February 1994, Ngirabatware went to the Cyanika-Gisa roadblock, addressed the *Interahamwe* youths manning the roadblock and gave them and Honoré Ndayamiyemenshi money "as encouragement and incitement for their work in capturing and killing Tutsis". Paragraph 49 of the Indictment alleges that, towards the end of February 1994, Ngirabatware went to the same roadblock and addressed the youths who were present, including Ndayamiyemenshi, "incit[ing] them to kill members of the Tutsi population, by telling them that the Hutu leader was murdered the night before, and called on them to kill all the Tutsis".

28. The Appeals Chamber notes that in its analysis, the Trial Chamber discussed the evidence in relation to the allegations contained in paragraphs 41 and 49 of the Indictment together.[82] Having considered the evidence of Witnesses ANAN and ANAT,[83] the Trial Chamber observed that they both testified to Ngirabatware addressing a crowd and giving money to Ndayamiyemenshi at the Cyanika-Gisa roadblock.[84] It considered that the witnesses described the same roadblock, irrespective of the name they used to identify it.[85] The Trial Chamber also took into account the discrepancies in the witnesses' testimony in relation to the date of the event but considered that these were minor given the lapse of time and the similarities in their accounts.[86] The Trial Chamber was therefore convinced that both witnesses referred to the same event.[87]

29. On the basis of the evidence presented, the Trial Chamber found that Ngirabatware's instruction to "'kill Tutsis' objectively and unambiguously called for an act of violence" prohibited under Article 2(2) of the ICTR Statute.[88] On this basis, it found Ngirabatware guilty of direct and public incitement to commit genocide.[89] The Appeals Chamber is satisfied that paragraph 49 of the

[79] Appeal Brief, para. 228(iii).
[80] Appeal Brief, para. 228(iii).
[81] Response Brief, para. 289, *referring to* Indictment, para. 49.
[82] *See* Trial Judgement, paras. 221-222, 300-320.
[83] The Prosecution indicated that Witnesses ANAN and ANAT were expected to testify in relation to both paragraphs 41 and 49 of the Indictment. *See* Prosecution Pre-Trial Brief, RP. 1245; *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Prosecutor's Extremely Urgent Motion for Leave to Vary the List of Witnesses to be Called and Extension of Witness Protection Orders, 22 December 2009 (confidential) ("Prosecution's Motion for Leave to Vary Witness List"), para. 25.
[84] *See* Trial Judgement, paras. 305-306
[85] Trial Judgement, para. 305.
[86] *See* Trial Judgement, para. 307.
[87] *See* Trial Judgement, para. 307.
[88] Trial Judgement, para. 1368.
[89] Trial Judgement, paras. 1367-1370.

Indictment provided Ngirabatware with sufficient notice in this regard. As to the allegation contained in paragraph 41 of the Indictment that Ngirabatware gave money at the roadblock, the Trial Chamber found that the Prosecution had failed to prove that weapons used in attacks against Tutsis were purchased with this money.[90] Accordingly, Ngirabatware was not found criminally responsible for this conduct.[91] The Appeals Chamber finds that Ngirabatware has failed to demonstrate that he was unduly prejudiced by the Trial Chamber's decision to consider the allegations in paragraphs 41 and 49 of the Indictment together, particularly given that he was acquitted of the core allegation contained in paragraph 41 of the Indictment.

2. Date and Location of the Commission of the Crime

30. Ngirabatware argues that the Indictment failed to plead with sufficient precision the date of his alleged criminal conduct.[92] He also submits that both the Indictment and the Trial Judgement incorrectly state that the roadblock was in the Nyamyumba Commune as, during the trial, it transpired that the roadblock was in the Rubavu Commune.[93] Ngirabatware further submits that, whereas the Prosecution Pre-Trial Brief specified that the relevant roadblock was not in Cyanika, the main witnesses relied on by the Prosecution placed the roadblock in Cyanika.[94] He also argues that, contrary to what was stated in the Indictment, there was no customs office at the alleged location.[95] Ngirabatware claims that, as a result, the Indictment was defective and not curable in relation to the location of the crime and that the Trial Chamber erred in allowing the Prosecution to mould its case as the evidence unfolded, thus causing him prejudice.[96]

31. The Prosecution responds that any vagueness in the Indictment in relation to the date of Ngirabatware's conduct was remedied by the Prosecution's pre-trial submissions.[97] It further claims that, while the commune was not always correctly identified, the location of the roadblock was identified clearly and consistently throughout the trial.[98]

32. The Appeals Chamber recalls that, in accordance with Article 19(4)(a) of the Statute, an accused has the right to be informed promptly and in detail of the nature and cause of the charges against him. The charges against an accused and the material facts supporting those charges must be

[90] Trial Judgement, para. 320.
[91] Trial Judgement, para. 320.
[92] Appeal Brief, paras. 228(i), 240.
[93] Appeal Brief, paras. 219, 221-227. *See also* T. 30 June 2014 pp. 3-5, 12-13.
[94] T. 30 June 2014 p. 7. *See also* Appeal Brief, paras. 225-226; Appeal Brief, Annex K.
[95] Appeal Brief, paras. 220, 225(i). *See also* T. 30 June 2014 pp. 4-5.
[96] Appeal Brief, paras. 217-227; Appeal Brief, Annex K; Reply Brief, paras. 87-95. *See also* T. 30 June 2014 pp. 5, 12-13, 44-45.
[97] Response Brief, para. 284, *referring to* Prosecution Pre-Trial Brief, Annex 3, RP. 1082, 1070.
[98] Response Brief, paras. 268-282. *See also* T. 30 June 2014 p. 41.

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pleaded with sufficient precision in an indictment so as to provide notice to the accused.[99] The issue of whether a fact is "material" depends on the nature of the Prosecution's case.[100] However, an indictment need not have the degree of specificity of the evidence underpinning it.[101] The Prosecution is expected to know its case before proceeding to trial and cannot omit material facts of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.[102]

33. An indictment which fails to set forth material facts in sufficient detail is defective.[103] The defect may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charges.[104] If an appellant raises a defect in the indictment for the first time on appeal, he bears the burden of showing that his ability to prepare his defence was materially impaired.[105] Where an accused had already raised the issue of lack of notice before the trial chamber, the burden rests on the Prosecution to demonstrate on appeal that the accused's ability to prepare a defence was not materially impaired.[106]

34. The Appeals Chamber recalls that a broad time range, in and of itself, does not invalidate a paragraph of the Indictment.[107] Paragraph 49 of the Indictment specifies that the crime was committed "[t]owards the end of February" and "following the killing of CDR Chairman Bucyana". The Appeals Chamber does not consider the Indictment to be vague or overly broad with respect to the date of Ngirabatware's alleged conduct. In addition, the Prosecution's pre-trial submissions clarified that Bucyana was killed on 22 February 1994,[108] a fact which was not disputed at trial,[109] indicating that the crime was committed between 22 and 28 February 1994. Accordingly, the Appeals Chamber finds that the Indictment, read together with the Prosecution's pre-trial submissions, provided Ngirabatware with sufficient notice as to the timing of the commission of the crime.

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[99] *Ndindiliyimana et al.* Appeal Judgement, para. 171; *Šainović et al.* Appeal Judgement, paras. 213, 225, 262; *Gotovina and Markač* Appeal Judgement, para. 45.
[100] *Ndindiliyimana et al.* Appeal Judgement, para. 171; *Renzaho* Appeal Judgement, para. 53; *Nahimana et al.* Appeal Judgement, para. 322; *Ndindabahizi* Appeal Judgement, para. 16.
[101] *Šainović et al.* Appeal Judgement, para. 225; *Rutaganda* Appeal Judgement, para. 302.
[102] *Ndindiliyimana et al.* Appeal Judgement, para. 172; *Kanyarukiga* Appeal Judgement, para. 73.
[103] *Ndindiliyimana et al.* Appeal Judgement, para. 172; *Šainović et al.* Appeal Judgement, para. 262; *Bagosora and Nsengiyumva* Appeal Judgement, para. 96.
[104] *Ndindiliyimana et al.* Appeal Judgement, paras. 172, 176; *Šainović et al.* Appeal Judgement, para. 262; *Gotovina and Markač* Appeal Judgement, para. 45; *Bagosora and Nsengiyumva* Appeal Judgement, para. 96.
[105] *Ndindiliyimana et al.* Appeal Judgement, para. 176; *Ntagerura et al.* Appeal Judgement, paras. 31, 138; *Kvočka et al.* Appeal Judgement, para. 35.
[106] *Ndindiliyimana et al.* Appeal Judgement, para. 176; *Ntagerura et al.* Appeal Judgement, para. 138; *Kvočka et al.* Appeal Judgement, para. 35.
[107] *Bagosora and Nsengiyumva* Appeal Judgement, para. 150; *Rukundo* Appeal Judgement, para. 163.
[108] Prosecution Pre-Trial Brief, Annex 3, RP. 1082, 1070.
[109] *See* Trial Judgement, para. 281.

35. Turning to Ngirabatware's submission that the Indictment was defective in relation to the location of the roadblock, the Appeals Chamber notes that paragraph 49 of the Indictment alleges that the roadblock was situated "at the Customs Office on the Cyanika-Gisa tarred road in Nyamyumba commune". The Trial Chamber found that, given the testimony of Witness ANAN that there was no customs office in Cyanika, the Indictment was, in this respect, "factually incorrect".[110] It nevertheless concluded that the additional information provided in the Indictment as to the alleged location of the roadblock gave sufficient notice to Ngirabatware in that respect.[111]

36. The Appeals Chamber notes that Exhibit 4 attached to the Prosecution Pre-Trial Brief specified that the reference to the "customs office" indicated the location where people and vehicles passing through the Gisa roadblock were being searched by the *Interahamwe*, akin to what is done at a customs office.[112] Accordingly, any vagueness as to whether the reference to a "customs office" in the Indictment identified an actual customs office on the Cyanika-Gisa road was remedied by the Prosecution's provision of timely notice.

37. The Appeals Chamber turns next to Ngirabatware's submission in relation to the commune where the roadblock was allegedly located. The Appeals Chamber notes that, on appeal, the parties agree that the Cyanika-Gisa road was in the Rubavu Commune.[113] However, in the Indictment, the Prosecution alleged that the roadblock on the Cyanika-Gisa road was in the Nyamyumba Commune.[114] While the Trial Chamber observed that evidence on the trial record placed the roadblock in the Rubavu Commune,[115] it was nevertheless satisfied that the roadblock was in the Nyamyumba Commune, as pleaded in the Indictment.[116] Having considered the evidence relied upon by the Trial Chamber and the parties in their submissions on appeal,[117] the Appeals Chamber finds that no reasonable trier of fact could have found beyond reasonable doubt that the roadblock was in the Nyamyumba Commune. Rather, the evidence demonstrates that the roadblock was in the Rubavu Commune.

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[110] Trial Judgement, para. 228 ("Given that the Indictment alleges this event occurred in a location, namely at the Customs Office, that the Prosecution's own witness acknowledged does not exist, the Indictment is factually incorrect in this regard.").
[111] Trial Judgement, para. 228.
[112] Prosecution Pre-Trial Brief, Annex 2, Exhibit 4, RP. 1130. *See also* Witness ANAN, T. 8 February 2010 p. 94 (closed session).
[113] *See* Appeal Brief, para. 227; Response Brief, paras. 275, 282. *See also* T. 30 June 2014 p. 41.
[114] Indictment, para. 49.
[115] Trial Judgement, para. 228, *referring to* Witness ANAS, T. 16 March 2010 p. 14, Witness ANAT, T. 17 March 2010 p. 59, Ngirabatware, T. 1 December 2010 p. 64, Witness DWAN-49, T. 19 September 2011 pp. 7-8 (closed session), T. 20 September 2011 p. 40.
[116] Trial Judgement, paras. 319, 1332, 1366.
[117] Trial Judgement, para. 228, *referring to* Witness ANAS, T. 16 March 2010 p. 14, Witness ANAT, T. 17 March 2010 p. 59, Ngirabatware, T. 1 December 2010 p. 64, Witness DWAN-49, T. 19 September 2011 pp. 7-8 (closed session), T. 20 September 2011 p. 40; Appeal Brief, para. 225(iii), (vii), *referring*, in addition to the evidence referred to by the Trial Chamber, *to* Witness ANAO, T. 17 February 2010 p. 5; Response Brief, para. 272.

38. The Appeals Chamber will therefore address the question whether Ngirabatware lacked notice of the roadblock's location given the variance between the commune identified in the Indictment and the finding that the roadblock was in another commune. The Appeals Chamber recalls that, in principle, minor differences between an indictment and the evidence presented at trial do not prevent a consideration of the indictment in light of the evidence.[118] In assessing whether the differences are indeed minor, the chamber must satisfy itself that no prejudice shall, as a result, be caused to the accused.[119] Depending on the specific circumstances of each case, the question to be determined is whether the accused was reasonably able to identify the crime and criminal conduct alleged in the particular paragraph of the indictment.[120]

39. The Appeals Chamber notes that Nyamyumba and Rubavu are neighbouring communes[121] and that the Prosecution specified, both in the Indictment and in its Pre-Trial Brief, that the roadblock was located on the Cyanika-Gisa tarred road.[122] In particular, the summary of Witness ANAN's anticipated testimony annexed to the Prosecution's Pre-Trial Brief placed the roadblock on the Cyanika-Gisa tarred road,[123] and further material, including photographs and sketches, indicated that the roadblock was located on an 800-meter stretch on the tarred road between Cyanika and Gisa.[124] In addition, the trial record shows that Ngirabatware, who was sufficiently familiar with the area,[125] defended himself against the allegation that the roadblock was situated along the Cyanika-Gisa road and called four Defence witnesses, namely Witnesses DWAN-49, Habinshuti, DWAN-114, and Aouili, to challenge the Prosecution's evidence regarding the existence of a demonstration and a related roadblock at that locale.[126]

40. The Appeals Chamber also notes that the Prosecution's case that the roadblock was located on the Cyanika-Gisa road remained consistent throughout the trial.[127] As to the roadblock's precise

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[118] *Rutaganda* Appeal Judgement, para. 302.
[119] *Rutaganda* Appeal Judgement, para. 303.
[120] *Rutaganda* Appeal Judgement, para. 303.
[121] *See, e.g.*, Defence Exhibit 1.
[122] Indictment, paras. 41, 49; Prosecution Pre-Trial Brief, paras. 64-65.
[123] Prosecution Pre-Trial Brief, RP. 1244.
[124] Prosecution Pre-Trial Brief, RP. 1130-1126, 1142 which in a sketch identifies the distance between Gisa and Cyanika as 800 meters. *See also* Prosecution Exhibit 6.
[125] Ngirabatware, T. 14 December 2010 p. 43 ("I never heard about any CDR demonstration in Gisa, a place which I, of course, know very well.").
[126] *See, e.g.*, Witness DWAN-49, T. 19 September 2011 pp. 31-32; Witness Habinshuti, T. 17 October 2011 pp. 23-24, 26; Witness DWAN-114, T. 20 February 2012 p. 50; Witness Aouili, T. 22 February 2012 pp. 16-17.
[127] *See, e.g.*, Indictment, para. 49; Prosecution Pre-Trial Brief, paras. 64-65, RP. 1244, 1130-1126; Prosecution Exhibit 6, p. 46; Prosecution Exhibit 7. *See also* Witness Delvaux, T. 23 September 2009 pp. 57-58, T. 24 September 2009 pp. 10-11, 43; Witness ANAN, T. 1 February 2010 pp. 36, 43, T. 8 February 2010 p. 94 (closed session); Witness ANAO, T. 16 February 2010 p. 12, T. 17 February 2010 p. 5, T. 18 February 2010, pp. 6-7 (closed session); Witness ANAS, T. 16 March 2010 pp. 14-15; Witness ANAT, T. 16 March 2010 p. 67; *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Prosecution's Submissions on the Registry's Confidential Report on the Site Visit Dated 31 May 2012, 14 June 2012 (confidential) ("Prosecution's Submissions on the Site Visit"), paras. 38-39.

location, the sketch annexed to the Prosecution's Pre-Trial Brief,[128] as well as Witnesses Delvaux, ANAO, and ANAS,[129] placed the roadblock on that road nearer to Gisa, whereas the main Prosecution witnesses, namely Witnesses ANAT and ANAN, placed it on the same road but close to Cyanika.[130] Despite such discrepancies, the ICTR Registry's official record of the site visit, which took place after all the witnesses were heard, shows that the parties "unanimously agreed" as to the roadblock's exact location.[131] Indeed, the parties' submissions following the site visit make clear that their dispute over the distance between Cyanika and Gisa was limited to approximately 300 meters.[132] Accordingly, the Appeals Chamber finds that the inconsistencies in the evidence as to the roadblock's precise location were minor and do not, as such, show that Ngirabatware lacked sufficient notice of the location where the crime was allegedly committed or that he suffered any prejudice as a result. Accordingly, the Appeals Chamber is satisfied that Ngirabatware was reasonably able to identify the location of his alleged criminal conduct.

3. The Presence of a Crowd at the Roadblock

41. Ngirabatware submits that the Indictment was defective in that it did not plead the material facts in relation to the public nature of the incitement to commit genocide.[133] In particular, he argues that he was not put on notice of the presence of a group of 150 to 250 youths at the roadblock.[134] In response, the Prosecution submits that the Indictment provided sufficient notice by stating that Ngirabatware had addressed youths present at the roadblock.[135]

42. The Trial Chamber found that, while Ngirabatware delivered his speech at the Cyanika-Gisa roadblock, the evidence clearly indicated that the intended audience was not only those manning the roadblock but a group which may have been composed of 150 to 250 people assembled there.[136] The Appeals Chamber notes that paragraph 49 of the Indictment alleged that at the roadblock Ngirabatware addressed "the youths who were present". Considering that an indictment need not

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[128] *See* Prosecution Pre-Trial Brief, Annex 2, Exhibit 4, RP. 1130.
[129] Witness Delvaux, T. 23 September 2009 pp. 57-58, T. 24 September 2009 pp. 10-11, 43, in which he comments on the map he prepared and was admitted into evidence as Prosecution Exhibit 6; Witness ANAO, T. 16 February 2010 p. 12, T. 17 February 2010 p. 5, T. 18 February 2010, pp. 6-7 (closed session); Witness ANAS, T. 16 March 2010 p. 14.
[130] Witness ANAN, T. 1 February 2010 pp. 36, 43, T. 8 February 2010 p. 94 (closed session); Witness ANAT, T. 16 March 2010 p. 67.
[131] Chamber Exhibit 1, p. 5.
[132] *See* Prosecution's Submissions on the Registry's Confidential Report on the Site Visit Dated 31 May 2012, 14 June 2012, p. 10: "Site 38 [Cyanika] is 700 meters away from Gisa"; Defence's Additional Submissions to the Defence Closing Brief Following the Site Visit in the Republic of Rwanda on 21-25 May 2012, 14 June 2012 (confidential), para. 12: "the distance between Gisa and Cyanika [...] was more than 1 Kilometer". *See also* Trial Judgement, para. 304.
[133] Appeal Brief, para. 228(ii).
[134] Appeal Brief, paras. 228(iv), 243; Reply Brief, para. 96.
[135] Response Brief, para. 288.
[136] Trial Judgement, para. 1367. *See also* Trial Judgement, paras. 319, 1366.

have the degree of specificity of the evidence underpinning it,[137] the Appeals Chamber is satisfied that the Indictment was not defective in this regard.

4. Conclusion

43. Based on the foregoing, the Appeals Chamber finds that Ngirabatware has failed to demonstrate that he lacked notice of the charge of direct and public incitement to commit genocide.

B. Adequate time to Prepare for Witness ANAT's Cross-Examination

44. On 22 December 2009, the Prosecution sought leave to add a number of witnesses, including Witness ANAT, to its witness list.[138] It specified that Witness ANAT was expected to testify in relation to the allegations made in, *inter alia*, paragraphs 41 and 49 of the Indictment.[139] On 28 January 2010, the Trial Chamber granted the Prosecution's request.[140] Ngirabatware's request for leave to appeal the Trial Chamber's decision was rejected on 22 February 2010.[141]

45. Ngirabatware argues that he was denied sufficient time for the preparation of his defence in relation to the evidence of Witness ANAT.[142] In particular, he argues that the Trial Chamber failed to consider the effect on the fairness of the proceedings of the late addition of Witness ANAT to the Prosecution's witness list.[143] He further claims that the Trial Chamber erred by not allowing him adequate time to investigate Witness ANAT's "new claims".[144] The Prosecution responds that Ngirabatware fails to demonstrate an error on the part of the Trial Chamber or show that he suffered any prejudice.[145]

46. The Appeals Chamber notes that, in granting the Prosecution's request, the Trial Chamber explicitly considered whether the addition of Witness ANAT to the Prosecution's witness list would cause any prejudice to Ngirabatware.[146] In particular, the Trial Chamber noted that Witness ANAT's anticipated evidence would not significantly increase the complexity of the case or require significant additional time for Ngirabatware to prepare.[147] In this regard, the Trial Chamber considered that Witness ANAT's testimony would replace the testimony of other Prosecution

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[137] *See, e.g., Šainović et al.* Appeal Judgement, para. 225; *Rutaganda* Appeal Judgement, para. 302.
[138] Prosecution's Motion for Leave to Vary Witness List, para. 50.
[139] Prosecution's Motion for Leave to Vary Witness List, para. 25.
[140] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Prosecution Motion for Leave to Vary its Witness List, 28 January 2010 ("Decision of 28 January 2010"), p. 15.
[141] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion for Certification to Appeal the Decision on Variation of Prosecution Witness List, 22 February 2010 ("Decision on Certification"), p. 7.
[142] Appeal Brief, para. 228(v).
[143] Appeal Brief, para. 228(v).
[144] Appeal Brief, para. 228(v).
[145] Response Brief, para. 294.
[146] *See* Decision of 28 January 2010, paras. 50-54
[147] Decision of 28 January 2010, para. 51.

witnesses who had, in the meantime, become unavailable.[148] It also took into account the Prosecution's intention to call Witness ANAT at the end of the Prosecution's case, thus allowing Ngirabatware adequate time to prepare.[149] Indeed, the trial record shows that the Prosecution disclosed Witness ANAT's statement on 22 December 2009[150] and the witness testified nearly three months later on 16 and 17 March 2010.[151] The Trial Chamber also indicated that, should Ngirabatware demonstrate any prejudice, it was open to him to request a postponement of Witness ANAT's cross-examination or to seek leave to re-call the witness for further cross-examination.[152] The trial record shows that Ngirabatware's counsel cross-examined Witness ANAT extensively, particularly as to his evidence concerning the Cyanika-Gisa roadblock, without seeking additional time to prepare for the cross-examination.[153] Furthermore, contrary to Ngirabatware's claim, the anticipated evidence of Witness ANAT, at least as to the Cyanika-Gisa roadblock incident which underpinned Ngirabatware's conviction, concerned allegations which were not "new", but were included in the Indictment and were also addressed by Witness ANAN in his testimony.[154]

47. In view of the above considerations, the Appeals Chamber finds that Ngirabatware has failed to show that he had insufficient time to prepare for Witness ANAT's cross-examination.

C. Legal Elements of Direct and Public Incitement to Commit Genocide

48. The Trial Chamber found that, following the murder of Bucyana, Ngirabatware went to the Cyanika-Gisa roadblock and urged a crowd of 150 to 250 people who had assembled there to kill Tutsis.[155] The Trial Chamber found that Ngirabatware's speech constituted direct and public incitement to commit genocide,[156] as it objectively and unambiguously called for an act of violence prohibited by Article 2(2) of the ICTR Statute.[157] The Trial Chamber was also satisfied that Ngirabatware made the speech with the intent to directly incite genocide,[158] and that the intended audience was the crowd gathered at the roadblock, as opposed to only those manning it.[159]

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[148] Decision of 28 January 2010, para. 52.
[149] *See* Decision of 28 January 2010, para. 54.
[150] Prosecution's Motion for Leave to Vary Witness List, Annex E, containing the statement of Witness ANAT.
[151] *See* Witness ANAT, T. 16 March 2010 pp. 60-91, T. 17 March 2010 pp. 1-68.
[152] Decision on Certification, para. 27.
[153] Witness ANAT, T. 16 March 2010 pp. 70-91, T. 17 March 2010 pp. 1-60.
[154] *See* Trial Judgement, para. 301, and the evidence cited therein.
[155] Trial Judgement, paras. 1366-1367.
[156] Trial Judgement, paras. 1367-1368.
[157] Trial Judgement, para. 1368.
[158] Trial Judgement, para. 1368.
[159] Trial Judgement, para. 1367.

49. Ngirabatware submits that the Trial Chamber erred in finding that his conduct fulfilled the *actus reus* and *mens rea* requirements of the crime of direct and public incitement to commit genocide.[160]

1. *Actus Reus*

50. Ngirabatware argues that the Trial Chamber erred in finding that his conduct amounted to direct and public incitement to commit genocide.[161] He submits that: (i) the mere presence of a group at the vicinity of the roadblock does not suffice to show that the alleged inciting statements were received by the public as, at best, the statements were heard by only three persons;[162] and (ii) the group was selected and limited to the *Interahamwe* and *Impuzamugambi* manning the roadblock.[163] Ngirabatware argues that these circumstances are consistent with private incitement and that the Trial Chamber erred in distinguishing his case from the cases of *Kalimanzira* and *Nahimana et al.*[164]

51. The Prosecution responds that Ngirabatware's arguments should be dismissed as the public nature of the incitement was demonstrated by both the publicly accessible location at which Ngirabatware made the inciting statement and the unrestricted audience.[165]

52. The Appeals Chamber recalls that the *actus reus* of direct and public incitement to commit genocide requires that the accused directly and publicly incited the commission of genocide.[166] The crime is completed as soon as the discourse in question is uttered.[167] When assessing the "public" element of the incitement, factors such as the place where the incitement occurred and whether the audience was selected or limited can be taken into account.[168] The ICTR Appeals Chamber has held that "the number of persons and the medium through which the message is conveyed may be relevant in assessing whether the attendance was selected or limited, thereby determining whether or not the recipient of the message was the general public."[169] The ICTR Appeals Chamber has previously found that supervising a specific group of individuals manning a roadblock does not

[160] Notice of Appeal, paras. 37, 41-42; Appeal Brief, paras. 233-239, 264-271.
[161] Appeal Brief, paras. 233, 238-239.
[162] Appeal Brief, paras. 234-236(i)-(ii), 237, 244(vi); Reply Brief, para. 97. *See also* T. 30 June 2014 pp. 15-16, 22.
[163] Appeal Brief, para. 236(iii); Reply Brief, paras. 98-102.
[164] Appeal Brief, paras. 234-235, *referring to Kalimanzira* Appeal Judgement, paras. 155, 159, *Nahimana et al.* Appeal Judgement, para. 862. *See also* Appeal Brief, para. 243; Reply Brief, para. 101. *See also* T. 30 June 2014 pp. 15-16.
[165] Response Brief, paras. 295-299. *See also* T. 30 June 2014 pp. 34-35.
[166] *Nzabonimana* Appeal Judgement, para. 121; *Kalimanzira* Appeal Judgement, para. 155; *Bikindi* Appeal Judgement, para. 135; *Nahimana et al.* Appeal Judgement, para. 677.
[167] *Nahimana et al.* Appeal Judgement, para. 723.
[168] *Nzabonimana* Appeal Judgement, paras. 231, 384
[169] *Nzabonimana* Appeal Judgement, paras. 231, 384.

constitute public incitement to commit genocide "since only the individuals manning the roadblocks would have been the recipients of the message and not the general public".[170]

53. The Appeals Chamber notes that the Trial Chamber correctly recalled the applicable law with regard to the public element of the crime of direct and public incitement to commit genocide.[171] In finding that Ngirabatware's speech fulfilled the public element of the crime, the Trial Chamber explicitly considered that the intended audience of his speech was a group that may have been composed of as many as 150 to 250 people who had gathered at the roadblock, as opposed to only those manning it.[172] In challenging the Trial Chamber's relevant findings, Ngirabatware merely presents a different interpretation of the evidence of Witnesses ANAN and ANAT.[173] A review of the trial record shows that Witness ANAN testified that Ngirabatware spoke with Ndayamiyemenshi and the youths who were present at the roadblock.[174] When asked how many youths Ngirabatware spoke to, Witness ANAN estimated between 150 and 250.[175] Witness ANAT also testified that Ngirabatware assembled a group at the roadblock and made inciting statements.[176] In addition, contrary to Ngirabatware's assertion, Witness ANAN did not suggest that the audience at the roadblock was limited to members of the *Interahamwe* or *Impuzamugambi*, but merely identified Ndayamiyemenshi as "the person in charge of the *Impuzamugambi* of the CDR".[177] Neither Witness ANAN nor Witness ANAT limited the crowd to the *Interahamwe* or *Impuzamugambi* manning the roadblock.

54. In view of the Trial Chamber's factual findings, the Appeals Chamber is satisfied that the Trial Chamber correctly distinguished the present case from the *Kalimanzira* and *Nahimana et al.*

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[170] *Kalimanzira* Appeal Judgement, para. 155, *citing Nahimana et al.* Appeal Judgement, para. 862. *See also Kalimanzira* Appeal Judgement, paras. 156, 159, 161.
[171] Trial Judgement, para. 1355 *referring to Kalimanzira* Appeal Judgement, para. 158, *Nyiramasuhuko et al.* Trial Judgement, para. 5987.
[172] Trial Judgement, para. 1367.
[173] Appeal Brief, paras. 234, 236(i)-(ii), 237; Reply Brief, para. 100.
[174] Trial Judgement, para. 301, *referring to* Witness ANAN, T. 1 February 2010 pp. 36-37, 40, 43.
[175] Witness ANAN, T. 1 February 2010 pp. 36-37. (The witness stated as follows: "On arrival at the roadblock, [Ngirabatware] called Ndyamiyemenshi, Honore, who was the person in charge of the *Impuzamugambi* of the CDR. He said or expressed his condolences. He said, 'We were affected that the Tutsis had caused a calamity, but that we should take vengeance.' He said, 'You have to avenge yourselves; you have to kill some Tutsis, that is, for example, a Tutsi called Tito. Leave him alone. He is my friend, but you could find someone else.' He took money from his pocket and gave it to them. He gave them some little money, then the roadblock was taken away and he continued on his way. We also continued with our demonstration –or, continued with our march right up to where we had to end the demonstration." *See* Witness ANAN, T. 1 February 2010 p. 36. Witness ANAN was then asked to clarify the spelling of names and places and immediately afterwards counsel for the Prosecution asked him "at that roadblock, about how many youths did Ngirabatware speak to?" to which the witness responded "There were many". When asked to give an estimate, Witness ANAN stated "I would say between 150 to 250." *See* Witness ANAN, T. 1 February 2010 p. 37.)
[176] Witness ANAT, T. 16 March 2010 p. 67 ("A. [Ngirabatware] came where we had staged our activity. He assembled us and told us that the national leader of the CDR had been killed and that finally we will have our turn. He told us that we had to track down all the Tutsi of Gisa *secteur* for the purpose of killing each and every one of them, and that none of them should escape. Q. Where was this? A. He made those utterances where we were blocking the road leading from Gisenyi to Ruhengeri at the location known as Cyanika.").
[177] Witness ANAN, T. 1 February 2010 p. 36.

cases, on the basis that the incident at hand did not concern instructions given at a roadblock with intended recipients limited to the persons manning the roadblock, but a speech with an intended audience of as many as 150 to 250 persons.[178]

55. Lastly, Ngirabatware misrepresents the trial record in suggesting that there is no evidence of direct incitement to commit genocide.[179] The Appeals Chamber notes that Witness ANAN explicitly stated that Ngirabatware called upon the group of about 150 to 250 youths to "take vengeance" by killing Tutsis.[180] Witness ANAT also testified that Ngirabatware told them to "track down all the Tutsi of the Gisa *secteur* for the purpose of killing each and every one of them."[181] Ngirabatware has failed to show any error in the Trial Chamber's reliance on this evidence.

56. In view of the above, Ngirabatware has failed to demonstrate that the Trial Chamber erred in finding that the *actus reus* of the crime of direct and public incitement had been fulfilled.

2. *Mens Rea*

57. Ngirabatware submits that the Trial Chamber erred by failing to make a finding that he had genocidal intent in February 1994 and that he intended to publicly incite the commission of genocide.[182] The Prosecution responds that Ngirabatware fails to show any error.[183]

58. The Appeals Chamber recalls that the *mens rea* of direct and public incitement to commit genocide requires that the accused had the intent to directly and publicly incite others to commit genocide.[184] Such intent presupposes in itself a genocidal intent.[185] The Appeals Chamber is satisfied that the Trial Chamber correctly articulated the law in this respect.[186]

59. The Trial Chamber also correctly noted that, when based on circumstantial evidence, any finding that the accused had genocidal intent must be the only reasonable inference from the totality of the evidence.[187] The Trial Chamber found that Ngirabatware's actions and words at the Cyanika-Gisa roadblock provided circumstantial evidence of his intent to destroy, in whole or in part, the Tutsi ethnic group, as such.[188] In particular, the Trial Chamber relied on Witness ANAN's

[178] Trial Judgement, para. 1367.
[179] Appeal Brief, para. 237.
[180] Witness ANAN, T. 1 February 2010 p. 36.
[181] Witness ANAT, T. 16 March 2010 p. 67.
[182] Appeal Brief, paras. 264-271.
[183] Response Brief, paras. 335-340.
[184] *Nzabonimana* Appeal Judgement, para. 121; *Kalimanzira* Appeal Judgement, para. 155; *Bikindi* Appeal Judgement, para. 135; *Nahimana et al.* Appeal Judgement, para. 677.
[185] *Nahimana et al.* Appeal Judgement, para. 677.
[186] *See* Trial Judgement, para. 1352.
[187] Trial Judgement, para. 1327.
[188] Trial Judgement, para. 1334.

testimony that at the roadblock Ngirabatware called upon the group to kill Tutsis,[189] and on Witness ANAT's testimony that Ngirabatware told the group "to track down all the Tutsi of Gisa *secteur* for the purpose of killing each and every one of them, and that none of them should escape".[190] The Appeals Chamber is satisfied that the Trial Chamber's factual findings and the evidence it relied upon could lead a reasonable trial chamber to conclude that the only reasonable inference from the evidence was that, at the time of his speech, Ngirabatware had genocidal intent. This conclusion was implicit in the Trial Chamber's finding that Ngirabatware had the requisite *mens rea* for the crime of direct and public incitement to commit genocide.[191]

60. The Appeals Chamber further notes the Trial Chamber's finding that Ngirabatware delivered his speech at the roadblock "with the intent to directly incite genocide".[192] When read together with the Trial Chamber's finding that the "intended audience" of Ngirabatware's speech was a group composed of 150 to 250 people,[193] it is clear that the Trial Chamber was also satisfied that in addressing the crowd, Ngirabatware had the intent to publicly incite others to commit genocide.

61. Accordingly, Ngirabatware has failed to demonstrate that the Trial Chamber did not make the necessary findings in relation to his *mens rea* for direct and public incitement to commit genocide.

D. Assessment of the Evidence

62. In finding that Ngirabatware went to the Cyanika-Gisa roadblock and urged a group of as many as 150 to 250 people to kill Tutsis, the Trial Chamber relied primarily on the direct evidence of Prosecution Witnesses ANAN and ANAT.[194] At trial, Witness ANAT testified that he knew Witness ANAN well and that, when summoned by the Gisenyi Public Prosecutor's Office in 2005, Witness ANAT dictated the contents of his statement to Witness ANAN who wrote it down as he had "a very legible handwriting".[195] Witness ANAT confirmed that, as a consequence, Witness ANAN became aware of the contents of his statement and may have subsequently relied upon it.[196] However, Witness ANAT denied the suggestion made by Ngirabatware's counsel that he and

[189] Trial Judgement, para. 301, *citing* Witness ANAN, T. 1 February 2010 p. 36.
[190] Trial Judgement, para. 301, *citing* Witness ANAT, T. 16 March 2010 p. 67.
[191] Trial Judgement, para. 1368.
[192] Trial Judgement, para. 1368.
[193] Trial Judgement, para. 1367.
[194] Trial Judgement, paras. 300-319.
[195] Witness ANAT, T. 17 March 2010 pp. 55-59.
[196] Witness ANAT, T. 17 March 2010 pp. 56, 58-59.

Witness ANAN had participated in a deliberate conspiracy to fabricate evidence implicating Ngirabatware in return of having their sentences reduced.[197]

63. The Trial Chamber found speculative Ngirabatware's submission that there was collusion between Witnesses ANAN and ANAT.[198] Having found Witness ANAN to be generally a credible and reliable witness, it concluded that, although the testimony of Witness ANAT "hint[ed] at the possibility" that Witness ANAN's testimony may have been tainted, the differences in the witnesses' testimonies precluded any tainting.[199] The Trial Chamber also considered the testimony of Ngirabatware and Defence Witnesses Tchemi Tchambi Aouili, DWAN-114, Joseph Habinshuti, and DWAN-49.[200] It found, however, that their evidence did not cast doubt on the compelling accounts of Witnesses ANAN and ANAT.[201]

I. Collusion

64. Ngirabatware submits that the Trial Chamber erred in finding that there was no collusion between Witnesses ANAN and ANAT and that the differences in their testimonies precluded any tainting.[202] In support, Ngirabatware relies on Witness ANAT's testimony to the effect that Witness ANAN had recorded Witness ANAT's statement implicating Ngirabatware,[203] as well as on the fact that both witnesses were serving prison sentences together and did not mention Ngirabatware in their earlier statements.[204]

65. The Prosecution responds that Ngirabatware fails to demonstrate the existence of an agreement between Witnesses ANAN and ANAT to give false testimony and that, at best, the fact that the two witnesses were in the same prison amounted to a risk of contamination of their evidence.[205] The Prosecution also submits that Witness ANAN's statement was written prior to Witness ANAT's statement and that, in any event, whereas the former implicated Ngirabatware in the Cyanika-Gisa roadblock incident the latter did not.[206]

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[197] Witness ANAT, T. 17 March 2010 p. 56.
[198] Trial Judgement, para. 309.
[199] Trial Judgement, paras. 308-309.
[200] Trial Judgement, paras. 246-266, 271-273, 314-318.
[201] Trial Judgement, para. 318.
[202] Appeal Brief, paras. 251-252, *citing* Trial Judgement, para. 309, 258; Reply Brief, para. 103. *See also* T. 30 June 2014 pp. 7-8, 10-12, 45.
[203] Appeal Brief, para. 253.
[204] Appeal Brief, para. 254. *See also* T. 30 June 2014 p. 11.
[205] Response Brief, paras. 329-330.
[206] T. 30 June 2014 p. 35, *referring to* Defence Exhibit 83. The Appeals Chamber notes that during the Appeal Hearing, the Prosecution erroneously referred to Witness ANAN's statement of 8 April 2005 as Defence Exhibit 83 rather than Defence Exhibit 40. *See* T. 30 June 2014 p. 35.

66. The Appeals Chamber recalls that collusion has been defined as an agreement, usually secret, between two or more persons for a fraudulent, unlawful, or deceitful purpose.[207] If an agreement between witnesses for the purpose of untruthfully incriminating an accused were indeed established, their evidence would have to be excluded pursuant to Rule 95 of the ICTR Rules.[208] However, a mere risk of collusion is insufficient to exclude evidence under Rule 95 of the ICTR Rules.[209]

67. The Appeals Chamber notes that, at the Appeal Hearing, the Prosecution identified Witness ANAT's statement, which was recorded by Witness ANAN, as Defence Exhibit 83.[210] The statement, dated 17 April 2005, is a confession of Witness ANAT's own criminal conduct during the genocide and makes no reference to Ngirabatware or to the events at the Cyanika-Gisa roadblock.[211] It also appears that, by the time the statement of Witness ANAT was recorded by Witness ANAN, the latter had already implicated Ngirabatware in a statement taken nine days earlier, on 8 April 2005.[212] In view of this evidence, the Appeals Chamber finds that Ngirabatware fails to show an error in the Trial Chamber's conclusion that Witness ANAN's exposure to Witness ANAT's statement did not taint Witness ANAN's evidence and that the allegation of collusion was speculative. Consequently, the Appeals Chamber need not examine whether the Trial Chamber correctly considered that the differences in the witnesses' testimonies precluded any tainting as a result of Witness ANAN's exposure to Witness ANAT's statement.

68. Furthermore, given that the Trial Chamber had the advantage of observing the witness's demeanour in court, the Appeals Chamber considers that it was reasonable for the Trial Chamber to accept Witness ANAT's denial of conspiring to falsely implicate Ngirabatware. The Appeals Chamber also considers that the mere fact that Witnesses ANAN and ANAT were serving sentences in the same prison does not, in itself, demonstrate collusion.[213]

69. The Appeals Chamber further notes that the Trial Chamber was mindful of the fact that Witnesses ANAT and ANAN did not mention Ngirabatware in some of their prior statements. The

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[207] *Gatete* Appeal Judgement, para. 106, *citing Kanyarukiga* Appeal Judgement, para. 238; *Setako* Appeal Judgement, para. 137; *Renzaho* Appeal Judgement, para. 275; *Karera* Appeal Judgement, para. 234.
[208] *Gatete* Appeal Judgement, para. 106; *Kanyarukiga* Appeal Judgement, para. 238; *Setako* Appeal Judgement, para. 137; *Renzaho* Appeal Judgement, para. 275; *Karera* Appeal Judgement, para. 234. Rule 95 of the ICTR Rules provides: "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."
[209] *Kanyarukiga* Appeal Judgement, para. 238.
[210] *See* T. 30 June 2014 p. 35. The Appeals Chamber notes that Ngirabatware did not contest the Prosecution's submission that Defence Exhibit 83 was Witness ANAT's statement recorded by Witness ANAN. *See also* T. 31 August 2010 pp. 43-44.
[211] *See* Defence Exhibit 83, pp. 1-6.
[212] The Trial Chamber noted that Witness ANAN first implicated Ngirabatware on 8 April 2005. *See* Trial Judgement, para. 196. *See also* Defence Exhibit 40, p. 2.

Trial Chamber nevertheless accepted as reasonable Witness ANAT's explanation that he did not implicate Ngirabatware in letters he wrote to the *Gacaca* court following his conviction, because these went through the Gisenyi prison's *Gacaca* committee in which Ngirabatware's relatives were influential and, therefore, he feared for his life and the lives of family members.[214] The Trial Chamber also accepted Witness ANAN's explanation that he did not mention Ngirabatware in his prior statements to the Rwandan authorities and ICTR investigators made in 2002 because no one asked him specific questions about Ngirabatware.[215] The Appeals Chamber recalls that trial chambers have full discretionary power in assessing the credibility of a witness and in determining the weight to be accorded to his testimony.[216] Ngirabatware has failed to show that no reasonable trial chamber could have accepted the explanations provided by Witnesses ANAT and ANAN for not referring to Ngirabatware in their prior statements.

70. For the foregoing reasons, the Appeals Chamber finds that Ngirabatware has failed to show that the Trial Chamber erred in finding that no collusion or tainting between Witnesses ANAN and ANAT was demonstrated.

2. Witnesses ANAN and ANAT

71. Ngirabatware asserts that the Trial Chamber erred in finding that the testimonies of Witnesses ANAN and ANAT were reliable, consistent, and corroborated each other despite their previous convictions and the Trial Chamber's obligation to exercise caution in its assessment.[217] In particular, he refers to discrepancies in their evidence regarding: (i) the location of the roadblock;[218] (ii) the date of the incident;[219] (iii) the mutual presence of Witnesses ANAN and ANAT at the roadblock;[220] (iv) the presence at the roadblock of a crowd and its size;[221] and (v) the purpose,

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[213] *Cf., e.g., Kanyarukiga* Appeal Judgement, paras. 240-241; *Setako* Appeal Judgement, paras. 134-139. *See also Karera* Appeal Judgement, para. 234.
[214] Trial Judgement, para. 312, *referring to* Witness ANAT, T. 17 March 2010 p. 44.
[215] Trial Judgement, para. 196, *referring to* Witness ANAN, T. 8 February 2010 p. 30 (closed session). *Cf., e.g., Karera* Appeal Judgement, paras. 110-114; *Kajelijeli* Appeal Judgement, para. 96; *Gatete* Appeal Judgement, para. 212.
[216] *Kanyarukiga* Appeal Judgement, para. 121, *referring to Bikindi* Appeal Judgement, para. 114, *Nchamihigo* Appeal Judgement, para. 47, *Nahimana et al.* Appeal Judgement, para. 194.
[217] Appeal Brief, paras. 248-249, 252, 258. *See also* T. 30 June 2014 pp. 8, 12, 43-45. In addition, Ngirabatware appears to argue that the Trial Chamber erred by relying on the evidence of Witnesses ANAN and ANAT which was not corroborated by that of Witness ANAO. *See* Appeal Brief, para. 248; Reply Brief, para. 105. The Appeals Chamber declines to consider Ngirabatware's undeveloped submission. In addition, the Appeals Chamber notes that, in so far as the incident at the Cyanika-Gisa roadblock is concerned, the Trial Chamber observed that the evidence of Witness ANAO corroborated that of Witnesses ANAN and ANAT in relation to the presence at the roadblock of Honoré Ndayamiyemenshi, given Witness ANAO's testimony that Ndayamiyemenshi had been responsible for the Cyanika-Gisa roadblock at the relevant time. *See* Trial Judgement, para. 306.
[218] Appeal Brief, paras. 248, 250(i).
[219] Appeal Brief, paras. 240, 248.
[220] Appeal Brief, para. 248.
[221] Appeal Brief, paras. 244(iii)-(v), 245, 248, 250(ii).

amount, and recipient of the money given by Ngirabatware at the roadblock.[222] He also argues that the Trial Chamber erred in ignoring the inconsistencies between Witness ANAN's prior statements and his testimony, and in excusing his refusal to answer questions during cross-examination.[223]

72. The Prosecution responds that the Trial Chamber correctly assessed the reliability of the testimonies of Witnesses ANAN and ANAT and found that they corroborated each other on material aspects.[224]

73. The Appeals Chamber finds that Ngirabatware has failed to show that the Trial Chamber erred in accepting the evidence of Witnesses ANAN and ANAT as consistent and reliable with respect to the location of the roadblock and the date of the commission of the crime. The Trial Chamber considered Witness ANAN's evidence that the roadblock was located on a tarmac road near the Cyanika market in the Gisa Sector,[225] as well as Witness ANAT's testimony that the roadblock was at Cyanika, on the road leading from Gisenyi to Ruhengeri.[226] Both witnesses testified that the roadblock was near Cyanika and that Honoré Ndayamiyemenshi was present.[227] The Trial Chamber was satisfied that, despite referring to it differently, the two witnesses testified as to the same roadblock.[228] The Appeals Chamber finds that the Trial Chamber's conclusion was reasonable, particularly given that the Trial Chamber had the benefit of its own observations during the site visit to the alleged location.[229]

74. The Trial Chamber also duly considered the discrepancy in dates between the testimony of Witness ANAN, who described the demonstrations as taking place two to three days after Bucyana's assassination, and Witness ANAT who placed this event on the day after the assassination.[230] Nevertheless, it found this to be a minor discrepancy justified by the lapse of time since the events had occurred.[231] The Appeals Chamber recalls 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.[232] It is not necessary that both

[222] Appeal Brief, para. 248.
[223] Appeal Brief, paras. 255-256.
[224] Response Brief, paras. 315-320, 322-328. *See also* T. 30 June 2014 pp. 34-35.
[225] Trial Judgement, para. 301, *referring to* Witness ANAN, T. 1 February 2010 pp. 36-37, 43.
[226] Trial Judgement, para. 302, *referring to* Witness ANAT, T. 16 March 2010 p. 67, T. 17 March 2010 p. 59.
[227] Witness ANAN, T. 1 February 2010 pp. 36-37; Witness ANAT, T. 16 March 2010 pp. 67-68.
[228] Trial Judgement, paras. 304-305.
[229] Trial Judgement, para. 305.
[230] Trial Judgement, para. 307, *referring to* Witness ANAN, T. 1 February 2010 pp. 33-34, 43, Witness ANAT, T. 16 March 2010 pp. 67-68, 70, T. 17 March 2010 p. 59.
[231] Trial Judgement, para. 307, *referring to* Witness ANAN, T. 1 February 2010 pp. 33-34, 43, Witness ANAT, T. 16 March 2010 pp. 67-68, 70, T. 17 March 2010 p. 59.
[232] *Gatete* Appeal Judgement, para. 125, *referring to Kanyarukiga* Appeal Judgement, paras. 177, 220, *Ntawukulilyayo* Appeal Judgement, para. 121, *Nahimana et al.* Appeal Judgement, para. 428.

testimonies be identical in all aspects or describe the same fact in the same way.[233] It follows 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.[234] Ngirabatware has failed to show that the Trial Chamber erred in applying these principles to the evidence of Witnesses ANAN and ANAT in relation to the location of the roadblock and the time of the commission of the crime.

75. The Trial Chamber further noted that, while both witnesses testified as to being present at the roadblock, Witness ANAT stated that Witness ANAN was not there.[235] Contrary to Ngirabatware's submission,[236] the Trial Chamber provided a reasonable explanation as to why it considered this to be a minor discrepancy which did not cast doubt on the credibility of either witness. In particular, it noted that: (i) the witnesses did not know each other at the relevant time and therefore Witness ANAT would not have been able to recognize Witness ANAN; (ii) Witness ANAN was never asked during his testimony whether Witness ANAT was present; and (iii) both witnesses testified to the presence of Ndayambiyemenshi together with a group which had assembled at the roadblock.[237]

76. Ngirabatware has also failed to demonstrate that the Trial Chamber erred in its finding that Witness ANAN's testimony was consistent with that of Witness ANAT with regard to the presence of a group of people at the roadblock. In particular, the Trial Chamber's observation that both witnesses testified to a group assembled at the roadblock was consistent with the witnesses' testimony on that matter.[238] However, Witness ANAT's testimony was silent as to the size of the group.[239] In effect, in finding that the number of people addressed by Ngirabatware at the roadblock "may have been as high as between 150 and 250 people",[240] the Trial Chamber relied exclusively on the evidence of Witness ANAN.[241]

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[233] *Gatete* Appeal Judgement, para. 125, *referring to Kanyarukiga* Appeal Judgement, para. 220, *Ntawukulilyayo* Appeal Judgement, para. 24, *Nahimana et al.* Appeal Judgement, para. 428.
[234] *Gatete* Appeal Judgement, para. 205, *referring to Hategekimana* Appeal Judgement, para. 82, *Ntawukulilyayo* Appeal Judgement, para. 24, *Nahimana et al.* Appeal Judgement, para. 428.
[235] Trial Judgement, para. 310.
[236] *See* Appeal Brief, para. 248.
[237] Trial Judgement, para. 310. The Appeals Chamber notes that, contrary to Ngirabatware's submission (*See* Appeal Brief, para. 248), the fact that both witnesses were CDR party members does not in itself undermine the Trial Chamber's conclusion that the witnesses did not know each other in 1994, particularly in light of Witness ANAT's testimony that their respective activities as CDR members were conducted at different locations. *See* Witness ANAT, T. 17 March 2010 p. 59.
[238] Trial Judgement, paras. 301-302, 310. *See also* Witness ANAN, T. 1 February 2010 p. 37; Witness ANAT, T. 16 March 2010 p. 67.
[239] Witness ANAT, T. 16 March 2010 p. 67.
[240] Trial Judgement, para. 319.
[241] Trial Judgement, paras. 237, 310.

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77. The Appeals Chamber recalls that trial chambers have discretion to decide whether corroboration is necessary, and to rely on uncorroborated, but otherwise credible, witness testimony.[242] Therefore, a trial chamber may rely on a single witness testimony for the proof of a material fact.[243] The Trial Chamber's discretion to rely on uncorroborated, but otherwise credible, witness testimony applies equally to the evidence of witnesses who may have motive to implicate the accused, provided that appropriate caution is exercised in the evaluation of their testimony.[244]

78. The Trial Chamber was satisfied that Witness ANAN was a credible and reliable witness.[245] In its assessment, it explicitly took into account his conviction of genocide for events in late April 1994.[246] Because of his conviction and custodial sentence, as well as his involvement in distributing weapons to CDR party members and other youths, which rendered him a possible accomplice of Ngirabatware, the Trial Chamber decided to treat Witness ANAN's testimony with the appropriate caution.[247]

79. The Trial Chamber also considered and rejected Ngirabatware's challenge to Witness ANAN's credibility on account of omissions in his prior statements and inconsistencies with his testimony. Specifically, the Trial Chamber noted that the witness had made a number of statements and confessions in 2002, including one to an ICTR investigator in which he addressed the role of over 50 persons; yet in none of these did he refer to Ngirabatware whom he implicated for the first time in a statement in April 2005.[248] However, the Trial Chamber found reasonable Witness ANAN's explanation that he did not mention Ngirabatware earlier because no one asked him specific questions in this regard.[249] As the ICTR Appeals Chamber has previously held, "to suggest that if something were true a witness would have included it in a statement or a confession letter is obviously speculative and, in general, it cannot substantiate a claim that a Trial Chamber erred in assessing the witness's credibility."[250] Accordingly, Ngirabatware has failed to show that the Trial Chamber erred in this respect.

80. Furthermore, the Trial Chamber considered and rejected Ngirabatware's submissions that Witness ANAN's testimony should be disregarded in its entirety as he was uncooperative and

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[242] *Gatete* Appeal Judgement, para. 138, *referring to Ntabakuze* Appeal Judgement, para. 150, *Ntawukulilyayo* Appeal Judgement, para. 21, *Karera* Appeal Judgement, para. 45, *Hategekimana* Appeal Judgement, para. 150, *Renzaho* Appeal Judgement, para. 556.
[243] *Hategekimana* Appeal Judgement, para. 187, *referring to Horadinaj et al.* Appeal Judgement, para. 219; *Karera* Appeal Judgement, para. 45; *Kajelijeli* Appeal Judgement, para. 170.
[244] *Šainović et al.* Appeal Judgement, para. 1101, *referring to Nchamihigo* Appeal Judgement, paras. 42-48.
[245] Trial Judgement, paras. 197, 308.
[246] Trial Judgement, para. 192.
[247] Trial Judgement, paras. 193, 283.
[248] Trial Judgement, para. 196.
[249] Trial Judgement, para. 196, *referring to* Witness ANAN, T. 8 February 2010 p. 30 (closed session).
[250] *Munyakazi* Appeal Judgement, para. 85, *citing Kajelijeli* Appeal Judgement, para. 176.

elusive.[251] In doing so, it recalled that during cross-examination, Ngirabatware's counsel had focused for days on the offences committed by Witness ANAN in Rwanda which caused "uneasiness in the witness that his case would be reopened".[252] Indeed, the trial record shows that although the witness was initially prepared to answer questions in relation to the proceedings against him,[253] he subsequently expressed concerns that providing further information in this regard may cause the reopening of the case against him.[254] He therefore became reluctant to provide further details in this regard.[255] Given that the Trial Chamber had the advantage of observing Witness ANAN's demeanour and responses in direct and cross-examination, the Appeals Chamber finds that Ngirabatware has failed to show that the Trial Chamber erred in relying on Witness ANAN's evidence despite his reluctance to answer certain questions regarding his criminal record.

81. The Appeals Chamber further notes that, although Witness ANAN's testimony as to the size of the group assembled at the roadblock was not supported by other evidence, other important aspects of his testimony about this incident were corroborated by the evidence of Witness ANAT.[256] Taking the Trial Chamber's considerations as a whole, the Appeals Chamber is satisfied that the Trial Chamber exercised appropriate caution in evaluating Witness ANAN's testimony. In view of the discretion enjoyed by trial chambers in assessing the credibility of a witness and determining the weight to be accorded to his testimony,[257] the Appeals Chamber finds that Ngirabatware has failed to demonstrate that no reasonable trier of fact could have relied on Witness ANAN's uncorroborated evidence about the size of the group assembled at the Cyanika-Gisa roadblock.

82. As to Ngirabatware's submissions that there were discrepancies in the evidence of Witnesses ANAN and ANAT regarding the purpose, amount, and recipient of the money Ngirabatware gave at the roadblock,[258] the Appeals Chamber recalls that Ngirabatware was not

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[251] Trial Judgement, para. 291.
[252] Trial Judgement, para. 291.
[253] *See, e.g.*, Witness ANAN, T. 2 February 2010 pp. 16-29, 48, 80 (closed session), T. 3 February 2010 p. 35 (closed session).
[254] Witness ANAN, T. 2 February 2010 p. 19 ("I know that because people have been here several times and that they were subsequently returned to prison, well, I would not like much discussion or much attention to be focused on my case. You said that you are protecting my safety. But you should also bear in mind this important point, people were taken back to prison after they completed their testimony here in Arusha. I would not like that to be my case."), T. 2 February 2010 pp. 32-33, 36-37.
[255] *See, e.g.*, Witness ANAN, T. 2 February 2010 pp. 88-89 (closed session).
[256] The Appeals Chamber notes in particular that Witness ANAN's description of the relevant events was corroborated by Witness ANAT as to the approximate timing of the event and location of the roadblock, Ngirabatware's arrival, inciting statements and giving money, as well as the presence of a group at the roadblock. *See* Trial Judgement, paras. 301-302, 305-307, 310, 313.
[257] *Ndindiliyimana et al.* Appeal Judgement, para. 331, *referring to Kanyarukiga* Appeal Judgement, para. 121, *Bikindi* Appeal Judgement, para. 114, *Nchamihigo* Appeal Judgement, para. 47, *Nahimana et al.* Appeal Judgement, para. 194.
[258] Appeal Brief, para. 246(ii)-(iii).

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found criminally responsible on the basis of this conduct.[259] Consequently, he fails to show that any discrepancies in the evidence in this regard have an impact on his conviction.

83. In view of the foregoing, Ngirabatware's submissions that the Trial Chamber erred in relying on the evidence of Witnesses ANAN and ANAT are dismissed.

3. Defence Evidence

84. Ngirabatware argues that, by addressing the Prosecution evidence first and then the evidence adduced by the Defence, the Trial Chamber erred in law by failing to consider the evidence as a whole.[260] He also claims that the Trial Chamber effectively reversed the burden of proof when evaluating the evidence of Defence Witnesses Tchemi Tchambi Aouili, DWAN-114, and DWAN-49.[261] Ngirabatware further asserts that the Trial Chamber erred by not relying on UNAMIR Situation Reports and rejecting the evidence of Witnesses Aouili, DWAN-114, Joseph Habinshuti, and DWAN-49.[262] He claims in particular that the Trial Chamber erred in finding that all the Defence witnesses testifying on this matter may have missed a demonstration of the scale attributed to it by Witness ANAN.[263] Lastly, he asserts that the Trial Chamber's finding that the demonstration had taken place in "mid-afternoon" was unsupported by the evidence, and that the Trial Chamber erred in stating that the testimonies of Witnesses Habinshuti and ANAN were consistent in this respect.[264]

85. In response, the Prosecution submits that it was reasonable for the Trial Chamber to attach limited probative value to the evidence provided by the Defence witnesses and to rely instead on the testimonies of Witnesses ANAN and ANAT.[265]

86. The Appeals Chamber notes that, in articulating the burden of proof, the Trial Chamber correctly recalled that the ultimate weight to be attached to each piece of evidence cannot he determined in isolation.[266] It was also mindful of its obligation to weigh the totality of the evidence in order to determine whether the Prosecution has met the burden of proof beyond reasonable doubt.[267] In relation to the events at the Cyanika-Gisa roadblock, the Trial Chamber first discussed

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[259] *See* Trial Judgement, paras. 319-320, 1332.
[260] Appeal Brief, para. 246(i). *See also* T. 30 June 2014 pp. 8-10.
[261] Appeal Brief, para. 246(ii), first and fourth bullet points. *See also* T. 30 June 2014 pp. 8-9.
[262] Appeal Brief, paras. 246(ii), 257. *See also* T. 30 June 2014 pp. 9-10.
[263] T. 30 June 2014 p. 9.
[264] Appeal Brief, paras. 246(ii), second and fifth bullet-points, 246(iii); Reply Brief, para. 104. *See also* T. 30 June 2014 p. 9.
[265] Response Brief, paras. 307-313. *See also* T. 30 June 2014 pp. 35-36.
[266] Trial Judgement, para. 50, *referring to Martić* Appeal Judgement, para. 233.
[267] Trial Judgement, para. 50, *referring to Martić* Appeal Judgement, para. 233.

the evidence presented by the Prosecution.[268] Having considered Ngirabatware's challenges to this evidence, the Trial Chamber concluded that Witnesses ANAN and ANAT provided credible and consistent accounts of the events.[269] It then turned to assess the evidence presented by Ngirabatware. Having examined the testimonies of the relevant Defence witnesses,[270] the Trial Chamber preferred to rely on the evidence of Prosecution Witnesses ANAN and ANAT which it found "compelling".[271] The Appeals Chamber recalls that, in assessing witness testimony, "it falls to the Trial Chamber to take the approach it considers most appropriate for the assessment of evidence".[272] The Trial Chamber's considerations reveal a careful and detailed discussion of the evidence before it. The Appeals Chamber finds no merit in Ngirabatware's submission that, in reaching its conclusions, the Trial Chamber failed to consider the evidence as a whole.

87. The Appeals Chamber turns to Ngirabatware's submission that the Trial Chamber effectively reversed the burden of proof in evaluating the evidence of Defence Witnesses Aouili, DWAN-114, and DWAN-49. The Trial Chamber considered the testimony of Witnesses Aouili and DWAN-114, both former UNAMIR observers, to the effect that they did not see or hear of a roadblock or a demonstration of the magnitude described by Witness ANAN in the Cyanika-Gisa area, and that such an event could not have taken place without them being aware of it.[273] The Trial Chamber noted, however, the limitations placed on UNAMIR observers in carrying out their mandate and their "likely lack of information" on such events, as well as the fact that they were not tasked with investigations.[274] It also considered that both witnesses acknowledged that events may have occurred in that area of which they may not have been aware.[275]

88. The Appeals Chamber finds no merit in Ngirabatware's claim that the language used by the Trial Chamber suggests a reversal of the burden of proof. The Trial Chamber's observations reflect that it was not satisfied that Witnesses Aouili and DWAN-114 would have necessarily known that a demonstration in the Cyanika-Gisa area had taken place. Indeed, the trial record shows that Witness Aouili accepted, albeit with some reservation, that it remained possible that events had occurred in the Gisenyi prefecture without UNAMIR being informed about them.[276] He also confirmed that it

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[268] Trial Judgement, paras. 301-313.
[269] Trial Judgement, para. 313.
[270] Trial Judgement, paras. 314-318.
[271] Trial Judgement, para. 318.
[272] *Kalimanzira* Appeal Judgement, para. 96, *referring to Rutaganda* Appeal Judgement, para. 207; *Kayishema and Ruzindana* Appeal Judgement, para. 119.
[273] Trial Judgement, para. 314, *referring to* Witness Aouili, T. 22 February 2012 pp. 16-17, 23-24, 26, Witness DWAN-114, T. 20 February 2012 pp. 48-50, 53, T. 21 February 2012 pp. 3-4.
[274] Trial Judgement, para. 315.
[275] Trial Judgement, para. 315.
[276] Witness Aouili, T. 22 February 2012 p. 18. In particular, in response to the Prosecutor's question "(d)o you agree that it is possible [that] events occurred in Gisenyi prefecture in public but the military observers of the UN did not observe them or were not informed about them?" Witness Aouili responded that "I will agree with you on that but on

was not within UNAMIR's official tasks to monitor political rallies and conduct investigations,[277] and it was up to "anyone interested" to come and provide information about various incidents.[278] He further testified that, towards the end of February, there were fewer patrols outside Gisenyi town as a result of fuel shortage.[279] Witness Aouili denied ever seeing personally a civilian roadblock and conceded that it remained possible that a civilian roadblock was erected but it changed location in the meantime.[280]

89. Furthermore, Witness DWAN-114 also testified that UNAMIR was experiencing difficulties related to transport, communication,[281] and in gathering information relevant for carrying out its mandate.[282] In particular, he testified that, when he was deployed in Gisenyi on the first or second week of February 1994, his team consisted of six military observers,[283] they had no vehicles or communications equipment, and "depended on [their] two feet" for carrying out patrols within the borders of Gisenyi town.[284] In addition, he testified that, while they gathered information through "personal conversations with people", only one person on his team spoke French, no one could understand Kiswahili or Kinyarwanda, and they did not have an interpreter.[285] The witness conceded that demonstrators could have blocked the main road from Ruhengeri to Gisenyi at Cyanika-Gisa after the death of CDR Chairman Bucyana, without the Gisenyi based UNAMIR observers knowing about it.[286]

90. The Appeals Chamber recalls that the task of hearing, assessing, and weighing the evidence presented at trial is left primarily to the trial chamber,[287] and that the assessment of the demeanour of witnesses in considering their credibility is one of the fundamental functions of a trial chamber to which the Appeals Chamber must accord considerable deference.[288] Bearing these principles in

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account of the small size of Gisenyi and the account of the fact that we, the observers located there, had a lot of advantages. Now if it happened publicly, it could not have escaped us, or – it's not possible that we were informed. Publicly, we would have been informed, or we would have seen it."

[277] Witness Aouili, T. 22 February 2012 pp. 20, 22, 27.

[278] Witness Aouili, T. 22 February 2012 pp. 25, 27.

[279] Witness Aouili, T. 22 February 2012 p. 27.

[280] Witness Aouili, T. 22 February 2012 pp. 23-24.

[281] DWAN-114, T. 20 February 2012 pp. 25-26, 50, T. 21 February 2012 p. 11.

[282] DWAN-114, T. 21 February 2012 p. 11.

[283] DWAN-114, T. 21 February 2012 p. 10. Witness Aouili testified that at the beginning there were six military observes who were subsequently joined by one more person. *See* Witness Aouili, T. 22 February 2012 p. 7.

[284] DWAN-114, T. 20 February 2012 pp. 25-26, T. 21 February 2012 p. 10.

[285] DWAN-114, T. 20 February 2012 pp. 29-30, T. 21 February 2012 p. 11.

[286] DWAN-114, T. 21 February 2012 p. 4.

[287] *Kupreškić et al.* Appeal Judgement, para. 30.

[288] *Hategekimana* Appeal Judgement, para. 202, *referring to Muvunyi II* Appeal Judgement, para. 26, *Nchamihigo* Appeal Judgement, para. 47, *Bikindi* Appeal Judgement, para. 114, *Simba* Appeal Judgement, para. 9, *Nahimana et al.* Appeal Judgement, paras. 14, 194, *Ndindabahizi* Appeal Judgement, para. 34, *Ntagerura et al.* Appeal Judgement, paras. 12, 213, *Semanza* Appeal Judgement, para. 8, *Ntakirutimana* Appeal Judgement, paras. 12, 204, 244, *Kamuhanda* Appeal Judgement, para. 138, *Kayishema and Ruzindana* Appeal Judgement, para. 222.

mind, Ngirabatware has failed to show that the Trial Chamber erred in its evaluation of the evidence of Witnesses Aouili and DWAN-114.

91. The Trial Chamber further considered the testimony of Witness DWAN-49 that a roadblock did not exist at Cyanika-Gisa prior to the death of President Habyarimana, but found it to be of limited probative value.[289] In particular, the Trial Chamber found that his testimony was based in part on evidence presented in *Gacaca* proceedings and it remained possible that not all events of 1994 were raised in those proceedings.[290] The Trial Chamber also considered that the witness's vague and general assertion, that he passed by the area of the roadblock every day, did not exclude the possibility that he missed the mid-afternoon demonstration testified to by Prosecution witnesses.[291] The Trial Chamber's language in this regard merely indicates that it was not satisfied that the witness would have necessarily known that a demonstration in the Cyanika-Gisa area had taken place. The Appeals Chamber therefore finds no merit in Ngirabatware's argument that the Trial Chamber reversed the burden of proof in evaluating the evidence of Witness DWAN-49. Nor has Ngirabatware shown that the Trial Chamber otherwise erred in its assessment of this witness's evidence.

92. The Appeals Chamber further recalls that a trial chamber is not required to expressly refer and comment upon every piece of evidence admitted onto the record.[292] Ngirabatware's suggestion that had a demonstration at the Cyanika-Gisa roadblock taken place, it would have been mentioned in UNAMIR Situation reports[293] is speculative and fails to show an error on the part of the Trial Chamber.

93. Finally, the Appeals Chamber finds no merit in Ngirabatware's claim that there was no evidence supporting the Trial Chamber's finding that the demonstration took place in "mid-afternoon".[294] In reaching its finding, the Trial Chamber relied on Witness ANAN's testimony that the demonstrators' activities began at the Electrogaz roadblock and moved to the Cyanika-Gisa roadblock at approximately 2.00 p.m.[295] It also considered the testimony of Witness Habinshuti, a gendarme who was on alert for demonstrations after Bucyana's death.[296] Although the latter testified that no such demonstration had taken place because otherwise he would have known of it[297] he also stated that by 2.00 p.m. he had returned to his military camp.[298] On this basis, the Trial

[289] Trial Judgement, para. 318, *referring to* Witness DWAN-49, T. 19 September 2011 pp. 31, 39.
[290] Trial Judgement, para. 318.
[291] Trial Judgement, para. 318.
[292] *See Munyakazi* Appeal Judgement, paras. 174-175, *referring to Muhimana* Appeal Judgement, para. 72.
[293] Appeal Brief, para. 246, third bullet point.
[294] *See* Trial Judgement, para. 318.
[295] *See* Trial Judgement, para. 316. *See also* Witness ANAN, T. 1 February 2010 pp. 33-36, 40.
[296] Trial Judgement, para. 316, *referring to* Witness Habinshuti, T. 17 October 2011 pp. 17-19, 26.
[297] Trial Judgement, para. 316, *referring to* Witness Habinshuti, T. 17 October 2011 pp. 17-19, 26.

Chamber found that there was no contradiction between his testimony and that of Witness ANAN to the effect that the demonstration at the Cyanika-Gisa roadblock began at approximately 2.00 p.m.[299] Importantly, the Trial Chamber added that Witness Habinshuti's insistence that no demonstrations, killings, or other events happened in his area, despite being confronted with documents to the contrary, diminished his credibility.[300]

94. Accordingly, Ngirabatware has not demonstrated that the Trial Chamber erred in its assessment of the Defence evidence.

4. Ngirabatware's Testimony

95. Ngirabatware submits that the Trial Chamber erred in disregarding his testimony concerning his whereabouts on 23, 24, and 25 February 1994 and in failing to provide a reasoned opinion.[301] He also argues that the Trial Chamber erred in not drawing a "necessary inference" from the fact that his testimony in this respect was not challenged by the Prosecution, as required by Rule 90(G)(ii) of the ICTR Rules.[302]

96. The Prosecution responds that the Trial Chamber considered and correctly rejected Ngirabatware's testimony that he was not in Gisenyi at the time alleged in the Indictment, and that his claim in this regard was sufficiently challenged in cross-examination.[303]

97. The Appeals Chamber recalls that, as for any witness, a trier of fact is required to determine the overall credibility of an accused testifying at his own trial and then assess the probative value of his evidence in the context of the totality of the evidence.[304] A review of the Trial Judgement shows that the Trial Chamber expressly considered Ngirabatware's evidence, including his testimony that he was in Kigali on 23, 24, and 25 February 1994.[305] However, it considered that the Defence evidence did not cast a reasonable doubt on the compelling accounts provided by Prosecution Witnesses ANAN and ANAT.[306] In addition, in assessing the probative value to be accorded to Ngirabatware's testimony, on several occasions the Trial Chamber noted "the obvious motive that Ngirabatware may have in deflecting [the] criminal allegation against him in his own trial".[307] The

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[298] Trial Judgement, para. 316. *See also* Trial Judgement, para. 251, *referring to* Witness Habinshuti, T. 17 October 2011 pp. 23-24, 63.
[299] Trial Judgement, para. 316.
[300] Trial Judgement, para. 317.
[301] Appeal Brief, paras. 241(i), 246(iv); Reply Brief, para. 103. *See also* T. 30 June 2014 pp. 8-9.
[302] Appeal Brief, para. 241(ii). *See also* Appeal Brief, para. 56(iii).
[303] Response Brief, paras. 301-303.
[304] *Karera* Appeal Judgement, para. 19, *referring to Ntakirutimana* Appeal Judgement, para. 391, *Musema* Appeal Judgement, para. 50, *Muhimana* Appeal Judgement, para. 19.
[305] Trial Judgement, paras. 83-84, 165-166, 177, 201, 245-247, 294, 303.
[306] Trial Judgement, para. 318.
[307] Trial Judgement, paras. 201, 294, 826.

Trial Chamber was not required to systematically justify why it rejected each part of his evidence. The Appeals Chamber notes that the Trial Chamber had the advantage of observing Ngirabatware's demeanour in court. Given the deference to be accorded to a trial chamber's assessment of the credibility of witnesses testifying before it, Ngirabatware has failed to show that the Trial Chamber erred in rejecting his testimony.

98. In addition, Rule 90(G)(ii) of the ICTR Rules does not support Ngirabatware's allegation of an error on the part of the Trial Chamber. The ICTR Appeals Chamber has previously held that Rule 90(G)(ii) of the ICTR Rules was not intended to apply to an accused testifying as a witness in his own case given that, in principle, an accused is well aware of the Prosecution's case.[308] Rule 90(G)(ii) of the ICTR Rules is also silent on any inferences that may be drawn by a trial chamber from a witness's testimony that is not subject to cross-examination.[309] Thus it remains within the trial chamber's discretion to infer as true, or not, statements unchallenged during cross-examination.[310] In any event, the Appeals Chamber notes that Ngirabatware, who testified after the presentation of the Prosecution's case, consistently denied the allegations against him.[311] The Prosecution cross-examined Ngirabatware on a number of issues, including his ability to travel from Kigali to Gisenyi after the death of Bucyana, his participation at the CDR demonstration at Electrogaz and Cyanika-Gisa by addressing a group telling them to kill Tutsi, and giving money to the CDR person responsible for the *Impuzamugambi*.[312] The Appeals Chamber therefore finds no merit in Ngirabatware's submission that, on this basis, the Trial Chamber erred in the evaluation of his testimony.

5. Non-admission of Defence Evidence

99. Ngirabatware argues that the Trial Chamber erred in denying his request to have the statements of Witnesses DWAN-48 and DWAN-78 admitted into evidence.[313] The Prosecution responds that Ngirabatware fails to show any error or to demonstrate that he suffered prejudice as a result of the non-admission of the statements in question.[314]

100. The Appeals Chamber notes that on 4 July 2011, Ngirabatware requested admission into evidence of witness statements by, *inter alios*, Witnesses DWAN-48 and DWAN-78 under

[308] *Karera* Appeal Judgement, para. 27.
[309] *Karera* Appeal Judgement, para. 27.
[310] *Karera* Appeal Judgement, para. 29.
[311] *See, e.g.*, Ngirabatware, T. 18 November 2010 p. 22, T. 22 November 2010 pp. 63-64, T. 23 November 2010 pp. 18-20, 29-33, T. 14 December 2010 pp. 41-49.
[312] *See* Ngirabatware, T. 14 December 2010 pp. 28-30, 33, 35, 42-44, 48-50.
[313] Appeal Brief, paras. 259-261(i), (iii), 262. The Appeals Chamber notes that, while Ngirabatware also refers to the will-say statements of Witnesses DWAN-24, DWAN-28, and DWAN-38, he fails to provide a reference to the Trial Chamber's impugned decision. *See* Appeal Brief, para. 261(ii)-(iii).

Rule 92*bis* of the ICTR Rules.[315] In his statement, proposed Witness DWAN-48 alleged, *inter alia*, that Witness ANAN had encouraged him to provide false testimony implicating various accused before the ICTR, including Ngirabatware, in return for a substantial amount of money and that several years later Witness ANAN informed him that he had made false allegations.[316] He also stated that, following Bucyana's death in February 1994, he met regularly with Witness ANAN in the Ngurugunzu or Ntaganzwa Sectors and that he was confident that Witness ANAN had not visited Gisenyi at the relevant time.[317] Similarly, in his statement Witness DWAN-78 also alleged that Witness ANAN never left Kibilira Commune, Gisenyi Prefecture, following Bucyana's death, and that while in prison he had requested DWAN-78 to make false allegations against one person.[318]

101. On 22 September 2011, the Trial Chamber denied Ngirabatware's request finding that the above statements tended to disprove the acts and conduct of Ngirabatware and were therefore inadmissible under Rule 92*bis*(A) of the ICTR Rules.[319] In particular, the Trial Chamber reasoned that the statements, which alleged that Witness ANAN had never gone to Nyamyumba Commune in 1994 or to Gisenyi after Bucyana's death in February 1994, "indirectly contradict Prosecution Witness ANAN's testimony that the Accused visited roadblocks, which is the subject of four paragraphs of the Indictment".[320] In addition, the Trial Chamber found that the statements imputed serious criminal conduct to Witness ANAN and it would be "contrary to the public interest for serious allegations against Witness ANAN to be admitted by way of written statements."[321] Ngirabatware's request for reconsideration or certification to appeal the Trial Chamber's Decision of 22 September 2011 was rejected on 25 November 2011.[322]

102. The Appeals Chamber recalls that, pursuant to Rule 92*bis*(A) of the ICTR Rules, a trial chamber "may admit [...] the evidence of a witness in the form of a written statement *in lieu* of

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[314] Response Brief, paras. 332-334.
[315] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Defence Motion to Declare Written Statements Admissible, for Leave for Certification by a Presiding Officer of These Written Statements and/or for Reconsideration of the Trial Chamber's Decision Rendered on 11 and 12 April 2011, 4 July 2011 (confidential) ("Motion of 4 July 2011"), paras. 31, 42-46, 51-53, 74.
[316] *See* Motion of 4 July 2011, Annex 4(c), RP. 102773-102772.
[317] *See* Motion of 4 July 2011, Annex 4(c), RP. 102774-102773.
[318] *See* Motion of 4 July 2011, Annex 4(e), RP. 102761.
[319] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion to Declare Written Statements Admissible, for Leave for Certification by a Presiding Officer of These Written Statements and/or Reconsideration of the Trial Chamber's Decisions Rendered on 11 and 12 April 2011, 22 September 2011 ("Decision of 22 September 2011"), para. 41.
[320] Decision of 22 September 2011, para. 40, *referring to* Indictment, paras. 24, 41, 48, 49.
[321] Decision of 22 September 2011, para. 41. *See also* Decision of 22 September 2011, para. 40.
[322] *See The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Defence Motion for Reconsideration and/or Certification to Appeal the Trial Chamber's Decision of 22 September 2011 on Admission of Written Statements Pursuant to Rule 92*bis* of the Rules of Procedure and Evidence, 28 September 2011; *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion for Reconsideration or Certification to Appeal the Trial Chamber's Rule 92*bis* Decision of 22 September 2011, 25 November 2011.

written testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment." Pursuant to Rule 92*bis*(A)(ii) of the ICTR Rules, factors against admitting evidence in the form of a written statement include, *inter alia*, whether "there is an overriding public interest in the evidence in question being presented orally". The ICTY Appeals Chamber has also held that:

> Where the evidence is so pivotal to the prosecution case, and where the person whose acts and conduct the written statement describes is so proximate to the accused, the Trial Chamber may decide that it would not be fair to the accused to permit the evidence to be given in written form.[323]

103. The Appeals Chamber observes that the statements of Witnesses DWAN-48 and DWAN-78 relate to the acts of Witness ANAN as opposed to those of Ngirabatware.[324] The Appeals Chamber finds therefore that the Trial Chamber's interpretation of matters going to proof of "the acts and conduct of the accused" is inconsistent with the clear distinction in the jurisprudence between the acts and conduct of the accused, as charged in the indictment, and the acts and conduct of others.[325] It is only the former that is excluded from the procedure laid down in Rule 92*bis* of the ICTR Rules which provides that only matters other than the acts and conduct of the accused can be admitted in written form.[326]

104. In any event, the Trial Chamber's additional reason for denying admission of the proposed evidence in written form is compatible with Rule 92*bis*(A)(ii) of the ICTR Rules. The Appeals Chamber is satisfied that the Trial Chamber acted within its discretion in determining that there was an overriding public interest for such serious allegations, imputing to Witness ANAN conduct potentially undermining the integrity of the proceedings as a whole, to be presented orally. Ngirabatware has failed to demonstrate that he made any effort to call these witnesses to testify or that he had good reason for not doing so. Moreover, rather than articulating an error in the Trial Chamber's reasoning, Ngirabatware merely focuses on the purported importance of the proposed evidence. Such arguments are clearly insufficient to discharge his burden on appeal. Ngirabatware's submissions in this regard are therefore dismissed.

E. Conclusion

105. Based on the foregoing, the Appeals Chamber dismisses Ngirabatware's Fifth Ground of Appeal.

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[323] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002, para. 13 (internal references omitted). *See also* Decision of 22 September 2011, para. 32.
[324] *See* Motion of 4 July 2011, Annexes 4 and 4(e).
[325] *See Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002, para. 9.
[326] *See Galić* Appeal Decision, para. 9.

V. GENOCIDE (GROUND 1)

106. The Trial Chamber convicted Ngirabatware for instigating and aiding and abetting genocide based on his role in distributing weapons and his statements at two roadblocks in Nyamyumba Commune on 7 April 1994.[327] Specifically, the Trial Chamber found that, on 7 April 1994, prior to the attack on Safari Nyambwega, Ngirabatware delivered weapons to the Bruxelles roadblock, where he told Faustin Bagango that he did not want any Tutsis alive in Bruxelles.[328] The Trial Chamber found that Bagango and Jean Simpunga ensured the further distribution of the weapons in Nyamyumba Commune.[329]

107. The Trial Chamber also concluded that, later the same day, and still prior to the attack on Nyambwega, Ngirabatware returned to the Bruxelles roadblock and delivered more weapons.[330] The Trial Chamber found that, upon arriving at the roadblock, Ngirabatware reprimanded the *Interahamwe*, including Juma, for only pretending to work, stated that he brought weapons because he did not want to see any Tutsis in Busheke cellule, and accused Nyambwega of communicating with "*Inyenzi*".[331] The Trial Chamber determined that, following this incident, Ngirabatware delivered weapons to the nearby Gitsimbi/Cotagirwa roadblock where he told Bagango that he did not want to see any Tutsis in Nyamyumba Commune, ordered Bagango to work well, and told him that Nyambwega needed to be located and killed.[332] According to the Trial Judgement, later that same day, various *Interahamwe*, including Juma, attacked and seriously injured Nyambwega.[333]

108. The Trial Chamber further concluded that:

> The *Interahamwe* used at least some of the weapons Ngirabatware distributed on 7 April 1994 during the attacks and killings, and Ngirabatware's actions and words encouraged the *Interahamwe* to kill. This distribution formed a distinct form of encouragement to the *Interahamwe* within Nyamyumba *commune*. The act of distributing the weapons and prompting the *Interahamwe* to kill all Tutsis a day after the President's death, demonstrated Ngirabatware's explicit support for the attacks and killings of Tutsis in Nyamyumba *commune*, and substantially contributed to it.[334]

109. While the Trial Chamber noted that the number of Tutsis killed in Nyamyumba Commune remained unknown,[335] it observed that there was a substantial amount of credible and reliable evidence that Tutsis were attacked and killed starting on 7 April 1994,[336] and that the *Interahamwe*

[327] Trial Judgement, paras. 1337, 1339-1341.
[328] Trial Judgement, paras. 839, 869, 1335.
[329] Trial Judgement, paras. 839, 869, 875, 1335.
[330] Trial Judgement, paras. 840, 870, 1336.
[331] Trial Judgement, paras. 840, 870, 1336.
[332] Trial Judgement, paras. 840, 870, 1336.
[333] Trial Judgement, paras. 871, 1336.
[334] Trial Judgement, para. 1337. *See also* Trial Judgement, para. 882.
[335] Trial Judgement, para. 1412.
[336] Trial Judgement, paras. 876-878.

who manned the Bruxelles and Gitsimbi/Cotagirwa roadblocks were notorious for their role in killing Tutsis and looting their property in the days following President Habyarimana's death.[337]

110. Ngirabatware submits that the Trial Chamber erred in convicting him of instigating and aiding and abetting genocide.[338] In this section, the Appeals Chamber considers Ngirabatware's arguments that: (i) he lacked sufficient notice of the charge of genocide; (ii) the Trial Chamber erred in relation to his responsibility for aiding and abetting genocide; (iii) the Trial Chamber erred in relation to his responsibility for instigating genocide; and (iv) the Trial Chamber erred in its assessment of the evidence in relation to the killings of Thérèse, Dismas, and Nzabanita, and the attack on Nyambwega.

A. Notice

111. Paragraph 16 of the Indictment reads:

> In April 1994, after the death of President HABYARIMANA, Augustin NGIRABATWARE transported weapons to Nyamyumba commune, Gisenyi where he gave these weapons to Faustin BAGANGO, Bourgemestre [*sic*] of Nyamyumba commune for distribution to the Interahamwe militia for the purpose of eliminating members of the Tutsi ethnic group in Gisenyi during the period April to July 1994. In so doing, Augustin NGIRABATWARE instigated and aided and abetted the genocide of the Tutsi.

112. At trial, Ngirabatware argued that the Indictment, including paragraph 16, was impermissibly vague in relation to the time frame, location, the alleged direct perpetrators, the victims, and the mode of responsibility.[339] At both the pre-trial stage and in the Trial Judgement, the Trial Chamber determined that paragraph 16 of the Indictment was sufficiently detailed to provide Ngirabatware with adequate notice.[340]

113. As noted above, on the basis of the allegation in paragraph 16 of the Indictment, the Trial Chamber found that, on 7 April 1994, Ngirabatware delivered weapons to Bagango and the *Interahamwe* gathered at the Bruxelles and the Gitsimbi/Cotagirwa roadblocks in Nyamyumba Commune and exhorted them to kill Tutsis in the area.[341] The Trial Chamber found that, following

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[337] Trial Judgement, para. 881.
[338] Notice of Appeal, paras. 8-14; Appeal Brief, paras. 1-76.
[339] Trial Judgement, para. 699, *referring to* Defence Closing Brief, paras. 41-59. *See also The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Defence Motion to Dismiss Based Upon Defects in Amended Indictment (Rule 72(A)(ii) of the Rules of Procedure and Evidence), 11 March 2009, p. 7.
[340] Trial Judgement, paras. 700-707. *See also The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion to Dismiss Based Upon Defects in Amended Indictment, 8 April 2009 ("Decision on Motion to Dismiss the Indictment"), paras. 31, 38; *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion for Stay of Proceedings Based on Alleged Numerous Defects in the Indictment, 3 April 2012 ("Decision on Motion to Dismiss the Indictment"), paras. 14-15.
[341] Trial Judgement, paras. 839-840, 869-870, 1335-1336.

these distributions, *Interahamwe* who manned the roadblocks participated in killings in Nyamyumba Commune.[342]

114. Ngirabatware submits that the Indictment failed to provide adequate notice of the material facts related to: (i) the date and time of the incidents; (ii) their location; (iii) the number of times he distributed weapons; and (iv) the identity of the perpetrators and the victims.[343]

115. In assessing Ngirabatware's challenges, the Appeals Chamber recalls that charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused.[344] Whether particular facts are "material" depends on the nature of the Prosecution case.[345] Where it is alleged that the accused instigated or aided and abetted in the planning, preparation or execution of the alleged crimes, the Prosecution is required to identify the "particular acts" or "the particular course of conduct" on the part of the accused which forms the basis for the charges in question.[346]

116. If an indictment is found to be defective because it fails to plead material facts or does not plead them with sufficient specificity, the defect may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charges.[347] However, a clear distinction has to be drawn between vagueness in an indictment and an indictment omitting certain charges altogether.[348] 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.[349] In reaching its judgement, a trial chamber can only convict the accused of crimes that are charged in the indictment.[350]

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[342] Trial Judgement, paras. 876, 878, 881, 1337.
[343] Appeal Brief, paras. 2-28, 30. Ngirabatware also challenges the notice he received in relation to his form of responsibility. *See* Appeal Brief, para. 29. However, Ngirabatware develops that challenge in his Third Ground of Appeal. *See infra* Section VII.
[344] *See, e.g., Hategekimana* Appeal Judgement, para. 258; *Muvunyi II* Appeal Judgement, para. 19; *Renzaho* Appeal Judgement, para. 53; *Kalimanzira* Appeal Judgement, para. 46.
[345] *Ntagerura et al.* Appeal Judgement, para. 23.
[346] *Ntagerura et al.* Appeal Judgement, para. 25, *citing Blaškić* Appeal Judgement, para. 213.
[347] *See, e.g., Mugenzi and Mugiraneza* Appeal Judgement, para. 117; *Ntabakuze* Appeal Judgement, para. 30; *Renzaho* Appeal Judgement, para. 55; *Simba* Appeal Judgement, para. 64.
[348] *See, e.g., Mugenzi and Mugiraneza* Appeal Judgement, para. 117; *Ntabakuze* Appeal Judgement, para. 30; *Ntawukulilyayo* Appeal Judgement, para. 189; *Renzaho* Appeal Judgement, para. 55; *Rukundo* Appeal Judgement, para. 29.
[349] *See, e.g., Mugenzi and Mugiraneza* Appeal Judgement, para. 117; *Ntabakuze* Appeal Judgement, para. 30; *Ntawukulilyayo* Appeal Judgement, para. 189; *Renzaho* Appeal Judgement, para. 55; *Rukundo* Appeal Judgement, para. 29.
[350] *Mugenzi and Mugiraneza* Appeal Judgement, para. 117; *Ntawukulilyayo* Appeal Judgement, para. 189; *Munyakazi* Appeal Judgement, para. 36; *Rukundo* Appeal Judgement, para. 29. *See also Kvočka et al.* Appeal Judgement, para. 33.

1. Date and Time

117. In finding that Ngirabatware was present at the Bruxelles and the Gitsimbi/Cotagirwa roadblocks, the Trial Chamber relied principally on the evidence of Prosecution Witnesses ANAE and ANAM.[351] The Trial Chamber noted that Witness ANAE placed the distribution of weapons in April 1994[352] and that Witness ANAM testified that the distribution occurred seven or eight days after the death of President Habyarimana.[353] The Trial Chamber expressed concerns as to the reliability of Witness ANAM's ability to measure time.[354] The Trial Chamber observed, however, that both witnesses linked the distribution of weapons to the attack on Safari Nyambwega, which it considered important in ascertaining the timing of the incidents.[355] Having reviewed the evidence related to the attack on Nyambwega, the Trial Chamber concluded that he was attacked at some point during the day on 7 April 1994, and thus the distribution of weapons occurred on that day as well.[356]

118. Ngirabatware submits that paragraph 16 of the Indictment – which describes the relevant events as occurring "[i]n April 1994, after the death of President Habyarimana" – fails to inform him of the date and time when the incidents occurred.[357] Ngirabatware further contends that the subsequent information concerning the timing of the incident provided by the Prosecution in the Pre-Trial Brief and in the statements of witnesses supporting the allegation offered no additional clarity and fluctuated from some days before the President's death to the end of April 1994.[358] Moreover, according to Ngirabatware, the Trial Chamber improperly altered key facets of the Prosecution case, namely by deciding that the events described by Prosecution Witness ANAM as occurring around 13 or 14 April 1994 in fact occurred on 7 April 1994.[359] To illustrate the prejudice that followed from the imprecision in the date, Ngirabatware recalls that he was limited to only 35 defence witnesses and was forced to call witnesses to account for a variety of dates between 7 and 14 April 1994 rather than call additional or different witnesses to focus on 7 April 1994.[360]

119. The Prosecution responds that paragraph 16 of the Indictment provided adequate notice to Ngirabatware of the date and time of his distribution of weapons in Nyamyumba Commune.[361]

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[351] Trial Judgement, paras. 789-815, 836-838.
[352] Trial Judgement, para. 709.
[353] Trial Judgement, para. 713.
[354] Trial Judgement, para. 787.
[355] Trial Judgement, para. 780. *See* Trial Judgement, paras. 709, 713, 717, 790.
[356] Trial Judgement, paras. 780-788, 790, 840.
[357] Appeal Brief, para. 2.
[358] Appeal Brief, paras. 2-3.
[359] Appeal Brief, para. 5; Reply Brief, paras. 3-6. *See also* T. 30 June 2014 pp. 46-47.
[360] Appeal Brief, paras. 4-6; Reply Brief, para. 2.
[361] Response Brief, paras. 15, 24-30.

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120. The Appeals Chamber observes that the date range pleaded in paragraph 16 of the Indictment appears broad. However, a broad date range, in and of itself, does not invalidate a paragraph of an indictment.[362] Nothing in paragraph 16 of the Indictment indicates that the Prosecution sought to hold Ngirabatware responsible for a single incident of weapon distribution.[363] Moreover, the Prosecution indeed presented evidence of Ngirabatware's role in multiple distributions of weapons in April 1994.[364] The fact that the Prosecution's theory of the scope of the distributions was broader than that ultimately proven at trial does not mean that the notice in relation to the date of the alleged incidents was deficient.[365]

121. The Appeals Chamber is also not convinced that the Pre-Trial Brief provided contradictory information concerning the timing of the specific events on 7 April 1994 that underpin Ngirabatware's convictions. Although the Pre-Trial Brief does not expressly state that the distributions occurred on 7 April 1994, the Appeals Chamber observes that paragraph 57 of the Prosecution Pre-Trial Brief indicates that the relevant distribution occurred "a few days after the President's death". It should be also noted that the Prosecution in its Pre-Trial Brief cautioned against a strict reliance on the dates proposed by its witnesses in their statements and instead indicated that focus be placed on the sequence of events.[366] Bearing this in mind, the Appeals Chamber is not convinced that the variance between 7 April 1994 and "a few days after the President's death" is significant.

122. Moreover, Witness ANAE's anticipated testimony annexed to the Prosecution Pre-Trial Brief echoes the narrow time frame of a few days after the death of the president.[367] As the Trial Chamber observed,[368] a comparison of the anticipated testimonies of Witnesses ANAE and ANAM annexed to the Prosecution Pre-Trial Brief clearly reveals that they concern the same or similar incidents.[369] The fact that the Prosecution Pre-Trial Brief did not expressly indicate that Witness ANAM was intended to support the allegation in paragraph 16 of the Indictment in no way obviates

[362] *Muvunyi I* Appeal Judgement, para. 58.
[363] *Cf. Rutaganda* Appeal Judgement, para. 304.
[364] *See generally* Trial Judgement, Sections 3.10.3-3.10.4.
[365] *Cf. Munyakazi* Appeal Judgement, para. 37.
[366] Prosecution Pre-Trial Brief, para. 23 ("The Prosecution urges caution with respect of the dates of occurrences given by victim-witnesses who refer to something happening on a day that follows a significant event. The Kinyarwanda language does not have a specific term for the English "day after" or the French "lendemain" but an indefinite term that can refer to a series of days. Something that happened several days after an event can be interpreted to mean that it happened the next day and then fixed by an interviewer on a calendar date that a witness who does not live by calendar dates may accept as correct. The Prosecution urges the Court to focus on the witnesses' testimony as to the sequence of events, rather than on matters of clock and calendar for individuals who were in hiding for days or weeks and had neither.").
[367] Prosecution Pre-Trial Brief, Annex 1, RP. 1255-1254 (indicating that "[a] few days after the president's death, Augustin Ngirabatware and other officials arrived at petit Brusxelles [sic] in his car, accompanied by blue Daihatsu pick-up carrying weapons.").
[368] Trial Judgement, para. 790.
[369] Prosecution Pre-Trial Brief, Annex 1, RP. 1255-1254, 1246-1245.

the notice that Ngirabatware received of his role in the distribution of weapons in the Bruxelles area of Nyamyumba Commune in early April 1994. Accordingly, the Appeals Chamber is not convinced that Ngirabatware has shown that the Prosecution Pre-Trial Brief gave materially conflicting and contradictory information concerning the timing of the event.

123. The Appeals Chamber also finds no merit in Ngirabatware's submission that the Trial Chamber impermissibly altered the Prosecution's case by moving the timing of the events described by Witness ANAM from 13 or 14 April 1994 to 7 April 1994 in order to prejudice Ngirabatware. The Prosecution sought a conviction under paragraph 16 of the Indictment on the basis of the testimonies provided by its witnesses including Witness ANAM.[370] Moreover, the Trial Chamber provided clear reasons for fixing the events on 7 April 1994, after noting the link between the distributions described by Witnesses ANAE and ANAM and the attack of Nyambwega, other credible evidence concerning when Nyambwega was killed, and its concerns with the reliability of Witness ANAM's ability to accurately describe time frames.[371] Ngirabatware has not demonstrated that these considerations are unreasonable and, as a consequence, that he was materially prejudiced by the Trial Chamber's decision to fix the events on 7 April 1994.[372]

124. Accordingly, Ngirabatware has not demonstrated that he lacked sufficient notice of the timing of the distribution of weapons or that he was materially prejudiced.

2. Location

125. Ngirabatware submits that paragraph 16 of the Indictment – which describes the events occurring in Nyamyumba Commune, Gisenyi Prefecture – did not provide adequate notice of the location of his culpable conduct.[373] Ngirabatware submits that the combined effect of the absence of notice of the time and place deprived him of an opportunity to identify potential witnesses and conduct effective investigations.[374]

126. The Prosecution responds that Ngirabatware fails to identify any prejudice resulting from the nature of the pleading of the location in paragraph 16 of the Indictment.[375] The Prosecution

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[370] *See* Prosecution Closing Brief, paras. 66-67.
[371] Trial Judgement, paras. 780-788.
[372] *Cf. Muvunyi II* Appeal Judgement, paras. 23-26 (finding that it was not unreasonable for the trial chamber to reject portions of Prosecution evidence tending to suggest that a meeting fell outside the scope of the indictment after the trial chamber assessed the testimonies of the relevant witnesses in the context of other evidence and being satisfied that the witnesses were mistaken).
[373] Appeal Brief, paras. 8-10. *See also* Reply Brief, para. 7. In this respect, Ngirabatware highlights the ICTR Appeals Chamber finding in the *Muvunyi I* Appeal Judgement holding that "a reference to a meeting in 'Mugusa *commune* sometime in late April 1994' did not provide adequate notice of time and location of the alleged culpable conduct." *See* Appeal Brief, para. 8, *referring to Muvunyi I* Appeal Judgement, paras. 121-122.
[374] Appeal Brief, para. 10.
[375] Response Brief, paras. 31-34.

further submits that, even assuming the location was vague, the defect, if any, was cured by subsequent information in the Prosecution Pre-Trial Brief.[376] The Prosecution also highlights the proximity of the roadblocks, both near the home of Ngirabatware's parents, and his ability to fully cross-examine Witnesses ANAE and ANAM in relation to the events.[377]

127. The Appeals Chamber agrees that the reference to Nyamyumba Commune in the Indictment is exceedingly broad and does not alone provide Ngirabatware with adequate notice of his presence in Nyamyumba Commune at the Bruxelles and the Gitsimbi/Cotagirwa roadblocks. As Ngirabatware challenged the notice he received at trial,[378] it falls to the Prosecution to demonstrate that Ngirabatware was not materially prejudiced.[379]

128. Paragraphs 57 and 58 of the Prosecution Pre-Trial Brief as well as the annexed summary of Witness ANAE's anticipated testimony refer to Ngirabatware's role in distributing weapons in the Bruxelles area near his parents' home.[380] Accordingly, the Appeals Chamber is satisfied that Ngirabatware had sufficient notice of his role in distributing weapons in this general area, which, given the close proximity of the Bruxelles and Gitsimbi/Cotagirwa roadblocks,[381] would have allowed Ngirabatware to investigate these incidents.[382] The Prosecution Pre-Trial Brief was filed nearly five months before Witness ANAE testified and eight months before Witness ANAM appeared.[383] In view of this specific information identifying the general area of the distribution, the

[376] Response Brief, para. 32.
[377] Response Brief, paras. 32-33. *See also* Prosecution Pre-Trial Brief, Annex 2, RP. 1142, 1093 (indicating the distance between the roadblocks and a sketch of the roadblocks in proximity to Ngirabatware's parents' home drawn by ICTR Investigators).
[378] *See* Trial Judgement, para. 699, *referring to* Ngirabatware Closing Brief, para. 45. The Prosecution suggests that Ngirabatware challenged the notice he received only at the close of the case which was considered untimely. *See* Response Brief, para. 31. As the Prosecution submits, Ngirabatware did not challenge the location of the distribution of weapons alleged in paragraph 16 of the Indictment at the pre-trial stage. *See The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Defence Motion to Dismiss Based Upon Defects in Amended Indictment, 11 March 2009, pp. 7-8 (challenging only the date range in paragraph 16, and the location in relation to allegations in other paragraphs). However, in rejecting Ngirabatware's challenge in the Trial Judgement, the Trial Chamber did not describe it as untimely. *See* Trial Judgement, paras. 699-700.
[379] *See, e.g.*, *Ndindiliyimana et al.* Appeal Judgement, para. 176; *Muvunyi I* Appeal Judgement, para. 27; *Niyitegeka* Appeal Judgement, para. 200; *Kvočka et al.* Appeal Judgement, para. 35.
[380] Prosecution Pre-Trial Brief, Annex 1, RP. 1255-1254.
[381] *See* Trial Judgement, para. 829.
[382] A review of Witness ANAM's anticipated testimony annexed to the Prosecution Pre-Trial Brief mentions roadblocks in Gitsimbi and the Little Brussels Centre in Rushubi Sector, near Ngirabatware's parents' house. Prosecution Pre-Trial Brief, Annex 1, RP. 1246. Even though the Prosecution Pre-Trial Brief does not list Witness ANAM in relation to paragraph 16 of the Indictment, this information – which clearly relates to the distribution of weapons and which is linked to the charge of genocide – would have provided Ngirabatware with additional information allowing for focused investigations. *See also* Prosecution Pre-Trial Brief, Annex 2, RP. 1142, 1093 (indicating the distance between the roadblocks and a sketch of the roadblocks in proximity to Ngirabatware's parents' home drawn by ICTR Investigators).
[383] The Prosecution Pre-Trial Brief was filed in May 2009. Witnesses ANAE and ANAM testified in October 2009 and January 2010, respectively.

Appeals Chamber is satisfied that the Prosecution provided timely, clear and consistent information regarding the location of the events in Nyamyumba Commune.[384]

129. Accordingly, the Appeals Chamber is not satisfied that Ngirabatware suffered any material prejudice as a result of the defect in the pleading of the location of the events in the Indictment.

3. Number of Distributions

130. Ngirabatware submits that paragraph 16 of the Indictment did not provide him with adequate notice that he would be convicted on the basis of three separate distributions of weapons at two locations, that any subsequent information was neither clear nor consistent, that the Trial Chamber erred in considering the evidence of Witness ANAM in relation to paragraph 16 of the Indictment, and that, as a result, he suffered prejudice.[385]

131. According to Ngirabatware, paragraph 16 of the Indictment and the Prosecution Pre-Trial Brief mentioned only one incident.[386] Ngirabatware acknowledges that Witness ANAM implicated him in additional distributions; however, in his view, any information he had in relation to these incidents did not indicate that it would be used in support of paragraph 16 of the Indictment and did not relate to 7 April 1994.[387] In addition, Ngirabatware argues that, although the information related to Witness ANAM in the Prosecution Pre-Trial Brief refers to the existence of roadblocks in Bruxelles and Gitsimbi, that information indicates only that he distributed weapons at the roadblock near his parents' home in Bruxelles.[388]

132. The Prosecution responds that the number of weapons distributions was not a material fact to be pleaded in the Indictment and that, in any case, Ngirabatware had adequate notice of the number and location of the incidents.[389]

133. The Appeals Chamber finds no merit in Ngirabatware's contention that he was put on notice of his role in only one distribution of weapons. As noted above, the Appeals Chamber is satisfied that paragraph 16 of the Indictment was not limited to one distribution.[390] Moreover, the Appeals Chamber has already rejected Ngirabatware's contention that Witness ANAM's evidence did not relate to the distribution of weapons on 7 April 1994 and that it was improper for the Trial Chamber

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[384] Ngirabatware's reliance on the *Muvunyi I* Appeal Judgement is inapposite. In that case, the ICTR Appeals Chamber concluded that, notwithstanding the defect in the indictment, Muvunyi failed to make a timely objection or demonstrate that he was prejudiced by the admission of the evidence related to the meeting. *See Muvunyi I* Appeal Judgement, paras. 123-124.
[385] Appeal Brief, paras. 16-23; Reply Brief, para. 12.
[386] Appeal Brief, para. 17.
[387] Appeal Brief, para. 18.
[388] Appeal Brief, para. 19.
[389] Response Brief, paras. 43-47.

to consider it for such a purpose.[391] 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.[392] Given the relative proximity of the roadblocks, the Appeals Chamber is satisfied that Ngirabatware would have been able to conduct meaningful investigations in relation to the events at the Gitsimbi/Cotagirwa roadblock.

134. In any event, in the context of this case, the Appeals Chamber is not convinced that the exact number of incidents is a material fact that the Prosecution was required to plead in the Indictment. The Prosecution is required to identify the "particular acts" or "the particular course of conduct" on the part of the accused which forms the basis for the charges in question.[393] The Trial Chamber convicted Ngirabatware of instigating and aiding and abetting genocide because of the provision of weapons, some of which were used in the attacks, accompanied by inflammatory statements, which taken collectively encouraged the killing of Tutsis in Nyamyumba Commune.[394] These material facts are pleaded in paragraph 16 of the Indictment.

135. Accordingly, Ngirabatware has not demonstrated that he lacked notice or suffered material prejudice in view of the Trial Chamber's findings that he distributed weapons on three occasions at two separate locations.

4. Identity of the Perpetrators and the Victims

136. In assessing Ngirabatware's contribution to the crimes, the Trial Chamber stated:

> The Chamber also observes the consistent and credible evidence that the *Interahamwe* who manned the *Bruxelles* and Gitsimbi/Cotagirwa roadblocks were notorious for their role in killing Tutsis and looting their property in Nyamyumba *commune* in the days after President Habyarimana's death. From the evidence the Chamber concludes that the *Interahamwe* to whom weapons were distributed at the *Bruxelles* roadblock and the Gitsimbi/Cotagirwa roadblock were engaged in the killing of Tutsi civilians, at roadblocks and in their houses.[395]

137. Ngirabatware submits that he lacked notice of the crimes to which he contributed and that the Indictment fails to particularize the identity of the perpetrators, the victims, and the approximate time frame of the attacks.[396] Moreover, Ngirabatware argues that the lack of clarity in the pleading

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[390] *See supra* para. 120.
[391] *See supra* para. 123.
[392] *Ntagerura et al.* Appeal Judgement, para. 21.
[393] *Ntagerura et al.* Appeal Judgement, para. 25, *citing Blaškić* Appeal Judgement, para. 213.
[394] Trial Judgement, para. 1337. *See also* Trial Judgement, paras. 881-882.
[395] Trial Judgement, para. 881.
[396] Appeal Brief, paras. 11-15, 28, 63-64; Reply Brief, paras. 9-11, 13-15. *See also* T. 30 June 2014 pp. 13-16, 46.

of the identity of the perpetrators and victims prevented him from investigating the actual link between his conduct and the underlying crimes.[397]

138. In addition, Ngirabatware submits that paragraph 16 of the Indictment is defective because it fails to plead that he instigated anyone other than Bagango and thus the Trial Chamber impermissibly expanded the charges by finding that he instigated the *Interahamwe*.[398] Ngirabatware contends that this expansion prejudiced him because it was not established that Bagango killed anyone.[399] Furthermore, he argues that, had the Indictment pleaded that he instigated the *Interahamwe*, the description of the perpetrators would have been impermissibly vague.[400]

139. The Prosecution responds that Ngirabatware fails to identify any error in the notice he received in relation to the underlying crimes, perpetrators, or victims that resulted in any prejudice.[401]

140. The Appeals Chamber is not convinced that Ngirabatware lacked adequate notice of the nature of the underlying crimes, the perpetrators, or the victims. The Appeals Chamber recalls that, in certain circumstances, the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates of the commission of the crimes.[402] Moreover, whether certain facts, such as the identity of the victims, are material, necessarily depends upon the type of responsibility alleged by the Prosecution.[403] In addition, it may also be sufficient to identify perpetrators by category.[404] The Appeals Chamber has already rejected Ngirabatware's claims that he lacked notice of his role in distributing weapons to *Interahamwe* at the Bruxelles and Gitsimhi/Cotagirwa roadblocks. The Trial Chamber found that his words and actions at these locations encouraged and provided practical assistance to subsequent killings.[405]

141. In its findings, the Trial Chamber observed that there was ample evidence of the notorious role of the *Interahamwe* at these roadblocks in the killing of Tutsis.[406] In these circumstances, the Appeals Chamber is not convinced that the Prosecution was required to provide any greater specificity and dismisses Ngirabatware's submissions that his role in the killing of particular named

[397] Appeal Brief, para. 28.
[398] Appeal Brief, paras. 24-26.
[399] Appeal Brief, para. 27(i).
[400] Appeal Brief, para. 27(ii)-(iii).
[401] Response Brief, paras. 35-42, 48-49.
[402] *Muvunyi I* Appeal Judgement, para. 58. *See also Ntagerura et al.* Appeal Judgement, para. 23, *citing Kupreškić et al.* Appeal Judgement, para. 89.
[403] *Blaškić* Appeal Judgement, paras. 210, 213.
[404] *Cf. Šainović et al.* Appeal Judgement, para. 275.
[405] Trial Judgement, paras. 882, 1339
[406] Trial Judgement, para. 881.

victims was not specifically pleaded.[407] In addition, the Appeals Chamber finds no merit in Ngirabatware's suggestion that he was only provided notice of his role in instigating Bagango and no one else.[408] Nothing in paragraph 16 of the Indictment or any other information provided in the Prosecution Pre-Trial Brief in relation to the incidents on 7 April 1994 indicates that the theory of the Prosecution's case limited Ngirabatware's responsibility to the actions of Bagango. To the contrary, the Prosecution Pre-Trial Brief indicated that there were more than 50 *Interahamwe* present when Ngirabatware implored Bagango to kill Tutsis.[409]

142. Accordingly, the Appeals Chamber is not satisfied that Ngirabatware lacked notice of the underlying crimes, the perpetrators, or the victims.

5. Conclusion

143. In view of the foregoing, the Appeals Chamber is not satisfied that Ngirabatware has identified any error in the notice he received in relation to his involvement in the distribution of weapons on 7 April 1994 that resulted in material prejudice.

B. Aiding and Abetting

1. *Actus Reus*

144. Ngirabatware argues that the Trial Chamber erred in finding that some of the weapons which he distributed at the roadblocks were later used to kill Tutsis in Nyamyumba Commune.[410] In particular, he submits that there was no evidence showing that any of these weapons were, in fact, used to kill Tutsis.[411] He also submits that the Trial Chamber failed to refer to particular incidents of killings and the approximate time of their commission, or to identify the physical perpetrators and the victims.[412] Ngirabatware argues that, as a consequence, there was no "demonstrable relationship" between his acts and those of the physical perpetrators.[413]

145. Ngirabatware further submits that, since he was not present at or near the scene of the crimes, the Trial Chamber erred in holding him responsible for aiding and abetting through encouragement.[414] He also argues that there was no evidence showing that any of the physical

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[407] *See* Appeal Brief, paras. 11-14.
[408] *See* Appeal Brief, paras. 25-26; Reply Brief, para. 13.
[409] Prosecution Pre-Trial Brief, paras. 58-59.
[410] Appeal Brief, para. 38, *referring to* Trial Judgement, paras. 780-788, 881, 1304-1306, 1316, 1337, 1339.
[411] Appeal Brief, paras. 33-36; Reply Brief, paras. 18, 23. *See also* T. 30 June 2014 p. 47.
[412] Appeal Brief, paras. 34, 50, *referring to Kalimanzira* Appeal Judgement, paras. 77-79, *Seromba* Appeal Judgement, para. 48, *Kamuhanda* Appeal Judgement, para. 68; Reply Brief, paras. 19-22.
[413] Appeal Brief, para. 37.
[414] Appeal Brief, paras. 41-42; Reply Brief, para. 28.

perpetrators was encouraged by his acts or words.[415] Finally, he claims that the Trial Chamber erred in failing to determine whether the "specific direction" requirement of aiding and abetting had been satisfied in his case.[416]

146. The Prosecution responds that the evidence on the record and the Trial Chamber's respective findings show that there was a link between Ngirabatware's acts and the subsequent attacks and killings of Tutsis.[417] It further submits that the Trial Chamber's conclusion that the *Interahamwe* were encouraged by Ngirabatware's words and acts was correct, and that the Trial Chamber made all the necessary findings in relation to the elements of aiding and abetting liability.[418]

147. In examining whether Ngirabatware's conduct had a substantial effect on the commission of the attacks and killings of Tutsis in Nyamyumba Commune, the Trial Chamber considered that, as Minister of Planning, member of the technical commission of Nyamyumba Commune, and high-ranking member of the MRND party, Ngirabatware was an influential personality in Nyamyumba Commune in 1994,[419] and that his actions encouraged the *Interahamwe* to kill Tutsis.[420] In particular, the Trial Chamber considered evidence showing that the weapons which he distributed, including machetes, firearms, and grenades, were received by Bagango and the *Interahamwe* manning the Bruxelles and the Gitsimbi/Cotagirwa roadblocks,[421] and that Bagango complied with Ngirabatware's instructions by further distributing the weapons.[422]

148. The Trial Chamber also referred to evidence showing that the attacks and killing of Tutsis in Nyamyumba Commune intensified after 7 April 1994.[423] It specifically considered evidence showing that the *Interahamwe* manning the Bruxelles and Gitsimbi/Cotagirwa roadblocks were involved in the killing of Tutsi civilians at roadblocks and in their houses[424] and to first-hand testimony about attacks against Tutsi civilians.[425] For instance, the Trial Chamber considered evidence that, immediately after Ngirabatware gave weapons to the *Interahamwe* at the Bruxelles roadblock and reproached them for not killing Tutsis, specifically accusing Nyambwega of

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[415] Appeal Brief, paras. 43-44; Reply Brief, para. 25.
[416] Appeal Brief, para. 45, *referring to Perišić* Appeal Judgement, paras. 25-36; Reply Brief, para. 29
[417] Response Brief, paras. 51-58.
[418] Response Brief, paras. 60-62.
[419] Trial Judgement, paras. 85-87, 882.
[420] Trial Judgement, para. 882.
[421] Trial Judgement, para. 875.
[422] Trial Judgement, para. 876.
[423] Trial Judgement, para. 876.
[424] Trial Judgement, paras. 829, 881. *See also* Trial Judgement, para. 876, *referring to* Witness ANAF, T. 30 September 2009 pp. 73-74, T. 1 October 2009 pp. 7, 20 (closed session), Witness DWAN-45, T. 15 August 2011 p. 27.
[425] Trial Judgement, para. 877. *See also* Trial Judgement, para. 879, *referring to* Witness ANAO, T. 15 February 2010 pp. 46, 49-50, 60 (closed session), 61, 66.

communicating with "*Inyenzi*", these *Interahamwe* attacked Nyambwega with a machete, and inflicted serious bodily injury by cutting his ear and leg.[426] The Trial Chamber thus concluded that the only reasonable inference from the totality of the evidence was that the *Interahamwe* used at least some of the weapons Ngirabatware distributed on 7 April 1994 during the attacks and killings.[427]

149. The Appeals Chamber recalls that, while the Prosecution must establish the acts of the principal perpetrators for which it seeks to hold the aider and abettor responsible,[428] an accused may be convicted for having aided and abetted a crime which requires specific intent even where the principal perpetrators have not been tried or identified.[429] Contrary to Ngirabatware's submission, the Trial Chamber relied on first-hand witness testimony in referring to particular incidents of killings committed in the days following the death of President Habyarimana,[430] and identified the physical perpetrators by reference to their membership in the *Interahamwe*, including some of them by name.[431] The Trial Chamber also referred to evidence identifying individual Tutsis who were victims of the attacks.[432] Ngirabatware fails to show that the Trial Chamber's findings in this regard were insufficient. The Appeals Chamber finds that a reasonable trier of fact could have concluded that the only reasonable inference from the evidence was that at least some of the weapons Ngirabatware distributed at the roadblocks were used to kill and cause serious bodily injury to Tutsis in Nyamyumba Commune.

150. The Appeals Chamber further recalls that "encouragement" is a form of conduct which may lead to criminal responsibility for aiding and abetting a crime.[433] The ICTY Appeals Chamber has held that "the encouragement or support need not be explicit; under certain circumstances, even the act of being present on the crime scene (or in its vicinity) as a 'silent spectator' can be construed as the tacit approval or encouragement of the crime."[434] Ngirabatware points to the fact that he was not found to have been present when the attacks and killings of Tutsis were taking place. The Appeals Chamber finds Ngirabatware's argument to be misguided. It follows from the Trial Chamber's relevant finding that it did not consider Ngirahatware to be a "silent spectator" who tacitly approved

[426] Trial Judgement, para. 878.
[427] Trial Judgement, para. 881.
[428] *Aleksovski* Appeal Judgement, para. 165.
[429] *Krstić* Appeal Judgement, para. 143; *Brdanin* Appeal Judgement, para. 355.
[430] Trial Judgement, paras. 876, 878-880, and the evidence cited therein.
[431] Trial Judgement, paras. 876, 878-880, n. 1126.
[432] Trial Judgement, para. 879, nn. 1114, 1116, 1119-1120.
[433] *Brdanin* Appeal Judgement, para. 277, *referring to Tadić* Appeal Judgement, para. 229, *Aleksovski* Appeal Judgement, para. 162, *Vasiljević* Appeal Judgement, para. 102, *Blaškić* Appeal Judgement, para. 48, *Kvočka et al.* Appeal Judgement, para. 89, *Simić* Appeal Judgement, para. 85. *See also Kalimanzira* Appeal Judgement, para. 74; *Muvunyi I* Appeal Judgement, para. 80; *Kayishema and Ruzindana* Appeal Judgement, paras. 201-202.

and encouraged the crime by his mere presence and authority. Rather, the Trial Chamber found that the encouragement provided by Ngirabatware was explicit in that, as an influential figure in Nyamyumba Commune, he distributed weapons to the *Interahamwe* while exhorting them to kill Tutsis.[435] In such circumstances, whether Ngirabatware was present at the crime scene is inconsequential for his responsibility for aiding and abetting to arise.[436] In view of the evidence considered and relied upon by the Trial Chamber, Ngirabatware's claim that the *Interahamwe* who were manning the roadblock and committed the killings were unaware of the encouragement he provided is similarly without merit.[437]

151. Further, the Trial Chamber found that, at the roadblocks, Ngirabatware delivered weapons and stated that he brought them because he did not want to see any Tutsis in Nyamyumba Commune.[438] Bearing in mind these acts of assistance and encouragement, Ngirabatware was present during the preparation of the crimes committed by the principal perpetrators, and thus his substantial contribution to the crimes is self-evident.

152. Accordingly, Ngirabatware's argument that the Trial Chamber erred in relation to the *actus reus* elements of aiding and abetting is dismissed.

2. *Mens Rea*

153. Ngirabatware argues that the Trial Chamber erred in failing to make the requisite *mens rea* findings in relation to his liability for aiding and abetting genocide.[439] He further argues that the Trial Chamber erred in finding that he was aware of the genocidal intent of the physical perpetrators because there was no evidence showing: (i) the identity of the physical perpetrators; (ii) that any of those present at the roadblocks killed Tutsis; and (iii) that any of the physical perpetrators possessed genocidal intent.[440] He also argues that, since the *Interahamwe* at the Gitsimbi/Cotagirwa roadblock were instructed by Bagango and Hassan Tubaramure to kill all the Tutsis, the Trial Chamber erred

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[434] *Brdanin* Appeal Judgement, para. 277, *referring to Aleksovski* Trial Judgement, para. 87, *Kayishema and Ruzindana* Appeal Judgement, paras. 201-202; *Akayesu* Trial Judgement, para. 706; *Bagilishema* Trial Judgement, para. 36; *Furundžija* Trial Judgement, para. 207.
[435] *See* Trial Judgement, para. 1337. *Cf. Renzaho* Appeal Judgement, para. 337.
[436] *See Mrkšić and Šljivančanin* Appeal Judgement, para. 81 ("The *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated, and the location at which the *actus reus* takes place may be removed from the location of the principal crime.").
[437] The Appeals Chamber is also not persuaded by Ngirabatware's claim that he lacked sufficient notice that the distribution of weapons had encouraged the killings of Tutsis. *See* Appeal Brief, para. 40. Paragraph 16 of the Indictment explicitly alleged that Ngirabatware distributed weapons thereby aiding and abetting the killings of Tutsis.
[438] Trial Judgement, paras. 1335-1336.
[439] Notice of Appeal, para. 12; Appeal Brief, paras. 70, 74; Reply Brief, para. 43.
[440] Appeal Brief, paras. 71-73; Reply Brief, paras. 44-45.

in finding that he knew that the *Interahamwe* were engaged in killings and that his actions would contribute to those killings.[441]

154. The Prosecution responds that the Trial Chamber correctly recalled the applicable legal standard for aiding and abetting.[442] It further submits that the Trial Chamber's findings and the evidence it relied upon support the conclusion that Ngirabatware had the requisite *mens rea* for aiding and abetting genocide.[443]

155. The Appeals Chamber recalls that the requisite *mens rea* for aiding and abetting is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal perpetrator.[444] The aider and abettor need not share the *mens rea* of the principal perpetrator but must be aware of the essential elements of the crime ultimately committed by the principal, including his state of mind.[445] Specific intent crimes such as genocide require that the aider and abettor must know of the principal perpetrator's specific intent.[446]

156. The Trial Chamber found that "Ngirabatware was aware that the *Interahamwe* were engaged in killings and that his actions would contribute to these killings."[447] It also concluded that the *Interahamwe* attacked and killed Tutsis in Nyamyumba Commune with genocidal intent and that Ngirabatware was aware of the physical perpetrators' specific intent.[448] Therefore, contrary to Ngirabatware's submission, the Trial Chamber made the necessary *mens rea* findings in relation to his liability for aiding and abetting genocide.

157. The Appeals Chamber has already considered and dismissed Ngirabatware's argument that the Trial Chamber failed to sufficiently identify the physical perpetrators of the crimes.[449] Ngirabatware's submission that there was no evidence showing that the *Interahamwe* who manned the roadblocks were engaged in killings is likewise without merit. The Trial Chamber considered extensive evidence, including first-hand witness testimony, that Tutsis were killed at these roadblocks and in their houses.[450] As to the genocidal intent of the physical perpetrators, in view of Ngirabatware's inflammatory statements at the roadblocks and the ensuing pattern of killings, the

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[441] Appeal Brief, paras. 74-75, *referring to* Trial Judgement, para. 876.
[442] Response Brief, para. 88.
[443] Response Brief, paras. 88-90.
[444] *Ndahimana* Appeal Judgement, para. 157, *referring to Perišić* Appeal Judgement, para. 48, *Ntawukulilyayo* Appeal Judgement, para. 222; *Kalimanzira* Appeal Judgement, para. 86; *Rukundo* Appeal Judgement, para. 53.
[445] *Ndahimana* Appeal Judgement, para. 157, *referring to Perišić* Appeal Judgement, para. 48, and authorities cited therein.
[446] *Ndahimana* Appeal Judgement, para. 157, *referring to Ntawukulilyayo* Appeal Judgement, para. 222, *Blagojević and Jokić* Appeal Judgement, para. 127.
[447] Trial Judgement, para. 876.
[448] Trial Judgement, para. 1340.
[449] *See supra* para. 149.
[450] *See* Trial Judgement, paras. 876, 879-881

Appeals Chamber considers that the evidence before the Trial Chamber was sufficient to support a finding that the physical perpetrators acted with genocidal intent. Particularly in relation to Juma, an *Interahamwe*, the Trial Chamber explicitly found that he possessed genocidal intent[451] and participated in the attack against Nyambwega following Ngirabatware's statement at the Bruxelles roadblock that Nyambwega was communicating with "*Inyenzi*".[452]

158. Ngirabatware also fails to show an error in the Trial Chamber's findings that he was aware of the genocidal intent of the physical perpetrators and that his acts would contribute to the killings. The Appeals Chamber recalls the Trial Chamber's finding that Ngirabatware distributed weapons at the Bruxelles and Gitsimbi/Cotagirwa roadblocks stating that he did not want to see any Tutsis in Nyamyumba Commune.[453] In these circumstances, whether Ngirabatware knew that Bagango and Hassan Tubaramure had instructed the *Interahamwe* manning the roadblocks to kill all the Tutsis[454] is irrelevant. In addition, contrary to Ngirabatware's suggestion,[455] knowledge of the actual commission of the crime is not required. The Appeals Chamber recalls in this regard that, where an accused is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime and is guilty as an aider and abettor.[456]

159. Accordingly, Ngirabatware's argument that the Trial Chamber erred in relation to the *mens rea* elements of aiding and abetting is dismissed.

C. Instigation

1. *Actus Reus*

160. Ngirabatware argues that the Trial Chamber erred in finding that his statements at the roadblocks instigated the *Interahamwe* to kill Tutsis.[457] In particular, he argues that: (i) the majority of his statements were addressed to Bagango;[458] (ii) none of the *Interahamwe* who heard the remaining statements had been identified; and (iii) there is no evidence that any subsequent killings were prompted specifically by his words.[459]

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[451] Trial Judgement, para. 1322.
[452] Trial Judgement, paras. 870-871, 1320. *See also* Trial Judgement, paras. 780-788.
[453] Trial Judgement, paras. 869-870, 1335-1336.
[454] *See* Appeal Brief, para. 75. *See also* Trial Judgement, para. 876.
[455] Appeal Brief, para. 75.
[456] *Haradinaj et al.* Appeal Judgement, para. 58, *citing Blaškić* Appeal Judgement, para. 50.
[457] Appeal Brief, paras. 46-52, *referring to* Trial Judgement, paras. 882, 1337, 1339. *See also* Appeal Brief, para. 64.
[458] Appeal Brief, para. 48.
[459] Appeal Brief, paras. 47, 49, 51, *referring to Ndindabahizi* Appeal Judgement, paras. 116-117; Reply Brief, paras. 30-33.

161. The Prosecution responds that none of Ngirabatware's statements were made exclusively to Bagango and that the link between Ngirabatware's conduct and statements and the killings was established on the evidence.[460]

162. The evidence considered by the Trial Chamber showed that during Ngirabatware's second visit to the Bruxelles roadblock, Ngirabatware addressed the *Interahamwe* manning the roadblock by telling them that they only pretended to work and accused Nyambwega of communicating with "*Inyenzi*".[461] The evidence also showed that Ngirabatware told the *Interahamwe* that he delivered the weapons because he did not want to see any Tutsis in Busheke cellule.[462] The Appeals Chamber recalls that the *actus reus* of "instigating" implies prompting another person to commit an offence.[463] The Trial Chamber noted that, immediately after Ngirabatware gave weapons to the *Interahamwe* at the Bruxelles roadblock, these *Interahamwe* attacked Nyambwega with a machete, and inflicted serious bodily injury by cutting his ear and leg.[464] The Trial Chamber also referred to Witness ANAO's evidence that those manning the roadblocks were "desirous of carrying out instructions" and people were killed at the roadblocks.[465] In view of the scale of the crimes, the Trial Chamber was not required to identify each member of the *Interahamwe* who was prompted by Ngirabatware's inflammatory statements to commit killings or each individual victim of such crimes. The Appeals Chamber is satisfied that a reasonable trier of fact could have concluded that the only reasonable inference from the evidence was that Ngirabatware prompted the *Interahamwe* at the Bruxelles roadblock to attack and kill Tutsis.

163. Accordingly, Ngirabatware's argument that the Trial Chamber erred in relation to the *actus reus* element of instigation is dismissed.

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[460] Response Brief, paras. 66-70.
[461] Trial Judgement, para. 713, *referring, inter alia, to* Witness ANAM, T. 25 January 2010 p. 25 (closed session) ("A. [Ngirabatware] said the following: 'The Tutsis are moving about freely, for example, Safari is sending cars *(sic)* to *Inyenzi* and he is doing so under your nose and yet you pretend that you are working.' Q. Witness, as far as you are aware, who was Ngirabatware addressing those words? A. He was speaking to the *Interahamwe* he had found at the roadblock."). *See also* Witness ANAM, T. 25 January 2010 pp. 26-27.
[462] Trial Judgement, para. 713, *referring, inter alia, to* Witness ANAM, T. 25 January 2010 p. 36 (closed session) ("A. He said he did not want to see any Tutsi in Busheke. Q. What do you understand by those words? A. Listen, Counsel, this was the figure of authority, and everyone had to comply with the instructions he had just given. And at the time all the Tutsi were being hunted down. Q. Witness, I didn't quite follow your answer. What did you understand by what Ngirabatware meant by saying what he said in relation to the weapons? A. Those statements meant that all Tutsi had to be found out wherever they were, because as I have said, at the time all the Tutsis were being hunted down to be killed.").
[463] *Karera* Appeal Judgement, para. 317, *referring to Nahimana et al.* Appeal Judgement, para. 480, *Ndindabahizi* Appeal Judgement, para. 117; *Kordić and Čerkez* Appeal Judgement, para. 27.
[464] Trial Judgement, para. 878.
[465] Trial Judgement, para. 879, *referring to* Witness ANAO, T. 15 February 2010 pp. 61, 66.

2. *Mens Rea*

164. Ngirabatware argues that the Trial Chamber erred in failing to make the requisite *mens rea* findings in relation to his liability for instigating genocide.[466] He further argues that no reasonable trier of fact could have inferred that he had the requisite *mens rea*, absent evidence on: (i) the identity of the physical perpetrators; (ii) his "acquaintance with them"; and (iii) his knowledge of their genocidal intent.[467]

165. The Prosecution responds that the Trial Chamber made sufficient and reasonable findings in relation to Ngirabatware's *mens rea* for instigating genocide.[468]

166. The Appeals Chamber recalls that the *mens rea* for instigating is established where the perpetrator acts with either direct intent to prompt another to commit a crime, or with awareness of the substantial likelihood that a crime will be committed in execution of that instigation.[469] Furthermore, where the crime alleged is genocide, it must also be proven that the perpetrator acted with the specific intent to destroy a protected group as such in whole or in part.[470]

167. The Appeals Chamber observes that, in finding Ngirabatware guilty of instigating genocide, the Trial Chamber failed to determine whether he acted with direct intent to prompt the physical perpetrators to commit genocide or with awareness of the substantial likelihood that the crime will be committed as a result of that instigation. As noted above, such determination was indispensable for finding Ngirabatware responsible for instigating the commission of genocide.

168. The Appeals Chamber notes, however, the Trial Chamber's finding that at the Bruxelles roadblock, Ngirabatware told Bagango and the *Interahamwe* that he brought weapons because he did not want any Tutsis alive in Bruxelles.[471] The Trial Chamber further considered that Ngirabatware was aware that his acts would contribute to killings committed by the *Interahamwe*.[472] It also found that he possessed genocidal intent.[473] Contrary to Ngirabatware's submission, whether he personally knew the individual perpetrators is irrelevant. The Appeals Chamber considers that, in view of the facts as found by the Trial Chamber and the evidence it relied upon, a reasonable trier of fact could have found beyond reasonable doubt that the only

[466] Appeal Brief, para. 67; Reply Brief, paras. 41-42.
[467] Appeal Brief, para. 67.
[468] Response Brief, para. 87.
[469] *Nchamihigo* Appeal Judgement, para. 61, *referring to Kordić and Čerkez* Appeal Judgement, paras. 29, 32
[470] *Nchamihigo* Appeal Judgement, para. 61, *referring to Seromba* Appeal Judgement, para. 175.
[471] Trial Judgement, paras. 1335-1336.
[472] Trial Judgement, para. 876.
[473] Trial Judgement, para. 1305.

reasonable inference from the evidence was that Ngirabatware had the direct intent to instigate genocide. Accordingly, the Appeals Chamber dismisses Ngirabatware's arguments in this regard.

D. Assessment of the Evidence

1. Killings of Thérèse, Dismas, and Nzabanita

169. In finding that there was sufficient evidence that people were attacked and killed after Ngirabatware left on 7 April 1994,[474] the Trial Chamber relied, *inter alia*, on the evidence of Witness ANAO that members of the *Interahamwe* killed Thérèse,[475] and on Witness ANAO's own admission that he killed Nzabanita and Dismas.[476] The Trial Chamber noted that Witness ANAO was among those who received weapons from Ngirabatware on 7 April 1994 and was present when Ngirabatware exhorted the killing of Tutsis.[477]

170. Ngirabatware argues that, for various reasons, the Trial Chamber should have treated Witness ANAO's evidence with caution[478] and should have reconciled the contradictions between his testimony and that of Witness ANAE as to the perpetrator of Thérèse's killing.[479] Ngirabatware also argues that the Trial Chamber erred in finding that Nzabanita and Dismas were killed with weapons delivered by him.[480] Finally, Ngirabatware claims that the Trial Chamber ignored judgments rendered by Rwandan courts which were relevant to the killing of Dismas and Nzabanita.[481]

171. The Prosecution responds that the proximity of the Bruxelles and Gitsimbi/Cotagirwa roadblocks, the timing of the attack and the types of weapons which Witness ANAO possessed supported the inference that Ngirabatware provided the weapons used to kill Nzabanita and Dismas.[482] The Prosecution further submits that none of Ngirabatware's remaining arguments shows an error in the Trial Chamber's evaluation of the evidence.[483]

172. In assessing Witness ANAO's credibility, the Trial Chamber considered his prior convictions and sentence for his participation in the genocide and decided to treat his evidence with caution.[484] Ngirabatware fails to show that, having made this determination, the Trial Chamber

[474] Trial Judgement, para. 878.
[475] Trial Judgement, para. 879.
[476] Trial Judgement, para. 880.
[477] Trial Judgement, para. 880.
[478] Appeal Brief, para. 53.
[479] Appeal Brief, para. 54.
[480] Appeal Brief, para. 53.
[481] Appeal Brief, para. 55.
[482] Response Brief, paras. 73-74.
[483] Response Brief, paras. 75-77.
[484] *See* Trial Judgement, para. 825. *See also* Trial Judgement, paras. 283, 476-479

erred in the evaluation of Witness ANAO's testimony. Ngirabatware also fails to show how the contradictions in the evidence as to whether Witness ANAO or another member of the *Interahamwe* was responsible for the killing of Thérèse at the Gitsimbi/Cotagirwa roadblock have an impact on his conviction.

173. Turning to Ngirabatware's arguments in relation to the killing of Nzabanita and Dismas, the Appeals Chamber notes that Witness ANAO, who was manning the Gitsimbi/Cotagirwa roadblock,[485] testified that Nzabanita and Dismas were killed with clubs and machetes, and that, although he had a grenade, he did not use it.[486] The Appeals Chamber observes that the Trial Chamber did not determine the type of weapons which Ngirabatware delivered at the Gitsimbi/Cotagirwa roadblock.[487] While the Trial Chamber found that, at the nearby Bruxelles roadblock, Ngirabatware earlier delivered machetes, firearms, and grenades,[488] the Appeals Chamber is not persuaded by the Prosecution's submission that the proximity of the roadblocks and the timing of the attack allow for the only reasonable inference that the weapons used in the killing of Nzabanita and Dismas were those distributed by Ngirabatware. In fact, the Trial Chamber noted that there might have been other sources of weapons that were distributed in Nyamyumba Commune.[489]

174. However, the Appeals Chamber recalls the Trial Chamber's finding that Ngirabatware arrived at the Bruxelles and Gitsimbi/Cotagirwa roadblocks with a total of four vehicles transporting weapons.[490] The Appeals Chamber notes that there was scant evidence as to how each particular weapon was used. Nonetheless, in view of the weapons that were distributed by Ngirabatware at the roadblocks and the extensive evidence considered by the Trial Chamber that Tutsis were subsequently attacked and killed,[491] the Appeals Chamber finds that a reasonable trier of fact could have found that the only reasonable inference from the evidence was that the *Interahamwe* used at least some of the weapons Ngirabatware distributed on 7 April 1994 during the attacks and killings.[492]

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[485] Trial Judgement, n. 1126, and the evidence cited therein.
[486] *See* Trial Judgement, para. 880, *referring to* Witness ANAO, T. 16 February 2010 pp. 4-5, T. 18 February 2010 pp. 39-40 (closed session).
[487] *See* Trial Judgement, para. 840.
[488] Trial Judgement, paras. 839-840.
[489] Trial Judgement, para. 882.
[490] Trial Judgement, paras. 839-840, 869-870, 1335-1336.
[491] Trial Judgement, paras. 876-879.
[492] *See* Trial Judgement, para. 881. The Appeals Chamber further notes that the facts in the present case are distinguishable from the facts in the *Kamuhanda* case. In the latter case, the accused had distributed weapons at a meeting at his cousin's home and the Trial Chamber failed to determine whether the assailants who carried out the attack at the Gikomero Parish Compound participated at that meeting. *See Kamuhanda* Appeal Judgement, para. 65, *citing Kamuhanda* Trial Judgement, para. 273. *See also Kamuhanda* Appeal Judgement, paras. 63, 68.

175. The Trial Chamber further noted that Witness ANAO, who was among those who manned the Gitsimbi/Cotagirwa roadblock, was present when Ngirabatware exhorted the killing of Tutsis.[493] The Appeals Chamber finds that, on this basis, it was reasonable for the Trial Chamber to infer that Witness ANAO heard Ngirabatware when the latter addressed Bagango at the Gitsimbi/Cotagirwa roadblock.[494] In these circumstances, the Appeals Chamber finds no error in the Trial Chamber's finding that Ngirabatware's words prompted Witness ANAO to commit the crime. Finally, the Appeals Chamber finds no merit in Ngirabatware's argument that the Trial Chamber erred in ignoring judgements rendered by Rwandan courts.[495] The fact that certain evidence has not been explicitly referred to does not necessarily mean that it was not taken into account in the Trial Chamber's assessment.[496] Accordingly, Ngirabatware's arguments are dismissed.

2. The Attack on Safari Nyambwega

176. The Trial Chamber found that Safari Nyambwega was attacked and seriously injured on 7 April 1994 by various *Interahamwe*, including Juma.[497] It further found that the attack occurred after Ngirabatware delivered weapons at the Bruxelles roadblock where he reprimanded the *Interahamwe*, including Juma, for only pretending to work, stated that he brought weapons because he did not want to see any Tutsis in Busheke cellule, and accused Nyambwega of communicating with "*Inyenzi*".[498] The Trial Chamber further found that, upon delivering weapons at the Gitsimbi/Cotagirwa roadblock later the same day, Ngirabatware told Bagango that Nyambwega needed to be found and killed.[499]

177. Ngirabatware claims that the attack against Nyambwega was not of sufficient gravity as to support a conviction for genocide.[500] He further argues that the Trial Chamber erred in finding that the attack occurred after Ngirabatware delivered weapons at the roadblocks.[501] Ngirabatware also submits that there was no evidence showing that the assailants used weapons delivered by him,[502] and claims that the Trial Chamber failed to exclude the reasonable possibility that Nyambwega had been attacked by *Interahamwe* who were not among those manning the Bruxelles and

[493] Trial Judgement, paras. 737, 880.
[494] *See* Trial Judgement, para. 880. The Appeals Chamber notes that the Trial Chamber considered the evidence of Witness ANAM that at the Gitsimbi/Cotagirwa roadblock Ngirabatware sent Witness ANAO to summon Bagango, and that Witness ANAO assisted with transferring the weapons to Bagango's vehicle. *See* Trial Judgement, para. 716, *referring to* Witness ANAM, T. 25 January 2010 pp. 40, 44-45 (closed session), T. 27 January 2010 p. 15 (closed session). However, Witness ANAM's testimony is inconclusive as to whether Witness ANAO heard Ngirabatware speaking to Bagango.
[495] *See* Appeal Brief, para. 55.
[496] *See Nzabonimana* Appeal Judgement, para. 105
[497] Trial Judgement, paras. 788, 871, 878, 1304, 1320, 1336.
[498] Trial Judgement, paras. 840, 870, 1304, 1336.
[499] Trial Judgement, paras. 840, 870, 1304, 1336.
[500] Appeal Brief, para. 39.
[501] Appeal Brief, para. 56; Reply Brief, paras. 34-36. *See also* T. 30 June 2014 p. 47.

Gitsimbi/Cotagirwa roadblocks,[503] and that Juma had been prompted by others to commit the crime.[504] Finally, Ngirabatware argues that the Trial Chamber erred in ignoring the evidence of Witness DWAN-39 that, during *Gacaca* court proceedings, Ngirabatware was not implicated in Nyambwega's death.[505]

178. The Prosecution responds that it was reasonable for the Trial Chamber to conclude that the attack against Nyambwega commenced in the morning and continued until sometime in the afternoon on 7 April 1994.[506] The Prosecution further submits that machetes distributed by Ngirabatware were used in the attack on Nyambwega and that the Trial Chamber's evaluation of the evidence was correct.[507]

179. The Appeals Chamber notes the Trial Chamber's finding that members of the *Interahamwe*, including Juma, attacked Nyambwega and inflicted serious bodily injury by cutting his ear and leg.[508] In this regard, the Trial Chamber considered the evidence of Witness ANAE that Nyambwega's face was disfigured and his tendons and one of his ears had been cut off.[509] Ngirabatware fails to substantiate his submission that the injuries inflicted upon Nyambwega did not meet the requirements of serious bodily harm under Article 2 of the ICTR Statute.[510]

180. The Appeals Chamber further observes that Witnesses ANAF and DWAN-3 testified that the attack on Nyambwega took place in the morning of 7 April 1994.[511] The Trial Chamber considered their testimonies to be first-hand and consistent.[512] Witness ANAM, who also provided evidence in relation to the attack on Nyambwega, testified that the attack occurred after Ngirabatware delivered weapons at the Bruxelles and Gitsimbi/Cotagirwa roadblocks, which was around 2.00 p.m. on 7 April 1994.[513] The Trial Chamber held that it did not consider Witness ANAM to be reliable concerning measurements of time and that, therefore, "her evidence concerning the time frame for Nyambwega's attack carries no weight."[514] Nevertheless, it decided to rely on the evidence of Witnesses ANAE and ANAM that Nyambwega was attacked after

[502] Appeal Brief, paras. 57-58; Reply Brief, para. 37.
[503] Appeal Brief, para. 59; Reply Brief, paras. 38-39.
[504] Appeal Brief, para. 60. *See also* Appeal Brief, para. 64.
[505] Appeal Brief, para. 61.
[506] Response Brief, paras. 79-81.
[507] Response Brief, paras. 82-84.
[508] Trial Judgement, paras. 871, 878.
[509] Trial Judgement, para. 711, *referring to* Witness ANAE, T. 20 October 2009 p. 67 (closed session).
[510] *See Seromba* Appeal Judgement, para. 46.
[511] Trial Judgement, paras. 732, 772.
[512] Trial Judgement, para. 788.
[513] Trial Judgement, paras. 713-717.
[514] Trial Judgement, para. 787.

Ngirabatware delivered the weapons at the roadblocks.[515] To the extent that the Trial Chamber relied on Witness ANAM's corroborated evidence as to the sequence of the events and not in relation to their precise timing, the Appeals Chamber sees no inconsistency in the Trial Chamber's considerations and its evaluation of the evidence.

181. The Trial Chamber further found that, upon delivering weapons for a second time at the Bruxelles roadblock, Ngirabatware told the *Interahamwe*, among them Juma, that he did not want to see any Tutsis in Busheke cellule and accused Nyambwega of communicating with "*Inyenzi*".[516] At the nearby Gitsimbi/Cotagirwa roadblock, Ngirabatware told Bagango that Nyambwega needed to be found and killed.[517] The Appeals Chamber finds that Ngirabatware merely presents an alternative interpretation of the evidence without showing that no reasonable trier of fact could have found that there was a link between his role in the distribution of weapons and his statements at the roadblocks, and the subsequent attack on Nyambwega.

182. Finally, contrary to Ngirabatware's submission, the Trial Chamber considered the evidence of Witness DWAN-39 that Ngirabatware's name was never mentioned during *Gacaca* court proceedings.[518] However, it considered this evidence to be of limited probative value and decided to rely instead on the credible and corroborated accounts given by Witnesses ANAE and ANAM.[519] Ngirabatware fails to show that, in doing so, the Trial Chamber committed any error.

E. Conclusion

183. Based on the foregoing, the Appeals Chamber dismisses Ngirabatware's First Ground of Appeal.

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[515] Trial Judgement, paras. 785-786, 790, 793-794, 804, *referring to* Witness ANAE, T. 20 October 2009 p. 32, T. 20 October 2009 pp. 71, 77 (closed session), Witness ANAM, T. 25 January 2010 pp. 25-29, 35-40, 44-45 (closed session), T. 26 January 2010 pp. 48-49 (closed session), T. 27 January 2010 pp. 3, 5-6, T. 27 January 2010 pp. 9-11, 16-17 (closed session).
[516] Trial Judgement, para. 870.
[517] Trial Judgement, para. 870.
[518] Trial Judgement, para. 837.
[519] Trial Judgement, para. 837.

VI. ALIBI (GROUND 2)

184. The Trial Chamber found that, on 7 April 1994, Ngirabatware delivered weapons and addressed local officials and *Interahamwe* at the Bruxelles and Gitsimbi/Cotagirwa roadblocks in Nyamyumba Commune.[520] The Trial Chamber relied on these factual findings to determine that Ngirabatware instigated and aided and abetted genocide in Nyamyumba Commune,[521] participated in a joint criminal enterprise,[522] and was responsible for rape as a crime against humanity as a natural and foreseeable consequence of the execution of the enterprise's common plan.[523] In finding that Ngirabatware was present in Nyamyumba Commune on 7 April 1994, the Trial Chamber relied on Prosecution Witnesses ANAE, ANAM, and ANAL.[524]

185. At trial, Ngirabatware advanced an alibi placing him in Kigali from 6 to 12 April 1994.[525] The Trial Chamber found that Ngirabatware failed to give proper notice of his alibi in accordance with Rule 67(A)(ii)(a) of the ICTR Rules and, accordingly, took this into account in evaluating the alibi evidence.[526] In its deliberations, the Trial Chamber considered alibi evidence related to the period from 6 to 8 April 1994.[527] In this respect, Ngirabatware presented evidence that he was at the Presidential Guard camp in Kigali from midnight on 6 April 1994 until he sought refuge at the French Embassy on the morning of 8 April 1994.[528] The Trial Chamber concluded that the "alibi evidence is incredible and insufficient to raise a reasonable doubt in the Prosecution's case with regards to 7 April 1994."[529] The Trial Chamber, however, accepted that it was reasonably possibly true that Ngirabatware was present at the Fench Embassy from early afternoon on 8 April 1994.[530]

186. Ngirabatware submits that the Trial Chamber erred in the assessment of his alibi and the Prosecution evidence placing him in Nyamyumba Commune on 7 April 1994.[531] In this section, the Appeals Chamber considers whether the Trial Chamber erred: (i) in finding that Ngirabatware failed to provide adequate notice of his alibi; (ii) in applying the burden of proof and in its approach to the evidence; and (iii) in assessing the evidence.

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[520] Trial Judgement, paras. 839-840, 869-870, 1303-1304, 1335-1336.
[521] Trial Judgement, para. 1345.
[522] Trial Judgement, paras. 1305-1307.
[523] Trial Judgement, paras. 1388, 1390-1393.
[524] Trial Judgement, paras. 789, 815, 817, 824, 838. *See also* Trial Judgement, paras. 818, 823, 825, 827, 832-833, 836-837.
[525] Trial Judgement, para. 492.
[526] Trial Judgement, paras. 649, 696.
[527] Trial Judgement, paras. 663-694.
[528] Trial Judgement, paras. 496-506, 531-539, 551-552, 571-573, 580-582, 591-592, 596.
[529] Trial Judgement, para. 696.
[530] Trial Judgement, paras. 695-696.
[531] Notice of Appeal, paras. 10(ii), 10(iv), 15-23; Appeal Brief, paras. 77-146.

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A. Notice of Alibi

187. On 23 September 2009, Ngirabatware filed a Notice of Alibi which stated that "Augustin Ngirabatware was in Kigali town from 6th to 12th April 1994".[532] The Notice of Alibi did not identify any particular location in Kigali where he was during this period or any potential supporting witnesses or evidence.[533] In its decision of 12 February 2010, the Trial Chamber found that the initial notice of alibi was not in conformity with Rule 67(A)(ii)(a) of the ICTR Rules and ordered Ngirabatware to disclose the names and addresses of witnesses and any other evidence supporting his alibi as soon as reasonably practicable.[534]

188. On 22 March 2010, Ngirabatware filed his Additional Alibi Notice which contained lists of individuals, who sought refuge at the French Embassy in Kigali on 8 and 9 April 1994 as well as French Embassy personnel.[535] On 16 April 2010, the Trial Chamber again found that Ngirabatware's notice of alibi failed to conform to the requirements of Rule 67(A)(ii)(a) of the ICTR Rules.[536] On 4 May 2010, Ngirabatware filed a Second Additional Notice of Alibi which listed 15 potential alibi witnesses, and their addresses, relating to his presence at the Presidential Guard camp and later the French Embassy during the period of 6 to 12 April 1994.[537] The Trial Chamber noted that the Second Additional Notice of Alibi was filed after all relevant Prosecution witnesses testifying as to that period had already been heard and failed to include several alibi witnesses or potential alibi witnesses, who were only included when the Pre-Defence Brief was subsequently filed in October 2010.[538]

189. In the Trial Judgement, the Trial Chamber found that Ngirabatware "gradually" filed his alibi notice.[539] The Trial Chamber ultimately concluded that Ngirabatware's alibi for 7 April 1994 was not reasonably possibly true.[540] As part of this consideration, the Trial Chamber noted that the

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[532] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Notice of Alibi Pursuant to Rule 67(A)(ii), 23 September 2009 ("Notice of Alibi"), para. 1.
[533] Notice of Alibi, paras. 1-3. The Notice of Alibi simply noted that "[s]everal witnesses may be able to confirm the above mentioned notice of alibi, but the Defence of Ngirabatware is awaiting information and documents in order to fulfill our obligations under Rule 67 A) ii) a) "). *See* Notice of Alibi, para. 3.
[534] Decision on Prosecution Motion for an Order to Compel the Accused to Disclose Particulars of his Alibi, 16 February 2010, paras. 31-32. *See also* Trial Judgement, para. 647.
[535] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Additional Alibi Notice, 22 March 2010 ("Additional Notice of Alibi").
[536] Decision on Prosecutor's Supplementary Motion to Compel the Accused to Disclose Particulars of his Alibi, 16 April 2010, paras. 23-25. *See also* Trial Judgement, para. 648.
[537] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Second Additional Alibi Notice, 4 May 2010 ("Second Additional Notice of Alibi"), paras. 6-7.
[538] Trial Judgement, para. 648.
[539] Trial Judgement, para. 647.
[540] Trial Judgement, para. 696. *See also* Trial Judgement, para. 648.

manner and context in which Ngirabatware provided notice of his alibi indicated that "there is a high probability that the alibi was tailored and fabricated to fit the Prosecution case".[541]

190. Ngirabatware submits that the Trial Chamber erred in finding that he failed to give timely notice of his alibi and in drawing negative inferences on that basis regarding the credibility of the alibi evidence.[542] In this respect, Ngirabatware submits that the Trial Chamber either ignored or was unaware of a series of correspondence between his counsel and the Prosecution providing names and information as soon as this information became available.[543] In any case, Ngirabatware contends that the Prosecution suffered no prejudice since it: (i) interviewed all alibi witnesses before the end of its case-in-chief; (ii) was permitted to add additional witnesses and call rebuttal evidence; and (iii) did not contest that Ngirabatware was in Kigali, but rather tried to prove the feasibility of travel from Kigali to Gisenyi Prefecture.[544]

191. The Prosecution responds that the Trial Chamber correctly determined that Ngirabatware provided late notice of his alibi and correctly took this fact into account in assessing the credibility of his alibi evidence.[545]

192. Rule 67(A)(ii)(a) of the ICTR Rules requires the defence to notify the Prosecution before the commencement of trial of its intent to enter a defence of alibi. In accordance with this provision, "the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the name and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi."

193. The Appeals Chamber observes that Ngirabatware's Notice of Alibi, filed on the first day of trial, fails to identify a single potential witness or particularize any location within Kigali where he claimed to have been between 6 and 12 April 1994.[546] Moreover, his Additional Notice of Alibi provides only a list of individuals, with no addresses, at the French Embassy on 8 and 9 April 1994 and gives no indication that any of these individuals equally attest to his broader whereabouts in Kigali from 6 to 12 April 1994.[547] His Second Additional Notice of Alibi, filed at the close of the Prosecution case, does provide such notice, but is incomplete in terms of the number of witnesses ultimately called.[548]

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[541] Trial Judgement, para. 685.
[542] Appeal Brief, paras. 130-135.
[543] Appeal Brief, paras. 131-132. *See also* Appeal Brief, Annex F.
[544] Appeal Brief, para. 131.
[545] Response Brief, paras. 143-151.
[546] Notice of Alibi, paras. 1-3.
[547] Additional Notice of Alibi, RP. 5716-5712.
[548] Second Additional Notice of Alibi, paras 6-7. *See also* Trial Judgement, para. 648

194. The evolving nature of ongoing investigations and the reality of a party's possession of incomplete information at certain stages of trial proceedings might excuse the provision of an incomplete initial notice of alibi or justify subsequent supplemental filings.[549] However, the complete absence of any detail whatsoever concerning particularized locations or possible witnesses in an alibi notice until the eve of the defence case confirms that the Trial Chamber correctly determined that Ngirabatware did not provide notice in accordance with Rule 67(A)(ii)(a) of the ICTR Rules.[550] Ngirabatware's contention that he provided notice of his alibi to the Prosecution through numerous other trial submissions listed in Annex F of his Appeal Brief simply reinforces the Trial Chamber's conclusion that he provided piecemeal notice of his alibi. It does not demonstrate that he specified the place or places where he claimed to have been present at the time of the crimes, the witnesses, or other evidence he intended to rely on as required by Rule 67(A)(ii)(a) of the ICTR Rules.

195. As a result, the Appeals Chamber considers that the Trial Chamber reasonably questioned the circumstances surrounding the belated advancement of Ngirabatware's alibi. The manner in which an alibi is presented may impact its credibility.[551] This is the case even if the Prosecution ultimately had an opportunity to interview the potential alibi witnesses or call additional evidence to rebut the alibi. A trial chamber is not required to consider whether the Prosecution suffered prejudice from the delayed filing of the notice of alibi.[552] Therefore, it was within the Trial Chamber's discretion to take into account Ngirabatware's failure to provide adequate and timely notice in assessing his alibi in connection with the events occurring on 7 April 1994.

196. Accordingly, Ngirabatware has not demonstrated that the Trial Chamber erred in assessing the notice he provided for his alibi or in drawing negative inferences from it.

B. Burden of Proof and Failure to Assess the Evidence as a Whole

197. Ngirabatware submits that the Trial Chamber failed to consider the evidence as a whole, impermissibly compartmentalized its assessment of the alibi evidence and the evidence related to

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[549] *Cf. Kanyarukiga* Appeal Judgement, para. 99.
[550] *See Kanyarukiga* Appeal Judgement, para. 99 ("Kanyarukiga could have filed a notice of alibi, setting out the evidence in his possession upon which he intended to rely and indicating that the notice of alibi would be amended upon receipt of any further disclosure."); *Munyakazi* Appeal Judgement, para. 17 ("Moreover, the purported notice provided by the Defence Pre-Trial Brief fails to conform to the Rule since it was filed after the commencement of trial, following the close of the Prosecution case, and because it lacks any description of the witnesses or evidence supporting the alibi."); *Kalimanzira* Appeal Judgement, para. 56 (finding that an accused's intimation at an initial appearance and pre-trial brief that he was in a particular prefecture during much of the period covered by the indictment did not conform to the requirements of Rule 67(A)(ii)(a) of the ICTR Rules).
[551] *See Ndahimana* Appeal Judgement, paras. 113-114; *Kanyarukiga* Appeal Judgement, para. 97; *Munyakazi* Appeal Judgment, para. 18; *Kalimanzira* Appeal Judgement, para. 56; *Nchamihigo* Appeal Judgement, para. 97; *Ndindabahizi* Appeal Judgement, para. 66.
[552] *Kanyarukiga* Appeal Judgement, para. 98.

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the distribution of weapons in Nyamyumba Commune, and assessed piecemeal, both collectively and individually, the credibility of the evidence of the Prosecution and the Defence.[553] As a result, Ngirabatware contends that the Trial Chamber's approach violated the burden of proof, distorted the evidence, prevented it from considering the corroborative and cumulative effect of the alibi evidence, and inflated the credibility of the inculpatory evidence underpinning his convictions.[554]

198. To illustrate his claims, Ngirabatware refers to the Trial Chamber's observations in the Trial Judgement that "the evidence does not demonstrate that it was impossible to travel from Kigali to Nyamyumba *commune*"[555] and that "the Defence [...] needs only to raise the reasonable possibility that Ngirabatware was elsewhere",[556] as well as its references to "doubts" about the presence of Ngirabatware and Defence Witness Jean Baptiste Byilingiro at the Presidential Guard compound.[557] According to Ngirabatware, he only needed to produce evidence of an alibi and it was then for the Prosecution to exclude all reasonable possibilities of his whereabouts that were incompatible with the Prosecution case.[558] In addition, Ngirabatware asserts that the Trial Chamber's deliberations reflect that it impermissibly assessed each alibi witness individually without comparing their testimony and considering the extent to which they corroborated each other.[559] Moreover, Ngirabatware contends that the Trial Chamber also failed to take into account the entire body of alibi evidence and ignored witness evidence related to 6 and 8-12 April 1994.[560] Ngirabatware argues that, had the Trial Chamber viewed the evidence holistically, it could not have reasonably rejected the credible and corroborated accounts of the alibi witnesses.[561]

199. Ngirabatware also contends that the Trial Chamber failed to consider the impact of the alibi and other defence evidence on the reliability of the Prosecution witnesses who attested to his presence in Gisenyi Prefecture.[562] In particular, Ngirabatware submits that the accounts of Prosecution Witnesses ANAE, ANAM, and ANAL of his presence in Gisenyi Prefecture were rebutted by a large quantity of defence evidence.[563] However, according to Ngirabatware, the Trial

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[553] Appeal Brief, paras. 77-106.
[554] Appeal Brief, para. 79.
[555] T. 30 June 2014 p. 17, *referring to* Trial Judgement, para. 676.
[556] Appeal Brief, para. 82, *referring to* Trial Judgement, para. 653.
[557] Appeal Brief, paras. 83(i), 84, *referring to* Trial Judgement, paras. 668, 670. Ngirabatware also refers to the Trial Chamber finding his attempts to leave the Presidential Guard camp "doubtful". *See* Appeal Brief, para. 83(ii), *referring to* Trial Judgement, para. 675. *See also* T. 30 June 2014 p. 17.
[558] Appeal Brief, para. 82.
[559] Appeal Brief, paras. 86-88. *See also* T. 30 June 2014 pp. 17-18.
[560] Appeal Brief, paras. 101-105. *See also* T. 30 June 2014 pp. 19-20.
[561] Appeal Brief, paras. 89-95, 103-105. *See also* Appeal Brief, pp. 41-46.
[562] Appeal Brief, paras. 96-100.
[563] Appeal Brief, para. 98.

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Chamber assessed and determined that the evidence of these Prosecution witnesses was credible before considering, and without taking into account, Defence evidence.[564]

200. The Prosecution responds that the Trial Chamber assessed the evidence as a whole, properly applied the burden of proof, and appropriately weighed and evaluated the evidence on the record.[565]

201. The Appeals Chamber recalls that:

> [i]t is incumbent on the Trial Chamber to adopt an approach it considers most appropriate for the assessment of evidence. The Appeals Chamber must *a priori* lend some credibility to the Trial Chamber's assessment of the evidence proffered at trial, irrespective of the approach adopted. However, the Appeals Chamber is aware that whenever such approach leads to an unreasonable assessment of the facts of the case, it becomes necessary to consider carefully whether the Trial Chamber did not commit an error of fact in its choice of the method of assessment or in its application thereof, which may have occasioned a miscarriage of justice.[566]

202. Bearing these principles in mind, the Trial Chamber's approach to the assessment of the relevant evidence is not unreasonable. The Appeals Chamber will not presume lightly that a trial chamber failed to consider particular evidence in light of the totality of the relevant evidence presented at trial.[567] Indeed, it is clear from the organization of the Trial Judgement that the Trial Chamber considered the accounts of witnesses who testified in relation to the events in Nyamyumba Commune on 7 April 1994 and those who testified in relation to Ngirabatware's alibi from 6 to 12 April 1994 in light of the totality of the evidence.[568]

203. In particular, the Appeals Chamber notes that the Trial Chamber expressly stated that "[i]n its deliberations, the Chamber has considered the alibi evidence in conjunction with the Prosecution evidence in order to make findings with respect to [p]aragraphs 16, 33, and 55 of the Indictment."[569] Moreover, at the outset of its deliberations on the alibi, the Trial Chamber recalled the Prosecution's evidence placing Ngirabatware in Nyamyumba Commune on 7 April 1994.[570] The Trial Chamber's assessment of the alibi is also replete with comparisons between the accounts of various

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[564] Appeal Brief, paras. 98-100. *See also* T. 30 June 2014 pp. 20-21.
[565] Response Brief, paras. 91-118.
[566] *Kayishema and Ruzindana* Appeal Judgement, para. 119.
[567] *See, e.g., Rukundo* Appeal Judgement, para. 217 ("The Trial Chamber did not discuss the other aspects of Witness SLA's evidence in detail in its deliberations. It also did not specifically discuss Rukundo's testimony or the accounts of Witnesses CCH and ATT. This, however, does not mean that the Trial Chamber did not consider this evidence in the context of the events at the Saint Léon Minor Seminary. A Trial Chamber is not required to expressly reference and comment upon every piece of evidence admitted onto the record. It is clear from the organization of the Trial Judgement that the Trial Chamber considered the accounts of Witnesses SLA and CCH as well as that of Rukundo in light of the totality of the evidence admitted at trial. Rukundo has pointed to no error in the Trial Judgement's recounting of their evidence. Accordingly, in finding Witnesses CSF, CCG, and BLC credible, the Trial Chamber considered the account of events provided by Rukundo and Witnesses CCH and SLA.").
[568] *See* Trial Judgement, Sections 3.9 (First Alibi, 6-12 April 1994), 3.10 (Distribution of Weapons, April 1994).
[569] Trial Judgement, para. 494. *See also* Trial Judgement, paras. 778, 853 (recalling its discussion of the alibi in its factual findings in relation to Ngirabatware's role in distributing weapons in Nyamyumba Commune).
[570] Trial Judgement, para. 663.

witnesses.[571] In addition, the Trial Chamber expressly stated that it considered the alibi witnesses "individually and collectively".[572] The Trial Chamber made a similar statement prior to making its factual findings on Ngirabatware's role in the distribution of weapons in Nyamyumba Commune.[573]

204. Accordingly, in finding certain Prosecution witnesses credible and in determining that Ngirabatware's alibi was not reasonably possibly true, the Trial Chamber bore in mind the other relevant evidence on the record and did not apply a piecemeal approach.

205. In addition, the Appeals Chamber notes that the Trial Chamber correctly recalled that:

> [a]n accused does not bear the burden of proving his alibi beyond reasonable doubt. Rather "[h]e must simply produce the evidence tending to show that he was not present at the time of the alleged crime" or, otherwise stated, present evidence "likely to raise a reasonable doubt in the Prosecution case." If the alibi is reasonably possibly true, it must be accepted.[574]

206. Moreover, the Trial Chamber also accurately reflected the Prosecution's burden of proof:

> Where an alibi is properly raised, the Prosecution must establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true. The Prosecution may do so, for instance, by demonstrating that the alibi does not in fact reasonably account for the period when the accused is alleged to have committed the crime. Where the alibi evidence does *prima facie* account for the accused's activities at the relevant time of the commission of the crime, the Prosecution must "eliminate the reasonable possibility that the alibi is true," for example, by demonstrating that the alibi evidence is not credible.[575]

207. The Appeals Chamber finds nothing problematic in the Trial Chamber's statement that "the Defence [...] needs only to raise the reasonable possibility that Ngirabatware was elsewhere".[576] Indeed, this statement is consistent with the requirement that an alibi needs to be "reasonably possibly true" to be accepted.[577] However, the Appeals Chamber notes with concern the Trial Chamber's observations that it had "doubts"[578] about Ngirabatware's and Witness Byilingiro's presence at the Presidential Guard compound and that the alibi evidence did not demonstrate that it was impossible for Ngirabatware to travel from Kigali to Nyamyumba Commune.[579] Nonetheless, this language, while inappropriate, is not fatal when viewed in the broader context of the Trial

[571] *See generally* Trial Judgement, paras. 664-679.
[572] Trial Judgement, para. 685.
[573] Trial Judgement, para. 838 ("The Chamber has considered all of the Defence evidence, as well as the evidence of Prosecution Witness ANAO. But this evidence, whether considered individually or cumulatively, is not capable of undermining the strong, credible and compelling accounts provided by Witnesses ANAE and ANAM.").
[574] *See* Trial Judgement, para. 642, *referring to Zigiranyirazo* Appeal Judgement, para. 17 (internal citations omitted).
[575] Trial Judgement, para. 643, *referring to Zigiranyirazo* Appeal Judgement, para. 18 (internal citations omitted).
[576] Trial Judgement, para. 653. *See also* Trial Judgement, para. 696.
[577] *See Zigiranyirazo* Appeal Judgement, para. 17.
[578] Trial Judgement, paras. 670, 675
[579] Trial Judgement, para. 676.

Chamber's findings,[580] including its accurate reflection of the burden of proof and its ultimate conclusion that the alibi evidence appeared incredible and fabricated.[581]

208. Accordingly, Ngirabatware has not demonstrated that the Trial Chamber failed to assess the evidence as a whole or shifted the burden of proof.

C. Assessment of the Evidence

1. Assessment of Prosecution Evidence Related to Nyamyumba Commune

209. The Trial Chamber found that, on 7 April 1994, Ngirabatware delivered weapons to the Bruxelles roadblock, where he told Faustin Bagango that he did not want any Tutsis alive in Bruxelles.[582] In making this finding, the Trial Chamber relied on Prosecution Witness ANAE.[583] The Trial Chamber also concluded that, later the same day, Ngirabatware returned to the Bruxelles roadblock, and delivered more weapons.[584] The Trial Chamber determined that, following this incident, Ngirabatware delivered weapons to the nearby Gitsimbi/Cotagirwa roadblock where he told Bagango that he did not want to see any Tutsis in Nyamyumba Commune, ordered Bagango to work well, and told him that Nyambwega needed to be located and killed.[585] In making these findings, the Trial Chamber relied on Prosecution Witness ANAM.[586]

210. The Trial Chamber found that the events at the Bruxelles roadblock described by Witnesses ANAE and ANAM shared similar features.[587] However, the Trial Chamber also observed a number of differences in their accounts, which led it to believe that the witnesses were describing separate incidents.[588] The Trial Chamber however considered that, in light of the similarities, "Witnesses ANAE and ANAM corroborate each another to the extent that Ngirabatware was in the area of Bruxelles roadblock on 7 April 1994, where he was engaged in distributing weapons to Bagango and *Interahamwe*, as well as in encouraging attacks on Tutsis".[589]

211. Ngirabatware submits that the Trial Chamber erred in concluding that there were a "significant number of similarities between [Witnesses ANAE's and ANAM's] account".[590] In particular, Ngirabatware identifies various discrepancies between their testimonies in relation to the

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[580] *See Zigiranyirazo* Appeal Judgement, para. 20.
[581] *See* Trial Judgement, paras. 642, 685, 696.
[582] Trial Judgement, paras. 839, 869, 1335.
[583] Trial Judgement, paras. 790, 794-803.
[584] Trial Judgement, paras. 840, 870, 1336.
[585] Trial Judgement, paras. 840, 870, 1336.
[586] Trial Judgement, paras. 792-793. *See also* Trial Judgement, paras. 713-714, 789-791, 804-815.
[587] Trial Judgement, para. 790.
[588] Trial Judgement, paras. 791-792.
[589] Trial Judgement, para. 815.
[590] Appeal Brief, para. 111, *referring to* Trial Judgement, para. 815. *See also* Reply Brief, paras. 53-55.

date of the weapons distribution, number of incidents, location, those accompanying him, the type of vehicle, type of weapons distributed, who offloaded the weapons, who received the weapons, who was present at the roadblock, and the presence and actions of Bagango.[591] In addition, Ngirabatware highlights other purported discrepancies between the witnesses' testimonies and their prior statements.[592] Ngirabatware argues that these inconsistencies and contradictions are highly material and that the Trial Chamber erred in failing to evaluate them.[593] In addition, Ngirabatware contends that, where the Trial Chamber evaluated certain inconsistencies between the witnesses' testimonies and their statements or other witnesses, it unreasonably excused them.[594]

212. The Prosecution responds that the Trial Chamber correctly assessed the evidence of Witnesses ANAE and ANAM and reasonably addressed and explained any differences between their accounts, their prior statements, or other witnesses.[595]

213. There is no merit in Ngirabatware's attempt to call into question the Trial Chamber's reliance on particular aspects of Witnesses ANAE's and ANAM's testimonies by pointing to differences in their evidence. The Appeals Chamber recalls that the trial chamber has the main responsibility to resolve any inconsistencies that may arise within or amongst witnesses' testimonies.[596] It is within the discretion of the trial chamber to evaluate any such inconsistencies, to consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the fundamental features of the evidence.[597]

214. Although there may be various differences between the accounts of Witnesses ANAE and ANAM, as explained in the Trial Judgement, the Trial Chamber acknowledged that their accounts varied in certain material respects and resolved these variances by determining that the witnesses were referring to separate incidents occuring at different times.[598] In reiterating various discrepancies in the evidence, Ngirabatware fails to take account of this key determination or demonstrate that it was unreasonable. Moreover, he also does not appreciate that the Trial Chamber only considered that the two witnesses corroborated each other insofar as the fundamental features of their evidence placed Ngirabatware in the Bruxelles area on 7 April 1994 distributing weapons

[591] Appeal Brief, pp. 52-56.
[592] Appeal Brief, pp. 52-56.
[593] Appeal Brief, para. 112.
[594] Appeal Brief, paras. 113-115.
[595] Response Brief, paras. 122-128.
[596] *Hategekimana* Appeal Judgement, para. 282; *Rukundo* Appeal Judgement, para. 207; *Simba* Appeal Judgement, para. 103.
[597] *Hategekimana* Appeal Judgement, para. 282; *Rukundo* Appeal Judgement, para. 207; *Simba* Appeal Judgement, para. 103.
[598] Trial Judgement, paras. 791-792.

and encouraging the killing of Tutsis in the area.[599] The Trial Chamber also articulated specific reasons for preferring the accounts of Witnesses ANAE and ANAM over other witnesses, including finding that they provided reliable, credible, and compelling evidence in contrast with other witnesses.[600] Ngirabatware has also demonstrated no error in the Trial Chamber's decision to excuse the differences between Witnesses ANAE's and ANAM's testimonies and their prior statements. The Appeals Chamber recalls that a trial chamber has broad discretion to determine the weight to be given to such discrepancies.[601]

215. Accordingly, Ngirabatware has not demonstrated any error in the Trial Chamber's assessment of the evidence of Witnesses ANAE and ANAM.

2 Assessment of Defence Evidence Related to the Alibi

216. In assessing the alibi advanced by Ngirabatware, the Trial Chamber considered, *inter alia*, the testimonies of Defence Witnesses DWAN-7, Byilingiro, Musabeyezu-Kabuga, Bicamumpaka, and Bongwa, and the evidence of Prosecution Witness Joseph Ngarambe.[602] The Trial Chamber noted that the nature and proximity of the relationship between Ngirabatware and the Defence witnesses does not, in and of itself, render their testimony not credible.[603] It considered, however, that these witnesses might have had a motive to protect Ngirabatware and therefore took this factor into account when assessing their evidence.[604]

217. Ngirabatware submits that the Trial Chamber erred in its evaluation of the evidence of the witnesses.[605] The Prosecution responds that the Trial Chamber correctly assessed their evidence and provided detailed reasoning as to why it did not find it to be individually and collectively credible.[606]

(a) Witness DWAN-7

218. Witness DWAN-7 testified that, in the early afternoon of 7 April 1994, he received a telephone call from Ngirabatware who sought to take refuge at the witness' residence.[607] The witness stated that Ngirabatware "could only have called [...] from Kigali" as the witness could

[599] Trial Judgement, para. 815.
[600] Trial Judgement, paras. 825, 832-833, 836-838. *See also* Trial Judgement, para. 815.
[601] *Hategekimana* Appeal Judgement, para. 280; *Gacumbitsi* Appeal Judgement, para. 74. *See also Kajelijeli* Appeal Judgement, para. 96.
[602] Trial Judgement, paras. 492, 530-546, 569-601, 619-625, 664-670, 672-674.
[603] Trial Judgement, para. 658.
[604] Trial Judgement, para. 658.
[605] Appeal Brief, paras. 117-125.
[606] Response Brief, paras. 129-136.
[607] Trial Judgement, para. 590, *referring to* Witness DWAN-7, T. 4 July 2011 pp. 12, 34, 36, 38.

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hear gunfire and shells' explosions over the telephone.[608] The Trial Chamber considered Witness DWAN-7's testimony that Ngirabatware must have only called him from Kigali to be speculative.[609] In this regard, the Trial Chamber took into account that there was no direct evidence on the record to show that Ngirabatware indeed called Witness DWAN-7 from the Presidential Guard compound or Kigali and that, since Witness DWAN-7 was not at the compound himself, his evidence had limited probative value as to Ngirabatware's presence at that location on 7 April 1994.[610] The Trial Chamber also found that the witness' attitude was biased in favour of Ngirabatware "since the witness was determined to portray Ngirabatware's character as unblemished."[611] The Trial Chamber further recalled that Witness DWAN-7's denial of a video footage, depicting Ngirabatware with *Interahamwe* in a MRND rally in 1992, rendered the witness not credible.[612] The Trial Chamber therefore concluded that the testimony of Witness DWAN-7 was neither objective nor reliable.[613]

219. Ngirabatware argues that the Trial Chamber failed to consider that Witness DWAN-7's evidence in relation to the telephone call was corroborated by other evidence on the record, including evidence showing that, at the relevant time, there was heavy gunfire in Kigali though not in Nyamyumba.[614] He also claims that the Trial Chamber erred in finding that the witness' comments on the video footage had an impact on his evidence pertaining to the telephone call, and that, in any event, allowing the witness to comment on the video footage was in contravention of the Trial Chamber's prior ruling that the video was admitted into evidence not for its content, but for determining Ngirabatware's credibility.[615] Finally, Ngirabatware claims that the Trial Chamber unreasonably suggested that, to be credible, Witness DWAN-7 should have had a negative view of Ngirabatware.[616]

220. The Appeals Chamber recalls that Ngirabatware's alibi rested upon his claim that he was at the Presidential Guard camp on 7 April 1994.[617] The Trial Chamber explicitly considered evidence from both parties on the prevailing insecurity in Kigali on 7 April 1994, particularly around the Presidential Guard camp, as well as about Witness DWAN-7's military experience and ability to

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[608] Trial Judgement, para. 592, *citing* Witness DWAN-7, T. 4 July 2011 p. 13.
[609] Trial Judgement, para. 673.
[610] Trial Judgement, para. 673.
[611] Trial Judgement, para. 674.
[612] Trial Judgement, para. 674. *See* Prosecution Exhibit 32.
[613] Trial Judgement, para. 674.
[614] Appeal Brief, para. 119. *See also* T. 30 June 2014 pp. 18-19.
[615] Appeal Brief, paras. 118-119. Ngirabatware also claims that the Trial Chamber erred in failing to allow Witness DWAN-7 to see the video in full so as to see the context of the video. *See* Appeal Brief, para. 119.
[616] Appeal Brief, para. 118. Ngirabatware further claims that Witness DWAN-7's evidence as to Ngirabatware's good character was provided nine years before the operative indictment was issued. *See* Appeal Brief, para. 120, *referring to* Prosecution Exhibit 53.
[617] Trial Judgement, para. 651.

recognize gunfire.[618] However, the Trial Chamber found Witness DWAN-7's testimony that Ngirabatware must have only called him from Kigali to be speculative.[619] In particular, the Trial Chamber observed that there was no direct evidence on the record that Ngirabatware indeed called Witness DWAN-7 from the Presidential Guard camp or Kigali.[620] The Appeals Chamber notes that, while Witness Musabeyezu-Kabuga testified that Ngirabatware had called Witness DWAN-7 from the Presidential Guard camp on 7 April 1994,[621] her evidence in this regard was hearsay as she did not personally witness the call but heard about it from Ngirabatware.[622] Moreover, as explained below, the Trial Chamber considered Witness Musabeyezu-Kabuga's evidence placing Ngirabatware at the Presidential Guard camp not credible for various reasons.[623] As to Ngirabatware's own testimony that he called Witness DWAN-7 from the Presidential Guard camp, the Trial Chamber viewed his evidence with caution in light of the fact that, after his alleged attempt to leave the Presidential Guard camp for the residence of Witness DWAN-7, he decided to stay with his family at the camp instead of joining many other families who left for the French Embassy later the same day.[624] Finally, Ngirabatware has failed to point to any evidence in support of his claim that, at the relevant time, heavy gunfire was occurring exclusively in Kigali.

221. The Appeals Chamber turns next to Ngirabatware's submission that the Trial Chamber erred in allowing Witness DWAN-7 to comment on a portion of a video footage introduced for the first time in the course of Ngirabatware's cross-examination by the Prosecution. The Appeals Chamber notes that on 8 December 2010, the Trial Chamber overturned an objection by the Defence and allowed a video featuring Ngirabatware at an *Interahamwe* rally on 28 May 1992 to be used in its entirety in the course of his cross-examination by the Prosecution.[625] The Trial Chamber reasoned that the video was allowed for the sole purpose of exposing alleged contradictions in Ngirabatware's testimony undermining his credibility.[626] On 5 July 2011, the Trial Chamber again overturned an objection by the Defence and allowed use of the same video in the course of Witness DWAN-7's cross-examination by the Prosecution, reiterating that its use was consistent with Rule 90(G) of the ICTR Rules in order to allow examination on matters going to the witness's credibility.[627] The Trial Chamber further held that, unlike Ngirabatware who was an accused in this case, the circumstances of Witness DWAN-7's testimony did not require showing the entire video

[618] Trial Judgement, para. 672.
[619] Trial Judgement, para. 673.
[620] Trial Judgement, para. 673.
[621] Trial Judgement, paras. 504, 536. *See also* Trial Judgement, para. 533, n. 708.
[622] Witness Musabeyezu-Kabuga, T. 18 October 2011 pp. 27, 31.
[623] *See infra* paras. 228, 231.
[624] Trial Judgement, para. 675.
[625] Ngirabatware, T. 8 December 2010 pp. 5-7.
[626] Ngirabatware, T. 8 December 2010 p. 7.
[627] Witness DWAN-7, T. 5 July 2011 pp. 48-49.

to the witness.[628] In view of the Trial Chamber's considerations, the Appeals Chamber is not persuaded by Ngirabatware's submission that by allowing the use of the footage during Witness DWAN-7's cross-examination, the Trial Chamber contradicted its ruling of 8 December 2010, or that it erred in not allowing the witness to see the video in its entirety.

222. Ngirabatware also fails to show an error in the Trial Chamber's decision to treat with caution Witness DWAN-7's evidence as to Ngirabatware's good character, considering the very close relationship between the two.[629] Indeed, Witness DWAN-7 testified that his professional relationship with Ngirabatware developed into a friendship, confirming that the two had known each other for at least three or four years and saw each other almost on a daily basis.[630] The ICTR Appeals Chamber has previously held that a witness's close personal relationship to an accused is one of the factors which a trial chamber may consider in assessing his or her evidence.[631] In any event, as explained above, the Trial Chamber's rejection of Witness DWAN-7's evidence was not based solely on his relationship with Ngirabatware.

(b) Witnesses Byilingiro and Ngarambe

223. Witness Byilingiro testified that he saw Ngirabatware at the Presidential Guard camp on 7 April 1994.[632] However the Trial Chamber "question[ed]" Witness Byilingiro's presence at the Presidential Guard camp and considered that "he was placed at the scene in order to exonerate Ngirabatware."[633] Accordingly, having considered the "sum total" of Witness Byilingiro's testimony, the Trial Chamber doubted that he was present at the Presidential Guard camp on 7 April 1994.[634]

224. The Trial Chamber further considered Witness Ngarambe's evidence that, upon his arrival at the French Embassy on 10 April 1994, he spoke with Byilingiro who informed him that he had first sought refuge at the Presidential Guard camp.[635] The Trial Chamber, however, was not convinced that this hearsay evidence supported Witness Byilingiro's presence at the Presidential Guard camp on 7 April 1994.[636]

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[628] Witness DWAN-7, T. 5 July 2011 p. 49.
[629] *See* Trial Judgement, para. 672. *See also* Trial Judgement, para. 587.
[630] Trial Judgement, paras. 587, 655.
[631] *Kanyarukiga* Appeal Judgement, para. 121, *referring to Bikindi* Appeal Judgement, para. 117. *See also Simba* Appeal Judgement, para. 210; *Semanza* Appeal Judgement, para. 120.
[632] Trial Judgement, para. 572, *referring to* Witness Byilingiro, T. 26 October 2011 pp. 12, 16-18. *See also* Trial Judgement, paras. 571-572.
[633] Trial Judgement, para. 668.
[634] Trial Judgement, para. 668.
[635] Trial Judgement, para. 669, *referring to* Witness Ngarambe, T. 25 August 2010 p. 28. *See also* Trial Judgement, para. 622
[636] Trial Judgement, para. 669.

225. Ngirabatware submits that there is no evidence showing that Witness Byilingiro was "placed at the scene in order to exonerate Ngirabatware" or that, at the relevant time, the witness was at a place other than the Presidential Guard camp.[637] Ngirabatware also claims that the Trial Chamber failed to consider that Witness Byilingiro's evidence was corroborated by the testimonies of Ngirabatware and Witness Musabeyezu-Kabuga, and erred in rejecting the corroboration provided by Witness Ngarambe.[638]

226. Contrary to Ngirabatware's submission, the Trial Chamber explicitly considered Witness Byilingiro's testimony in the context of the evidence provided by Ngirabatware and Witness Musabeyezu-Kabuga, who testified that there was gunfire in the vicinity of the Presidential Guard camp in the early hours of 7 April 1994.[639] The Trial Chamber noted that Witness Byilingiro did not mention any gunfire.[640] It also considered "doubtful" Witness Byilingiro's testimony that on 7 April 1994 he stayed for nearly two hours in the courtyard of the Presidential Guard camp, given that there was gunfire close by.[641] The Trial Chamber further found that Witness Byilingiro failed to adequately explain why in his interview with the Belgium Immigration authorities he did not mention that on 7 April 1994 he took refuge at the Presidential Guard camp.[642] The Trial Chamber also noted that, although Witness Byilingiro was not a close friend of Ngirabatware, he confirmed that he had known Ngirabatware for a long time in a professional capacity due to his position at the Ministry of Planning.[643] Ngirabatware fails to show that, in taking these factors into consideration, the Trial Chamber acted unreasonably.

227. In addition, in rejecting Witness Ngarambe's hearsay evidence that Byilingiro was at the Presidential Guard camp, the Trial Chamber explicitly noted that the source of the information received by Witness Ngarambe was Byilingiro himself.[644] Ngirabatware fails to show that the Trial Chamber erred in assessing the probative value and the weight to be afforded to Witness Ngarambe's hearsay evidence. Ngirabatware thus fails to show an error in the Trial Chamber's finding that Witness Byilingiro's presence at the Presidential Guard camp on 7 April 1994 was implausible.

[637] Appeal Brief, para. 121.
[638] Appeal Brief, para. 121.
[639] Trial Judgement, para. 668.
[640] Trial Judgement, para. 668.
[641] Trial Judgement, para. 668.
[642] Trial Judgement, paras. 668, 670.
[643] Trial Judgement, paras. 656, 670.
[644] Trial Judgement, para. 669.

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(c) Witnesses Musabeyezu-Kabuga, Bongwa, and Bicamumpaka

228. Witnesses Musabeyezu-Kabuga and Bongwa testified to having personally seen Ngirabatware at the Presidential Guard camp on 7 April 1994.[645] Witness Musabeyezu-Kabuga, Ngirabatware's sister-in-law, testified that she arrived with Ngirabatware at the Presidential Guard camp on the night of 6 April and saw him and spoke to him every 45 minutes during the night of 6 to 7 April 1994 as, given her pregnant condition, she had to pass through the small room where the men, including Ngirabatware, were staying.[646] The Trial Chamber did not find her account plausible and considered that the witness was trying to protect Ngirabatware.[647] In relation to Witness Bongwa's evidence, the Trial Chamber considered that the witness' omission to mention in her prior testimony in the *Bizimungu et al.* case that Ngirabatware was present at the Presidential Guard camp rendered her evidence in this regard unreliable.[648] The Trial Chamber also noted that there were several internal inconsistencies in her testimony.[649]

229. Further, Witness Bicamumpaka testified that he learned from André Ntagerura and Casimir Bizimungu that Ngirabatware was at the Presidential Guard camp from 6 to 7 April and moved to the French Embassy on 8 April 1994.[650] However, having decided to treat with caution his testimony as Ngirabatware's former colleague and accused person before the ICTR, the Trial Chamber found that Bicamumpaka's hearsay evidence had little probative value.[651]

230. Ngirabatware argues that the Trial Chamber erred in rejecting Witness Musabeyezu-Kabuga's testimony on the incorrect basis that she frequently saw and only spoke to Ngirabatware on the night of 6 to 7 April 1994 when her own husband and children were also present.[652] Ngirabatware also claims that the Trial Chamber erred in its assessment of Witness Bongwa's evidence and in failing to assess her testimony in light of the totality of the evidence presented.[653] As to the evidence of Witness Bicamumpaka, Ngirabatware claims that the rejection of his evidence constituted a violation of the witness' presumption of innocence in view of his acquittal by the ICTR.[654]

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[645] Trial Judgement, para. 664. *See also* Trial Judgement, paras. 534-538, 580-581.
[646] Trial Judgement, paras. 530, 664. *See also* Trial Judgement, paras. 531-534.
[647] Trial Judgement, para. 664.
[648] Trial Judgement, paras. 665-666.
[649] Trial Judgement, para. 667.
[650] Trial Judgement, para. 694, *referring to* Witness Bicamumpaka, T. 22 August 2011 p. 46. *See also* Trial Judgement, para. 596.
[651] Trial Judgement, paras. 657, 694.
[652] Appeal Brief, para. 122. *See* Trial Judgement, para. 664.
[653] Appeal Brief, para. 124.
[654] Appeal Brief, para. 123.

231. In disbelieving Witness Musabeyezu-Kabuga's claim that, at the Presidential Guard camp, she saw and spoke only to Ngirabatware every 45 minutes, the Trial Chamber noted that the witness's husband and children were also present in the room where Ngirabatware was staying.[655] Ngirabatware takes issue with the fact that, at the time, Witness Musabeyezu-Kabuga had no children and that she testified as to also having spoken to her husband.[656] Be that as it may, Ngirabatware fails to show that the Trial Chamber abused its discretion by treating with caution Witness Musabeyezu-Kabuga's evidence, considering the purported frequency of her interaction with Ngirabatware on the night of 6 to 7 April 1994 and her close relationship with him. In this regard, the Trial Chamber observed that Witness Musabeyezu-Kabuga was Ngirabatware's sister-in-law, for whom Ngirabatware allegedly went at lengths to try and evacuate because of her pregnant condition.[657] The Appeals Chamber recalls that the task of hearing, assessing, and weighing the evidence presented at trial is left primarily to the trial chamber[658] and that the assessment of the demeanour of witnesses in considering their credibility is one of the fundamental functions of a trial chamber to which the Appeals Chamber must accord considerable deference.[659] Bearing these principles in mind, Ngirabatware has failed to show that the Trial Chamber erred in finding that Witness Musabeyezu-Kabuga's evidence as to Ngirabatware's presence at the Presidential Guard camp was not credible.

232. In relation to the evidence of Witness Bongwa, the Appeals Chamber notes that the witness' omission of Ngirabatware's name in her prior statement in the *Bizimungu et al.* case was central to the Trial Chamber's evaluation of her credibility.[660] In arguing that the Trial Chamber should have nevertheless considered Witness Bongwa's testimony in light of the totality of the evidence presented, Ngirabatware merely seeks to substitute the Trial Chambers' evaluation of the evidence with his own. In any case, as discussed above, the Trial Chamber evaluated Witness Bongwa's evidence in light of the totality of the evidence.[661] Specifically, the Trial Chamber noted that Witness Bongwa was the only one to testify that Ngirabatware spent the night of 6 to 7 April 1994 in the big officer's mess hall, whereas Ngirabatware and Witnesses Musabeyezu-Kabuga and Byilingiro testified that Ngirabatware spent the night in the small hall.[662] The Trial Chamber noted

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[655] Trial Judgement, para. 664.
[656] Appeal Brief, para. 122. *See also* Witness Musabeyezu-Kabuga, T. 18 October 2011 pp. 25-26.
[657] Trial Judgement, para. 656.
[658] *Kupreškić et al.* Appeal Judgement, para. 30.
[659] *Hategekimana* Appeal Judgement, para. 202, *referring to Muvunyi II* Appeal Judgement, para. 26, *Nchamihigo* Appeal Judgement, para. 47, *Bikindi* Appeal Judgement, para. 114, *Simba* Appeal Judgement, para. 9, *Nahimana et al.* Appeal Judgement, paras. 14, 194, *Ndindabahizi* Appeal Judgement, para. 34, *Ntagerura et al.* Appeal Judgement, paras. 12, 213, *Semanza* Appeal Judgement, para. 8, *Ntakirutimana* Appeal Judgement, paras. 12, 204, 244, *Kamuhanda* Appeal Judgement, para. 138, *Kayishema and Ruzindana* Appeal Judgement, para. 222.
[660] *See* Trial Judgement, paras. 665-666.
[661] *See supra* Section VI.B.
[662] Trial Judgement, para. 667. *See* Witness Bongwa, T. 30 January 2012 p. 14. Contrary to Ngirabatware's submission (*See* Appeal Brief, para. 124), none of the three witnesses corroborated Witness Bongwa's account that Ngirabatware

that, in addition, Witness Bongwa was the only witness who testified that, on the morning of 7 April 1994, they moved into a small house within the Presidential Guard camp.[663] The Trial Chamber also took into account that Witness Bongwa's husband was a minister in the Interim Government and thus a colleague of Ngirabatware and that, therefore, the witness may have had a motive to exculpate Ngirabatware.[664]

233. Finally, otherwise than showing a disagreement with the Trial Chamber's evaluation of Witness Bicamumpaka's evidence, Ngirabatware fails to show that the Trial Chamber acted unreasonably in disbelieving his evidence due to its hearsay nature and the witness's position as former colleague of Ngirabatware and accused at the time of his testimony in the present case.

3. Feasibility of Travel

234. The Trial Chamber concluded that it was feasible to travel from Kigali to Gisenyi Prefecture in April 1994 using different routes.[665] The Trial Chamber determined that Ngirabatware would have been able to make the journey in four to five hours from Kigali to Gisenyi Prefecture via Ruhengeri if accompanied by an armed escort.[666] In reaching this conclusion, the Trial Chamber considered various factors, including: (i) evidence of the existence of several routes between Kigali and Gisenyi Prefecture, including the tarmac road via Ruhengeri; (ii) travel time estimates ranging between approximately four to eight hours; (iii) road conditions, including the existence of roadblocks; (iv) testimony that a military or official vehicle might require shorter travel time; (v) Ngirabatware's position as a minister who travelled with an armed escort; and (vi) its observations from the site-visit travelling via the Ruhengeri route.[667]

235. Ngirabatware submits that the Trial Chamber erred in making its findings on the feasibility of his travel between Kigali and Gisenyi Prefecture.[668] Specifically, Ngirabatware contends that the Trial Chamber failed to consider or to admit relevant evidence describing the impracticability of travel between Kigali and Gisenyi Prefecture in April 1994.[669] In addition, Ngirabatware submits that the Prosecution did not dispute that he was in Kigali on the early morning or in the afternoon

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spent the night of 6 to 7 April 1994 in the big officer's mess hall. *See* Ngirabatware, T. 25 November 2010 p. 22; Witness Musabeyezu-Kabuga, T. 18 October 2011 p. 25; Witness Byilingiro, T. 26 October 2011 pp. 11-12.

[663] Trial Judgement, para. 667. *See also* Witness Bongwa, T. 30 January 2012 p. 14.

[664] Trial Judgement, para. 657.

[665] Trial Judgement, para. 679. Prosecution Witnesses ANAW and DAK identified four and two routes, respectively, which could have been used to travel between Kigali and Gisenyi. *See* Trial Judgement, paras. 627, 632-636, 677, nn. 820, 877. In the Trial Judgement, the Trial Chamber defined the two routes identified by Witness DAK as Route One and Route Two. *See* Trial Judgement, paras. 632, 677.

[666] Trial Judgement, para. 684. *See also* Trial Judgement, para. 681. The Trial Chamber made this estimate based on Route One as identified by Prosecution Witness DAK. *See* also Trial Judgement, paras. 632-636, 677.

[667] Trial Judgement, paras. 677-684.

[668] Appeal Brief, paras. 127-129, 138-144.

[669] Appeal Brief, paras. 127-129, 143-144.

and on the evening of 7 April 1994.[670] Ngirabatware further argues that the Prosecution never presented any evidence concerning the circumstances surrounding Ngirabatware's movements from Kigali to Gisenyi Prefecture.[671] According to Ngirabatware, in this context, the Trial Chamber filled the evidentiary void on the basis of inferences that were prejudicial to him.[672] In particular, Ngirabatware challenges the Trial Chamber's conclusions as to the road taken, the required travel time, the presence of gendarmes, and his ability to easily pass through roadblocks.[673] In his submissions, Ngirabatware implies that in the absence of direct evidence, in making any inferences on his ability to travel, the Trial Chamber should have adopted the routes and travel times most favourable to him, which would have precluded his participation in the crimes.[674]

236. The Prosecution responds that the Trial Chamber considered all relevant evidence related to the feasibility of travel and did not err in denying the admission of additional statements on this matter.[675] In addition, the Prosecution submits that the Trial Chamber reasonably assessed the evidence concerning Ngirabatware's ability to travel and correctly concluded that he would be able to do so in four to five hours.[676]

237. With respect to Ngirabatware's claim that the Trial Chamber failed to evaluate certain pieces of evidence concerning the difficulty of travel, the Appeals Chamber recalls that a trial chamber is not required to expressly reference and comment upon every piece of evidence admitted onto the record.[677] The Trial Chamber considered evidence from a variety of sources concerning the feasibility of travel in April 1994, including evidence from Defence and Prosecution witnesses concerning the difficulty of travel and the security situation in Kigali.[678] In this context, Ngirabatware fails to show that the Trial Chamber disregarded any additional similar evidence or that any express consideration of it would have altered its overall conclusions in light of the totality of the evidence it considered.

238. In addition, the Appeals Chamber is also not convinced that Ngirabatware has demonstrated any error in the Trial Chamber's decision not to admit the statements of Defence Witnesses DWAN-149 and DWAN-166 into evidence pursuant to Rule 92*bis* of the ICTR Rules. In this respect, Ngirabatware points only to the relevance of the evidence to his case which, as noted above, was similar in many respects to evidence considered already by the Trial Chamber.

[670] Appeal Brief, paras. 138-139.
[671] Appeal Brief, paras. 140-141.
[672] Appeal Brief, para. 141.
[673] Appeal Brief, para. 141.
[674] Appeal Brief, paras. 141-142.
[675] Response Brief, paras. 139-142, 168-172.
[676] Response Brief, paras. 154-167.
[677] *Rukundo* Appeal Judgement, para. 217; *Muhimana* Appeal Judgement, para. 72.
[678] Trial Judgement, paras. 676-679, 683.

However, he fails to address or articulate any error in the actual reason for the Trial Chamber's decision not to admit the statements, namely that the feasibility of travel was a serious matter of contention and in the Trial Chamber's view such evidence should only be presented orally.[679]

239. Finally, there is no merit in Ngirabatware's contention that the Prosecution was required to establish the circumstances surrounding his travel from Kigali to Gisenyi Prefecture. The Prosecution was only required to prove beyond reasonable doubt that Ngirabatware was present and committed the relevant criminal acts in Nyamyumba Commune on 7 April 1994. Contrary to Ngirabatware submissions, nowhere in the Trial Judgement did the Trial Chamber accept that he was in Kigali at any particular time in the morning or evening of 7 April 1994. Indeed, the Trial Chamber rejected Ngirabatware's alibi as to that date in its totality and even questioned his presence at the Presidential Guard camp on the night of 6 April 1994.[680] The Trial Chamber only considered it reasonably possibly true that Ngirabatware was in Kigali at the French Embassy by early afternoon on 8 April 1994.[681] Accordingly, Ngirabatware's challenge to the Trial Chamber's findings on the particular route or travel time between Kigali and Gisenyi Prefecture are not material. Indeed, at no time did the Trial Chamber place any weight on the travel time in considering whether Ngirabatware was in a position to commit the crimes.

240. Accordingly, Ngirabatware has not identified any error in the Trial Chamber's evaluation of the feasibility of travel between Kigali and Gisenyi Prefecture that would invalidate its findings in relation to his presence in Nyamyumba Commune on 7 April 1994.

D. Conclusion

241. For the foregoing reasons, the Appeals Chamber, Judge Moloto dissenting, dismisses Ngirabatware's Second Ground of Appeal.

[679] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion for Admission of Written Statements, 14 May 2012, para. 31.
[680] Trial Judgement, paras. 685, 696. *See also* Trial Judgement, paras. 664-665.
[681] Trial Judgement, paras. 695-696.

VII. JOINT CRIMINAL ENTERPRISE (GROUND 3)

242. The Trial Chamber convicted Ngirabatware under Count 6 of the Indictment, of rape as a crime against humanity, pursuant to the extended form of joint criminal enterprise, in relation to the repeated rape of Chantal Murazemariya by Juma and Makuze, two members of the joint criminal enterprise, in Nyamyumba Commune in April 1994.[682] Ngirabatware submits that the Trial Chamber erred in holding him responsible for the crime of rape on the basis of his participation in a joint criminal enterprise.[683]

243. Count 6 of the Indictment alleges that Ngirabatware participated in a joint criminal enterprise, the common purpose of which was "the extermination of the Tutsi civilian population".[684] It further alleges that "[t]he risk of rapes of female members of the Tutsi population was a natural and foreseeable consequence of the execution of the common design".[685] Consequently, Count 6 of the Indictment charges Ngirabatware with rape, as a crime against humanity, pursuant to the third category of joint criminal enterprise. It further alleges that "[t]he particulars that give rise to [Ngirabatware's] criminal responsibility, including his participation in the joint criminal enterprise (category 3) are set forth above and in paragraphs 61 to 63 below".[686]

244. Count 5 of the Indictment charges Ngirabatware with the crime of extermination as a crime against humanity.[687] Like Count 6 (rape), Count 5 (extermination) alleges that Ngirabatware participated in a joint criminal enterprise with a common purpose of exterminating Tutsis.[688] Count 5 (extermination) specifies, however, that Ngirabatware contributed to the extermination through his acts and conduct described in paragraphs 50 to 60 of the Indictment.[689] In the course of the trial, the Trial Chamber granted the Prosecution's request to withdraw paragraphs 54 and 56 through 59 of the Indictment[690] and subsequently found that the Prosecution had failed to prove beyond reasonable doubt any of the remaining allegations pleaded in support of the charge of extermination under Count 5, namely paragraphs 50 through 53, 55 and 60 of the Indictment.[691]

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[682] Trial Judgement, paras. 1393-1394.
[683] Notice of Appeal, paras. 24-27; Appeal Brief, paras. 147-171.
[684] Indictment, p. 15. The named participants in the joint criminal enterprise under Count 6 of the Indictment are: Ildefonse Nizeyimana, Gersom Nzabahiranya, Felicien Kabuga, Théoneste Bagosora, Anatole Nsengiyumva, Felix Niyoniringiye, Faustin Bagango, Jean Simpunga, Gahamango, Bandesiminsi, Jean Bosco Murekumbaze, Mateke Nyakabwa, Mathieu Ngirumpatse, Mathias Nyagasaza, Banzi Wellars, Juma and Makuze.
[685] Indictment, p. 15.
[686] Indictment, p. 15.
[687] Indictment, pp. 12-15.
[688] Indictment, p. 12.
[689] Indictment, p. 13.
[690] Rule 98*bis* Decision, p. 12. *See supra* para. 13.
[691] Trial Judgement, para. 1378. *See* Trial Judgement, paras. 883-888, 898-901, 917-920, 1055-1062, 1254-1259. *See supra* para. 15.

Accordingly, Ngirabatware was acquitted of extermination as a crime against humanity charged under Count 5 of the Indictment.[692]

245. Nonetheless, in convicting Ngirabatware of rape as a crime against humanity under Count 6 of the Indictment, the Trial Chamber found that he participated in a joint criminal enterprise with the common purpose of, *inter alia*, exterminating the Tutsi civilian population in Nyamyumba Commune.[693] The Trial Chamber found that Ngirabatware significantly contributed to the common purpose by distributing weapons at the Bruxelles and Gitsimbi/Cotagirwa roadblocks on 7 April 1994 and encouraging the *Interahamwe* to kill Tutsis.[694] This finding on Ngirabatware's contribution to the joint criminal enterprise is based on paragraph 16 of the Indictment, which is alleged under Count 2 (genocide) of the Indictment.[695]

246. Ngirabatware submits that the Trial Chamber erred in convicting him under Count 6 of the Indictment of rape as a crime against humanity pursuant to the extended form of joint criminal enterprise, because his contribution to the common purpose was not pleaded in the Indictment.[696] Specifically, he argues that the conduct described in paragraph 16 of the Indictment pertained only to his alleged responsibility for instigating and aiding and abetting genocide under Count 2 of the Indictment, and not to committing through participation in a joint criminal enterprise under Count 6 of the Indictment.[697] Ngirabatware further argues that he cannot be held responsible under Count 6 of the Indictment because the alleged common criminal purpose of the joint criminal enterprise under Count 6 was the extermination of the Tutsi civilian population and he was acquitted of the crime of extermination charged under Count 5.[698]

247. The Prosecution responds that the *chapeau* of Count 6 incorporated, by way of reference, paragraph 16 of the Indictment and that Ngirabatware received clear and consistent notice of the charges against him.[699] The Prosecution further submits that despite Ngirabatware's acquittal under Count 5 of the Indictment, the Trial Chamber was entitled to rely on the evidence of his participation in the common plan to exterminate the Tutsi population in support of his conviction under Count 6 of the Indictment.[700]

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[692] Trial Judgement, paras. 1379, 1394.
[693] Trial Judgement, paras. 1305, 1322, 1393
[694] Trial Judgement, paras. 1303-1306.
[695] *See* Indictment, p. 6.
[696] Appeal Brief, paras. 147-151, 156-160, 164.
[697] Appeal Brief, paras. 147-151, 164; Reply Brief, paras. 62-67. *See also* T. 30 June 2014 p. 14.
[698] Appeal Brief, para. 165; Reply Brief, para. 70. *See also* T. 30 June 2014 p. 48.
[699] Response Brief, paras. 175-181, 190. *See* T. 30 June 2014 pp. 38-39.
[700] Response Brief, para. 191. *See* T. 30 June 2014 pp. 31, 43.

248. The Appeals Chamber recalls that the Prosecution is required to plead the specific forms of individual criminal responsibility with which the accused is being charged.[701] In cases where the Prosecution alleges liability pursuant to a joint criminal enterprise, the following material facts must be pleaded in the indictment: the nature and purpose of the enterprise, the period over which the enterprise is said to have existed, the identity of the participants in the enterprise, and the nature of the accused's participation in the enterprise.[702] The indictment should also clearly indicate which form of joint criminal enterprise is being alleged.[703]

249. 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.[704] Ngirabatware was charged with participation in a joint criminal enterprise with the common purpose to exterminate the Tutsis under Count 5 of the Indictment.[705] Count 6 of the Indictment charges Ngirabatware with rape as a natural and foreseeable consequence of the execution of the common purpose to exterminate the Tutsi civilian population.[706] Accordingly, despite the minor nuances in the language,[707] the nature of the common purpose under Count 5 of the Indictment is identical to that under Count 6. In fact, Count 5 and Count 6 are the only counts in the Indictment alleging that the common purpose of the joint criminal enterprise was the crime of extermination. A plain reading of the Indictment thus indicates that the common purpose of exterminating the Tutsi civilian population pleaded under Count 6 of the Indictment was linked to the charge of extermination contained in Count 5 of the Indictment. In these circumstances, the mention in the *chapeau* of Count 6 of the particulars concerning Ngirabatware's participation in the joint criminal enterprise "as set forth above"[708] can be interpreted to refer solely to Ngirabatware's alleged contribution to the joint criminal enterprise to commit extermination as set forth in Count 5 of the Indictment.

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[701] *Ntawukulilyayo* Appeal Judgement, para. 188; *Simić* Appeal Judgement, para. 21; *Rukundo* Appeal Judgement, para. 30.
[702] *Šainović et al.* Appeal Judgement, para. 214, *citing Simić* Appeal Judgement, para. 22. *See also Simba* Appeal Judgement, para. 63.
[703] *Simba* Appeal Judgement, para. 63; *Simić* Appeal Judgement, para. 22.
[704] *Bagosora and Nsengiyumva* Appeal Judgement, para. 182; *Seromba* Appeal Judgement, para. 27. The Appeals Chamber observes that the Trial Chamber was cognizant of the law in this regard: "In assessing an indictment, each paragraph should not be read in isolation but rather should be considered in the context of other paragraphs in the indictment". *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion to Dismiss Based Upon Defects in Amended Indictment, 8 April 2009 ("Decision on Motion to Dismiss the Indictment"), para. 21, *referring to Rutaganda* Appeal Judgement, para. 304.
[705] Indictment, pp. 12-13.
[706] Indictment, p. 15.
[707] Count 5 of the Indictment describes the common criminal purpose as "the extermination of the Tutsi" (Indictment, p. 12), whereas Count 6 of the Indictment describes the common criminal purpose as "the extermination of the Tutsi civilian population" (Indictment, p. 15).
[708] Indictment, p. 15.

250. In light of the above, the Appeals Chamber considers that Count 6 of the Indictment is narrowly tailored and alleges Ngirabatware's contribution to the common purpose to exterminate the Tutsis on the basis of his conduct pleaded under Count 5 of the Indictment. In relying on paragraph 16 of the Indictment, the Trial Chamber impermissibly expanded the charge of rape as a crime against humanity by incorporating Ngirabatware's conduct pleaded under Count 2 (genocide) of the Indictment.[709] Accordingly, the Appeals Chamber finds that the Trial Chamber erred in relying on Ngirabatware's conduct alleged in paragraph 16 of the Indictment in determining his criminal responsibility under Count 6 of the Indictment.[710]

251. The Appeals Chamber further recalls that the Trial Chamber acquitted Ngirabatware of the crime of extermination as pleaded under Count 5 of the Indictment.[711] In particular, the Trial Chamber found that the Prosecution had failed to prove beyond reasonable doubt Ngirabatware's contribution to the common purpose to exterminate the Tutsis as pleaded in the allegations supporting that count.[712] In the absence of an appeal by the Prosecution, the Appeals Chamber does not consider it necessary, in the present circumstances, to comment on Ngirabatware's acquittal under Count 5 of the Indictment. In relation to Ngirabatware's conviction under Count 6 of the Indictment, the Trial Chamber found that "the rape of Tutsis was a natural and foreseeable consequence of the common criminal purpose and that Ngirabatware was at least subjectively aware that this was a possible consequence of the [joint criminal enterprise]."[713] The Appeals Chamber observes that Ngirabatware's contribution to the common purpose to exterminate the Tutsi civilian population was essential for establishing his responsibility for crimes committed beyond the common purpose, but which are nevertheless a natural and foreseeable consequence thereof.[714] Since the Prosecution failed to prove Ngirabatware's contribution to the common purpose of

[709] *Cf. Muvunyi I* Appeal Judgement, paras. 154-157.
[710] *See* Trial Judgement, paras. 1303-1306, 1385, 1391-1393.
[711] Trial Judgement, paras. 1377-1379.
[712] *See* also Trial Judgement, paras. 883-888 (in addressing para. 50 of the Indictment, the Trial Chamber found that the Prosecution had failed to prove beyond reasonable doubt that Ngirabatware distributed machetes in mid-April 1994 and that attacks and killings resulted from any such distribution), paras. 898-901 (in addressing para. 60 of the Indictment, the Trial Chamber found that the Prosecution had failed to prove beyond reasonable doubt that there were meetings in Butare in February 1994 or at the MRND Palace in March 1994, that in furtherance of the agreement made in these meetings, Ngirabatware instigated the *Interahamwe* to seek and kill Tutsi civilians, and that Tutsis were killed as a result), paras. 918-920 (in addressing para. 55 of the Indictment, the Trial Chamber found that the Prosecution had failed to prove beyond reasonable doubt that Ngirabatware instructed members of the *Interahamwe* to "remove all the dirt between their teeth" and "pull up all the weeds from the millet field"), paras. 1055-1061 (in addressing para. 51 of the Indictment, the Trial Chamber found that the Prosecution had failed to prove beyond reasonable doubt that, around mid-April 1994, Ngirabatware convened a meeting with attackers at the residence of his parents and instigated them to kill Tutsis), para. 1062 (in addressing para. 52 of the Indictment, the Trial Chamber found that the Prosecution had failed to prove beyond reasonable doubt that around mid-April Ngrirabatware brought hand grenades to the *Interahamwe* militia, who had convened at his parents' residence, to be used to kill Tutsis), paras. 1253-1259 (in addressing para. 53 of the Indictment, the Trial Chamber found that the Prosecution had failed to prove beyond reasonable doubt that, towards the end of April 1994, Ngirabatware provided his vehicle to the *Interahamwe* and that this facilitated their movements to massacre sites).
[713] Trial Judgement, para. 1390.

exterminating the Tutsi civilian population pleaded under Count 5 of the Indictment, Ngirabatware's conviction for rape entered via the extended form of joint criminal enterprise under Count 6 of the Indictment cannot be sustained.

252. For the foregoing reasons, the Appeals Chamber grants, in part, Ngirabatware's Third Ground of Appeal, reverses his conviction for the rape of Chantal Murazemariya, and enters a verdict of acquittal under Count 6 of the Indictment. It is therefore unnecessary to address the parties' remaining submissions concerning Ngirabatware's participation in a joint criminal enterprise.[715] In addition, Ngirabatware's Fourth Ground of Appeal challenging other aspects related to his conviction for the rape of Chantal Murazemariya is dismissed as moot.[716] The impact of this finding, if any, on Ngirabatware's sentence will be addressed in Section VIII below.

[714] *Kvočka et al.* Appeal Judgement, para. 83, *citing Tadić* Appeal Judgement, paras. 203, 220, 228.

[715] More specifically, Ngirabatware argues that the Trial Chamber erred by: (i) expanding and moulding the charges in relation to the time of creation, purpose, geographical scope, and members of the joint criminal enterprise, whose contribution was not pleaded in the Indictment (Appeal Brief, paras. 152-155, 164; Reply Brief, paras. 68-69); (ii) relying on his participation in a number of meetings, some falling outside the Tribunal's temporal jurisdiction, which were not pleaded in the Indictment and took place prior to the existence of the joint criminal enterprise (Appeal Brief, para. 159); (iii) failing to make a finding that he possessed the requisite *mens rea* for extermination which was the crime encompassed by the common criminal purpose under Count 6 of the Indictment (Appeal Brief, para. 165; Reply Brief, paras. 70, 73); (iv) failing to provide a reasoned opinion in relation to the timing and nature of the contribution to the common purpose of the other joint criminal enterprise members and their shared intent to commit extermination (Appeal Brief, paras. 167-168; Reply Brief, para. 72); (v) failing to consider all the defence evidence regarding the credibility and reliability of the Prosecution evidence (Appeal Brief, para. 159, *referring to* Trial Judgement, n. 1597. *See also* Appeal Brief, Annex H); (vi) making findings in relation to joint criminal enterprise members who were never charged or convicted, and in reaching conclusions different from those reached by other trial chambers (Appeal Brief, paras. 169-170).

[716] In his Fourth Ground of Appeal, Ngirabatware argues that: (i) he lacked sufficient notice of the charge of rape as a crime against humanity (Appeal Brief, paras. 173-178; Reply Brief, paras. 77-78); (ii) lacked sufficient notice of the evidence relevant to the charge of rape (Appeal Brief, paras. 179-185; (iii) the Trial Chamber erred in applying an incorrect *mens rea* standard under the extended form of joint criminal enterprise (Appeal Brief, para. 208); (iv) the Trial Chamber erred in finding that the rape of Chantal Murazemariya was a natural and foreseeable consequence of the execution of the common purpose (Appeal Brief, paras. 209-210, 212-213, 215); and (v) the Trial Chamber erred in its assessment of the evidence in relation to the rape of Chantal Murazemariya (Appeal Brief, paras. 188-206; Reply Brief, paras. 84, 86).

VIII. SENTENCING (GROUND 7)

A. Ngirabatware's Sentencing Appeal

253. The Trial Chamber sentenced Ngirabatware to a single sentence of 35 years of imprisonment based on his convictions for instigating and aiding and abetting genocide, committing direct and public incitement to commit genocide, and committing, pursuant to the third category of joint criminal enterprise, rape as a crime against humanity.[717] The Appeals Chamber recalls that it has reversed Ngirabatware's conviction for rape as a crime against humanity.[718] Accordingly, the Appeals Chamber will limit its analysis to the Trial Chamber's sentencing considerations related to Ngirabatware's convictions for instigating and aiding and abetting genocide and for direct and public incitement to commit genocide.

254. Ngirabatware submits that the Trial Chamber erred in determining his sentence and thus seeks a significant reduction of his sentence to time served.[719] In this section, the Appeals Chamber considers whether the Trial Chamber erred in assessing: (i) the degree of Ngirabatware's participation in the crimes; (ii) the sentencing practices in Rwanda; (iii) the mitigating factors; and (iv) the aggravating factors.

255. The Appeals Chamber recalls that trial chambers have broad discretion in determining an appropriate sentence due to their obligation to individualize penalties to fit the circumstances of the convicted person and the gravity of the crime.[720] As a general rule, the Appeals Chamber will revise a sentence only if the appealing party demonstrates that a trial chamber committed a discernible error in exercising its discretion or that it failed to follow the applicable law.[721] To demonstrate a discernible error, an appellant must show that the trial chamber gave weight to extraneous or irrelevant considerations; failed to accord weight or sufficient weight to relevant considerations; made a clear error as to the facts upon which it exercised its discretion or, its decision was so unreasonable or plainly unjust that the Appeals Chamber can infer that the trial chamber must have failed to exercise its discretion properly.[722]

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[717] Trial Judgement, paras. 1345, 1370, 1393-1395, 1419-1420.
[718] *See supra* para. 252.
[719] Notice of Appeal, paras. 47-56; Appeal Brief, paras. 276-282.
[720] *See, e.g., Ndindiliyimana et al.* Appeal Judgement, para. 418; *Šainović et al.* Appeal Judgement, para. 1798.
[721] *See, e.g., Ndindiliyimana et al.* Appeal Judgement, para. 418; *Ndahimana* Appeal Judgement, para. 218; *Gatete* Appeal Judgement, para. 268.
[722] *See, e.g., Lukić and Lukić* Appeal Judgement, para. 641; *Haradinaj et al.* Appeal Judgement, para. 322; *Boškoski and Tarčulovski* Appeal Judgement, para. 205.

1. Degree of Participation in the Crimes

256. Ngirabatware submits that the Trial Chamber erred in imposing a disproportionately high sentence.[723] In particular, he argues that the Trial Chamber failed to refer to any evidence showing that he substantially contributed to the killing of Tutsis.[724]

257. In response, the Prosecution submits that the Trial Chamber found that Ngirabatware's conduct substantially contributed to the killings in Nyamyumba Commune.[725] The Prosecution contends that the Trial Chamber correctly considered Ngirabatware's words and actions in February and April 1994 as inherently grave and that his conduct was linked to the attacks and killings that occurred after he distributed weapons to the *Interahamwe* on 7 April 1994.[726]

258. The Appeals Chamber recalls that the determination of the gravity of the crimes requires consideration of the particular circumstances of the case, as well as the form and degree of the participation of the convicted person in the crimes.[727] Contrary to Ngirabatware's submissions, the Trial Chamber noted the nature and form of his participation in the crimes.[728] In particular, it recalled that he aided and abetted and instigated genocide through his words and actions in distributing weapons on 7 April 1994 which substantially contributed to the killing of Tutsis in Nyamyumba Commune.[729] The Trial Chamber also expressly considered that, although the number of victims remained unknown, this fact did not detract from the heinous nature and gravity of Ngirabatware's crimes.[730] The Appeals Chamber, Judge Moloto dissenting, has elsewhere dismissed Ngirabatware's challenges to the Trial Chamber's assessment of the evidence underpinning his contribution to the crimes.[731] His cursory attempts to relitigate these matters in his sentencing appeal are likewise without merit

259. Accordingly, the Appeals Chamber is not satisfied that Ngirabatware has identified any error in the Trial Chamber's consideration of the form and degree of his participation in the crimes. The impact, if any, on Ngirabatware's sentence of the reversal of his conviction for rape as a crime against humanity will be addressed in Section VIII(B) below.

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[723] Appeal Brief, para. 276.
[724] Appeal Brief, para. 276, *referring to* Trial Judgement, para. 1414.
[725] Response Brief, paras. 348-349.
[726] Response Brief, paras. 347, 349.
[727] *See, e.g., Hategekimana* Appeal Judgement, para. 292; *Ntabakuze* Appeal Judgement, para. 302.
[728] *See* Trial Judgement, paras. 1411-1412.
[729] *See* Trial Judgement, para. 1412. *See also* Trial Judgement, paras. 874, 876, 878, 881-882, 1337, 1339, 1345.
[730] *See* Trial Judgement, para. 1412.
[731] *See supra* Section VI. *See also supra* Section V.

2. Sentencing Practices in Rwanda

260. Ngirabatware submits that the Trial Chamber erred in failing to rely upon Rwandan sentencing practices in the determination of his sentence.[732] The Prosecution responds that the Trial Chamber considered the Rwandan sentencing practices and that, if anything, Ngirabatware's sentence is too lenient.[733]

261. The Appeals Chamber recalls that, while a trial chamber must take account of the general practice regarding sentences in the Rwandan courts, it is not bound by that practice.[734] In the present case, the Trial Chamber expressly considered that, under Rwandan law, similar crimes as those Ngirabatware was convicted of carry the possible penalty of life imprisonment, depending on the nature of the accused's participation.[735]

262. Accordingly, Ngirabatware has not substantiated his submission that, in imposing a sentence of 35 years of imprisonment, the Trial Chamber failed to properly consider the general practice regarding sentences in the Rwandan courts.

3. Mitigating Factors

263. Ngirabatware argues that the Trial Chamber erred in failing to accord due weight or in finding unsubstantiated the following mitigating factors: (i) his efforts to develop Rwanda; (ii) his non-discriminatory attitude towards Tutsis in his daily life; (iii) the fair treatment of all employees of the Ministry of Planning; (iv) his health condition; (v) his involvement in the Arusha Peace Accords implementation; and (vi) his denunciation of attempts to divide Rwandans.[736] He further submits that the Trial Chamber erred in stating that certain evidence could not be considered in the context of mitigation because it had been tendered for other purposes.[737] Finally, Ngirabatware argues that the Trial Chamber erred in failing to consider his lack of criminal record as a mitigating factor.[738]

264. In response, the Prosecution submits that the Trial Chamber correctly exercised its discretion in assessing the relevant mitigating factors.[739] The Prosecution further argues that, even if the Trial Chamber had erred in not considering certain evidence because of the purpose for which it

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[732] Appeal Brief, para. 278.
[733] Response Brief, para. 350.
[734] *Nahimana et al.* Appeal Judgement, para. 1063, *referring to Semanza* Appeal Judgement, paras. 377, 393, *Akayesu* Appeal Judgement, para. 420, *Serushago* Appeal Judgement, para. 30.
[735] Trial Judgement, para. 1400.
[736] Appeal Brief, para. 279.
[737] Appeal Brief, para. 280.
[738] Appeal Brief, para. 280.
[739] Response Brief, paras. 351-356.

was tendered, such evidence has no weight for sentencing purposes since it does not show any specific contribution by Ngirabatware towards the restoration of peace and security in Rwanda.[740]

265. Pursuant to Rule 101(B)(ii) of the ICTR Rules, a trial chamber is required to take into account any mitigating circumstances in determining a sentence.[741] The Appeals Chamber recalls that neither the ICTR Statute nor the ICTR Rules exhaustively define the factors which may be considered in mitigation. Rather, what constitutes a mitigating factor is a matter for the trial chamber to determine in the exercise of its discretion.[742] A trial chamber has a considerable degree of discretion in making this determination, as well as in deciding how much weight, if any, to be accorded to the factors identified.[743] Accordingly, the existence of mitigating factors does not automatically imply a reduction of sentence or preclude the imposition of a particular sentence.[744] The Appeals Chamber recalls that the accused bears the burden of establishing mitigating factors by a preponderance of the evidence.[745]

266. The Trial Chamber considered as mitigating factors Ngirabatware's public service and his contribution to the development of his native region prior to 6 April 1994, and accorded them some weight.[746] Moreover, in assessing mitigating factors, the Trial Chamber expressly considered Ngirabatware's contentions regarding his treatment of his employees at the Ministry of Planning, his positive attitude towards Tutsis, his lack of prior convictions, his medical condition, and his propagation of the idea of peace and unity in Rwanda.[747] However, the Trial Chamber was not satisfied that Ngirabatware's submissions demonstrated a lack of discrimination against Tutsis in view of its findings on the gravity of his offences and the aggravating factors.[748]

267. In addition, the Trial Chamber found that "no evidence substantiates [the Defence] claims that Ngirabatware's conduct in detention was sound, that he had no prior criminal convictions, that his medical condition warrants exceptional mitigation in these circumstances, and that

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[740] Response Brief, paras. 356-357.
[741] *See also Hategekimana* Appeal Judgement, para. 305; *Munyakazi* Appeal Judgement, para. 174; Muvunyi *II* Appeal Judgement, para. 70; *Rukundo* Appeal Judgement, para. 255; *Nchamihigo* Appeal Judgement, para. 387; *Muhimana* Appeal Judgement, para. 231.
[742] *See, e.g., Bikindi* Appeal Judgement, para. 158; *Simba* Appeal Judgement, para. 328; *D. Milošević* Appeal Judgement, para. 316.
[743] *See, e.g., Šainović et al.* Appeal Judgement, para. 1807; *Hategekimana* Appeal Judgement, para. 305; *Munyakazi* Appeal Judgement, para. 174.
[744] *See, e.g., Ntabakuze* Appeal Judgement, para. 280; *Nahimana et al.* Appeal Judgement, para. 1038; *Nyiitegeka* Appeal Judgement, para. 267.
[745] *See, e.g., Rukundo* Appeal Judgement, para. 255; *Bikindi* Appeal Judgement, para. 165; *Muhimana* Appeal Judgement, para. 231.
[746] Trial Judgement, para. 1416.
[747] *See* Trial Judgement, paras. 1409-1410, 1417-1418.
[748] Trial Judgement, para. 1417. The Appeals Chamber understands the Trial Chamber's reference in paragraph 1417 to "other findings made above by the Chamber" to mean the findings on the gravity of the offences and the aggravating factors as those are the only findings made by the Trial Chamber which proceed its consideration of mitigating circumstances. *See* Trial Judgement, paras. 1411-1414.

Ngirabatware propagated the ideas of peace and unity between Hutus and Tutsis in Rwanda."[749] Contrary to Ngirabatware's submission,[750] the Appeals Chamber does not interpret this statement as suggesting that no evidence was identified in support of these factors. Indeed, the Trial Chamber referred to various sources highlighted by Ngirabatware, including his submissions during closing arguments and specific evidence.[751] It follows from the Trial Judgement that the Trial Chamber did not find this evidence sufficient to substantiate its reliance on the factors identified by Ngirabatware. The fact that the Prosecution did not contest them did not require the Trial Chamber to accept them as established. As a general matter, Ngirabatware's mere assertion that the Trial Chamber failed to give these factors or the evidence supporting them adequate weight is insufficient to demonstrate that the Trial Chamber erred in its assessment.[752]

268. Ngirabatware claims that the Trial Chamber erred in failing to consider evidence showing his participation at a meeting between the Government of Rwanda and the RPF on 13 December 1993, as well as his own testimony that he was involved in the implementation of the Arusha Peace Accords.[753] The Appeals Chamber notes that, in his sentencing submissions, Ngirabatware did not refer to his testimony that he was involved in the Arusha Peace Accords implementation.[754] Recalling that the Trial Chamber was not under an obligation to seek out information that Counsel did not put before it at the appropriate time,[755] the Appeals Chamber dismisses Ngirabatware's argument in this respect.

269. In relation to the minutes from the meeting between the Government of Rwanda and the RPF, the Appeals Chamber notes that the French transcript of the proceedings indicates that Ngirabatware did refer to this evidence in the course of his closing arguments.[756] While the Trial Chamber did not explicitly refer to the evidence in its sentencing considerations, this does not necessarily mean that it did not consider it in the context of assessing Ngirabatware's mitigating circumstances. A Trial Chamber is not required to expressly reference and comment upon every piece of evidence admitted onto the record.[757] In any event, the Appeals Chamber notes that Ngirabatware's participation at the meeting was limited to making a general statement regarding funds from donors and requesting the creation of a sub-committee to deal with the issue of

[749] *See* Trial Judgement, para. 1418.
[750] *See* Appeal Brief, paras. 279-280.
[751] *See* Trial Judgement, paras. 1409-1410, 1417, 1418, nn. 1667-1668, 1671-1672.
[752] *See Rukundo* Appeal Judgement, para. 267.
[753] Appeal Brief, para. 279, *referring to* Defence Exhibit 86A; Ngirabatware, T. 18 November 2010 pp. 58-60, 62-63, 68, 74, T. 22 November 2010 p. 14.
[754] *See* Closing Arguments, T. 25 July 2012 pp. 44-55.
[755] *See Đorđević* Appeal Judgement, para. 945, *citing Kupreškić et al.* Appeal Judgement, para. 414; *Bikindi* Appeal Judgement, para. 165.
[756] Closing Arguments, T. 25 juillet 2012 pp. 48-49. The English transcript refers to Defence Exhibit 96. (*See* Closing Arguments, T. 25 July 2011 p. 44).
[757] *See Munyakazi* Appeal Judgement, paras. 174-175.

"spontaneous refugees".[758] Recalling that trial chambers are endowed with a considerable degree of discretion in determining what constitutes a mitigating factor, the Appeals Chamber finds that the Trial Chamber did not err in determining that Ngirabatware's involvement in the Arusha Peace Accords did not constitute a mitigating factor.

270. The Trial Chamber further considered that the evidence Ngirabatware sought to rely upon, in support of his submission that he propagated the ideas of peace and unity between Hutus and Tutsis, carried no weight for sentencing purposes because it was tendered in order to substantiate his alibi.[759] The Appeals Chamber recalls that in the course of the trial, the parties are entitled to present evidence and any relevant information that may assist the trial chamber in determining an appropriate sentence if the accused is found guilty.[760] Pursuant to Rule 86(C) of the ICTR Rules, sentencing submissions should be addressed during closing arguments.[761] It was therefore Ngirabatware's prerogative to identify at that time any mitigating circumstances in the trial record.[762] Accordingly, the Appeals Chamber finds that the Trial Chamber erred in law in failing to give any weight to evidence solely on the basis that it was tendered for other purposes in the course of the trial.

271. The Appeals Chamber, however, is not convinced that the evidence Ngirabatware sought to rely upon goes to mitigation. Ngirabatware referred to an excerpt from the *Togo-Presse* dated 29 April 1994 recording his statement that the Rwandan government was seeking the peaceful coexistence of Hutus and Tutsis.[763] He also sought to rely on an interview with Radio Rwanda, dated 24 May 1994, in the course of which he stated that he did not "accept a Hutu kill a Tutsi and a Tutsi kill a Hutu".[764] The Appeals Chamber notes that the statement in the *Togo-Presse* is a general statement made, not in Ngirabatware's personal capacity, but as a government representative of Rwanda and that the text of the interview, which is negative towards the RPF whom Ngirabatware describes as "predominantly [...] Tutsis who fled Rwanda in 1959", includes his use of the phrase *Inyenzi-Inkotanyi*.[765] Therefore the Appeals Chamber considers that Ngirabatware fails to show, by a preponderance of evidence, that he propagated the ideas of peace and unity between Hutus and

[758] Defence Exhibit 86A, p. 5.
[759] Trial Judgment, para. 1418, n. 1672, *referring to* Defence Exhibits 111 and 206.
[760] *See* Rule 102(A)(vi); ICTR Rule 85(A)(vi); ICTY Rule 85(A)(vi).
[761] *See* Rule 103(C).
[762] *See, e.g., Rukundo* Appeal Judgement, para. 255; *Bikindi* Appeal Judgement, para. 165.
[763] Closing Arguments, T. 25 July 2012 p. 49; Defence Exhibit 111A, p. 7 (of the French newspaper). *See* also Appeal Brief, para. 280.
[764] Closing Arguments, T. 25 July 2012 pp. 49-50, *referring to* Defence Exhibit 206, p. 36. *See* also Appeal Brief, para. 280. The Appeals Chamber notes that Ngirabatware also seeks to rely upon Defence Exhibit 87 and Ngirabatware's testimony in relation to the exhibit (*see* Appeal Brief, n. 830). However, Defence Exhibit 87 contains no reference to Ngirabatware's actions or views and therefore has no relevance to the determination of Ngirabatware's sentence.
[765] Defence Exhibit 206, p. 37. *See* Defence Exhibit 206, pp. 33, 43.

Tutsis in Rwanda. Consequently, the Appeals Chamber finds that the Trial Chamber's legal error in not considering this evidence has no impact on its determination of Ngirabatware's sentence.

272. Accordingly, the Appeals Chamber is not satisfied that Ngirabatware has identified any error in the consideration of his mitigating factors that would invalidate his sentence.

4. Aggravating Factors

273. Ngirabatware argues that the Trial Chamber erred in taking into account as aggravating factors his statements at the Kanyabuhombo School meeting in early 1994 and his presence at a CDR political party demonstration at the Electrogaz roadblock in late February 1994.[766] In particular, he submits that the two incidents were not criminal in character, were not proved beyond a reasonable doubt, and did not fall into any "recognisable categories of aggravating factors".[767] Ngirabatware further submits that he had no notice that the Prosecution regarded them as aggravating factors.[768]

274. The Prosecution responds that the Trial Chamber properly took into account the two incidents as aggravating factors and that it was entitled to consider them in sentencing even though they did not underpin Ngirabatware's conviction.[769] The Prosecution also argues that the incidents were pleaded in the Indictment and proved beyond a reasonable doubt.[770]

275. The Appeals Chamber recalls that, for sentencing purposes, a Trial Chamber may only consider in aggravation factors pleaded in the Indictment[771] and that the Prosecution must prove the existence of such factors beyond a reasonable doubt.[772] The Appeals Chamber notes that the Prosecution pled both incidents in the Indictment.[773] Accordingly, there is no merit in Ngirabatware's contention that he lacked notice of these incidents. In addition, the Trial Chamber found beyond reasonable doubt that Ngirabatware made a speech at Kanyabuhombo School in early 1994 and that those in attendance understood that it was intended to fan ethnic hatred.[774] The Trial Chamber also found that, following the murder of Martin Bucyana, Chairman of the CDR political party, Ngirabatware addressed approximately 400 people at the Electrogaz roadblock, stating that

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[766] Appeal Brief, para. 281, *referring to* Trial Judgement, para. 1414.
[767] Appeal Brief, para. 281.
[768] Appeal Brief, para. 281. The Appeals Chamber observes that Ngirabatware's argument was not set forth in his Notice of Appeal and the Appeals Chamber is thus not required to consider it. However, taking into account that, in its response, the Prosecution addresses Ngirabatware's argument, the Appeals Chamber has decided to exercise its discretion and consider Ngirabatware's submission notwithstanding his failure to comply with the ICTR Rules.
[769] Response Brief, para. 358.
[770] Response Brief, para. 358.
[771] *See, e.g.*, *Renzaho* Appeal Judgement, para. 615; *Simba* Appeal Judgement, para. 82.
[772] *See, e.g.*, *Nahimana et al.* Appeal Judgement, para. 1038; *Kajelijeli* Appeal Judgement, para. 294.
[773] Indictment, paras. 23, 40, 48. The Appeals Chamber notes that Ngirabatware raised several issues of notice regarding these pleadings which the Trial Chamber rejected. *See* Trial Judgement, paras. 153-155, 224.

another roadblock was needed because "Tutsis may easily cross".[775] While the Trial Chamber did not enter a conviction based on these findings,[776] it considered Ngirabatware's actions and words as aggravating factors in determining his sentence.[777] Ngirabatware's cursory claim that these incidents were not proved beyond reasonable doubt is devoid of any argument identifying an error in the Trial Chamber's assessment. In a similar vein, Ngirabatware's unsubstantiated submissions fail to show why the Trial Chamber could not consider incidents where Ngirabatware made inflammatory comments as aggravating factors.[778]

276. Accordingly, the Appeals Chamber is not satisfied that Ngirabatware has identified any error in the Trial Chamber's consideration of the aggravating factors.

5. Conclusion

277. For the foregoing reasons, the Appeals Chamber dismisses Ngirabatware's Seventh Ground of Appeal.

B. Impact of the Appeals Chamber's Findings on Ngirabatware's Sentence

278. The Appeals Chamber has dismissed Ngirabatware's challenges to his conviction for direct and public incitement to commit genocide.[779] The Appeals Chamber has also rejected, Judge Moloto dissenting, Ngirabatware's challenges to his conviction for instigating and aiding and abetting genocide.[780] However, the Appeals Chamber has granted, in part, Ngirabatware's Third Ground of Appeal and reversed his conviction for committing, pursuant to the extended form of joint criminal enterprise, rape as a crime against humanity.[781] Having considered the significant gravity of the crimes for which Ngirabatware's convictions have been affirmed, the Appeals Chamber considers that only a limited reduction of his sentence is warranted. In these circumstances, the Appeals Chamber reduces Ngirabatware's sentence of 35 years of imprisonment to 30 years of imprisonment.

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[774] Trial Judgement, para. 215. *See also* Trial Judgement, para. 1328.
[775] Trial Judgement, para. 299. *See also* Trial Judgement, para. 1331; Dissenting Opinion of Judge William H. Sekule.
[776] Trial Judgement, paras. 1330, 1334.
[777] Trial Judgement, para. 1414.
[778] *Cf. Ndindabahizi* Appeal Judgement, paras. 140-141.
[779] *See supra*, para. 105.
[780] *See supra*, paras. 183, 241.
[781] *See supra*, para. 252.

IX. DISPOSITION

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

PURSUANT to Article 23 of the Statute and Rule 144 of the Rules;

NOTING the written submissions of the parties and their oral arguments presented at the appeal hearing on 30 June 2014;

SITTING in open session;

GRANTS Ngirabatware's Third Ground of Appeal and **REVERSES** Ngirabatware's conviction for rape as a crime against humanity pursuant to the extended form of joint criminal enterprise;

DISMISSES, Judge Moloto dissenting in part, Ngirabatware's appeal in all other respects;

AFFIRMS Ngirabatware's convictions for committing direct and public incitement to commit genocide, and, Judge Moloto dissenting, instigating and aiding and abetting genocide;

SETS ASIDE the sentence of 35 years of imprisonment and **IMPOSES** a sentence of 30 years of imprisonment, subject to credit being given under Rules 125(C) and 131 of the Rules for the period Ngirabatware has already spent in detention since his arrest on 17 September 2007;

RULES that this Judgement shall be enforced immediately pursuant to Rule 145(A) of the Rules;

ORDERS that, in accordance with Rules 127(C) and 131 of the Rules, Ngirabatware is to remain in the custody of the Mechanism pending the finalization of arrangements for his transfer to the State where his sentence will be served.

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

Theodor Meron	Bakone Justice Moloto	Christoph Flügge
Presiding Judge	Judge	Judge

Burton Hall	Liu Daqun
Judge	Judge

Judge Bakone Justice Moloto appends a dissenting opinion.

Done this 18th day of December 2014 at Arusha, Tanzania

[Seal of the Mechanism]

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X. DISSENTING OPINION OF JUDGE BAKONE JUSTICE MOLOTO

1. The majority dismissed Ngirabatware's appeal against conviction for instigating and aiding and abetting genocide at Nyamyumba Commune on 7 April 1994 and confirmed his conviction by the Trial Chamber. I respectfully disagree. I do so for the following reasons:

1) the Trial Chamber considered the wrong question, therefore irrelevant facts;

2) the Trial Chamber's assessment of the evidence was speculative and without a reasoned opinion and;

3) the theory of the Prosecution's case on the alibi is inconsistent with the Prosecution's evidence.

1. The Trial Chamber Considered Irrelevant Facts

2. Ngirabatware presented an alibi defence to show that he was not at Nyamyumba Commune in 7 April 1994. He stated that he was at the Presidential Guard Camp (PGC) in Kigali on the day in question. To succeed in his defence Ngirabatware bore the burden to show, on a preponderance of the evidence, that he was at the PGC in Kigali at the relevant time.

3. On the other hand, in order to rebut the alibi, the Prosecution had to prove, beyond a reasonable doubt, that (i) Ngirabatware was not at the PGC on the day and at the time he was alleged to have been in Nyamyumba Commune and (ii) that he was, in fact, at Nyamyumba Commune on the said day and at the said time.[1]

(a) Whether Ngirabatware was at the PGC

4. For its rebuttal of Ngirabatware's presence at the PGC on 7 April 1994, the Prosecution led evidence to show that it was feasible to travel from Kigali to Nyamyumba Commune on the day in question despite the difficulty to do so because of the war situation. This is the wrong question. The correct question is whether Ngirabatware was not at the PGC on 7 April 1994 and if he was, whether he did travel to Nyamyumba Commune on that day. It is always possible to travel from point A to point B and indeed from Kigali to Nyamyumba Commune, despite any difficulties. Proving feasibility to travel does not prove that travel did in fact take place. More is required to show that Ngirabatware did travel to Nyamyumba Commune, for example, the time he is alleged to

[1] See *Linaj et al*, Appeal Judgement, para. 64, confirming the *Linaj et al* Trial Judgment at para. 11 "The Prosecution must not only rebut the validity of the alibi but also establish beyond reasonable doubt the guilt of the Accused as alleged in the Indictment".

have left Kigali, the route he actually took and the time he arrived. Instead the Prosecution postulated possible routes he might have taken and chose one that would take 4 to 5 hours to travel.

5. It is important to note that by addressing feasibility to travel, the Prosecution (and the Trial Chamber when accepting the argument) implicitly acknowledged that Ngirabatware was in Kigali on 7 April 1994. This acknowledgement necessitates leading evidence to show that Ngirabatware did travel to Nyamyumba Commune on 7 April 1994. As no such evidence was proffered, the Trial Chamber's finding was based on speculation and irrelevant facts.

6. I therefore conclude that the Prosecution failed to discharge the first leg of its burden of proof that Ngirabatware was not at the PGC in Kigali on 7 April 1994. On the contrary, the Prosecution implicitly confirms that Ngirabatware was in Kigali on 7 April 1994.

(b) Whether Ngirabatware was at Nyamyumba Commune.

7. The Prosecution led evidence to show that Ngirabatware was at Nyamyumba Commune on 7 April 1994. The veracity of this evidence must be assessed, which I will do below.

2. The Trial Chamber's Evaluation of the Evidence

(a) Defence Evidence

8. Ngirabatware led evidence of several witnesses all of whom confirm that he was at the PGC in Kigali from the night of 6 April 1994 until he left for the French Embassy on 8 April 1994. The Trial Chamber did not point to any inconsistencies or contradictions in the evidence. Instead, it dealt with other matters which I will address below.

9. I recall that a Trial Chamber has wide discretion in evaluating evidence, given that it has the advantage of hearing evidence directly and observing the demeanour of witnesses. The Appeals Chamber usually defers to the Trial Chamber, unless the Trial Chamber failed to provide a reasoned opinion for its findings (error of law) or the Trial Chamber's finding on a fact is so unreasonable that no trier of fact could reasonably come to the same conclusion (error of fact). In my view, the Trial Chamber did not give a reasoned opinion for rejecting the Defence evidence in this case. Instead it made speculative conclusions for the most part and relied on 'facts' not supported by the evidence in other parts.

10. The Trial Chamber dismissed the evidence of the Defence witnesses on the basis that they 'may have been motivated to protect Ngirabatware in this trial'[2]. To say 'may' is not stating a fact; it is mere suspicion or speculation. This speculation was based solely on the personal and/or professional relationship Ngirabatware had with the Defence witnesses. Personal and professional relationships can result into one of three motives. The witness may, indeed, be biased in favour of an accused, but may also be biased against the accused because of jealousy or hatred, for example. Thirdly such witness may be honest and truthful, hence unbiased. Therefore, to find that a witness is biased in favour of the accused a Trial Chamber must point to something beyond the mere relationship, such as an inconsistency or contradiction in the evidence or demeanour evincing such bias. Where such evidence or demeanour is not evident, the Trial Chamber must exclude the probability that the witness is honest or biased against the accused. That is, bias in favour of the accused must be the only reasonable inference from the evidence. Failure to do either is speculative or results in cherry-picking by the Trial Chamber. In this case the Trial Chamber rejected the evidence of some of Ngirabatware's witnesses based on their personal or professional relationship to him.

11. The Trial Chamber rejected the evidence of Musabeyezu-Kabuga because she is Ngirabatware's sister-in-law. Beyond that the Trial Chamber disbelieved Musabeyezu-Kabuga that she spoke to Ngirabatware every 45 minutes during the night of 6 April 1994. Yet, Musabeyezu-Kabuga explained that this was because she was pregnant at the time, hence she had to frequently visit the toilet, passing where Ngirabatware was sleeping. The reasoning of the Trial Chamber that it was remarkable that Musabeyezu-Kabuga did not speak to her husband who was also at the PGC is not borne out by the evidence. The evidence shows she did speak to her husband. Equally unsupported by the evidence is the Trial Chamber's finding that Musabeyezu-Kabuga was with her children at the time. The evidence shows she had no children at the time. This demonstrates the fact that the Trial Chamber considered irrelevant facts. Finally the Trial Chamber disbelieved Musabeyezu-Kabuga because Ngirabatware helped her find refuge at the PGC. Relatives, especially close ones like in-laws, usually help one another and there is nothing sinister about Ngirabatware helping Musabeyezu-Kabuga find refuge. The fact that a person helps another does not preclude that other from being truthful. Again, the Trial Chamber must point to something beyond just the help and personal relationship.

12. The Trial Chamber also rejected the evidence of Bicamumpaka, DWAN-122 and Kayitana, Ngirabatware's driver, based on personal or professional relationships. The following paragraph 1203 from the Trial Judgement is telling:

[2] Trial Judgement, para. 658. *See also* Appeal Judgement, para. 216.

> "The Chamber notes testimony from Bicamumpaka, witness DWAN-122 and Kayitana, but attaches limited weight to their evidence, due to the close personal or professional relationship between these individuals and Ngirabatware".

13. With respect to Kayitana the Trial Chamber also implied that he had a monetary incentive to be biased in favour of Ngirabatware, as he was granted "improved financial gains". The Trial Chamber does not say where the 'improved financial gains' came from. Kayitana was employed by the Ministry of Planning in the Government, not by Ngirabatware. In any case, at the time of testifying Ngirabatware was in detention hence in no position to influence Kayitana's work or income. There is also no evidence that Ngirabatware influenced his income while in government. It is remarkable that the Trial Chamber did not expand on this finding given its serious nature and the impact it must have had on the weight attributed to Kayitana's evidence.

(b) Prosecution Evidence

14. Neither of the three Prosecution witnesses that testified regarding Ngirabatware's alleged weapons deliveries at Nyamyumba Commune testified that this occurred on 7 April 1994. Witness ANAM said the delivery took place seven or eight days after the death of President Habyarimana, while Witness ANAE said it was in April. How long after the death of President Habyarimana is not mentioned. As a result it is not mentioned how the witnesses could be referring to the same incident based on that evidence. The only common piece of information between the witnesses is that it happened before the attack on Safari Nyambwega. Safari Nyambwega was attacked on 7 April 1994 thus the Trial Chamber determined that the deliveries took place on 7 April 1994, relying on two witnesses (ANAF and DWAN-3) who did not testify about weapons deliveries. It is not mentioned how long before the attack on Safari Nyambwega the deliveries occurred or at what time during the day, despite the fact that both witnesses ANAF and DWAN-3 testified the attack on Safari Nyambwega occurred during the morning of 7 April 1994.

15. The Prosecution witnesses ANAM, ANAE, and ANAL placed the delivery of weapons at two different spots in Nyamyumba Commune, leading to the Trial Chamber believing that they were testifying to two different incidents. Witness ANAE testified to distribution of machetes at a roadblock in Bushoke cellule, Witness ANAM testified about the distribution of grenades and rifles at Gitsimbi and Bruxelles roadblocks, and Witness ANAL testified about the distribution of grenades and rifles at Bananiye's house. Given that they purported to be testifying about the same incident, the Trial Chamber changed from believing that they were testifying about two incidents and determined that the witnesses testified about a single incident. It is worth noting that the Trial Chamber neither pointed to any additional evidence clarifying the inconsistencies nor provided any reasoned opinion for changing its mind. Instead, the Trial Chamber proceeded to rationalise the inconsistencies in the evidence by determining that the two spots were not far from each other – the

Gitsimbi and the Bruxelles roadblocks – and that it concerned two weapons deliveries that occurred on the same day.

16. Thus, while all three Prosecution witnesses (ANAM, ANAE, and ANAL) who testified regarding weapons deliveries provide different dates and different locations for the deliveries, the Trial Chamber relies on only one witness (ANAM) in relation to the locations of the distributions, whereas it relies on neither of them in relation to the date on which the distributions would have taken place. This is a finding without a reasoned opinion. No trier of fact could reasonably come to the same conclusion based on the evidence proffered by the Prosecution.

17. The Trial Chamber's evaluation of the evidence was based on speculation and irrelevant facts.

(c) Evidence as a Whole

18. Viewed in its totality it is clear that, but for the personal and professional relationships to Ngirabatware, the evidence presented by the alibi witnesses was consistent, credible and without contradictions. As against the Defence evidence, the Prosecution evidence is fraught with deficiencies and is incredible.

3. The Prosecution's Theory of the Case

19. I have already referred to the Prosecution's attempt to rebut Ngirabatware's presence at the PGC by using feasibility to travel theory. I recall that it was the Prosecutions theory that a single trip would take up to 4 to 5 hours. I also recall that the Trial Chamber found that two deliveries were made. There is no evidence of where the weapons were collected from, when the trips started and along which route Ngirabatware is supposed to have travelled. In fact there is no evidence that he travelled from Kigali as shown above. The only distance addressed is from Kigali to Nyamyumba Commune.

20. It is alleged that the two deliveries took place in the day on 7 April 1994. Excluding time for loading and off-loading, it would take some 16 to 20 hours to do the two trips which makes it impossible that the two deliveries could have occurred in the day. Therefore, the Prosecution's theory of this part of the case is incompatible with the evidence.

4. Conclusion

21. Quite clearly Ngirabatware proved on a preponderance of the evidence that he was at the PGC in Kigali on 7 April 1994 and the Prosecution failed to disprove that and failed to place Ngirabatware at Nyamyumba Commune on 7 April 1994.

22. In these circumstances it is my view that the Trial Chamber erred in convicting Ngirabatware of instigating and aiding and abetting genocide at Nyamyumba Commune on 7 April 1994. In the same vein I do not agree with the majority in dismissing Ngirabatware's appeal and confirming his conviction. In my view Ngirabatware's appeal should succeed.

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

Judge Bakone Justice Moloto

Done this 18th day of December 2014
At Arusha
Tanzania

[Seal of the Mechanism]

XI. ANNEX A - PROCEDURAL HISTORY

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

A. Composition of the Appeals Chamber

2. On 27 February 2013, the President of the Mechanism ordered that the Bench in the present case be composed of Judge Theodor Meron (Presiding), Judge Bakone Justice Moloto, Judge Christoph Flügge, Judge Burton Hall, and Judge Liu Daqun.[1] On 28 February 2013, the Presiding Judge assigned himself as the Pre-Appeal Judge in this case.[2]

B. Notice of Appeal and Briefs

3. Following the Pre-Appeal Judge's decision granting, in part, Ngirabatware's request for stay of deadline to file a notice of appeal,[3] on 9 April 2013 Ngirabatware filed his notice of appeal against the Trial Judgement pursuant to Article 23 of the Statute and Rule 133 of the Rules.[4]

4. On 5 June 2013, the Pre-Appeal Judge granted, in part, Ngirabatware's motion requesting leave to exceed the word limit in relation to his appeal brief[5] and authorised Ngirabatware to file an appeal brief not exceeding 40,000 words.[6] Ngirabatware filed his appeal brief confidentially on 18 June 2013,[7] and a confidential *corrigendum* to his appeal brief on 16 July 2013.[8] The Prosecution filed its response brief on 29 July 2013[9] and a *corrigendum* to the response brief on 4 Novemher 2013.[10] On 9 August 2013, the Pre-Appeal Judge granted, in part, Ngirabatware's motion requesting leave to exceed the word limit in relation to his reply brief, and authorised

[1] Order Assigning Judges to a Case Before the Appeals Chamber, 27 February 2013.
[2] Order Assigning a Pre-Appeal Judge, 28 February 2013.
[3] Decision on Defence Motion for Stay of Deadline to File Notice of Appeal and an Order to the Registry, 14 March 2013.
[4] Augustin Ngirabatware's Notice of Appeal, 9 April 2013.
[5] Motion for Extension of Word Limit for Appellant's Brief, 13 May 2013.
[6] Decision on Augustin Ngirabatware's Motion for an Extension of the Word Limit for his Appellant Brief, 5 June 2013.
[7] Dr. Ngirabatware's Appeal Brief, 18 June 2013 (confidential).
[8] Corrigendum to Dr. Ngirabatware's Appeal Brief, 16 July 2013 (confidential). On 19 June 2013, Ngirabatware filed a public redacted version of his appeal brief (*see* Dr. Ngirabatware's Appeal Brief, 19 June 2013) which was subsequently made confidential pursuant to a decision of the Pre-Appeal Judge (*see* Decision on Requests for Reclassification, 22 August 2013). Ngirabatware filed an amended public redacted version of his appeal brief on 1 August 2013 (*see* Dr. Ngirabatware's Appeal Brief, 1 August 2013 (amended public redacted version)).
[9] Prosecution's Respondent's Brief, 29 July 2013, made confidential pursuant to Decision on Requests for Reclassification, 22 August 2013.
[10] Corrigendum to the Prosecution's Respondent's Brief, with confidential Annexes B and C, 4 November 2013.

Ngirabatware to file a reply brief not exceeding 12,000 words.[11] Ngirabatware filed his reply brief on 13 August 2013.[12]

C. Decisions Pursuant to Rule 142 of the Rules

5. Ngirabatware filed three motions requesting the admission of additional evidence on appeal on 25 July 2013, 2 September 2013, and 7 May 2014, respectively.[13] On 21 November 2014, the Appeals Chamber, Judge Moloto dissenting, dismissed Ngirabatware's motions for admission of additional evidence on appeal.[14]

D. Other Issues

6. On 5 March 2014, the Pre-Appeal Judge dismissed Ngirabatware's request for a stay of deadline to seek leave to call 13 witnesses or to present their statements *in lieu* of oral testimony as additional evidence on appeal, and for an order to the Registry to appoint a Presiding Officer for the purpose of obtaining certified statements from nine of the 13 potential witnesses.[15]

7. On 15 April 2014, the Appeals Chamber granted, in part, a motion by Ngirabatware, finding that the Prosecution has violated Rules 71(A)(ii) and 73(A) of the Rules in relation to the late disclosure of notes of Witness ANAN's interview and the transcripts of the testimony of Bizimungu and Mugiraneza in the *Bizimungu et al.* case.[16]

E. Status Conferences

8. In accordance with Rule 69 of the Rules, Status Conferences were held on 17 July 2013,[17] 8 November 2013,[18] 12 February 2014,[19] and 29 September 2014.[20] Ngirabatware waived his right

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[11] Decision on Augustin Ngirabatware's Extremely Urgent Motion for Extension of Word Limit for his Reply Brief, 9 August 2013.
[12] Dr. Ngirabatware's Brief in Reply to Prosecution Respondent's Brief (Pursuant to Rule 140 of the Rules of Procedure and Evidence), 13 August 2013.
[13] Dr. Ngirabatware's Confidential Motion Pursuant to Articles 73, 74 and 142 of the Rules of Procedure and Evidence, 25 July 2013 (confidential); Dr. Ngirabatware's Second Motion Pursuant to Articles 73, 74 and 142 of the Rules of Procedure and Evidence, 2 September 2013; Supplementary Motion for Admission of Additional Evidence on Appeal, 7 May 2014 (confidential).
[14] Decision on Ngirabatware's Motions for Relief for Rule 73 Violations and Admission of Additional Evidence on Appeal, 21 November 2014.
[15] Decision on Augustin Ngirabatware's Motion for Certification of Statements and for Stay of Deadline, 5 March 2014.
[16] Decision on Augustin Ngirabatware's Motion for Sanctions for the Prosecution and for an Order for Disclosure, 15 April 2014.
[17] Order Scheduling a Status Conference, 4 June 2013; Order Setting the Time for the Status Conference, 2 July 2013; Status Conference, T. 17 July 2013 pp. 1-3, 6-9, T. 17 July 2013 pp. 4-5 (closed session).
[18] Order Scheduling a Status Conference, 18 September 2013; Status Conference, T. 8 November 2013 pp. 1-4.
[19] Order Scheduling a Status Conference, 11 December 2013; Status Conference, T. 12 February 2014 pp. 1-3.
[20] Order Scheduling a Status Conference, 20 August 2013; T. 29 September 2014 pp. 1-3.

to a Status Conference to be held no later than 12 June 2014 in view of the proximity of the hearing on appeal which was held on 30 June 2014.

F. Appeal Hearing

9. The Appeals Chamber issued a Scheduling Order for Appeal Hearing on 16 June 2014. The parties' oral arguments were heard at the appeal hearing held on 30 June 2014 in Arusha, Tanzania.[21]

[21] T. 30 June 2014 pp. 1-51.

XII. ANNEX B – CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. ICTR

AKAYESU, Jean-Paul

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

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

BAGILISHEMA, Ignace

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

BAGOSORA, Théoneste and NSENGIYUMVA, Anatole

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").

BIZIMUNGU, Augustin

Augustin Bizimungu v. The Prosecutor, Case No. ICTR-00-56B-A, Judgement, 30 June 2014 ("*Bizimungu* Appeal Judgement").

GACUMBITSI, Sylvestre

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

The Prosecutor v. Jean de Dieu Kamuhanda, Case No. ICTR-99-54A-T, Judgement and Sentence, 22 January 2004 ("*Kamuhanda* Trial Judgement").

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

Édouard Karemera and Matthieu Ngirumpatse v. The Prosecutor, Case No. ICTR-98-44-A, Judgement, 29 September 2014 ("*Karemera and Ngirumpatse* Appeal Judgement").

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

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

MUGENZI, Justin and MUGIRANEZA, Prosper

Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor, Case No. ICTR-99-50-A, Judgement, 4 February 2013 ("*Mugenzi and Mugiraneza* Appeal Judgement").

MUHIMANA, Mikaeli

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

MUNYAKAZI, Yussuf

Yussuf Munyakazi v. The Prosecutor, 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-2000-55A, Judgement, 29 August 2008 ("*Muvunyi I* Appeal Judgement").

Tharcisse Muvunyi v. The Prosecutor, Case No. ICTR-2000-55A-A, Judgement, 1 April 2011 ("*Muvunyi II* Appeal Judgement").

NAHIMANA, Ferdinand *et al.*

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

NCHAMIHIGO, Siméon

Siméon Nchamihigo v. The Prosecutor, Case No. ICTR-01-63-A, Judgement, 18 March 2010 ("*Nchamihigo* Appeal Judgement").

NDAHIMANA, Grégoire

Grégoire Ndahimana v. The Prosecutor, Case No. ICTR-01-68-A, Judgement, 16 December 2013 ("*Ndahimana* Appeal Judgement").

NDINDABAHIZI, Emmanuel

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

NDINDILIYIMANA, Augustin *et al.*

Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu v. The Prosecutor, Case No. ICTR-00-56-A, Judgement, 11 February 2014 ("*Ndindiliyimana et al.* Appeal Judgement").

NIYITEGEKA, Eliézer

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

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

NTAKIRUTIMANA, Elizaphan and Gérard

Elizaphan Ntakirutimana and Gérard Ntakirutimana v. The Prosecutor, 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").

NYIRAMASUHUKO, Pauline *et al.*

The Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi and Élie Ndayambaje, Case No. ICTR-98-42-T, Judgement and Sentence, 24 June 2011 ("*Nyiramasuhuko et al.* Trial Judgement").

NZABONIMANA, Callixte

Callixte Nzabonimana v. The Prosecutor, Case No. ICTR-98-44D-A, Judgement, 29 September 2014 ("*Nzabonimana* Appeal Judgement").

RENZAHO, Tharcisse

Tharcisse Renzaho v. The Prosecutor, Case No. ICTR-97-31-A, Judgement, 1 April 2011 ("*Renzaho* Appeal 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-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement").

SEMANZA, Laurent

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

SERUSHAGO, Omar

Omar Serushago v. The Prosecutor, Case No. ICTR-98-39-A, Reasons for Judgment, 6 April 2000 ("*Serushago* Appeal Judgement").

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").

ZIGIRANYIRAZO, Protais

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

2. ICTY

ALEKSOVSKI, Zlatko

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-T, Judgement, 25 June 1999 ("*Aleksovski* Trial Judgement").

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

BRĐANIN, Radoslav

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

DELALIĆ, Zejnil *et al.*

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").

ĐORĐEVIĆ, Vlastimir

Prosecutor v. Vlastimir Đorđević, Case No. IT-05-87/1-A, Judgement, 27 January 2014 ("*Đorđević* Appeal Judgement").

FURUNDŽIJA, Anto

Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T, Judgement, 10 December 1998 ("*Furundžija* Trial Judgement").

GOTOVINA, Ante and MARKAČ, Mladen

Prosecutor v. Ante Gotovina and Mladen Markač, Case No. IT-06-90-A, Judgement, 16 November 2012 ("*Gotovina and Markač* Appeal Judgement").

HARADINAJ, Ramush *et al.*

Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-A, Judgement, 19 July 2010 ("*Haradinaj et al.* Appeal Judgement").

JELISIĆ, Goran

Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, Judgement, 5 July 2001 ("*Jelisić* Appeal Judgement").

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").

KRSTIĆ, Radislav

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

KUPREŠKIĆ, Zoran *et al.*

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

KVOČKA, Miroslav *et al.*

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

LUKIĆ, Milan and LUKIĆ, Sredoje.

Prosecutor v. Milan Lukić and Sredoje Lukić, Case No. IT-98-30/1-A, Judgement, 4 December 2012 ("*Lukić and Lukić* Appeal Judgement").

MARTIĆ, Milan

Prosecutor v. Milan Martić, Case No. IT-95-11-A, Judgement, 8 October 2008 ("*Martić* Appeal Judgement").

MILOŠEVIĆ, Dragomir

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Judgement, 12 November 2009 ("*D. Milošević* Appeal Judgement").

MRKŠIĆ, Mile and ŠLJIVANČANIN, Veselin

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

PERIŠIĆ, Momčilo

Prosecutor v. Momčilo Perišić, Case No. IT-04-81-A, Judgement, 28 February 2013 ("*Perišić* Appeal Judgement").

ŠAINOVIĆ, Nikola *et al.*

Prosecutor v. Nikola Šainović, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić, Case No. IT-05-87-A, Judgement, 23 January 2014 ("*Šainović et al.* Appeal Judgement").

SIMIĆ, Blagoje

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

TADIĆ, Duško

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

VASILJEVIĆ, Mitar

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

B. Defined Terms and Abbreviations

Appeal Brief

Dr. Ngirabatware's Appeal Brief (confidential), 18 June 2013; Corrigendum to Dr. Ngirabatware's Appeal Brief (confidential), 16 July 2013; Dr. Ngirabatware's Appeal Brief (amended public redacted version), 1 August 2013

CDR

Coalition pour la Défense de la République

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 aud Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994

ICTY

International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Territory of the Former Yugoslavia since 1991

Indictment

The Prosecutor v. Augustin Ngirabatware, Case No. ICTR-99-54-T, Amended Indictment, 13 April 2009

Mechanism or MICT

International Residual Mechanism for Criminal Tribunals

MRND

Mouvement Républicain National pour la Démocratie et le Développement

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footnote (footnotes)

Notice of Appeal

Augustin Ngirabatware's Notice of Appeal, 9 April 2013

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Prosecution

Office of the Prosecutor

Prosecution Closing Brief

The Prosecutor v. Augustin Ngirabatware, Case No. ICTR-99-54-T, Prosecutor's Closing Brief, 14 May 2012

Prosecution Pre-Trial Brief

The Prosecutor v. Augustin Ngirabatware, Case No. ICTR-99-54-T, The Prosecutor's Revised Pre-Trial Brief (Filed pursuant to Court Order dated 19 May 2009 and Rule 73(B)(i)*bis* of the Rules of Procedure and Evidence), 25 May 2009

Reply Brief

Dr. Ngirabatware's Brief in Reply to Prosecution Respondent's Brief (Pursuant to Rule 140 of the Rules of Procedure and Evidence), 13 August 2013

Response Brief

Prosecution's Respondent's Brief, 29 July 2013; Corrigendum to the Prosecution's Respondent's Brief, 4 November 2013, with confidential Annexes B and C

RP.

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RPF

Rwandan (also Rwandese) Patriotic Front

Rules

Rules of Procedure and Evidence of the Mechanism

Statute

Statute of the Mechanism

T.

Transcript from hearings at trial or appeal in the present case. All references are to the official English transcript, unless otherwise indicated

Trial Chamber

Trial Chamber II of the ICTR

Trial Judgement

The Prosecutor v. Augustin Ngirabatware, Case No. ICTR-99-54-T, Judgement and Sentence, pronounced on 20 December 2012, filed in writing on 21 February 2013

UN

United Nations

UNAMIR

United Nations Assistance Mission for Rwanda