UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Theodor Meron, Presiding** **Judge Mohamed Shahabuddeen** **Judge Florence Ndepele Mwachande Mumba** **Judge Wolfgang Schomburg** **Judge Inés Mónica Weinberg de Roca**
Registrar:	**Mr. Adama Dieng**
Judgement of:	**19 September 2005**

JEAN DE DIEU KAMUHANDA
(Appellant)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-99-54A-A

JUDGEMENT

Counsel for the Appellant:

Ms. Aïcha Condé

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. James Stewart
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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of an appeal by Jean de Dieu Kamuhanda against the Judgement and Sentence rendered by Trial Chamber II on 22 January 2004 in the case of *The Prosecutor v. Jean de Dieu Kamuhanda* ("Trial Judgement").[1]

I. INTRODUCTION

A. The Appellant

2. The Appellant, Jean de Dieu Kamuhanda, was born on 3 March 1953 in Gikomero Commune, Kigali-Rural Prefecture, Rwanda.[2] The Appellant was Minister of Higher Education and Scientific Research in the interim government, from 25 May 1994 until mid-July 1994.[3] The Appellant held a prominent position in Rwanda which gave him certain influence in Gikomero.[4] The Trial Chamber found that the Appellant distributed weapons to members of the *Interahamwe* and others engaged in attacks in Gikomero and that he participated in crimes against the Tutsi population in Gikomero on 12 April 1994.[5]

B. The Judgement and Sentence

3. The Trial Chamber found the Appellant individually criminally responsible for instigating, ordering, and aiding and abetting the killing and extermination of members of the Tutsi ethnic group in Gikomero Parish Compound, pursuant to Article 6(1) of the Statute.[6] Accordingly, the Trial Chamber found the Appellant guilty of the following crimes: genocide (Count 2) and extermination as a crime against humanity (Count 5).[7] For each conviction under Counts 2 and 5

[1] For ease of reference, two annexes are appended to this Judgement: Annex A - Procedural Background and Annex B - Cited Materials/Defined Terms.
[2] Trial Judgement, paras. 5, 6.
[3] Trial Judgement, paras. 6, 244.
[4] Trial Judgement, para. 73.
[5] Trial Judgement, para. 740.
[6] Trial Judgement, paras. 651, 700.
[7] Trial Judgement, para. 750.

the Trial Chamber, by a majority, sentenced the Appellant to imprisonment for the remainder of his life, with the sentences to run concurrently.[8]

C. The Appeal

4. As indicated in the Appellant's Notice of Appeal ("Notice of Appeal") and Appeal Brief ("Appeal Brief"), the Appellant is appealing against the convictions and the sentences, and requests the Appeals Chamber to quash the Trial Judgement, enter a verdict of not guilty on each of the charges, and order his immediate release, or, in the alternative, to return the case to a differently composed Trial Chamber, or, as a further alternative, to overturn the sentences imposed and sentence him to a fixed term of imprisonment.[9] The Appellant has divided his grounds of appeal into three categories: errors of law, errors of fact, and appeal against the sentence. Within these categories the Appeals Chamber has identified fifteen grounds of appeal.

D. Standards for Appellate Review

5. The Appeals Chamber now recalls some of the requisite standards for appellate review pursuant to Article 24 of the Statute. Article 24 addresses errors of law which invalidate the decision and errors of fact which occasion a miscarriage of justice.

6. As regards errors of law, the Appeals Chamber has recently stated that:

> Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant's arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[10]

7. As regards errors of fact, it is well established that the Appeals Chamber will not lightly overturn findings of fact made by a Trial Chamber.

> Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where

[8] Trial Judgement, paras. 770, 771.
[9] Notice of Appeal, p. 9; Appeal Brief, p. 108.
[10] *Ntakirutimana* Appeal Judgement, para. 11 (citations omitted). *See also, e.g.*, *Blaškic* Appeal Judgement, para. 14; *Niyitegeka* Appeal Judgement, para. 7; *Vasiljevic* Appeal Judgement, para. 6; *Rutaganda* Appeal Judgement, para. 20; *Musema* Appeal Judgement, para. 16.

> the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.[11]

8. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless the party can demonstrate that rejecting them constituted such error as to warrant the intervention of the Appeals Chamber.[12] Arguments of a party which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[13]

9. In order for the Appeals Chamber to assess the appealing party's arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the Judgement to which the challenge is being made.[14] Further, "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."[15]

10. Finally, it should be recalled that the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing.[16] The Appeals Chamber will dismiss arguments which are evidently unfounded without providing detailed reasoning.[17]

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[11] *Krstic* Appeal Judgement, para. 40 (citations omitted). *See also, e.g., Kajelijeli* Appeal Judgement, para. 5; *Blaškic* Appeal Judgement, paras. 16-19; *Ntakirutimana* Appeal Judgement, para. 12; *Niyitegeka* Appeal Judgement, para. 8.
[12] *Kajelijeli* Appeal Judgement, para. 6. *See also Ntakirutimana* Appeal Judgement, para. 13.
[13] *Kajelijeli* Appeal Judgement, para. 6. *See also, e.g., Blaškic* Appeal Judgement, para. 13; *Ntakirutimana* Appeal Judgement, para. 13; *Rutaganda* Appeal Judgement, para. 18.
[14] Practice Direction on Formal Requirements for Appeals from Judgement, 16 September 2002, para. 4(b). *See also Kajelijeli* Appeal Judgement, para. 7; *Blaškic* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 10; *Ntakirutimana* Appeal Judgement, para. 14; *Vasiljevic* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 19; *Kayishema and Ruzindana* Appeal Judgement, para. 137.
[15] *Vasiljevic* Appeal Judgement, para. 12. *See also, e.g., Kajelijeli* Appeal Judgement, para. 7; *Blaškic* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 10; *Kunarac et al*. Appeal Judgement, paras. 43, 48.
[16] *Kajelijeli* Appeal Judgement, para. 8. *See also, e.g., Niyitegeka* Appeal Judgement, para. 11; *Ntakirutimana* Appeal Judgement, para. 15; *Rutaganda* Appeal Judgement, para. 19; *Kunarac et al*. Appeal Judgement, para. 47.
[17] *Kajelijeli* Appeal Judgement, para. 8. *See also, e.g., Niyitegeka* Appeal Judgement, para. 11; *Blaškic* Appeal Judgement, para. 13; *Ntakirutimana* Appeal Judgement, para. 15; *Rutaganda* Appeal Judgement, para. 19; *Kunarac et al*. Appeal Judgement, para. 48.

II. ALLEGED ERRORS CONCERNING THE INDICTMENT (GROUND OF APPEAL 1)

11. Under the first ground of appeal, the Appellant submits that the Indictment did not properly inform him about the nature and cause of the charges against him. The Appellant alleges that: (1) the charge relating to the massacres in the Gishaka Catholic Parish was imprecise,[18] and (2) the Indictment lacked precision regarding the allegations that he distributed weapons in Gikomero.[19]

A. The Events at the Gishaka Catholic Parish

12. In respect of the alleged error of law relating to the charge concerning the events at the Gishaka Catholic Parish, the Appellant acknowledges that this error does not invalidate the Judgement since he was not found guilty on that charge.[20] Further, in this sub-ground, the Appellant does not raise any legal issue of a broader interest; he merely argues that the Trial Chamber did not meet the standard established by the Tribunal's jurisprudence.[21] This argument does not justify an intervention of the Appeals Chamber when there are no other interests of the Appellant at stake. Accordingly, the Appeals Chamber declines to address this sub-ground of appeal further.

B. The Distribution of Weapons in Gikomero

1. The Arguments of the Parties

13. Next, the Appellant submits that the Indictment does not provide details as to the alleged distribution of weapons. Consequently, the Appellant contends, the evidence relating to the distribution of weapons should be dismissed.[22] He argues that he did not know where the alleged distribution of weapons took place, as the Indictment mentioned only the *préfecture* of Kigali-Rural, but did not specify in which of its 16 *communes* the alleged distribution took place.[23] Only

[18] Appeal Brief, paras. 8-18.
[19] Appeal Brief, paras. 19-32.
[20] Appeal Brief, para. 11.
[21] Appeal Brief, para. 13.
[22] Appeal Brief, para. 20.
[23] Appeal Brief, para. 22.

after the Prosecution presented its evidence, the Appellant submits, did he realize against which allegations he had to defend himself.[24]

14. The Prosecution responds that the distribution of weapons was not a material fact that should have been pleaded; rather, it was part of the evidence that supported the allegations against the Appellant.[25] As such, it was only a matter for disclosure, and this disclosure was effected in a timely manner.[26] The Prosecution points to its Pre-Trial Brief, in which it alleged that the Appellant had distributed weapons to the inhabitants of Gikomero Commune prior to the massacre.[27] The Prosecution argues that the Appellant's ability to prepare his defence was not impaired: the Appellant had already himself mentioned the alleged distribution of weapons in his Pre-Trial Brief, and he had indicated that he would call witnesses to contradict the Prosecution's evidence relating to the distributions of weapons in Gikomero *commune*.[28] When the evidence concerning the arms distribution at the house of the Appellant's cousin in Gikomero was adduced at the trial, the Prosecution adds, the Appellant did not object.[29] Finally, the Prosecution argues that the Trial Chamber did rely on the distribution of weapons as one of several circumstances only to support its finding that the Appellant had the requisite intent for genocide. Of far more significance for the Appellant's conviction, in the Prosecution's view, was his initiation of the attack at the Gikomero Parish Compound.[30]

15. In reply, the Appellant argues that the distribution of weapons was one of the facts supporting the Trial Chamber's finding that he acted with genocidal intent, and thus was material to the charges brought against him.[31]

2. The Trial Chamber's Findings

16. The Trial Chamber found that the Appellant distributed weapons in Gikomero and relied on this finding to support its conclusions that the Appellant (1) intended to commit genocide,[32] and (2) aided and abetted genocide.[33] As to the first point, the Trial Chamber relied additionally

[24] Appeal Brief, para. 23.
[25] Respondent's Brief, paras. 22, 23.
[26] Respondent's Brief, para. 24.
[27] Respondent's Brief, para. 25.
[28] Respondent's Brief, paras. 28, 29.
[29] Respondent's Brief, para. 27.
[30] Respondent's Brief, para. 23.
[31] Reply Brief, paras. 4, 5.
[32] Trial Judgement, para. 637.
[33] Trial Judgement, para. 648.

on the facts that the Appellant led the armed attackers to the Gikomero Parish Compound, gave them the order to start the attack, and was still present when a Tutsi preacher named Augustin Bucundura was shot by one of the persons who had arrived with the Appellant.[34]

3. The Alleged Defect of the Indictment

17. An indictment is defective if it does not state the material facts underpinning the charges.[35] Whether a fact is material depends upon the nature of the Prosecution's case.[36] In *Kupreškic*, the ICTY Appeals Chamber held as follows:

> A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct charged to the accused. For example, in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail.[37]

18. In the present case, the relevant section of the Indictment reads:

> Interim Government Minister Jean de Dieu Kamuhanda had family ties to Gikomero commune, Kigali-Rural préfecture. During the month of April 1994 he supervised the killings in the area. On several occasions [*sic*] he personally distributed firearms, grenades and machetes to civilian militia in Kigali-Rural for the purpose of "killing all the Tutsi and fighting the FPR."[38]

The Trial Chamber found that the Appellant distributed weapons to a number of persons during a meeting at the home of his cousin between 6 and 10 April 1994,[39] but rejected the Prosecution's evidence about other alleged distributions of weapons.[40] The Trial Chamber concluded that the Appellant participated in the massacre at the Gikomero Parish Compound, "by aiding and abetting in the commission of the crime through the distribution of weapons."[41] Therefore, the Appeals Chamber finds, the distribution of weapons was a material fact relating to the Appellant's criminal responsibility and had to be pleaded in the Indictment in detail.

19. The Indictment alleged that the Appellant distributed weapons in Kigali-Rural *préfecture* in April 1994 "on several occasions", without further specifying the dates or locations of the alleged distributions. In the context of this case, the distribution of weapons was a criminal act which the

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[34] Trial Judgement, paras. 638-641.
[35] *Kupreškic et al*. Appeal Judgement, para. 88. *See also Ntakirutimana* Appeal Judgement, para. 25.
[36] *Kupreškic et al*. Appeal Judgement, para. 89.
[37] *Kupreškic et al*. Appeal Judgement, para. 89.
[38] Indictment, para. 6.44.
[39] Trial Judgement, para. 273.
[40] Trial Judgement, paras. 283 (Kayanga football field), para. 288 (Ntaruka *secteur*).
[41] Trial Judgement, para. 648.

Appellant, according to the Indictment, committed personally. At a minimum, the Prosecution was therefore required to provide the Appellant with information "in detail" about "the time and place of the events and the means" by which the alleged distributions were committed.[42]

20. The Prosecution possessed a statement of Witness GEK dated 12 February 1998, which contains a detailed description of the Appellant's visit to the homes of his cousins, including the exact date, and of his distribution of weapons to those present.[43] Therefore, the Prosecution was in a position to plead specific details regarding this matter, given that Witness GEK's statement was the sole evidentiary basis for the Prosecution's allegation of the distribution of weapons at the homes of the Appellant's cousins. The Prosecution's failure to include a detailed pleading of this fact therefore rendered the Indictment defective.

4. Failure to Object

21. In *Niyitegeka*, the Appeals Chamber ruled that, in order to succeed in challenging the exclusion of a material fact from an indictment, an accused must make a timely objection to the admission of evidence of the material fact in question before the Trial Chamber:

> In the case of objections based on lack of notice, the Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced. The Defence may also choose to file a timely motion to strike the evidence or to seek an adjournment to conduct further investigations in order to respond to the unpleaded allegation.[44]

Failure to object before the Trial Chamber will usually result in the Appeals Chamber disregarding the argument. Here, the Defence did not object to the introduction of Witness GEK's testimony at trial; rather, it challenged her credibility during cross-examination. However, even in such a case, the Appeals Chamber may choose to intervene *proprio motu*, considering the importance of the accused's right to be informed of the charges against him and the possibility of serious prejudice to the accused if the Prosecution informs him about crucial facts for the first time at trial. In such circumstances the accused has the burden of proving on appeal that his ability to prepare his case was materially impaired.[45]

22. In *Ntakirutimana*, the Appeals Chamber treated a challenge to the Indictment as properly raised, although the Appellant did not object to the error at the time of the introduction of the

[42] *See Kupreškic et al*. Appeal Judgement, para. 89.
[43] Statement of Witness GEK, 12 February 1998 (Defence Exhibit 2).
[44] *Niyitegeka* Appeal Judgement, para. 199. *See also Kayishema and Ruzindana* Appeal Judgement, para. 91.

evidence at trial, because the Trial Chamber had concluded that the challenges to the vagueness of the Indictment had subsequently been properly presented before it.[46]

23. In the present case, the Trial Chamber noted that

> ?tghe Defence submitted that in the above paragraphs of the Indictment, the Prosecution vaguely refers to weapons that the Accused allegedly distributed in his *commune* of Gikomero and to massacres which he allegedly led. Nowhere in the Indictment did the Prosecution provide the particulars of the circumstances in which these crimes were allegedly committed.[47]

Subsequently, the Trial Chamber did not indicate that it had any doubts about the admissibility of the Defence's argument, but found that the Indictment was not vague as to the massacre at the Gishaka Catholic Parish.[48] In light of these circumstances, the Appeals Chamber will consider whether the Appellant was sufficiently prejudiced so as to merit a remedy at the appellate stage, notwithstanding his failure to timely object at trial.

5. Prejudicial Effects of the Defective Indictment

24. The prejudicial effects of a defective indictment can be remedied if the Prosecution "provided the accused with clear, timely and consistent information detailing the factual basis underpinning the charges against him or her, which compensates for the failure of the indictment to give proper notice of the charges".[49]

25. The Appeals Chamber recalls that, in the present case, the Trial Chamber based its finding that the Appellant distributed weapons at his cousins' homes exclusively on the evidence given by Witness GEK. Witness GEK's statement of 12 February 1998, which contained details about this distribution of weapons, including the exact date, was disclosed to the Appellant in a redacted version on 22 November 2000. The unredacted statement was disclosed on 26 March 2001. In the Pre-Trial Brief filed on 30 March 2001, the Prosecution explicitly alleged that "[p]rior to the Gikomero massacre, the accused distributed weapons to certain indigenes of the Gikomero commune".[50] The same brief contained a summary of the statement of Witness GEK:

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[45] *Niyitegeka* Appeal Judgement, paras. 199, 200.
[46] *Ntakirutimana* Appeal Judgement, para. 52.
[47] Trial Judgement, para. 48.
[48] The Trial Chamber did not specifically address the argument that the Indictment was vague as to the distribution of weapons.
[49] *Kvocka et al.* Appeal Judgement, para. 34, referring to *Kupre{ki} et al*. Appeal Judgement, para. 114. *See also Niyitegeka* Appeal Judgement, para. 195; *Ntakirutimana* Appeal Judgement, para. 27.
[50] Prosecution Pre-Trial Brief, para. 1.

> According to this witness the accused came to her house to meet with her husband and brother-in-law, on the 8th April 1994. KAMUHANDA gave them grenades and a pruning knife each. Further she would testify on the conversation [that] took place between those three men. The accused had told them that they were the only ones who had not started killing and urged them to start.[51]

26. The Appeals Chamber concludes that the Prosecution provided the Appellant with timely, clear and consistent information about the alleged distribution of weapons in the homes of his cousins in Gikomero.

27. The Appeals Chamber observes that the Defence was not prejudiced by the aforementioned imprecision in the Indictment. It is clear from the Appellant's Pre-Trial Brief, filed on 25 July 2002, that he understood that the charges against him included "crimes he is alleged to have committed on or about 12 and 13 April 1994 at the catholic and protestant churches in Gikomero when he is alleged to have distributed weapons and supervised the massacres".[52] More specifically, the Appellant asserted that "[h]e did not travel to Gikomero after 6 April 1994; he did not distribute weapons there".[53] Moreover, the Appellant indicated that he would call witnesses to contradict Witness GEK's evidence, among them Witness GPK:

> This witness contradicts GEK's testimony. He states that she was no longer at his home on the 12th; that the accused had not come and distributed weapons in Gikomero because he certainly would have seen him; that the accused was not there during the events.[54]

Likewise, Witness EM was called by the Appellant to testify:

> [T]hat GEK had left her house upon hearing of the plane accident and contrary to what she says, could not have witnessed any distribution of weapons, nor massacres. She contradicts GEK's testimony in every respect.[55]

The Defence called Witnesses GPB and TMF for a similar purpose.[56]

28. In sum, the Appeals Chamber holds that the Prosecution provided the Appellant with timely, clear, and consistent information about this distribution of weapons. Moreover, the Appellant did not object to the only evidence adduced to prove this fact, the testimony of Witness GEK, and had ample opportunity to prepare his defence. Accordingly, this sub-ground of appeal is dismissed and the first ground of appeal is rejected in its entirety.

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[51] Prosecution Pre-Trial Brief, pp. 15, 16.
[52] Defence Pre-Trial Brief, p. 4.
[53] Defence Pre-Trial Brief, p. 5.
[54] Defence Pre-Trial Brief, p. 25.
[55] Defence Pre-Trial Brief, p. 28.
[56] Defence Pre-Trial Brief, pp. 26 (Witness GPB), 46 (Witness TMF).

III. ASSESSMENT OF EVIDENCE: EXHIBITS (GROUND OF APPEAL 2, IN PART)

29. The Appellant submits that the Trial Chamber erred in law by failing to consider the exhibits introduced by the parties.[57] The Appellant specifies three instances in which, in his view, the Trial Chamber did not meet its obligation to determine the probative value of all the exhibits:

(1) The Defence filed excerpts of earlier statements of Witness GEK and highlighted the inconsistencies it had found within these statements, submitting that the Trial Chamber never ruled on these inconsistencies.[58]

(2) The Defence filed a sketch of the Gikomero Parish Compound drawn by Witness GEE. The Appellant submits that the sketch did not correspond to the local situation, but that the Trial Chamber failed to take this into account.[59]

(3) Finally, the Appellant argues that the Defence submitted all the prior statements of Prosecution and alibi witnesses as exhibits, but that the Trial Chamber did not consider the inconsistencies in the case of the Prosecution witnesses and the corroboration in the case of the alibi witnesses.[60]

30. In response, the Prosecution argues that the Trial Chamber was not required to articulate in its Judgement every step of its reasoning in reaching a particular finding, nor to refer to every piece of evidence.[61] With regard to Witness GEK, the Prosecution submits that the Trial Chamber had the discretion to find the alleged inconsistencies inadequate to cast any substantial doubt on Witness GEK's testimony.[62] Regarding Witness GEE, the Prosecution submits that the Appellant merely repeats the position he took at trial, and that the Trial Chamber at least considered a similar argument.[63] The Prosecution submits that the appeal on these grounds should be dismissed.[64]

[57] Appeal Brief, paras. 60, 70.
[58] Appeal Brief, para. 62.
[59] Appeal Brief, para. 63.
[60] Appeal Brief, paras. 64, 65.
[61] Respondent's Brief, para. 161.
[62] Respondent's Brief, para. 163.
[63] Respondent's Brief, para. 164.
[64] Respondent's Brief, para. 167.

31. In reply, the Appellant relies on the Appeal Judgement in *Musema*, which, in his view, found that when a Trial Chamber did not refer to a particular piece of evidence, it could be presumed that the Trial Chamber did not take this piece of evidence into account.[65]

32. Contrary to the Appellant's view, *Musema* does not stand for such a proposition. In that case, the Appeals Chamber did not suggest that a Trial Chamber could be presumed to have *ignored* a piece of evidence just because it did not mention it in the Judgement. Rather, the Appeals Chamber held, in the paragraph cited by the Appellant, that it could be presumed (absent particular circumstances suggesting otherwise) that the Trial Chamber chose not to *"rely on"* an unmentioned piece of evidence—that is, that it considered the evidence but decided that it was either not reliable or otherwise not worth citing in the Judgement.[66] The Appeals Chamber then proceeded to assess the reasonableness of the Trial Chamber's decision not to rely on the evidence, ultimately identifying several reasons why the Trial Chamber could reasonably have concluded the evidence was not reliable and thus rejecting the challenge to its Judgement. The Appeals Chamber in *Musema* furthermore expressly acknowledged that

> … a Trial Chamber is not required to articulate in its judgement every step of its reasoning in reaching a particular finding. Although no particular evidence may have been referred to by a Chamber, it may nevertheless be reasonable to assume in the light of the particular circumstances of the case, that the Trial Chamber had taken it into account. Hence, where a Trial Chamber did not refer to any particular evidence in its reasoning, it is for the appellant to demonstrate that both the finding made by the Trial Chamber and its failure to refer to the evidence had been disregarded.[67]

Moreover, the reading of *Musema* proffered by the Appellant is inconsistent with the subsequent case law of the Appeals Chamber, which clearly establishes that a Trial Chamber is not obligated to identify and discuss in the Judgement each and every piece of evidence that it has considered.[68]

33. The alleged inconsistencies in Witness GEK's testimony are discussed as such under Ground of Appeal 12.[69] With regard to Exhibit D 9, the Appeals Chamber notes that this exhibit is a sketch drawn by the witness, which consists of a few uneven lines without any explanation. The Trial Chamber indeed did not refer to this exhibit; however, with regard to Witness GEE, the Trial Chamber stated it did not find "the fact that the Witness did not recognise the photograph in Prosecution Exhibit 2 to be unusual, insofar as the Witness testified that he had

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[65] Reply Brief, para. 86. *See also* Appeal Brief, para. 66, quoting *Musema* Appeal Judgement, para. 118.
[66] *Musema* Appeal Judgement, para. 118.
[67] *Musema* Appeal Judgement, para. 277 (citations omitted).
[68] *See, e.g., Semanza* Appeal Judgement, paras. 130, 139; *Rutaganda* Appeal Judgement para. 536; *^elebi}i Case* Appeal Judgement, para. 481.

never been at Gikomero Parish Compound before".[70] In light of this reasoning, with which the Appeals Chamber agrees, it was not unreasonable for the Trial Chamber to disregard the fact that the witness was apparently also unable to draw a sketch representing the same compound.

34. The Appeals Chamber now turns to the argument that the Appellant tendered the prior statements of "all the Prosecution witnesses"[71] and of all his alibi witnesses, and that the Trial Chamber should have examined them. The Appeals Chamber considers that this submission is unsubstantiated. Even if the Trial Chamber did not refer to these statements, the Appellant has not shown that the Trial Chamber in fact disregarded them, and he has not demonstrated that they would have prevented a reasonable trier of fact from entering a conviction.[72] Accordingly, the Appeals Chamber dismisses the submissions considered under this ground of appeal.

[69] *See* Chapter X.A.
[70] Trial Judgement, para. 453.
[71] Appeal Brief, para. 64.
[72] *See supra* para. 10 ("The Appeals Chamber will dismiss arguments which are evidently unfounded without providing detailed reasoning.").

IV. BURDEN OF PROOF (GROUND OF APPEAL 4)

35. The Appellant submits that the Trial Chamber erred in law by requiring the Defence to prove its argument beyond reasonable doubt, in effect requiring him to prove his innocence.[73] To support this submission, the Appellant refers to a number of passages from the Trial Judgement which show, in his view, that the Trial Chamber reversed the burden of proof.[74]

36. The Prosecution argues that these passages, correctly understood, meant that the Trial Chamber observed that the Defence evidence in question failed to raise a reasonable doubt because it was not incompatible with the Prosecution evidence.[75] In addition, the Prosecution points out, it should be remembered that the Trial Chamber rejected much of the Prosecution's case.[76]

37. The examples which the Appellant quotes will be discussed in greater detail in their proper context.[77] At the present stage, the Appeals Chamber will only consider whether, as the Appellant contends, they reveal a fundamental misapplication of the burden of proof on the part of the Trial Chamber.

38. The Appeals Chamber notes that with regard to alibi, the Trial Chamber stated that:

> when an alibi is submitted by the Accused the burden of proof rests upon the Prosecution to prove its case beyond a reasonable doubt in all aspects. Indeed, the Prosecution must prove "that the accused was present and committed the crimes for which he is charged and thereby discredit the alibi defence". If the alibi is reasonably possibly true, it will be successful.[78]

This definition is legally beyond reproach and shows that the Trial Chamber was aware of the applicable burden of proof.

39. As is explained below in Chapter XI, the Appeals Chamber notes that in some instances the Trial Chamber applied language which *prima facie* supports the Appellant's arguments, for example in paragraph 174 of the Trial Judgement: "The Trial Chamber finds that the evidence of Witness ALB does not *exonerate* the Accused from being present at Gikomero."[79] However, as the Prosecution correctly pointed out, these passages have to be read in context. The fact that the

[73] Appeal Brief, para. 82.
[74] Appeal Brief, para. 83.
[75] Respondent's Brief, para. 46.
[76] Respondent's Brief, para. 47.
[77] *See* Chapters IX, XI.
[78] Trial Judgement, para. 84, referring to *Musema* Appeal Judgement, para. 205 (citations omitted).
[79] Trial Judgement, para. 174 (emphasis added). *See* Appeal Brief, para. 85.

Trial Chamber in some instances used language which may be misunderstood, does not necessarily mean that it fundamentally misplaced the burden of proof. For example, the Trial Chamber found that the Appellant "may have been in the Kacyiru area at some time during the period of 7 April 1994 to 18 April 1994" and continued that, however, "this did not preclude him from travelling to the Gikomero *commune* at times during the same period."[80] This latter statement, interpreted in context, simply means that the Appellant's occasional presence at Kacyiru did not raise a reasonable doubt about his presence in Gikomero, which was supported by other parts of the evidence.

40. The same applies to the Appellant's argument that the Trial Chamber required him to prove the impossibility of travel between Kigali and Gikomero.[81] The material fact to be proven was not the possibility of travel between the two points, but whether the Appellant was present at Gikomero in the early afternoon of 12 April 1994. The Trial Chamber had found that there was evidence supporting the Appellant's presence there. One way for the Appellant to raise reasonable doubt about this evidence was to show that it was impossible to travel to Gikomero at the time in question. The fact that it was possible, albeit difficult, to travel was in the Trial Chamber's view consistent with the evidence showing that the Appellant was at Gikomero, and, therefore, the evidence introduced by the Appellant on this point was not sufficient to raise reasonable doubt about his presence there. The "rebuttal" evidence which, the Appellant claims, was not adduced,[82] is precisely the evidence that showed that he *was* present at Gikomero, notwithstanding any difficulties in travelling there. Therefore, the fact that the Trial Chamber was not satisfied that it was impossible to travel from Kigali to Gikomero does not show that the Trial Chamber misplaced the burden of proof.

41. Likewise, the fact that the Trial Chamber disregarded Witness GPK's and Xavièra Mukaminani's testimony that no weapons had been distributed at their neighbour's house does not show that the Trial Chamber misplaced the burden of proof. The Trial Chamber had heard Witness GEK's evidence about the distribution of weapons and found the witness to be credible. When it disregarded the evidence of two neighbours who claimed that they had not witnessed the distribution, which had taken place inside the house,[83] it did not misplace the burden of proof, but

[80] Trial Judgement, para. 167.
[81] Appeal Brief, para. 86.
[82] Appeal Brief, para. 86.
[83] Trial Judgement, para. 273.

simply found that the neighbour's testimony did not raise a reasonable doubt about the Prosecution's case.

42. The Trial Chamber reasoned that, even if the testimonies of the Defence witnesses about the events at the Gikomero Parish Compound were to be believed, this would not demonstrate that the Appellant was not on the scene.[84] The Trial Chamber had determined that a number of Prosecution witnesses supported the finding that the Appellant had been present at the beginning of the attack, but had left soon afterwards. The testimony of other witnesses, who had testified that they arrived later at the scene of the attack and had not seen the Appellant there, was not inconsistent with the testimony of the Prosecution witnesses and, therefore, not suited to cast any reasonable doubt on their evidence. The Trial Chamber's statements reconciling the competing sets of testimony again do not reflect a misunderstanding of the burden of proof.

43. With regard to Witness GPT, the Trial Chamber noted in paragraph 472 of the Trial Judgement that,

> following the inquiries [Witness GPT] made there was no mention of a leader of the attack of 12 April 1994 at the Gikomero Parish Compound. The Chamber notes that while indeed GPT may have made inquiries, he testified that he did not question Prosecution Witness GEK. The Chamber thus finds that even if GPT did make such inquiries, it does not rule out the possibility that a man identified as Kamuhanda had been at the Gikomero Parish Compound for a brief period on 12 April 1994, bringing with him attackers who attacked the refugees sheltering there.[85]

The Appellant argues that the Trial Chamber thus said "that statements by a Prosecution witness have more weight than those by a Defence witness".[86] This contention is unfounded. The Trial Chamber heard a number of witnesses who had been present when the Appellant arrived with the assailants at the Gikomero Parish Compound.[87] The fact that it attached more weight to these witnesses than to Witness GPT who had not been present, but testified about later inquiries, does not reveal any error of law on the part of the Trial Chamber.

44. Accordingly, the Appeals Chamber, Judge Weinberg de Roca dissenting,[88] finds that the Appellant has not established that the Trial Chamber misapplied the burden of proof and rejects this ground of appeal.

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[84] Trial Judgement, para. 470.
[85] Trial Judgement, para. 472.
[86] Appeal Brief, para. 90.
[87] For a more detailed discussion, *see* Chapter XI.K.
[88] *See* Chapter XVIII.

V. STANDARD OF PROOF (GROUND OF APPEAL 5)

45. Under this ground of appeal the Appellant submits that the Trial Chamber erred in law by misapprehending the standard and tests for assessing evidence. He advances three sub-grounds to support this submission. First, that the Trial Chamber committed errors concerning the identification evidence.[89] This sub-ground is addressed below in Chapter XI. Second, that the Trial Chamber did not assess the evidence as a whole, in particular regarding the alibi and the alleged impossibility of travel between Kigali and Gikomero.[90] The Appeals Chamber addresses these submissions in Chapters XI and IX, respectively. Third, the Appellant submits that the Trial Chamber applied different standards for the assessment of Defence and Prosecution witnesses, a point the Appeals Chamber addresses here.[91]

46. The Appellant submits that the Trial Chamber found Defence witnesses not to be credible upon realizing the slightest discrepancy in their testimony, whereas it accepted the testimony of Prosecution witnesses even if it showed irreparable discrepancies.[92] The Appellant argues that the Trial Chamber recalled the principle that "[t]he presence of inconsistencies in the evidence does not, *per se*, require a reasonable Trial Chamber to reject it as being unreliable",[93] but applied this principle only to the testimony of Prosecution witnesses, and systematically disregarded it in the case of Defence witnesses, thus breaching the principle of equality of arms and the right of the Appellant to a fair trial.[94] To support his argument, the Appellant enumerates a number of instances in which the Trial Chamber, in his view, disregarded evident inconsistencies in the testimony of Prosecution witnesses.[95] On the other hand, the Appellant argues, the Trial Chamber disregarded the alibi evidence solely because it had found contradictions in the evidence of Witnesses ALS, ALF, ALR, and ALB.[96]

47. At this point the Appeals Chamber examines only the alleged error of law. The Appeals Chamber understands that the Appellant contends that the Trial Chamber applied different

[89] Appeal Brief, paras. 93-107.
[90] Appeal Brief, paras. 108-114; Reply Brief, para. 29.
[91] Appeal Brief, paras. 115-133.
[92] Appeal Brief, para. 115.
[93] Trial Judgement, para. 36, quoting *Kupreškic et al*. Appeal Judgement, para. 31.
[94] Appeal Brief, para. 117.
[95] Appeal Brief, paras. 119-127.
[96] Appeal Brief, paras. 130, 131.

standards for the assessment of Defence and Prosecution witnesses, thus breaching his right to a fair trial.[97]

48. The Appeals Chamber observes that the Trial Chamber rejected in a number of instances the evidence given by Prosecution witnesses:

- Prosecution Witness GAB testified that the Appellant spoke at an MRND political rally in the Kayanga *secteur*, telling his audience that a "solution has been found to the problems that [the Tutsi] are raising and this will be conveyed, that solution will be conveyed to you in the not too distant future".[98] Between 9 and 11 April 1994, Witness GAB testified further, the Appellant distributed weapons in the Kayanga *secteur*.[99] The Trial Chamber found the evidence of Witness GAB not credible, and thus concluded that it was not established that the Appellant distributed weapons in the Kayanga *secteur*.[100]

- Prosecution Witness GAC testified that, between 8 and 12 April 1994, the Appellant distributed weapons at a bar in Ntaruka *secteur*, Gikomero *commune*.[101] The Trial Chamber found Witness GAC's account improbable and did not rely on his evidence, and declined to find that the Appellant distributed weapons in Ntaruka *secteur*.[102]

- Regarding the massacre at the Gikomero Parish Compound, the Trial Chamber indicated that it did not rely on the uncorroborated evidence of Witness GEI,[103] and that it found Witness GEM's estimates of times and numbers unreliable.[104]

- With regard to the events at the Gishaka Catholic Parish, the Trial Chamber noted "the many inconsistencies between the Witness testimonies"[105] and found "that the Prosecution has not proven the charges against the Accused in relation to his alleged involvement in the massacres which occurred there between these dates."[106]

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[97] Appeal Brief, para. 117.
[98] Trial Judgement, para. 275.
[99] Trial Judgement, para. 276.
[100] Trial Judgement, paras. 282, 283.
[101] Trial Judgement, para. 285.
[102] Trial Judgement, paras. 287, 288.
[103] Trial Judgement, para. 457.
[104] Trial Judgement, para. 459.
[105] Trial Judgement, para. 565.
[106] Trial Judgement, para. 567.

49. With regard to the alleged application of a stricter standard to Defence witnesses, the Appeals Chamber notes that the Appellant relies only on the assessment of the evidence of four of his alibi witnesses, whose evidence had been in fact rejected because of inconsistencies in their testimonies. Given the fact that the Trial Chamber, on the other hand, disregarded the evidence of a number of Prosecution witnesses, partly because of inconsistencies, the Appeals Chamber is not satisfied that the Appellant has established an inconsistent approach on the part of the Trial Chamber. Whether the Trial Chamber's treatment of the alleged inconsistencies in the individual testimonies amounts to errors of fact will be discussed later in its proper context.[107]

50. This ground of appeal is, accordingly, rejected.

[107] *See, e.g.*, Chapter X (Witness GEK); Chapter XI (Defence's alibi witnesses; Prosecution's witnesses of the Gikomero Parish Compound massacre).

VI. DISTORTION OF THE DEFENCE POSITION: THE ORIGIN OF THE ATTACKERS (GROUND OF APPEAL 7, IN PART)

51. The Appellant submits that the Trial Chamber distorted several arguments of the Defence as well as the testimony of Defence witnesses, thus denying him the right to a fair trial.[108] Most of his arguments in support of this submission relate closely to alleged errors of fact and will be addressed in subsequent chapters of this Judgement;[109] at this point, the Appeals Chamber will only address the allegation that the Trial Chamber distorted the Defence's argument about the origin of the attackers.

52. The Appellant contends that he had established that the people who attacked the refugees at the Gikomero Parish Compound came from Rubungo and argues that the Defence had always used the term "attackers" to designate the people who arrived in vehicles, but never to designate local people who joined in the attack.[110] The Appellant points out, however, that the Trial Chamber noted evidence that local Hutus joined the attackers.[111] In the view of the Appellant, this amounted to a "distortion" of his arguments.[112] This "distortion", he asserts, impacted upon the factual findings of the Trial Chamber, which found that the issue of the origin of the attackers was immaterial to the Appellant's criminal responsibility, whereas it was actually an important matter showing that the Appellant had no influence over the attackers.[113]

53. The Prosecution responds that the Trial Chamber was merely unprepared to accept the conclusion drawn by the Appellant, and that its factual findings about the Appellant's presence during the attack at the Gikomero Parish Compound were reasonable.[114]

54. The Appeals Chamber notes that the Appellant does not challenge the Trial Chamber's summary of his arguments on the issue of the origin of the attackers, but rather the Trial Chamber's conclusion on this point, which reads as follows:

> The Chamber finds that there is no conclusive evidence that the attackers came from Rubungo. The Chamber also notes the evidence of Witness GEC that local Hutus joined those who had arrived in vehicles. The Chamber has considered all the evidence tendered and finds that as far

[108] Appeal Brief, para. 150.
[109] *See* Chapter X.B.4 on the identity of Witness GEK; Chapter IX.D on the alleged impossibility to travel from Kigali to Gikomero; Chapter XI.C and XI.E on the alleged distortion of the testimony of the alibi witnesses.
[110] Appeal Brief, paras. 161, 162.
[111] Appeal Brief, para. 161.
[112] Appeal Brief, para. 164.
[113] Appeal Brief, paras. 163, 164.
[114] Respondent's Brief, paras. 207, 208.

> as the criminal responsibility of the Accused is concerned the issue raised by the Defence is not material.[115]

55. The Appeals Chamber finds that the Appellant has not demonstrated that the Trial Chamber distorted the Defence position that the attackers came from Rubungo. Rather, the Trial Chamber simply made a finding of fact based on the evidence, and furthermore deemed the issue immaterial to the Appellant's criminal responsibility. In both respects, the Trial Chamber did not distort the Appellant's arguments but simply disagreed with them. Accordingly, the Appeals Chamber dismisses the submissions considered in this chapter.

[115] Trial Judgement, para. 67 (citations omitted).

VII. VERDICT (GROUND OF APPEAL 8)

56. Under this ground of Appeal, the Appellant alleges first that the Trial Chamber erred in law in holding him responsible on the basis of Article 6(1) of the Statute, whereas, in the Appellant's view, none of the modes of participation enumerated in this provision could be imputed to him. He further alleges that the Trial Chamber erred in holding him guilty of genocide and extermination, without sufficient proof of the required intent for either crime.[116]

A. Criminal Responsibility of the Appellant Under Article 6(1) of the Statute

57. On the basis of the Appellant's involvement in the massacre at Gikomero Parish Compound, the Trial Chamber found the Appellant criminally responsible for the crimes of genocide and extermination in several senses: (1) he instigated others to commit the crimes; (2) he aided and abetted the crimes by distributing weapons and leading the attackers to the compound; and (3) he ordered the attackers to kill those who had taken refuge in the compound. The Appellant asserts that these findings are not supported by the evidence.[117]

1. Instigating Others to Commit the Crime

58. The Appellant submits that the Trial Chamber's finding that he instigated others to commit the crimes covers the mode of participation by "inciting to commit". He argues that the Prosecution did not adduce evidence proving the existence of a causal link between the incitement and the commission of the crime, because the persons to whom the Appellant allegedly gave weapons were not present during the massacre, and because it was never established that the weapons which the Appellant had distributed were used for the crimes.[118]

59. The Prosecution responds that to establish culpability for instigation pursuant to Article 6(1) of the Statute, the accused's actions must substantially contribute to the commission of the crime, but they need not be a condition *sine qua non* of the crime.[119] The Prosecution argues that at least one man present at the meeting when the weapons were distributed was a member of the *Interahamwe*, and that the Appellant knew that the *Interahamwe* would be able to incite others to attack the Tutsi in Gikomero *commune*. Moreover, the Prosecution adds that, even if some of the

[116] Appeal Brief, para. 177.
[117] Appeal Brief, paras. 181, 182.
[118] Appeal Brief, paras. 183, 184.
[119] Respondent's Brief, para. 248.

perpetrators of the crimes did not communicate with the Appellant, it was only reasonable to conclude that they were encouraged to participate in the killings by those whose participation was directly instigated by the Appellant.[120]

60. In order to assess the merits of the Appellant's factual challenge, the Appeals Chamber must first consider whether, indeed, the Trial Chamber's findings concerning incitement were premised on the Appellant's alleged conduct during the weapons distribution incident, or, instead, on some other conduct. The Appeals Chamber recalls that the Trial Chamber summarized its conclusions regarding the Appellant's participation in the killing in Gikomero Parish Compound as follows:

> On the basis of its factual findings and legal findings above, the Chamber finds that the Accused participated in the killings in Gikomero Parish Compound in Gikomero *commune* by ordering *Interahamwe*, soldiers, and policemen to kill members of the Tutsi ethnic group, instigating other assailants to kill members of the Tutsi ethnic group and by aiding and abetting in the commission of the crime through the distribution of weapons and by leading the attackers to the Gikomero Parish Compound.[121]

61. In the view of the Appeals Chamber, the Trial Judgement is unclear as to which "other assailants" the Trial Chamber refers when it concludes that the Appellant ordered "*Interahamwe*, soldiers, and policemen to kill members of the Tutsi ethnic group" and instigated "other assailants to kill members of the Tutsi ethnic group".[122] It might be argued that the Trial Chamber thought of members of the local population who joined the attackers when it mentioned "other assailants". This interpretation of the Trial Judgement could be supported by the argument that the Appellant had authority over *Interahamwe*, soldiers, and policemen, but not over civilian bystanders who spontaneously joined the attack. However, considering the entire Trial Judgement, the Appeals Chamber finds that there is not enough material to support this interpretation. Paragraph 648, quoted above, contains only the conclusions of the Trial Chamber. The factual basis for these conclusions is to be found in paragraph 505 of the Trial Judgement. Analyzing the evidence about the attack at the Gikomero Parish Compound, the Trial Chamber found that the Appellant arrived with a group of *Interahamwe*, soldiers, policemen and local population at the compound, that he initiated the attack and that he ordered the attackers to start the killing.[123] In these factual findings, the Trial Chamber did not distinguish between the people accompanying the Appellant and the local population; rather, it found that he ordered "the attack". In addition, the Trial Chamber did not find that there was a formal superior-subordinate relationship between the Appellant and the

[120] Respondent's Brief, paras. 250, 251.
[121] Trial Judgement, para. 648.
[122] Trial Judgement, para. 648.
[123] Trial Judgement, para. 505.

attackers,[124] but that he enjoyed "a certain influence in the Gikomero community";[125] the Trial Chamber thus did not distinguish on this basis between attackers under the Appellant's formal authority and other attackers. In conclusion, the Appeals Chamber finds that the factual findings of the Trial Chamber are not premised on a distinction between the Appellant "ordering" *Interahamwe*, soldiers, and policemen, and "instigating" other assailants to start the attack.

62. The Prosecution argues that the Appellant's conviction for instigation relates to his actions prior to the events of 12 April 1994.[126] The Appeals Chamber notes that the Trial Chamber found at paragraph 273 of the Judgement that "a meeting occurred sometime between 6 April 1994 and 10 April 1994 at the home of one of his cousins in Gikomero" involving "the Accused, two of his two cousins, an *Interahamwe*, and a neighbour." It further found as follows:

> [A]t this meeting, the Accused addressed those present and told them that the killings in Gikomero *commune* had not yet started and that "those [who] were to assist him to start had married Tutsi women". The Accused told those present that he would bring "equipment" for them to start, and that if their women were in the way, they should first eliminate them. Whilst in his house, Kamanzi received four grenades and a gun from the Accused. Following the meeting which took place in the house, the group went a few steps next door to the home of Karakezi, who is also a cousin of the Accused. Whilst there, the Accused gave the others grenades and machetes, for themselves, and also additional weapons which they were to distribute to others. The Accused told them that they should distribute those weapons and that he would return to assist them. He also said that he would return to see if they had begun the killings, or so that the killings could start. The Accused then left, and did not return that day.[127]

63. The Trial Chamber did not indicate whether it was of the opinion that the "other assailants" were the participants of the meeting in the home of the Appellant's cousin, and it did not refer to any evidence as to the identity of the other assailants. The Appeals Chamber considers that evidence as to who the other assailants may have been was not adduced at trial.

64. The Prosecution argues that it was only reasonable to conclude that the persons who had been present during the meeting at the home of the Appellant's cousin, even if they were not present at the attack themselves, encouraged the perpetrators of the killings. This is speculation without foundation in the evidence. To support its argument, the Prosecution relies on the Trial Chamber's finding that the Appellant was a person of "authority and influence in Gikomero Commune".[128]

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[124] Trial Judgement, para. 641.
[125] Trial Judgement, para. 73.
[126] Respondent's Brief, paras. 249-253.
[127] Trial Judgement, para. 273.
[128] Respondent's Brief, para. 251, referring to Trial Judgement, para. 73.

65. First, the Appeals Chamber observes that the Trial Chamber in the cited paragraph found that the Appellant enjoyed a "certain influence in the Gikomero community".[129] This fact alone is not sufficient to establish the Appellant's responsibility for "instigating" the crimes. Second, this reasoning would be inconsistent with the fact that the Trial Chamber did not exclude the possibility that the attackers did not come from Gikomero, but from Rubungo.[130] Therefore, the Appeals Chamber finds the fact that the Appellant enjoyed a certain influence in the Gikomero community to be immaterial to the alleged relation between the meeting in the Appellant's cousin's home and the attack on the Gikomero Parish Compound.

66. In summary, the Appeals Chamber finds that the Trial Chamber's conclusion that the Appellant instigated assailants to kill members of the Tutsi ethnic group is not supported by the evidence.

2. Aiding and Abetting

67. The Trial Chamber concluded that the Appellant aided and abetted the commission of the crimes through the distribution of weapons and by leading the attackers to the Gikomero Parish Compound. The Appellant challenges the Trial Chamber's finding that he distributed weapons prior to the attack, and argues that there was no evidence that he directed the attackers.[131]

68. The Appeals Chamber agrees, Judge Schomburg dissenting, with the Appellant that the evidence does not support any connection between the distribution of weapons and the subsequent attack on the Gikomero Parish Compound. It was neither established that the persons present during the meeting in the house of the Appellant's cousin took part in the attack, nor that the weapons he distributed were used at all. The Appeals Chamber recalls again that the Trial Chamber did not rule out the possibility that the attackers did not come from Gikomero, but from another location.[132]

69. In paragraph 648 of the Trial Judgement, the Trial Chamber found that the Appellant aided and abetted the commission of the crimes "by leading the attackers *to* the Gikomero Parish Compound".[133] This could be understood in the sense that the Trial Chamber held the Appellant responsible for aiding and abetting the attackers by guiding them to the Gikomero Parish

[129] Trial Judgement, para. 73.
[130] Trial Judgement, para. 67.
[131] Appeal Brief, para. 185.
[132] Trial Judgement, para. 67.

Compound. However, the Trial Chamber cited no evidence showing that the Appellant served in such a capacity; the closest thing to this that it cited was testimony stating only that the Appellant arrived at the Gikomero Parish Compound and that he was travelling in the passenger section of the front cabin of one of the vehicles.[134] This evidence does not show that the Appellant "led" the attackers to the massacre site. Indeed, another Prosecution witness testified that the Appellant emerged from the *second* vehicle in the convoy that arrived at the Compound, not the leading vehicle.[135]

70. It appears therefore that the Trial Chamber used the expression "leading" in a broader sense, as it employed the term in paragraph 505 of the Trial Judgement: "he led ?the attackersg *in* the Gikomero Parish Compound … to initiate the attack".[136] This is supported by the Trial Chamber's reasoning that the Appellant "was in a position of authority over the armed attackers because he led them to the Gikomero Parish Compound and because he ordered the attack".[137] The Appeals Chamber understands that the Trial Chamber considered its finding that the Appellant led the attackers *to* the site only as one element supporting its conclusion that he led the attackers *in* the attack, thus aiding and abetting the commission of the crimes.

71. The Trial Chamber enumerated a number of factual findings on which it based its conclusion that the Appellant aided and abetted the commission of the crimes by leading the attackers:

- The Appellant, at a meeting at the home of his cousin in Gikomero prior to the massacre, addressed those present, told them to start killing Tutsis, and distributed weapons to them.[138]

- The Appellant arrived at the Gikomero Parish Compound, accompanied by armed persons.[139]

- The Appellant ordered the armed persons to "work", which was understood as an order to start the killings.[140]

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[133] Emphasis added.
[134] *See* Trial Judgement paras. 300, 501.
[135] *See* Trial Judgement para. 320.
[136] Emphasis added.
[137] Trial Judgement, para. 504.
[138] Trial Judgement, para. 637.
[139] Trial Judgement, para. 638.

- Augustin Bucundura was shot by an armed person who had come with the Appellant, while the Appellant was still present at the Parish.[141]

- The Appellant was in a position of authority over the attackers.[142]

- The Appellant led the attackers in the Gikomero Parish Compound and initiated the attack.[143]

72. It has been already noted that a link between the participants of the meeting in the home of the Appellant's cousin and the attackers has not been established, so the first of these findings has to be disregarded. However, considering only the remaining five findings, the Appeals Chamber finds that a reasonable trier of fact could arrive at the conclusion that the Appellant aided and abetted the commission of the crimes by his actions at the Gikomero Parish Compound on 12 April 1994. The erroneous finding of the Trial Chamber that the Appellant aided and abetted the commission of crimes also by distributing weapons therefore does not amount to a miscarriage of justice.

3. Ordering

73. The Appellant submits that it has not been demonstrated that he held a position of authority in relation to the assailants.[144] He points to the Trial Chamber's finding that there was no specific evidence concerning the relationship between the attackers and him, and that the Trial Chamber did not find him responsible under Article 6(3) of the Statute. The Appellant argues that this finding should have prevented the Trial Chamber from finding him responsible for ordering under Article 6(1) of the Statute.[145] He adds that the simple fact that he arrived in the company of the attackers did not constitute circumstantial evidence of the necessary authority over the attackers. Concerning the order he allegedly gave, the Appellant submits that he has already demonstrated that most witnesses never mentioned an order, and that those witnesses who did were not credible.[146] He adds that he had established at trial that the attackers came from Rubungo, whereas the Trial Chamber had found that he had influence only in the Gikomero

[140] Trial Judgement, para. 639.
[141] Trial Judgement, para. 640.
[142] Trial Judgement, para. 641.
[143] Trial Judgement, para. 643.
[144] Appeal Brief, para. 186.
[145] Appeal Brief, paras. 188, 189.
[146] Appeal Brief, para. 192.

commune. This, the Appellant contends, shows that he could not have had any authority over the attackers.[147]

74. The Prosecution responds that there was sufficient evidence supporting the Trial Chamber's finding that the Appellant gave the order to "work", and that, in the absence of any clear evidence of authority, the existence of such authority may be inferred from the fact that an order is obeyed.[148] The Prosecution adds that the Appellant held a prominent and influential position in the Gikomero community and was a well-known civil servant, and that his mere presence at the Parish would have been an encouragement to the attackers.[149]

75. The Appeals Chamber notes that superior responsibility under Article 6(3) of the Statute is a distinct mode of responsibility from individual responsibility for ordering a crime under Article 6(1) of the Statute. Superior responsibility under Article 6(3) of the Statute requires that the accused exercise "effective control" over his subordinates to the extent that he can prevent them from committing crimes or punish them after they committed the crimes.[150] To be held responsible under Article 6(1) of the Statute for ordering a crime, on the contrary, it is sufficient that the accused have authority over the perpetrator of the crime,[151] and that his order have a direct and substantial effect on the commission of the illegal act.[152] In the *Semanza* Appeal Judgement, the Appeals Chamber made clear that no formal superior-subordinate relationship is required.[153]

76. There is no requirement that an order be given in writing or in any particular form, and the existence of an order may be proven through circumstantial evidence.[154] As will be shown below, the factual finding that the Appellant gave the order to start the massacre, and that this order was obeyed, was not unreasonable.[155] The Appeals Chamber finds that a reasonable trier of fact could conclude from the fact that the order to start the massacre was directly obeyed by the attackers that this order had direct and substantial effect on the crime, and that the Appellant had

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[147] Appeal Brief, paras. 204-210.
[148] Respondent's Brief, paras. 259, 260.
[149] Respondent's Brief, para. 261.
[150] *Bagilishema* Appeal Judgement, para. 50.
[151] *Semanza* Appeal Judgement, para. 361. *See also Kordi} and Cerkez* Appeal Judgement, para. 28 (for the identical provision in Article 7(1) of the ICTY Statute).
[152] *Kayishema and Ruzindana* Appeal Judgement, para. 186.
[153] *Semanza* Appeal Judgement, para. 361.
[154] *Kordi} and Cerkez* Trial Judgement, para. 388.
[155] *See* Chapter XI.K.4.c.

authority over the attackers, regardless of their origin. This sub-ground of appeal is therefore without merit and the Appeals Chamber dismisses it.

4. The Appellant's Convictions for Ordering and Aiding and Abetting

77. The factual findings of the Trial Chamber support the Appellant's conviction for aiding and abetting as well as for ordering the crimes. Both modes of participation form distinct categories of responsibility. In this case, however, both modes of responsibility are based on essentially the same set of facts: the Appellant "led" the attackers in the attack and he ordered the attackers to start the killings. On the facts of this case, with the Appeals Chamber disregarding the finding that the Appellant distributed weapons for the purposes of determining whether the Appellant aided and abetted the commission of the crimes, the Appeals Chamber does not find the remaining facts sufficiently compelling to maintain the conviction for aiding and abetting. In this case the mode of responsibility of ordering fully encapsulates the Appellant's criminal conduct at the Gikomero Parish Compound.[156]

B. Genocide

78. The Appellant submits that his intent to destroy the Tutsi ethnic group in whole or in part has not been proven.[157] He argues that the Trial Chamber based its finding on circumstantial evidence which was unreliable.[158] He challenges, in particular, the Trial Chamber's holding that the origin of the attackers was immaterial to his criminal responsibility.[159] The Appellant maintains that the attackers did not come from Gikomero, but from the neighbouring commune of Rubungo, whereas, the Appellant argues, the Trial Chamber found that he had influence only in the Gikomero Commune.[160]

79. Under the heading "Intent to Destroy in Whole or in Part the Tutsi Ethnic Group", the Trial Chamber referred to a number of its earlier findings:

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[156] *Cf. Semanza* Appeal Judgement, paras. 353, 364, Disposition (where the Trial Chamber's convictions for aiding and abetting extermination and complicity in genocide were reversed on appeal and the Appeals Chamber entered convictions for ordering extermination and genocide (ordering) with respect to the same events).
[157] Appeal Brief, para. 194.
[158] Appeal Brief, paras. 196-201.
[159] Appeal Brief, para. 204.
[160] Appeal Brief, paras. 205-210.

- The Appellant, at a meeting at the home of his cousin in Gikomero prior to the massacre, addressed those present, told them to start killing Tutsi, and distributed weapons to them.[161]

- The Appellant arrived with armed people at the Gikomero Parish Compound.[162]

- The Appellant ordered the armed persons whom he brought to the Parish to "work", which was understood as an order to start the killings.[163]

- Augustin Bucundura was shot by an armed person who had come with the Appellant, while the Appellant was still present at the Parish.[164]

- The Appellant was in a position of authority over the attackers.[165]

- The Appellant led the attackers in the Gikomero Parish Compound and initiated the attack.[166]

- A large number of Tutsi refugees was killed by those attackers.[167]

80. The Appeals Chamber finds that the fact that the Appellant gave the order to attack the refugees at the Gikomero Parish Compound, thus starting a massacre which resulted in the death of a large number of Tutsi refugees, would already as such allow a reasonable trier of fact to find that the Appellant had a genocidal intent.

81. In addition, the Appeals Chamber notes that Witness GEK, who had been found "highly credible" by the Trial Chamber,[168] testified about the meeting that occurred sometime between 6 and 10 April 1994 at the home of the Appellant's cousin in Gikomero:

> [A]t this meeting, the Accused addressed those present and told them that the killings in Gikomero *commune* had not yet started and that "those [who] were to assist him to start had married Tutsi women". The Accused told those present that he would bring "equipment" for them to start, and that if their women were in the way, they should first eliminate them.[169]

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[161] Trial Judgement, para. 637.
[162] Trial Judgement, para. 638.
[163] Trial Judgement, para. 639.
[164] Trial Judgement, para. 640.
[165] Trial Judgement, para. 641.
[166] Trial Judgement, para. 643.
[167] Trial Judgement, para. 644.
[168] Trial Judgement, para. 272.
[169] Trial Judgement, para. 273. *Cf*. Trial Judgement, para. 253, quoting T. 3 September 2001 pp. 170, 171.

82. The Appeals Chamber finds that these statements of the Appellant are direct evidence of his genocidal intent. It is immaterial that it was not established whether those who were present at the meeting were also among the perpetrators of the attack: once it was established that the Appellant had the intent to destroy the Tutsi ethnic group in whole or in part a few days prior to the massacre, it was reasonable for the Trial Chamber to conclude that the Appellant also acted with this intent when he gave the order to attack on 12 April 1994. Accordingly, the Appeals Chamber finds that the Trial Chamber did not err in holding that the Appellant had the specific intent to destroy the Tutsi ethnic group when he gave the order which resulted in the death of a large number of Tutsi refugees.

C. Extermination

83. The Appellant submits that the constituent elements of extermination as a crime against humanity have not been established.[170] He challenges the Trial Chamber's finding that the attack at the Gikomero Parish Compound formed part of a widespread or systematic attack against the Tutsi population, and contends that not every crime committed against a Tutsi between April and July 1994 in Rwanda constituted a crime against humanity.[171] In addition, the Appellant argues that the Trial Chamber did not establish that he was aware of the general context of the attack.[172]

84. The Prosecution responds that the magnitude of the Gikomero Parish Compound attack alone would be sufficient to satisfy the requirement of a widespread attack, and that the link between the attacks throughout the *préfecture* and the country on the one hand, and the attack at the Gikomero Parish Compound was "patently obvious".[173] Regarding the Appellant's criminal intent, the Prosecution argues that it is clear from Witness GEK's testimony that the Appellant was aware of and encouraged the general campaign against the Tutsis.[174]

85. The Appeals Chamber observes that the Appellant does not challenge the Trial Chamber's definition of the crime, but rather submits that the Trial Chamber's factual findings are erroneous and do not support his conviction for extermination as a crime against humanity.

86. The Appellant admitted at trial "that between 1 January 1994 and 17 July 1994 there were throughout Rwanda widespread or systematic attack [*sic*] against a population with the specific

[170] Appeal Brief, para. 214.
[171] Appeal Brief, paras. 216-219.
[172] Appeal Brief, paras. 224-227.
[173] Respondent's Brief, para. 273.

objective of extermination of the Tutsi."[175] The Trial Chamber found that the Appellant, accompanied by soldiers, policemen, and armed *Interahamwe*, came to the Gikomero Parish Compound and gave the order to attack, which was followed by the killing of a large number of Tutsi refugees.[176] Given these circumstances, the Appeals Chamber finds that the Appellant's argument that the relationship between the attacks against Tutsis in Rwanda, in general, and, specifically, the attack on the Tutsi refugees at the Gikomero Parish Compound has not been established is without merit.

87. Regarding the Appellant's criminal intent, the Appeals Chamber considers that his statements which were recounted by Witness GEK[177] demonstrate that he was aware of the general attack on the Tutsi population; the Appellant admonished the participants in the meeting "that the killings in Gikomero *commune* had not yet started".[178] In addition, the Appeals Chamber recalls that

> explicit manifestations of criminal intent are, for obvious reasons, often rare in the context of criminal trials. In order to prevent perpetrators from escaping convictions simply because such manifestations are absent, the requisite intent may normally be inferred from relevant facts and circumstances.[179]

Given the circumstances of the attack, which was carried out by armed soldiers, policemen, and *Interahamwe*,[180] it was reasonable for the Trial Chamber to conclude that the Appellant knew that this was not an isolated occurrence, but part of a widespread and systematic attack on the Tutsi population.

D. Conclusion

88. The Appeals Chamber concludes that the Trial Chamber erred when it found the Appellant individually criminally responsible under Article 6(1) of the Statute for instigating others to commit crimes, but did not err in finding that he was individually criminally responsible for ordering those crimes. Although, as explained above, the finding of his individual criminal responsibility for aiding and abetting the crimes is supported by the Trial Chamber's factual findings, the Appeals Chamber, Judge Shahabuddeen dissenting, deems it appropriate to confirm

[174] Respondent's Brief, para. 274.
[175] *See* Trial Judgement, para. 498, referring to Defence Response to the Prosecutor's Request to Admit Facts, 24 April 2001, fact number 89.
[176] Trial Judgement, para. 505.
[177] *See* Chapter X.
[178] Trial Judgement, para. 273.
[179] *Kayishema and Ruzindana* Appeal Judgement, para. 159.

only the finding of the Appellant's individual criminal responsibility for ordering the crimes. The Appellant's arguments with regard to his convictions for genocide and extermination are unfounded and the related sub-grounds of appeal are therefore dismissed.

[180] Trial Judgement, para. 505.

VIII. ALLEGED ERRORS IN THE ASSESSMENT OF THE APPELLANT'S TESTIMONY (GROUNDS OF APPEAL 9 AND 6, IN PART)

89. Under the ninth ground of appeal, the Appellant submits that the Trial Chamber erred in fact by making an erroneous assessment of his testimony.[181] Specifically, the Appellant contends that the Trial Chamber did not take into account his explanations rebutting the testimony of Witness GES and his explanations concerning his name and the events at the Gikomero Parish Compound.[182] The Appellant has also raised the first two arguments in his sixth ground of appeal, submitting that the Trial Chamber erred in law when it gave insufficient or no reasons for rejecting Witness PC's explanation concerning the meaning of "Kamuhanda" in Kinyarwanda as well as in respect of the Appellant's testimony concerning his name and that which, in his view, rebuts parts of Witness GES's testimony.[183]

90. The Prosecution responds that the Trial Chamber neither failed to consider the Appellant's testimony nor erred in assessing it.[184] The Prosecution notes that a Trial Chamber is not obliged to refer to every piece of evidence in its judgement.[185]

91. The Appeals Chamber recalls its holding from the *Musema* case that:

> Although no particular evidence may have been referred to by a Trial Chamber, it may nevertheless be reasonable to assume in the light of the particular circumstances of the case, that the Trial Chamber had taken it into account. Hence, where a Trial Chamber did not refer to any particular evidence in its reasoning, it is for the appellant to demonstrate that both the finding made by the Trial Chamber and its failure to refer to the evidence show that the evidence had been disregarded.[186]

92. The Appellant argues that the Trial Chamber did not take into account his explanation that Witness GES could not see him go to work because the department where the witness claimed to be working was not within sight of the Ministry of Higher Education where the Appellant worked.[187] The Appeals Chamber notes that contrary to the Appellant's submission, the Trial Chamber considered this proposition in its Judgement, although it did so without referring to the Appellant's testimony. The Trial Chamber wrote:

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[181] Appeal Brief, para. 230.
[182] Appeal Brief, para. 231.
[183] *See* Appeal Brief, paras. 137-142, referring to Trial Judgement para. 464.
[184] Respondent's Brief, para. 209.
[185] Respondent's Brief, para. 194, citing *Kupreškic et al.* Appeal Judgement, para. 39.
[186] *Musema* Appeal Judgement, para. 277 (citations omitted).
[187] Appeal Brief, para. 232. *See also* Reply Brief, paras. 93, 94; T. 19 May 2005 p. 96.

> The Defence suggested that the Department of Bridges and Roads, where the Witness testified to have been employed at the time, was located more than four kilometres away from the Ministry of Higher Education and Scientific Research, where the Accused worked, and not across the street, as the Witness testified. However, the Chamber notes the Witness's explanation that his office was in a building located across the street from the Accused's office in the Kacyiru Complex.[188]

The Appeals Chamber considers that this passage shows that the Trial Chamber did consider the Appellant's evidence on this point. Accordingly, the Appeals Chamber finds that the Appellant did not demonstrate that his evidence on this point was disregarded and dismisses this sub-ground of appeal.

93. The Appellant similarly argues that the Trial Chamber ignored his testimony that certain gatherings held by his ministry, known as "*Umugandas*" and "*animations*", were not carried out in concert with members of other ministries.[189] While this argument is not developed further, the Appellant presumably seeks to posit that his testimony countered Witness GES's testimony on this point and that the Trial Chamber did not acknowledge it. Although the Trial Chamber did not expressly recall this aspect of the Appellant's testimony in the Judgement, it was clearly alert to its substance since it noted the following:

> The Witness [GES] had the opportunity to see Kamuhanda at several *Umugandas* and *animations* that included personnel from several civil service divisions. When the Defence suggested that the different divisions of the civil service conducted separate *Umugandas* and *animations*, the Witness responded that sometimes different divisions conducted joint gatherings.[190]

Indeed, the Appellant conceded in his testimony that joint gatherings sometimes were held, although he stated that he never took part in such gatherings, an argument which he does not raise under this ground of appeal.[191] Thus, in the view of the Appeals Chamber, the Appellant has not shown that the Trial Chamber ignored his testimony on this point. Moreover, even if it had done so, it has not been shown how this would render the Trial Chamber's finding that Witness GES had prior knowledge of the Appellant unreasonable. Accordingly, the Appeals Chamber dismisses this sub-ground of appeal.

94. The Appellant submits that he testified to having been posted to Butare from 1990 to 1992.[192] He argues that the Trial Chamber did not take this evidence into account when it held, in paragraphs 448 and 466 of the Trial Judgement, that Witness GES knew the Appellant "because

[188] Trial Judgement, para. 447 (citations omitted).
[189] Appeal Brief, para. 232.
[190] Trial Judgement, para. 325 (citations omitted).
[191] T. 20 August 2002 p. 35.
[192] Appeal Brief, para. 233.

he regularly met him on the dates he indicated…."[193] In presenting this argument, the Appellant does not cite the record, contrary to the applicable Practice Direction.[194] Moreover, neither paragraph 448 nor 466 of the Trial Judgement to which the Appellant refers addresses Witness GES's prior knowledge of the Appellant.[195] However, the Appeals Chamber notes that when summarizing the testimony of Witness GES, the Trial Chamber recalled the Defence argument that the Appellant was at the Institut de Recherche Scientifique et Technologique (IRST) in Butare for two years from 1990 to 1992 as well as the witness's clarification that "it was possible that Kamuhanda went on a mission between 1990 and 1994."[196] When the Trial Chamber found Witness GES's account of prior knowledge of the Appellant to be credible, it expressly did so "[o]n the basis of all the evidence presented."[197] Considering the foregoing, the Appeals Chamber finds that the Appellant has failed to demonstrate that the Trial Chamber disregarded his evidence on this point. Accordingly, the Appeals Chamber dismisses this sub-ground of appeal.

95. The Appellant next submits that he testified that his name in Kinyarwanda means "on the road" which, according to him, the Trial Chamber failed to take into account when it rejected Witness PC's explanation on this point.[198] He asserts that the Trial Chamber's rejection of this explanation "'given the context' without specifying the 'context' in question and the impact of the 'context' on Witness PC's testimony does not suffice to reject the explanation given by the Accused and Witness PC."[199] The Appellant contends that his testimony and that of Witness PC "enlightened the Chamber on the shouting that witnesses allegedly heard when the person who was pointed out to them as Kamuhanda arrived on the scene."[200] He argues that when the refugees shouted *"Regardez 'Kamuhanda'"* this had to be understood as "*Regardez sur la route*",[201] or, "Look at the road."

96. Immediately before noting Witness PC's testimony that "Kamuhanda" can mean "on the road" in Kinyarwanda, the Trial Chamber summarized testimonies of several witnesses who testified that when the Appellant arrived at the Gikomero Parish on 12 April 1994 the refugees

[193] Appeal Brief, para. 233.
[194] Practice Direction on Formal Requirements for Appeals from Judgement, 16 September 2002, para. 4(b).
[195] Paragraph 448 is concerned with Witness GAA's prior knowledge of the Appellant, not with Witness GES. Whereas in paragraph 466, the Trial Chamber addressed evidence of the Appellant's arrival at Gikomero Parish on 12 April 1994, not Witness GES's prior knowledge of the Appellant.
[196] Trial Judgement, para. 325.
[197] Trial Judgement, para. 447.
[198] Appeal Brief, paras. 137, 139, 234. *See also* Reply Brief, para. 100.
[199] Appeal Brief, paras. 138, 235. *See also* Reply Brief, paras. 97, 98.
[200] Appeal Brief, para. 236.
[201] Reply Brief, para. 100. *See also* T. 19 May 2005 p. 68.

shouted that Kamuhanda had arrived and their fate was sealed.[202] In addition, the Appeals Chamber notes that Witness GEE testified that the refugees were shouting "We're going to be killed. Kamuhanda is coming" ("*Nous allons être tués, Kamuhanda arrive*");[203] according to Witness GEG, "That is Kamuhanda. Now that Kamuhanda is here, we are finished" ("*C'est Kamuhanda, et maintenant que Kamuhanda arrive, c'en* [sic] *est fini pour nous*");[204] and, according to Witness GEV, he was told "Kamuhanda has just arrived, our fate is sealed" ("*Kamuhanda vient d'arriver, et c'est fini pour nous*").[205] It is therefore clear that when the Trial Chamber rejected Witness PC's explanation that "Kamuhanda" can mean "on the road", it did so because that meaning, even if correct, would not fit the context of the events at the parish at the given time or the meaning of the word as actually used by several refugees. The Appeals Chamber finds that the Trial Chamber's conclusion on this point has not been shown to be unreasonable. In view of this conclusion, the Appeals Chamber need not determine whether the Trial Chamber failed to take into account the Appellant's testimony on the meaning of his name, because such an alleged failure, even if established, could not have occasioned a miscarriage of justice and, therefore, could not constitute an error of fact which may be corrected on appeal. Moreover, the Trial Chamber's reasoning on this point is not insufficient as a matter of law.

97. Lastly under this ground of appeal, the Appellant submits that "[i]t was equally incumbent on the Chamber to take into account his explanations of the events at the Gikomero Parish Compound."[206] The Appellant did not substantiate or develop this submission in any way. Consequently, the Appeals Chamber will not consider this submission further.

98. For the foregoing reasons, the Appeals Chamber dismisses the appeal in respect of all issues considered in this Chapter.

[202] *See* Trial Judgement, paras. 453-464.
[203] T. 18 September 2001 p. 5 (English)/p. 6 (French).
[204] T. 25 September 2001 p. 19 (English)/p. 23 (French).
[205] T. 6 February 2002 p. 54 (English)/p. 67 (French).
[206] Appeal Brief, para. 231.

IX. IMPOSSIBILITY OF TRAVEL FROM KIGALI TO GIKOMERO IN APRIL 1994 (GROUNDS OF APPEAL 11, IN ITS ENTIRETY, AND 2, 5, 6, AND 7, IN PART)

A. The Trial Chamber's Findings

99. Under this ground of appeal, the Appellant submits that the Trial Chamber erred when it dismissed the evidence tending to show that it was impossible to travel from Kigali to Gikomero around 12 April 1994, because the roads leading there were impassable due to fierce fighting.[207]

100. The Trial Chamber found that there were three main routes which led at that time from Kacyiru, Kigali to Gikomero:

> the Kacyiru—Kimihurura—Remera—Gikomero route;
>
> the Kacyiru—Kimihurura—Remera—Kanombe—Gikomero route; and
>
> the Kacyiru—Muhima—Gatsata route in the direction of Byumba.[208]

101. The Appeals Chamber recalls that after summarizing the evidence, the Trial Chamber noted that it was not satisfied that Witness RGM, one of the Defence witnesses, could have had access to the information about the positions which were the subject of his testimony.[209] With regard to Witness RKF, the Trial Chamber noted that he did not have first-hand information about the travel conditions, and admitted that there were small, secondary roads that could have been used to travel between Kigali and Gikomero.[210] On the other hand, the Trial Chamber noted that Defence witness Laurent Hitimana was able to move between Remera, Rubungo and Gasogi between 7 and 11 April 1994,[211] and that various witnesses had testified it was possible to pass through areas "way out" from the Remera area of Kigali in the direction of Gikomero.[212] The Trial Chamber arrived thus at the conclusion "that, although it might have been difficult, it was possible to move from Kigali to Gikomero within the period between 7 and 17 April 1994".[213]

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[207] Appeal Brief, paras. 288, 289.
[208] Trial Judgement, para. 178.
[209] Trial Judgement, para. 216.
[210] Trial Judgement, paras. 217, 218.
[211] Trial Judgement, para. 215.
[212] Trial Judgement, para. 219.
[213] Trial Judgement, para. 220.

102. During the appeal hearing the Appellant's Counsel argued that, even if it were possible to travel to Gikomero, it would have taken more than three hours to go there and back, whereas his alibi evidence showed that he never left his home for more than two hours.[214] Given the fact that the Trial Chamber did not accept the alibi evidence,[215] and that the Appellant himself does not even try to present any evidence showing how long the trip to Gikomero took at that time, the Appeals Chamber declines to address this argument further.

B. Failure to Rule on the Testimonies of Witnesses VPG, RGG, RGB, and RGS

103. The Appellant submits that his Defence called seven witnesses to show that it was impossible to move from Kigali to Gikomero on or around 12 April 1994: Witnesses VPG and Laurent Hitimana (protected Witness RKA, who subsequently renounced his protected status[216]) testified about travel from Kigali to Remera, Witnesses RGB and RGS about travel from Kigali to Byumba, and Witnesses RGM, RGG, and RKF testified to the positions of the warring armies in April 1994, corroborating the evidence of the first four witnesses.[217] The Appellant argues that the Trial Chamber addressed only the testimony of Witnesses RGM, RKF, and Laurent Hitimana (RKA).[218] By its failure to rule on the testimony of Witnesses VPG, RGB, RGS, and RGG, the Appellant argues, the Trial Chamber committed an error of law invalidating the Judgement.[219]

104. The Prosecution responds that the Trial Chamber was not obliged to refer to every piece of evidence, and that it took note of all the Defence witnesses' and the Appellant's testimony.[220]

105. The Appellant acknowledges that the Trial Chamber was "not required to set out in detail why it accepted or rejected a particular testimony",[221] but argues that, in the present case, the Trial Chamber failed to explain its position on the main issues raised.[222] However, the Appeals Chamber recalls that it is not sufficient for an appellant to show that the Trial Chamber did not refer to a particular piece of evidence:

> It is for an appellant to show that the finding made by the Trial Chamber is erroneous and that the Trial Chamber indeed disregarded some item of evidence, as it did not refer to it. In

[214] T. 19 May 2005 pp. 59, 60.
[215] *See* Trial Judgement, para. 176. For a discussion of the alibi evidence, *see* Chapter XI.
[216] Trial Judgement, para. 181.
[217] Appeal Brief, para. 290.
[218] Appeal Brief, para. 143.
[219] Appeal Brief, para. 145.
[220] Respondent's Brief, paras. 193, 56.
[221] Appeal Brief, para. 146, quoting *Musema* Appeal Judgement, para. 20.
[222] Appeal Brief, para. 148.

> Celebici, the Appeals Chamber found that the Appellant had "failed to show that the Trial Chamber erred in disregarding the alleged inconsistencies in its overall evaluation of the evidence as being compelling and credible, and in accepting the totality of the evidence as being sufficient to enter a finding of guilt beyond reasonable doubt on these grounds."[223]

An appellant who alleges that the Trial Chamber failed to provide a reasoned opinion in writing therefore not only has to show the lacuna in the Trial Chamber's reasoning, but also has to demonstrate that the evidence allegedly disregarded by the Trial Chamber would have affected the Trial Judgement.

106. The Trial Chamber summarized the evidence of all the four Defence witnesses in question.[224] In the case of Witness VPG, it also indicated why it attached only limited importance to his testimony: "the Witness stated that in 1994 he was neither in the military nor was he a combatant and that he did not personally visit the locations he was testifying about".[225] The Trial Chamber was aware of the testimony of the four Defence witnesses, but apparently did not consider them important enough to address their evidence in detail. The Appellant does not demonstrate why it was unreasonable for the Trial Chamber to do so; he merely asserts that their evidence was meant to show that it was impossible to travel to Gikomero,[226] without explaining how he reaches such a conclusion. Therefore, the Appeals Chamber finds that the Appellant has failed to establish an error of law in this respect.

107. Having reviewed the evidence of the four witnesses in question, the Appeals Chamber finds that a reasonable trier of fact considering this evidence could arrive at the conclusion that it was possible to travel from Kigali to Gikomero on 12 April 1994. Witness VPG, who identified himself as a friend of the Appellant,[227] did not visit the sites about which he was testifying.[228] He appeared to testify that it was impossible to reach the Kanombe airport and military camp,[229] whereas Witness RGG maintained that the government forces were able to protect the route to Kanombe military camp for at least two weeks after the start of the fighting.[230] Witness RGG, on the other hand, testified that on 8 April 1994 it would have been impossible for a civilian to go

[223] *Musema* Appeal Judgement, para. 21, quoting *Celebici Case* Appeal Judgement, para. 498.
[224] Trial Judgement, paras. 185-187 (Witness VPG); paras. 189, 190 (Witness RGG); para. 195 (Witness RGB); para. 196 (Witness RGS).
[225] Trial Judgement, para. 187.
[226] Appeal Brief, para. 145.
[227] T. 11 February 2003 p. 29.
[228] T. 11 February 2003 p. 43.
[229] T. 11 February 2003 p. 23.
[230] T. 30 April 2003 p. 54.

from Kacyiru (where the Appellant lived) to Kimihurura and to return from there,[231] which contradicts the Appellant's own testimony, who had testified that, after a first attempt failed, he made precisely this trip on 8 April 1994.[232]

108. Witnesses RGB and RGS testified about the situation on the Kigali – Byumba road only.[233] The Trial Chamber, relying on Witnesses GPR, GPE, GPF, GPT, and Laurent Hitimana, found that it had been possible to move between Remera, Rubungo, and Gikomero,[234] indicating that it found it possible to travel from Kigali to Gikomero on the Kigali – Remera – Gikomero route. It was therefore not unreasonable for the Trial Chamber to decline further discussion of the evidence relating to the Kigali – Byumba road.

109. The Appeals Chamber accordingly rejects the argument that the Trial Chamber committed an error by not considering the evidence of Witnesses VPG, RGB, RGS, and RGG.

C. Hearsay Evidence

110. The Appellant submits that the Trial Chamber, although it had recalled that hearsay evidence is not inadmissible *per se*, rejected the evidence given by Witnesses RKA (Laurent Hitimana), RGM, and RKF merely because it was second-hand or hearsay evidence.[235] By not examining this evidence, the Appellant argues, the Trial Chamber committed an error of law.

111. Nothing in the Trial Judgement suggests that the Trial Chamber did not examine the evidence of the three witnesses in question: it summarized their testimonies and analysed them, while noting that part of their evidence was hearsay or second-hand evidence. Despite such finding, the evidence was clearly considered. Therefore, the Appellant's argument supporting his allegation that the Trial Chamber erred in law by not considering this part of the evidence is without merit.

D. Distortion of the Defence Position

112. The Appellant takes issue with the Trial Chamber's approach to the evidence of Witnesses GPR, GPE, GPF, and GPT. He submits that the Trial Chamber used their evidence to show that

[231] T. 30 April 2003 p. 51.
[232] Trial Judgement, paras. 90, 91.
[233] Trial Judgement, paras. 195, 196; Appeal Brief, para. 290.
[234] Trial Judgement, paras. 215, 219.
[235] Appeal Brief, paras. 46-50; Reply Brief, para. 14.

it was possible to travel from Kigali to Gikomero.[236] In the Appellant's view, the Trial Chamber thus distorted the Defence position, because these witnesses were called by the Defence to testify about the situation in Gikomero; at most, the Appellant submits, they could testify about the possibility of moving between Rubungo and Gikomero.[237] Thus, the Appellant argues, the Trial Chamber distorted his arguments and deprived him of his right to a fair trial.

113. The Appellant appears to argue that the Trial Chamber was not entitled to take into account the testimonies of Witnesses GPR, GPE, GPF, and GPT when it analysed the evidence of the alleged impossibility of travel between Kigali and Gikomero, because these witnesses were called by the Defence to testify only about the situation in Gikomero. The Appeals Chamber notes that neither the Statute nor the Rules nor general principles of procedural law prevent the Trial Chamber from considering that part of the testimony of a Defence witness which goes beyond the scope originally intended by the Defence, as long as it remains within the scope of the indictment. In the present case, Witness GPT gave his evidence about the origin of the refugees during examination-in-chief, answering a direct question from Defence counsel.[238] Witness GPE gave this evidence answering a question from the Trial Chamber,[239] whereas the Witnesses GPR and GPF were questioned about the origin of the refugees during cross-examination.[240] The Appellant did not challenge this evidence at trial; moreover, the question by the Prosecution was clearly admissible under Rule 90(G)(i) of the Rules:

> Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, *where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of the case*.[241]

The evidence of the four witnesses in question forms part of the Trial Record. The Trial Chamber had to consider all the evidence before it, which it considered credible and relevant to the issue at stake. This sub-ground of appeal is therefore rejected.

E. Alleged Errors of Law and Fact

114. The Appellant submits that the Trial Chamber erred in its assessment of the evidence about the alleged impossibility of travel between Kigali and Gikomero, thus causing a miscarriage

[236] Appeal Brief, para. 158.
[237] Appeal Brief, para. 159.
[238] T. 14 January 2003 p. 3.
[239] T. 16 January 2003 p. 51.
[240] T. 15 January 2003 pp. 27, 28 (Witness GPR); T. 20 January 2003 p. 25 (Witness GPF).
[241] Emphasis added.

of justice.[242] The Appellant advances several sub-grounds to support this assertion, which will be addressed in turn by the Appeals Chamber.

1. Failure to Consider the Entire Body of Evidence

115. The Appellant contends that the Trial Chamber erred in law and fact by failing to consider the entire body of the evidence.[243] He points out that, individually, none of the witnesses demonstrated the impossibility of travel between Kigali and Gikomero; but seen in conjunction, they showed that it was in fact impossible to travel between these two locations.[244] Instead, the Appellant argues, the Trial Chamber fragmented the Defence evidence and thereby invalidated its findings.[245]

116. As to the alleged error of law on this point, the Appeals Chamber recalls the following statement of the Trial Chamber: "The Chamber has noted the testimony of the Accused and the various Defence Witnesses as to the impossibility of moving from Kigali to Gikomero commune during the period of 7 April 1994 to 17 April 1994."[246] The Appellant has not demonstrated that the Trial Chamber indeed failed to act as it described. Accordingly, this sub-ground of appeal is rejected.

117. As to the alleged error of fact, the Appeals Chamber observes that the issue is not whether it was impossible to travel between Kigali and Gikomero in April 1994, but whether the Appellant was present in Gikomero on 12 April 1994.[247] The Trial Chamber had found that there was evidence showing that he had been present. The fact that it was difficult to travel, or that one of the several routes available was closed, could be disregarded by a reasonable trier of fact, because these facts alone did not necessarily rule out the Appellant's presence in Gikomero. Only if it were shown that it was impossible to travel, meaning that all the available routes were closed, could no reasonable trier of fact have found the Appellant's presence in Gikomero on 12 April 1994 proven beyond reasonable doubt. Once the Trial Chamber found, for example, that movement along the Kigali – Remera – Gikomero route was possible, it could reasonably disregard the evidence about the route following the Byumba road. The Appeals Chamber finds

[242] Appeal Brief, para. 305.
[243] Appeal Brief, paras. 113, 303.
[244] Appeal Brief, para. 302.
[245] Appeal Brief, para. 303.
[246] Trial Judgement, para. 213.
[247] *See* Chapter IV.

that the Appellant has not demonstrated that the Trial Chamber's approach to the evidence in question was erroneous.

2. The Trial Chamber's Reliance on Witnesses GPR, GPE, GPF, and GPT

118. The Appellant argues that the Trial Chamber relied on the evidence of Witnesses GPR, GPE, GPF, and GPT, although these witnesses testified only about the situation at the Gikomero Parish Compound on 12 April 1994. At most, according to the Appellant, their evidence could show that it was possible to move between Rubungo and Gikomero, but not from Kigali to Gikomero.[248]

119. The relevant paragraph of the Trial Judgement reads:

> The Chamber notes that the evidence of Defence Witnesses GPR, GPE, GPF and GPT, who all testified about the situation in Gikomero, showed that some of the refugees at Gikomero had come from Mbandazi, Rubungo, Musave, Gasogi and Ndera and therefore that it was possible to pass through these areas. Those areas were way out from Remera area of Kigali. This evidence, taken in conjunction with the evidence of Defence Witness Laurent Hitimana who testified that he fled to Rubungo on 7 April 1994 and came back to Remera on 11 April 1994, demonstrates that it was possible to move from Remera all the way to Rubungo and onwards to Gikomero.[249]

It is clear from this paragraph that the Trial Chamber was aware of the fact that Witnesses GPR, GPE, GPF, and GPT did not testify about the whole Kigali – Remera – Gikomero route, but only about the situation prevailing in Gikomero and the neighbouring districts. The Trial Chamber therefore relied on this evidence only in conjunction with the testimony of Laurent Hitimana.

3. Witness Laurent Hitimana (Witness RKA)

120. With regard to Laurent Hitimana, the Appellant argues that the Trial Chamber erroneously disregarded his evidence as hearsay, although it was corroborated by other evidence. In addition, the Appellant submits that Laurent Hitimana travelled on foot from Remera to Kigali on 7 April 1994, whereas the Appellant allegedly went there on 12 April 1994, using a vehicle.[250]

121. According to his own testimony, Laurent Hitimana left the neighbourhood of Remera, where he was living and which formed a part of Kigali, on 7 April 1994.[251] He went to Rubungo and on to Gasogi, but returned from there to his house on 11 April 1994. At that time, the area

[248] Appeal Brief, paras. 292, 294.
[249] Trial Judgement, para. 219.
[250] Appeal Brief, para. 297.
[251] T. 13 February 2003 pp. 51, 53.

where he lived was under the control of government forces.[252] About the Kigali – Gikomero route, he testified that it was impossible to use this road, although he admitted that he did not try to do so himself.[253] However, he indicated that he had learned the positions of the opposing forces from refugees, and had not visited the places himself.[254] It was thus not unreasonable for the Trial Chamber to attach only limited evidentiary value to facts which the witness had not observed himself.

122. With regard to the fact that the witness travelled on foot, he explained that he left his vehicle at home, because the main road was closed by soldiers of the government army,[255] and that a special permit was needed to pass the roadblocks of the government forces.[256] But this testimony did not suggest that the Appellant, who was a senior government official and arrived in Gikomero accompanied by soldiers and policemen, would have been unable to pass through these government roadblocks. More importantly, Laurent Hitimana testified that he travelled between Rubungo, Gasogi, and Remera between 7 and 11 April 1994, and did not suggest that this passage was hindered by fighting.[257] A reasonable trier of fact could use this evidence to support the finding that it was possible to move between Kigali and Gikomero, either on foot or by vehicle.

4. Witness RGM

123. The Appellant contends that the Trial Chamber erred when it disregarded Witness RGM's evidence because it was "not satisfied that Witness RGM, a low ranking member of the *Gendarmerie*, could have had access to information about the various detailed positions, of which

[252] T. 13 February 2003 p. 56.
[253] T. 13 February 2003 p. 57.
[254] T. 13 February 2003 pp. 71, 72.
[255] T. 13 February 2003 p. 54.
[256] T. 13 February 2003 p. 61.
[257] *See, e.g.*, T. 13 February 2003 p. 55 (evidence about the situation in Rubungo on 7 and 8 April 1994):

> Q. How was it at Rubungo on that 7th April at about 7:00 in the afternoon?
>
> A. Nothing in particular.
>
> Q. And what about when you left on the 8th?
>
> A. Also nothing in particular to mention, nothing of note.

he testified".[258] In fact, the Appellant submits, the witness obtained his information from various radio operators and his superiors, and his evidence was corroborated by other evidence.[259]

124. The Appeals Chamber notes that the Trial Chamber summarized the testimony of Witness RGM and dismissed it because it found it unreliable.[260] The Appeals Chamber finds that Witness RGM admitted that he was not aware of all the positions of the opposing forces: "I didn't know all the positions in the whole of Kigali city, but I knew a few, especially where the Rwandan Armed Forces were".[261] Considering the fact that the route to Gikomero was allegedly blocked by the forces of the Rwandan Patriotic Front (RPF), it was not unreasonable for the Trial Chamber not to rely on a witness who had second-hand knowledge only about a "few" positions of the Rwandan Armed Forces. In addition, the Appeals Chamber notes that Witness RGM was testifying about the situation on the Kigali – Byumba road exclusively, but not on the Kigali – Remera – Gikomero route. A reasonable trier of fact could conclude that this testimony did not create reasonable doubt about the Appellant's presence in Gikomero on 12 April 1994.

5. Witness RKF

125. With regard to Witness RKF, the Appellant argues that even if this witness did not have first-hand information about the military situation, as the Trial Chamber found, his evidence was nevertheless admissible and was corroborated by other evidence. The Prosecution, the Appellant adds, also acknowledged that this witness was an expert on the situation.[262] The Appellant submits that the Trial Chamber's reasoning was contradictory: on the one hand, it disregarded Witness RKF's testimony because he had no first-hand information; on the other hand, the Appellant argues, it relied on his testimony regarding the existence of secondary roads.[263]

126. After a careful review of Witness RKF's testimony, the Appeals Chamber finds that a reasonable trier of fact could arrive at the conclusion that the impossibility of travel between Kigali and Gikomero had not been established. The Trial Chamber found, regarding Witness RKF, that "[w]hile he could have had access to intelligence regarding the general situation, he did not have firsthand information about the condition of travel between Kigali and Gikomero in the

[258] Appeal Brief, para. 298, quoting Trial Judgement, para. 216.
[259] Appeal Brief, para. 298.
[260] Trial Judgement, paras. 191, 216.
[261] T. 28 April 2003 p. 70.
[262] Appeal Brief, para. 299.
[263] Appeal Brief, para. 301.

period in question".[264] In fact, this witness provided detailed information about the situation on the Kigali – Byumba road, identifying the positions the RPF had taken and was using to block the road:

> [T]he RPF controlled Karuruma, Nyacyonga and all those areas belonged to them, and they had encircled our units which were behind them Nyarutarna and Byumba, and they had a commanding height which overlooked the road and they had their guns trained on the road. So it was impossible to go down that road.[265]

With regard to the situation on the route Kigali – Remera – Gikomero, his information was much less specific:

> Q. Now, let us take the route that goes from Kigali through Remera and Dara, and from there I want to go on to Gikomero and back around the 12th of April. Was that possible?
>
> A. Now, where do you go from Kigali because the roads were blocked off and the people were fleeing, they could see the RPF troops moving towards the capital. So civilians cannot go where there is fire. Besides, in that direction there was heavy artillery, heavy artillery which shook the Kigali capital. And I can't imagine anyone moving towards heavy artillery. In that direction you say you feel it that there was shelling. The RPF wanted their troops to infiltrate to reinforce the CND. So it's not for nothing that they encircled those areas. So all those areas were practically their areas under their control.[266]

The Appeals Chamber notes that in this instance the witness did not identify the positions taken by the RPF, but referred only generally to shelling by artillery fire and the movement of RPF troops. The witness appears to have assumed that the Remera and Dara areas were under the control of the RPF. This is not easily reconciled with the fact that, according to Witness RGG, the road to the military camp in Kanombe was open until mid-April 1994;[267] it is also inconsistent with the evidence given by Laurent Hitimana, who had testified that at least parts of Remera were under the control of the government forces until 27 April 1994.[268]

127. The Appeals Chamber further finds that the Appellant's argument that the Trial Chamber's reasoning was contradictory is without merit. The issue is, the Appeals Chamber recalls, whether the travel conditions between Kigali and Gikomero cast reasonable doubt on the finding that the Appellant was present in Gikomero on 12 April 1994. The Trial Chamber had to determine whether the evidence given by Witness RKF, in conjunction with the other evidence relating to this issue, was sufficient to create reasonable doubt about the Appellant's presence in Gikomero. In doing so, the Trial Chamber identified two reasons which influenced the evidentiary value of

[264] Trial Judgement, para. 217.
[265] T. 5 May 2003 p. 15.
[266] T. 5 May 2003 p. 15.
[267] T. 30 April 2003 p. 54.

Witness RKF's testimony: he had only second-hand information about the possibilities of travel towards Gikomero, and he admitted that there were secondary roads which probably allowed travel between Kigali and Gikomero. Both facts allowed a reasonable trier of fact to conclude that this testimony, considered in conjunction with other evidence, did not create reasonable doubt about the Appellant's presence in Gikomero on 12 April 1994.

F. Conclusion

128. The Appellant's main argument is that the evidence of the seven witnesses, assessed in its entirety, showed that it was impossible to travel between Kigali and Gikomero between 7 and 17 April 1994.[269] The Appeals Chamber recalls that it

> will not question factual findings where there was reliable evidence on which the Trial Chamber could reasonably base its findings. It is further admitted that two judges, both acting reasonably, can come to different conclusions, both of which are reasonable. A party that limits itself to alternative conclusions that may have been open to the Trial Chamber has little chance of succeeding in its appeal, unless it establishes that no reasonable tribunal of fact *"could have* reached the finding of guilt beyond reasonable doubt."[270]

129. The Appeals Chamber recalls again that, in the present case, the issue is not the possibility of travel as such, but the Appellant's presence in Gikomero on 12 April 1994. The Appellant could only succeed with this ground of appeal if he demonstrated that no reasonable trier of fact could have found, taking into account the competing evidence concerning his presence in Gikomero, his presence in Kigali, and the road conditions between the two, that the Prosecution had proved beyond a reasonable doubt that he was present in Gikomero when the crimes were committed. The Appellant merely tries to replace the Trial Chamber's assessment of the evidence with his own, without showing that the Trial Chamber's assessment was unreasonable. Accordingly, this ground of appeal is rejected.

[268] T. 13 February 2003 pp. 55, 56.
[269] Appeal Brief, para. 304.
[270] *Rutaganda* Appeal Judgement, para. 22 (citations omitted), citing *Bagilishema* Appeal Judgement, para. 10.

X. ALLEGED ERRORS OF FACT RELATING TO THE DISTRIBUTION OF WEAPONS (GROUNDS OF APPEAL 12, IN ITS ENTIRETY, AND 2 AND 7, IN PART)

130. In his second, seventh, and twelfth grounds of appeal, the Appellant submits that the Trial Chamber made several errors related to its finding that he distributed weapons to participants in the massacre at the Gikomero Parish. In relevant part, the Trial Chamber concluded as follows

> [A] meeting occurred sometime between 6 April 1994 and 10 April 1994 at the home of one of [the Appellant's] cousins in Gikomero. This meeting involved [the Appellant], two of his … cousins, an Interahamwe, and a neighbour. The Chamber finds that at this meeting, [the Appellant] addressed those present and told them that the killings in Gikomero *commune* had not yet started and that "those [who] were to assist him to start had married Tutsi women". [The Appellant] told those present that he would bring "equipment" for them to start, and that if their women were in the way, they should first eliminate them. Whilst in his house, [the owner, one of the Appellant's cousins] received four grenades and a gun from [the Appellant]. Following the meeting which took place in the house, the group went a few steps next door to the home of [another cousin of the Appellant]. Whilst there, [the Appellant] gave the others grenades and machetes, for themselves, and also additional weapons which they were to distribute to others. [The Appellant] told them that they should distribute those weapons and that he would return to assist them. He also said that he would return to see if they had begun the killings, or so that the killings could start. [The Appellant] then left, and did not return that day.[271]

The Appellant submits that these findings were unreasonable because they were based entirely on the testimony of Witness GEK, who, the Appellant contends, offered an untrustworthy, inconsistent, and incredible account of the events.[272] The Appeals Chamber understands the Appellant to argue that no reasonable Trial Chamber could have credited Witness GEK's testimony for the following reasons: (1) Witness GEK's statements about the distribution of weapons are so inconsistent as to be unreliable on their face; (2) substantial evidence unrelated to the specific charges of distributing weapons demonstrated that Witness GEK was not a credible witness; and (3) three Defence witnesses contradicted Witness GEK's testimony about the distribution of weapons.[273]

131. In assessing these challenges to the Trial Chamber's findings, the Appeals Chamber finds it helpful to begin by reviewing the relevant portions of Witness GEK's testimony, as summarized

[271] Trial Judgement, para. 273.
[272] T. 19 May 2005 pp. 65, 66.
[273] The Appellant also charges that GEK misled Prosecution Witnesses GAA and GEX by telling them that her house had been used by the Appellant to store weapons used for the Gikomero Parish Compound massacres. Appeal Brief, paras. 336, 337. The Appellant has not provided citations or any other evidentiary basis for this argument, which amounts to little more than a strenuous assertion of its conclusion. The Appeals Chamber declines to review it in detail.

by the Trial Chamber. Witness GEK testified that sometime between 6 and 10 April 2001, the Appellant came to Gikomero for a brief visit in order to distribute weapons and lay the groundwork for the pending massacre:

> Prosecution Witness GEK, a Tutsi woman, testified that her husband, who belongs to the Hutu ethnic group, was a member of [the Appellant's] family.... [She] saw [the Appellant] ... sometime between 6 April 1994 and 10 April 1994 when he came to their residence in Gikomero and stayed to talk to her husband. She stated that she was not in the same room when the discussion occurred between [the Appellant] and her husband. She said, "When [the Appellant] entered the house my husband requested me to go inside the room, because, at that time war had erupted, so he asked me to hide myself. But I was not far away and I could hear what they were saying to each other."
>
> Prosecution Witness GEK testified that there were four people in the room with [the Appellant] and her husband. She identified those people ... [and] said that these people came approximately two minutes after [the Appellant]. She testified that [the Appellant] told Kamanzi that the killing had not yet started in Gikomero *commune* and went on to say that "... those who were to assist him to start had married Tutsi women...." She said that [the Appellant] went on, saying that he would bring equipment for them to start, and that if their women were in the way they should first eliminate them.... She said that the meeting lasted between 20 and 30 minutes.
>
> Prosecution Witness GEK, when asked if she knew whether any weapon or item was handed over in that room, testified, "When I went outside I was able to see firearms, grenades, and machetes, which they distributed when he went outside the house." She said that [the Appellant] distributed firearms and grenades inside the house before they went outside and she saw her husband carrying "four grenades that resembled a hammer...." She testified that she knew the grenades, because she had seen them before when her husband was carrying them while he was a soldier.
>
> Prosecution Witness GEK testified, "When [the Appellant] went outside he went to [my neighbour's] home, a distance of about between five and ten steps. He distributed to them ... grenades and machetes.... She said that [the Appellant] distributed the weapons to four persons, but he left them other weapons that these four were to distribute to others. [She] said "... [f]rom where I was, from where they were, I could see [*sic*] what they were saying. [The Appellant] said to them to distribute those weapons and said that he would return to assist them." She testified that [the Appellant] said that he would return to see if they had started with the killings or that he would return so that the killings would start.[274]

132. After describing the Appellant's distribution of weapons during that brief visit, Witness GEK then testified that the Appellant returned to Gikomero several days later, on the day of the massacre at the Gikomero Parish Compound. As summarized by the Trial Chamber, Witness GEK testified that, some time between 10 and 14 April 1994, the Appellant

> came to the house of a neighbour to arrange for the killings to start ... at the primary school. [The Appellant] parked his vehicl[e], which was followed by another vehicle, a blue Daihatsu carrying a large number of people. [Witness GEK] explained that in the second vehicle some people were carrying machetes, clubs, and guns, but not everyone was armed, and that occupants either wore ordinary clothes or the *Interahamwe* uniform. The vehicle came from the direction of Kigali. On leaving, [the Appellant] entered his vehicle and went towards the primary school where there were large numbers of refugees. The Witness testified that she heard

[274] Trial Judgement, paras. 251-256 (citations omitted).

> gunshots and noise for between 20 and 40 minutes after [the Appellant] left. After the gunshots ceased, they were frightened, and could hear the vehicles' engines, but could not see them as they left. The Witness testified that she could see wounded children fleeing towards them and a young girl whose legs were amputated sought refuge in their house.[275]

A. Internal Inconsistencies

133. The Appellant argues that there were so many errors and inconsistencies in Witness GEK's account of the events in Gikomero Commune that it was patently unreasonable for the Trial Chamber to rely on her testimony in finding that the Appellant had distributed weapons.[276] Witness GEK gave four separate accounts of the events in the *commune*: an affidavit given to investigators in February 1998,[277] court testimony in April 2001,[278] court testimony in September 2001,[279] and court testimony in January 2003.[280] After comparing these statements, the Appellant claims that he has identified the following sets of discrepancies:[281]

Circumstances of the Weapons Distribution between 6 and 10 April 1994:

- *Colour of car*: In April 2001, Witness GEK testified that the Appellant arrived in a green vehicle.[282] In September 2001, however, she stated that he came in a white vehicle.[283]

- *Number of people present*: In both her February 1998 affidavit and her April 2001 testimony, Witness GEK testified that the Appellant spoke with three people in her house.[284] In September 2001, Witness GEK testified that he spoke with four people in her house.[285]

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[275] Trial Judgement, para. 314 (citations omitted).
[276] Appeal Brief, paras. 318-322.
[277] Defence Exhibit 2.
[278] T. 17 April 2001 pp. 118-165.
[279] T. 3 September 2001 pp. 157-186; T. 4 September 2001 pp. 6-117; T. 5 September 2001 pp. 3-83.
[280] T. 13 January 2003 pp. 58-76. The Appellant submits that Witness GEK's testimony against him in this case is also contradicted by her testimony in the Government I case. The Appeals Chamber has reviewed the relevant transcript excerpts from that case and declined to admit them as additional evidence on appeal because there is no reasonable probability that they could have affected the Trial Judgement. Rule 115 Decision, paras. 21-28.
[281] Not all of the alleged discrepancies listed here were raised in the Appeal Brief. In the interests of justice, however, the Appeals Chamber has chosen to review and address some particularly relevant points from the Defence Counsel's cross-examination of Witness GEK at trial. It should also be noted that some of the Appellant's allegations of discrepancies do not accurately reflect the trial record; the Appeals Chamber has nonetheless listed all discrepancies alleged by the Appellant in his Appeal Brief.
[282] Appeal Brief, para. 320. *See also* T. 17 April 2001 p. 128.
[283] Appeal Brief, para. 320. *See also* T. 3 September 2001 pp. 165, 166.
[284] Appeal Brief, para. 320. *See also* Defence Exhibit 2, p. 2; T. 17 April 2001 pp. 125, 126.
[285] Appeal Brief, para. 320. *See also* T. 3 September 2001 p. 168; T. 4 September 2001 pp. 46-56.

- *Grenades accepted by Witness GEK's husband*: In her February 1998 affidavit, Witness GEK stated that the Appellant gave her husband two grenades.[286] In April 2001, she testified that her husband refused to accept the weapons the Appellant tried to give him.[287] In September 2001, Witness GEK testified that her husband received four grenades from the Appellant.[288]

- *Willingness of others to accept weapons from the Appellant for distribution*: In her February 1998 affidavit, Witness GEK stated that the Appellant "told [the participants in the meeting] that there were other pruning knives in his pick-up and told them to handle the distribution to the people."[289] "[H]is three listeners refused to handle the distribution," however, and the Appellant therefore "left with his cargo," stating that he would "hand [the knives] over to the *Bourgmestre* so he could take care of the situation."[290] In her April 2001 and September 2001 testimony, however, Witness GEK testified that, before taking the truck that was carrying weapons to the *Bourgmestre*,[291] the Appellant did leave "other weapons that [the participants in the meeting] were to distribute to others."[292]

Circumstances of the Massacre on 12 April 1994:

- *Witness GEK's initial failure to mention seeing the Appellant on the day of the massacre*: In her statement to investigators in February 1998, Witness GEK did not mention seeing the Appellant in Gikomero on the day of the massacre at Gikomero Parish Compound.[293] In April 2001 and September 2001, however, Witness GEK testified that she saw the Appellant near her house in Gikomero and then head toward the parish compound along with a truckload of *Interahamwe*.[294]

[286] Defence Exhibit 2, p. 2.
[287] Appeal Brief, para. 320. *See also* T. 17 April 2001 pp. 127, 136.
[288] Appeal Brief, para. 320. *See also* T. 3 September 2001 p. 175; T. 4 September 2001 p. 59.
[289] Defence Exhibit 2, p. 2. *See also* T. 4 September 2001 pp. 72-74.
[290] Defence Exhibit 2, p. 2. *See also* T. 4 September 2001 pp. 72-74.
[291] T. 17 April 2001 p. 132; T. 4 September 2001 pp. 70, 71, 73.
[292] T. 3 September 2001 p. 176. *See also* T. 17 April 2001 pp. 129, 131.
[293] Defence Exhibit 2. *See also* T. 4 September 2001 pp. 82, 83.
[294] T. 17 April 2001 pp. 141-144; T. 3 September 2001 pp. 180-182; T. 4 September 2001 pp. 82, 83.

- *Whether the Appellant stopped near Witness GEK's house*: The Appellant claims that, in April 2001, Witness GEK testified that she saw the Appellant pass her house without stopping on his way to the Gikomero Parish Compound.[295] In September 2001, Witness GEK testified that the Appellant parked his vehicle in front of the house of Witness GEK's neighbour and that the vehicle was carrying a number of people.[296]

- *When Witness GEK saw killings in front of her house*: In April 2001, Witness GEK testified that she witnessed killings in front of her house the day *after* the massacre in the parish compound.[297] In September 2001, Witness GEK testified that she witnessed killings on the day of the attack as well as in the following days.[298]

Witness GEK's trip(s) to Kibobo:

- *Witness GEK's initial failure to mention her time in Kibobo* cellule: In her statement to investigators in February 1998, Witness GEK did not suggest that she had taken any trips to Kibobo *cellule* (a two hour walk from Gikomero[299]) around the time of the massacre at Gikomero Parish Compound.[300] Nor did she mention any such visit in her April 2001 testimony.[301] She mentioned her trips to Kibobo for the first time in September 2001, when she stated that she went to Kibobo after the massacre and remained there for an unspecified period of time before returning to Gikomero.[302]

- *When Witness GEK left for Kibobo*: In September 2001, Witness GEK testified that she went to Kibobo three days after the massacre in order to flee

[295] Appeal Brief, para. 321, citing T. 17 April 2001 pp. 73, 74.
[296] Appeal Brief, para. 321. *See also* T. 3 September 2001 pp. 180, 181.
[297] Appeal Brief, para. 321. *See also* T. 17 April 2001 pp. 139, 145, 146.
[298] Appeal Brief, para. 321, citing T. 3 September 2001 p. 177. *See also* T. 4 September 2001 pp. 9, 10, 12; T. 5 September 2001 pp. 19-23.
[299] T. 30 January 2003 p. 8 (Witness EM).
[300] Defence Exhibit 2.
[301] Appeal Brief, para. 322.
[302] Appeal Brief, para. 322. *See also* T. 4 September 2001 pp. 8, 9.

Interahamwe.[303] In January 2003, Witness GEK testified that she went to Kibobo the day after the killings.[304]

134. In response to these alleged inconsistencies, the Prosecution argues that they must be assessed "'on a case-by-case basis'", with due attention given to both "'the explanations given by the witness for the discrepancies between his or her testimonies and the materiality of such apparent discrepancies'".[305] The Prosecution further notes that "the alleged inconsistencies and discrepancies in the testimony of Witness GEK were already before the Trial Chamber, which did not fail to consider them properly before reaching its final conclusions".[306] In the Prosecution's view, the Trial Chamber made a reasonable decision that Witness GEK was credible, "based on the cogency of her evidence, her demeanour in court, and the context of all the evidence adduced at trial".[307]

135. After considering the parties' submissions, the Appeals Chamber concludes that the discrepancies in Witness GEK's testimony do not, either individually or collectively, so undermine her credibility as to require a reasonable Trial Chamber to discount her testimony. A review of the trial testimony demonstrates that a reasonable Trial Chamber could have viewed Witness GEK's testimony on these points as internally consistent:

- *Number of people present when the Appellant arrived to distribute weapons*: In September 2001, when Witness GEK was listing the people present in her house when weapons were distributed, she added one name to the list of three that she had mentioned the previous April.[308] She identified this individual – Ngiruwonsanga – as "a very famous Interahamwe in the secteur" who was

[303] T. 4 September 2001 p. 8.
[304] T. 13 January 2003 pp. 61, 62. The Appellant might also point to an apparent discrepancy as to whether or not Witness GEK stayed the night in Kibobo. In January 2003, Witness GEK testified that "I didn't spend the night there". T. 13 January 2003 p. 61. In September 2001, however, she testified that "I went to Kibobo fleeing from the Interahamwe. The Interahamwe came to attack us and then they went back, and then *I went back to Kibobo to spend the night* and I came back to my house. I didn't remain in Kibobo for several days". T. 5 September 2001 pp. 16, 17 (emphasis added). The Appeals Chamber considers that in context, however, it is clear that Witness GEK intended to say "I went back to *Gikomero* to spend the night". The unintentional transposing of two proper names is not an unfamiliar phenomenon; since her testimony on this point was not followed up on by either the Appellant or the Prosecutor, the Appeals Chamber does not attach much weight to the apparent slip.
[305] Respondent's Brief, para. 152, quoting *Musema* Trial Judgement, para. 88 (Prosecution's emphasis omitted).
[306] Respondent's Brief, para. 154 (noting that the Trial Judgement acknowledged that GEK gave some incorrect testimony), citing Trial Judgement, para. 266.
[307] Respondent's Brief, para. 171.
[308] T. 3 September 2001 p. 168.

present at all of the massacres in the region.[309] When cross-examined about her addition of Ngiruwonsanga to the list, she seemed surprised to be told that she had not previously mentioned him, insisting that he had indeed been present.[310] In reviewing this apparent discrepancy, the Appeals Chamber notes that Witness GEK's April 2001 testimony did in fact refer to "[an]other soldier who was with [the Appellant]" during his visit to Gikomero to distribute weapons.[311] Based on Witness GEK's September 2001 description of Ngiruwonsanga, that "other soldier" could very well have been Ngiruwonsanga; she did not specifically state that the list of names she gave in April was exhaustive, and from the context of her testimony, it appears that the unnamed "other soldier" was in the room with the Appellant, along with the three named persons.[312] The Appeals Chamber thus finds that it would not be unreasonable for a Trial Chamber to find Witness GEK's accounts consistent on this score.

- *Witness GEK's husband's refusal to accept grenades from the Appellant*: Witness GEK testified that "[m]y husband said that he could not accept that grenade because his own wife was Tutsi,"[313] and that when the Appellant "handed over the grenades to my husband and my husband refused to take them I thought [the Appellant] was going to kill me at the time."[314] Read in context, however, it is clear that these quotes are simply describing an initial refusal by the witness's husband, whose reluctance to take the weapons was eventually overcome by the Appellant's insistence. The Appeals Chamber therefore finds that it would not be unreasonable for a Trial Chamber to find Witness GEK's accounts consistent on this point.

- *Witness GEK's initial failure to mention seeing the Appellant on the day of the massacre*: Witness GEK's February 1998 affidavit describes both the Appellant and the 12 April massacre, concluding that "[t]his is all I remember for the

[309] T. 4 September 2001 pp. 50, 51.
[310] T. 4 September 2001 pp. 46-56.
[311] T. 17 April 2001 p. 126.
[312] T. 17 April 2001 pp. 125-126 ("I saw [the Appellant] in the sitting room of our house…, I went into [a nearby] room and when I got to the corridor and I shut the door and I stayed in there. Before entering [the nearby] room, I saw [the Appellant] with some gren[a]des in his hand. The other soldier who was with him was holding a machete.").
[313] T. 17 April 2001 p. 127.
[314] T. 17 April 2001 p. 136.

moment", but does not mention that she saw the Appellant on the day of the massacre.[315] While this could be seen as strange, two things must be remembered. First, the February 1998 affidavit was actually written on Witness GEK's behalf by an investigator after an initial, wide-ranging oral interview, the course of which was dictated, according to her testimony, by the investigator's specific questions.[316] Second, Witness GEK testified that on 12 April she only saw the Appellant for a very short period outside her house; it is reasonable that such a brief sighting might not have been foremost in her mind during her recounting of that day's events. Furthermore, Witness GEK's failure to mention her brief sighting of the Appellant on that day is not, strictly speaking, inconsistent with her later testimony that she did see him. The Appeals Chamber therefore finds that it would not be unreasonable for a Trial Chamber to find Witness GEK's accounts consistent on this score.

- *Whether the Appellant stopped near Witness GEK's house on the day of the massacre*: The Appeals Chamber does not see any discrepancy in Witness GEK's testimony on this point. While Defence Counsel's inaccurate citations make it difficult to know what they were relying on in pressing this ground, they may have been misled by ambiguity in part of the relevant French translation of Witness GEK's testimony. In the French version, Witness GEK's testimony is recorded as follows: "[The Appellant] était venu chercher ?Witness GEK's neighbourg, et ils sont passés par la route qui passe derrière notre maison, et ils se sont rendus à l'école."[317] Further on, however, in describing the group that headed to the Gikomero Parish Compound, Witness GEK stated that "[The Appellant] est passé tout près de chez moi. Il était avec ?Witness GEK's neighbourg, et également avec des militaires dans son véhicule…."[318] This implies, or, at the very least, is consistent with the implication, that the Appellant found Witness GEK's neighbour at his house (across from the house of Witness GEK) and then continued on to the school – which would have required stopping there, precisely as Witness GEK testified in September 2001.

[315] Defence Exhibit 2.
[316] T. 4 September 2001 p. 82.
[317] T. 17 April 2001 pp. 174, 175 (French).
[318] T. 17 April 2001 p. 177 (French).

The English translation of these April 2001 statements is even more obviously consistent with her September 2001 testimony: on the day of the massacre, the Appellant "came to look for ?my neighborg and they followed the road that passes behind our house and they went to the school."[319] Witness GEK then elaborated that "it was quite close to my house. He was with ?my neighborg and soldiers in his vehicle…."[320] The Appeals Chamber therefore finds that it is reasonable for a Trial Chamber to find Witness GEK's accounts consistent on this point.

- *Witness GEK's initial failure to mention her time in Kibobo*: The Appeals Chamber considers that like Witness GEK's initial failure to mention seeing the Appellant on the day of the massacre, this is not an inconsistency as such. Unlike Witness GEK's failure to mention seeing the Appellant, this ellipsis in her initial statements is not surprising. Nothing of relevance to the massacres in Gikomero happened in Kibobo; it was simply the place that she fled to after the events she testified about had already occurred.

136. Other discrepancies identified by the Appellant, however, appear at first glance to be genuinely irreconcilable. The Appeals Chamber recalls the inherent difficulties presented by eyewitness testimony as a class of evidence. The Appeals Chamber has previously noted the following:

> It is … normal for a witness who testified in several trials about the same event or occurrence to focus on different aspects of that event, depending on the identity of the person at trial and depending on the questions posed to the witness by the Prosecution. It is, moreover, not unusual for a witness's testimony about a particular event to improve when the witness is questioned about the event again and has his memory refreshed. The witness may become more focused on the event and recall additional details.[321]

137. Witness GEK herself said – when asked how easy it was for her to testify with precision about events that occurred years earlier during a very chaotic time – "it was not easy for me because I did not know before that I was going to be questioned about these events. Had I known

[319] T. 17 April 2001 p. 141.
[320] T. 17 April 2001 p. 143. The minor but substantive differences between these two translations of the original Kinyarwanda (*see* T. 17 April 2001 p. 131) shed light on an important point: because even the most expert translation can vary in minor detail from an original statement, it can be unfair and even misleading for the Appellant to rely on an overly close parsing of the translated text to assert that Witness GEK was inconsistent.
[321] *Kamuhanda*, Decision on Appellant's Motion for Admission of Additional Evidence on Appeal, para. 26 n. 42, quoting *Ntakirutimana* Reasons for Rule 115 Decision, para. 31.

that I would have taken notes, so that I said what I could remember".[322] As she pointed out, "[i]t all depends…. [S]omething could prompt you to remember something else, or something could get you to forget something else…. [T]he fact that I forget something does not mean that I did not say the truth…. [I]t all depends on the type of question put to you. With every question you can not remember everything."[323] In addition to these general observations on difficulties with eyewitness testimony, the Appeals Chamber also finds it relevant that Witness GEK, in general, does not appear to have overstated her testimony. On multiple occasions, she readily acknowledged her inability to recall specific details about the events in Gikomero.[324] Similarly, she readily acknowledged the limits of her testimony on the central fact of the Prosecution's case against the Appellant: his alleged direct participation in the massacre in the Gikomero Parish Compound. As to that question, she testified only that she saw him going in that direction on the day of the massacre with a group of armed men. These expressions of hesitation are, in the Appeal Chamber's view significant indicia of her credibility.

138. The Appeals Chamber notes that on the critical elements of her testimony against the Appellant, Witness GEK's testimony was unwavering: the Appellant came to her house shortly after the crash of President Habyarimana's plane, he rebuked the men he met there for not yet having started to kill Tutsis, he told them that their Tutsi wives should be killed if they posed any problem, and he distributed weapons for them to use in the coming massacre. Then, on the day of the massacre, the Appellant came by her house with a truckload of *Interahamwe* and headed toward the encamped refugees at Gikomero Parish Compound, after which she heard gunshots and noise for roughly half an hour. In the final analysis, the need to defer to the Trial Chamber on issues of credibility, particularly given the importance of witness demeanour, leads the Appeals Chamber to hold that these inconsistencies do not make it unreasonable for the Trial Chamber to have credited Witness GEK's evidence.

B. Impeachment of Witness GEK's Credibility by the Defence

139. The Appellant's attack on Witness GEK's credibility is not limited to an exegesis of the internal inconsistencies in her statements. The Appellant also argues that at least three

[322] T. 5 September 2001 p. 73.
[323] T. 4 September 2001 pp. 44, 54.
[324] *E.g.*, T. 3 September 2001 p. 167 (inability to state precisely what day the Accused came to Gikomero to distribute weapons); T. 3 September 2001 p. 180 (inability to state precisely what day the massacre in Gikomero Parish Compound occurred).

independent factors should have led the Trial Chamber to conclude that Witness GEK was an untrustworthy witness. The Appeals Chamber will analyze each contention in turn.

1. Witness GEK was Convicted of Murder

140. First, the Appellant observes that, following Witness GEK's initial trial court testimony, but before the close of the Appellant's trial, Witness GEK was convicted of murder in an unrelated affair. The Trial Chamber was put on notice of this fact when Witness GEK was called back for re-cross-examination.[325] "[T]he fact that GEK ordered the killing of one of her colleagues," the Appellant argues, "means that she is capable of worse things, including giving false testimony for shady motives."[326]

141. The Prosecution responds that "the fact that the witness was condemned, with the pending possibility of an appeal, for alleged acts that do not relate to the Appellant's case, does not imply that her credibility was thereby automatically undermined."[327]

142. During Witness GEK's subsequent testimony later in the trial proceedings, the witness admitted that she had been convicted of participation in a murder, noting that her appeal was pending. This fact is certainly troubling. However, the perpetrator of a murder is not necessarily prone to commit an offence against the proper administration of justice. In fact, there is nothing inherent in a murder conviction, particularly one wholly unrelated to the facts of the case at hand, that *per se* precludes a witness's testimony from being deemed credible by the trier of fact. Indeed, the testimony of persons allegedly[328] involved in the planning and execution of murders and other terrible crimes is often a crucial basis for the conviction of other participants in the scheme, in this Tribunal, in the ICTY, and in other courts. It is for the trier of fact to take into account criminal convictions and any other relevant evidence concerning the witness's character along with all the other relevant factors—for instance, the witness's demeanour, the content of her testimony, and its consistency with other evidence—in determining whether the witness is credible. Here, the Trial Chamber did so, and found that in light of all these factors, the unrelated murder conviction did not provide a reason to doubt the truthfulness of Witness GEK's testimony.

[325] T. 13 January 2003 pp. 63-70.
[326] Appeal Brief, para. 335.
[327] Respondent's Brief, para. 221.
[328] The Appeals Chamber was not able, and does not deem it necessary, to ascertain whether the domestic conviction was upheld on appeal.

The Trial Chamber is in the best position to evaluate credibility issues, and the Appeals Chamber sees no reason to disturb its judgement.

2. Witness GEK Allegedly Lied About Being in Gikomero on the Day of the Massacre

143. Second, the Appellant alleges that Witness GEK lied during her account of the massacre in Gikomero Parish Compound on 12 April 1994. This argument is intended to impugn Witness GEK's credibility more broadly: since Witness GEK, the Appellant contends, made up her entire story about the massacre, she is a demonstrably untrustworthy witness, and the Trial Chamber should not have believed her statement regarding the distribution of weapons several days earlier.

144. The Appeals Chamber recalls that Witness GEK testified that she was at home in Gikomero on 12 April 1994 and that she saw the Appellant arrive in town in a vehicle that was leading a truck full of *Interahamwe*. Witness EM, however, who was then Witness GEK's domestic employee, testified that, after spending days in Gikomero and nights in Kibobo from 7 to 9 April, she and Witness GEK actually moved to Kibobo *cellule* on the evening of 9 April 1994 and remained there without departing again, in one another's company at all times, through 13 April 1994.[329] Witness EM further alleged that Witness GEK delivered a baby in Kibobo around 8:00 in the evening of 12 April 1994, such that it would have been physically impossible for her to be in Gikomero on that day.[330] This testimony was corroborated in part by Xaviera Mukaminani, who lived in Witness GEK's neighbourhood, and who claimed that she did not see Witness GEK in Gikomero after the crash of President Habyarimana's plane on 6 April 1994.[331] Mukaminani testified that she was told that Witness GEK, whom she knew to be "in an advanced state" of pregnancy, sought refuge in Kibobo immediately following the crash of the presidential plane and did not return until after the 12 April massacre.[332] Similarly, Witness GPK testified that he was told that Witness GEK was in Kibobo on 12 April 1994,[333] although, as the Appellant admits, Witness GPK did not claim to have personally seen Witness GEK there.[334]

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[329] T. 30 January 2003 pp. 8, 9.
[330] T. 30 January 2003 pp. 9, 27.
[331] T. 10 February 2003 p. 30. Xaviera Mukaminani was initially identified as Witness TMF, but elected to reveal her identity before beginning her testimony. T. 10 February 2003 pp. 20, 21.
[332] T. 10 February 2003 pp. 30, 31.
[333] Appeal Brief, para. 315. *See also* T. 20 January 2003 pp. 58, 59.
[334] Appeal Brief, para. 312. *See also* T. 20 January 2003 pp. 58, 59. Witness GPK's testimony on this point is slightly ambiguous. Witness GPK stated that Witness GEK's cousin told him that Witness GEK was in Kibobo. *Id*. Witness GPK also stated that he went to Kibobo on the day of the massacre. *Id*. But Witness GPK did not claim to have personally seen Witness GEK in Kibobo when he went there on 12 April 1994. *Id*. The Appellant actually relies on this last fact to explain why Witness GPK did not corroborate Witness EM's assertion that Witness GEK was

145. The Prosecution argues that the Appellant "fails again to demonstrate any error in the Trial Chamber's finding that 'the testimony of Defence Witness EM lacks credibility, and is not sufficient to impugn the credibility of Prosecution Witness GEK'".[335] As to the other witnesses, the Prosecution contends, "[th]ere is no reason, in law or fact, why the Trial Chamber should have put more weight" on their testimony, or should have "consider[ed], as the Appellant seems to suggest, that any evidence from the [D]efence contrary to the [P]rosecution case should automatically raise a reasonable doubt".[336] This is underscored, the Prosecution suggests, by the fact that "[t]he Trial Chamber showed no hesitation in dismissing [P]rosecution allegations, where it found the evidence lacking credibility".[337]

146. The Appeals Chamber concludes that the Trial Chamber was not unreasonable in accepting that Witness GEK was in Gikomero and not Kibobo on 12 April 1994. Witness EM offered the most potentially damaging counterevidence on that point, but Witness EM's credibility was itself badly damaged, if not destroyed, during a wide-ranging cross-examination. Witness EM's allegation that Witness GEK delivered a child on the day of the massacre was all but refuted when the Prosecution introduced Witness GEK's official Rwandan identity card, which shows that the child in question was actually born five months later, in September 1994.[338] The Prosecution also repeatedly highlighted the implausibility of Witness EM's version of the events leading up to the massacre: "[s]o what you are saying is that [Witness GEK], who was literally about to have a child, that this caring husband we have heard about, made her walk two hours away from the house and two hours back on three separate nights into areas where he didn't know whether it was safe or not,"[339] with each trip made "in daylight [when you] could be seen by

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pregnant at the time these events occurred. Appeal Brief, para. 312 (noting that Witness GPK "never testified that he saw" Witness GEK in Kibobo on the day of the massacre) (emphasis in original). The Prosecution contests this point, suggesting that Witness GPK's testimony can be read to imply that he did see Witness GEK on 12 April 1994. Respondent's Brief, paras. 72-75. The Appeals Chamber, however, rejects Witness EM's testimony regarding Witness GEK's alleged pregnancy on other grounds.

[335] Respondent's Brief, para. 213, quoting Trial Judgement, para. 270.

[336] Respondent's Brief, para. 215.

[337] Respondent's Brief, para. 215.

[338] Prosecution Exhibit 49. *See also* T. 3 February 2003 p. 10 (initially introducing the identity card); T. 3 February 2003 pp. 25-27 (noting Defence Counsel's acknowledgment of the card's validity). It is also worth mentioning that Witness EM was unable to keep the day of the baby's alleged birth straight. First she alleged – including a number of date-specific details – that she was "sure" that the baby was born at 8 in the evening on the day that the massacre occurred. T. 30 January 2003 pp. 9, 27. Four days later, however, Witness EM changed her testimony to claim with precise phrasing that the baby was actually born at 8 in the morning on the day *after* the massacre. T. 3 February 2001 p. 6. There were other inconsistent aspects of her testimony that went directly to the core issue at hand: Witness EM testified on the one hand that Witness GEK was so pregnant that she was "not moving around" and unable to fetch firewood and water (T. 30 January 2003 p. 12) and on the other hand that Witness GEK was making daily two-hour trips to Kibobo and spending time harvesting bananas in the fields (T. 30 January 2003 pp. 8, 9).

[339] T. 30 January 2003 pp. 25-26. Witness EM's response was "Yes, that's what I said." T. 30 January 2003 p. 26.

anyone who could have killed you."[340] The Prosecution further emphasized the implausibility of Witness EM's claim that Witness GEK's husband took her back to Gikomero on 13 April 1994: "what you are saying is that [Witness GEK's] husband took her, a Tutsi, back to Gikomero when in actual fact he knew the Tutsis were being killed at that time, in that area".[341]

147. As for Xaviera Mukaminani and Witness GPK, neither one testified to having seen Witness GEK in Kibobo; they offered hearsay evidence that they were told she had been there. The Appeals Chamber considers that even if Witness GPK's testimony is interpreted – against the Defence's own reading of it[342] – to suggest that he personally saw Witness GEK in Kibobo, Witness GPK's credibility was itself drawn into substantial question. Witness GPK was insistently evasive about his ties to the Appellant.[343] Only after persistent questioning by the Prosecution did Witness GPK finally acknowledge that, in fact, his wife was the younger sister of one of the Appellant's close cousins.[344] Moreover, while at one point Witness GPK denied ever having been a suspect in the 12 April massacre in Gikomero,[345] at another point he acknowledged that "the government [initially] considered me as a criminal who had participated in the acts" in Gikomero.[346] In short, there were substantial problems with all of the Appellant's evidence on this point. It was therefore reasonable for the Trial Chamber to discredit the Appellant's effort to place Witness GEK in Kibobo on the day of the massacre.

3. Witness GEK's Testimony that the Appellant Drove His Own Car

148. Witness GEK testified that she saw the Appellant drive his vehicle to and from Gikomero.[347] In light of evidence that the Appellant cannot drive a car, however, the Trial Chamber concluded that "Witness [GEK] may have been mistaken about the driver of the

[340] T. 30 January 2003 p. 26.
[341] T. 30 January 2003 p. 30.
[342] *See* Appeal Brief, para. 312.
[343] When the Prosecution asked him, "[i]sn't it right that you have links with [the Appellant] through marriage?", Witness GPK responded only that "I have no family connection with him because no one in my family had taken a wife in [the Appellant's] family; nor had anyone in his family taken a wife from our family." T. 21 January 2003 p. 50.
[344] T. 21 January 2003 pp. 51, 52.
[345] T. 21 January 2003 p. 13.
[346] T. 21 January 2003 p. 4.
[347] Appeal Brief, paras. 54, 55, 119, 323-325. *See also, e.g.*, T. 17 April 2001 p. 132.

vehicle."[348] The Appellant points to this discrepancy as further evidence that Witness GEK was an unreliable witness.[349]

149. The Prosecution responds that, "despite *apparent* inconsistencies or contradictions, including that 'the Witness may have been mistaken about the driver of the vehicle', the Trial Chamber duly assessed her evidence and, with respect to its fundamental features, reasonably found [it] to be … credible".[350]

150. The Appeals Chamber has already discussed the inevitable problems that arise with eyewitness recollection of minor details.[351] The Appeals Chamber concludes that any error Witness GEK made about the driver of Appellant's car does not make it unreasonable for the Trial Chamber to have relied on the core elements of the witness's testimony to find that the Appellant did distribute weapons in Gikomero.

4. Witness GEK Allegedly Lied About Her Identity

151. Finally, the Appellant alleges that Witness GEK "testified under a false identity by changing her name," thereby "l[ying] about her identity".[352] The point of this evidence at trial, the Appellant claims, was not that "the Defence […] submitted that [Witness GEK] was an imposter", but that Witness GEK had "appeared for the hearing *under a false identity* by changing her name".[353] Specifically, while Witness GEK testified that her name is "Jane Doe"[354] and produced a Rwandan identity card to document that fact, the Appellant suggests that Witness GEK was actually known in Gikomero as "Jane Mukadoe".[355] The Appellant requests the Appeals Chamber to find that Witness GEK is deceitful and unreliable as she lied about her identity.[356]

152. The Prosecution contends that the fact that the witness, whose real last name was indeed "Doe", might have been better known to her peers as "Mukadoe" does not in any way prove that

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[348] Trial Judgement, para. 266.
[349] Appeal Brief, paras. 54, 55, 119, 323-325; Reply Brief, para. 116.
[350] Respondent's Brief, para. 154, quoting Trial Judgement, paras. 266, 439 (emphasis in original).
[351] *See supra* paras. 142, 143.
[352] Appeal Brief, paras. 326, 333 (emphasis in original).
[353] Appeal Brief, para. 152 (emphasis in original).
[354] As will be seen shortly, the explanation for the apparent discrepancy hinges on a close analysis of Witness GEK's last name. For the purpose of this discussion, the Appeals Chamber will therefore use the obviously pseudonymous "Jane Doe" instead of the name that Witness GEK asserts is hers.
[355] Appeal Brief, paras. 327-332. Explained in terms of the pseudonym discussed in the preceding footnote, the Appellant agrees that Witness GEK's first name is "Jane", but argues that the Kinyarwanda prefix "Muka" is attached to "Doe" to form GEK's real last name: "Mukadoe".
[356] Appeal Brief, para. 333.

she lied about her name or that she changed her name.[357] The Prosecution argues that Witness GEK gave an entirely satisfactory explanation for the reason that her legal name is different from the name she is commonly known by.[358]

153. The Appeals Chamber concludes that the allegations regarding Witness GEK's "true" name are no more than an effort to create confusion. The Appeals Chamber notes that notwithstanding their representations at this stage of the proceedings, the Appellant's Counsel clearly suggested at trial that Witness GEK was not who she said she was, that is that she was an imposter who had never been married to the Appellant's cousin. This is unequivocally borne out by the trial record,[359] and it was how the Trial Chamber understood the Defence submissions.[360] This effort to discredit Witness GEK failed, however, when the Appellant acknowledged that he actually did know Witness GEK and that she was precisely who she claimed to be.[361]

154. Now, as best as the Appeals Chamber understands the Appellant's submissions, Defence Counsel is trying to repackage its trial claims as an assertion that Witness GEK changed her name without properly notifying the Trial Chamber.[362] But the Appellant has never challenged Witness GEK's explanation of the apparent discrepancy between her official name and the name she was known by in Gikomero. Witness GEK testified that because her real last name "Doe" is ordinarily thought of as masculine, she is commonly, but incorrectly, known to her peers as "Mukadoe" because adding the prefix "Muka-" renders the name gender-appropriate.[363] As she explained,

> I was given this name [Doe] after my grandfather. That is the name of my grandfather. But since in Rwanda people are used to [Doe] being masculine, they tend to add Muka, so that it becomes [Mukadoe] instead of [Doe], but in truth, I am called [Doe].… And even on my ID card that was issued to me by the Republic of Rwanda, the name therein is [Doe, Jane].[364]

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[357] Respondent's Brief, para. 203.
[358] Respondent's Brief, para. 203.
[359] In particular, the Appellant's assertion that "the Defence never submitted that Witness GEK was an imposter and that she was not the wife of ?the man she identified as her husbandg" borders on outright falsehood. Appeal Brief, para. 152. *See also id.*, paras. 151-156. The trial record demonstrates that the Defence plainly suggested precisely that. *See, e.g.*, T. 4 September 2001 p. 23 ("[W]e question your identity as being the woman that married the late [man identified as her husband],"); T. 5 September 2001 pp. 58, 59 ("I return to my earlier proposition that you Madam are not the wife of [the man identified as your husband].").
[360] Trial Judgement, para. 266 ("The Defence initially claimed that Prosecution Witness GEK was not the person she claims to be.").
[361] Trial Judgement, para. 266. *See also* T. 26 August 2002 pp. 124, 128.
[362] *See* Appeal Brief, para. 156 (arguing that "the allegation that the witness had changed her family name … showed that Witness GEK lacked credibility.").
[363] T. 4 September 2001 pp. 18-22.
[364] T. 4 September 2001 p. 21.

The Appeals Chamber notes that the Appellant does not attempt to discredit this account. In any event, even if it were true that Witness GEK legally changed her name at some point by dropping the "Muka-" prefix, the Appellant neither explains how that is suggestive of deceitfulness nor proposes any conceivable reason Witness GEK could have had for doing so.

C. Contradictory Testimony by Defence Witnesses

155. The Appellant concludes his attack on Witness GEK's testimony by contending that several Defence witnesses contradicted her account of the distribution of weapons on at least two separate grounds. First, three witnesses in Witness GEK's neighbourhood stated that they did not see the Appellant distribute weapons.[365] Second, the Appellant alleges that three witnesses testified that Witness GEK was not even "[in Gikomero] on the dates she alleged the weapons distribution took place."[366]

1. Three Witnesses in Witness GEK's Neighbourhood Did Not See the Appellant Distribute Weapons

156. The Appellant notes that three Defence witnesses testified that they were either with Witness GEK or in the vicinity of the alleged weapons distribution during the relevant time period, and that they did not witness any of the events described by her. On direct examination, Witness GEK stated that, sometime between 6 and 10 April 1994, she saw the Appellant distribute weapons to purported Hutu allies in Gikomero. But Xaviera Mukaminani, who lived in Witness GEK's neighbourhood, testified that she was home between 6 and 10 April and did not witness any weapons distribution.[367] Similarly, Witness GPK testified that he was in the neighbourhood until 12 April 1994 and that he was not aware of any distribution of weapons.[368] And Witness EM, who was Witness GEK's domestic employee, testified that she was constantly in Witness GEK's company between 6 and 10 April and that she neither witnessed any weapons distribution nor saw the Appellant during that period of time.[369] All three witnesses testified, in

[365] Appeal Brief, paras. 310-314
[366] Appeal Brief, paras. 315-317.
[367] Appeal Brief, para. 310. *See also* T. 10 February 2003 pp. 30, 40, 41.
[368] Appeal Brief, para. 310. *See also* T. 20 January 2003 pp. 60-62.
[369] Appeal Brief, para. 310. *See also* T. 30 January 2003 pp. 7-12.

essence, that if such a thing had happened during their absence, they would not have failed to find out about it.[370]

157. While the Trial Chamber concluded that the failure of these witnesses to see the Appellant in Gikomero "does not exclude that he could have been there, as claimed by Witness GEK," the Appellant contends that this was unfair.[371] The Appellant argues that since Witness GEK could not pinpoint precisely when the distribution of weapons occurred, "it was therefore impossible for [the Appellant] to rebut these allegations in a precise and detailed manner."[372] Furthermore, the Appellant contends, it was not his burden to "exclude" the possibility that he was in Gikomero in the relevant time period; he need have only demonstrated that there is a reasonable doubt about his alleged visit to Gikomero.[373]

158. The Appeals Chamber finds that the Appellant's submissions on this point are unavailing. As the Prosecution argues, and as the Trial Chamber noted, the mere fact that Witnesses GPK and Xaviera Mukaminani did not witness or hear about the arms distribution does not mean that such a distribution of arms could not have occurred. Moreover, as discussed above, Witness EM's credibility was so badly damaged during cross-examination that it was not unreasonable for the Trial Chamber to discount her testimony entirely.

2. Witness GEK's Alleged Absence from Gikomero at the Time of the Alleged Weapons Distribution

159. The Appellant contends that three Defence witnesses further testified that Witness GEK was not even in Gikomero between 6 and 10 April 1994, when the Appellant allegedly distributed weapons there.[374] Witness EM stated that from 7 to 9 April, she and Witness GEK spent each night and a portion of every day in Kibobo *cellule*,[375] a two hour walk from Gikomero.[376] Witness EM further testified that, from the evening of 9 April until at least the day of the massacre, she and Witness GEK abandoned Gikomero entirely and spent all their time in Kibobo *cellule*.[377] Witness EM also claimed that during this entire period of time, she never left Witness GEK's

[370] Appeal Brief, para. 310. *See also* T. 30 January 2003 pp. 9, 11 (Witness EM); T. 10 February 2003 pp. 30, 40, 41 (Witness Xaviera Mukaminani); T. 20 January 2003 pp. 61, 62 (Witness GPK).
[371] Appeal Brief, para. 313, quoting Trial Judgement, para. 271.
[372] Appeal Brief, para. 313.
[373] Appeal Brief, para. 87.
[374] Appeal Brief, para. 315.
[375] Appeal Brief, para. 315. *See generally* T. 30 January 2003 pp. 8, 32.
[376] T. 30 January 2003 p. 8.
[377] T. 30 January 2003 pp. 8, 9, 32.

side.[378] Witness EM's claims on this point were corroborated by Xaviera Mukaminani, who testified that she did not see Witness GEK in Gikomero after President Habyarimana's plane crashed (6 April 1994), and that she was told Witness GEK had sought refuge in Kibobo.[379]

160. As noted above, the Prosecution argues that there is no reason that the Trial Chamber was required to give more credence to the testimony of Defence witnesses than it did.

161. The Appeals Chamber first notes that, even if taken at face value, neither Witness EM's nor Xaviera Mukaminani's testimony rules out the possibility that Witness GEK was in Gikomero at the time of the alleged weapons distribution. Witness EM's testimony acknowledges, at a minimum, that Witness GEK was in Gikomero on 6 April 1994, and Mukaminani's testimony was simply that she did not see Witness GEK in Gikomero during that time. Equally important, as discussed above, Witness EM's credibility was badly damaged on cross-examination. Accordingly, the Appeals Chamber finds, it was not unreasonable for the Trial Chamber to give credence to Witness GEK's assertion that she was in Gikomero on the date of the alleged weapons distribution.

D. Conclusion

162. In addition to considering each of these challenges to Witness GEK's testimony individually, the Appeals Chamber has considered whether, in their aggregate effect, the Appellant's contentions cast such doubt on Witness GEK's credibility as to render the Trial Chamber's reliance on her testimony unreasonable. The Appeals Chamber concludes that the principle of deference to the Trial Chamber on issues of fact, and particularly on questions involving the in-person evaluation of demeanour and credibility, must prevail. There is no sign that the Trial Chamber unreasonably accepted the testimony of all Prosecution witnesses; rather, there is every indication that it engaged in a careful and discerning process of genuinely seeking to determine the credibility of each witness on a case-by-case basis.[380] While the Appellant has presented substantial reasons in support of his arguments, the Appeals Chamber cannot find that it was unreasonable for the Trial Chamber to reach the opposite conclusion. Accordingly, the Appellant's submissions related to Witness GEK are dismissed.

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[378] T. 30 January 2003 p. 9.
[379] Appeal Brief, para. 315. *See also* T. 10 February 2003 pp. 30, 31.
[380] *See, e.g.*, Trial Judgment, paras. 282, 283 (finding Prosecution evidence "not credible" and rejecting the claim that the Appellant distributed weapons in another location as well).

XI. ALLEGED ERRORS RELATING TO THE GIKOMERO PARISH COMPOUND MASSACRE AND THE ASSESSMENT OF ALIBI EVIDENCE (GROUNDS OF APPEAL 3, 10, 13, AND 14, IN THEIR ENTIRETY, AND 2, 4, 5, AND 7, IN PART)

A. Introduction

163. In separate grounds of appeal, the Appellant made submissions in relation to the Trial Chamber's assessment of the alibi evidence and in relation to the Trial Chamber's finding on his presence at the Gikomero Parish Compound, respectively. Both issues, however, are inextricably interrelated: if the Trial Chamber erred in rejecting the Appellant's alibi evidence, this would have an influence on the examination of the Trial Chamber's finding on his presence at the Gikomero Parish Compound, and vice versa. For this reason, the grounds of appeal related to the Trial Chamber's assessment of the alibi evidence and the finding on the Appellant's presence at the Gikomero Parish Compound are considered together in this chapter.

164. The Trial Chamber found that on 12 April 1994 the Appellant led a group of armed people to the Gikomero Parish Compound, where a large number of refugees, mainly of Tutsi origin, had assembled. The Trial Chamber found that the Appellant initiated the attack on the assembled refugees and found, by majority, that he gave the order to attack. According to the Trial Chamber, the attackers killed and injured a large number of Tutsi refugees; the Appellant left the compound when the killings began.[381] The Trial Chamber based its findings in this regard on the testimony of three witnesses who had known the Appellant prior to 12 April 1994, and eight other witnesses who had heard at the site of the attack that the leader of the attack was called Kamuhanda.[382] In addition, the Trial Chamber relied on Witnesses GEK and GEB, who had testified that they had seen the Appellant in a vehicle in Gikomero Commune on 12 April 1994, shortly before the massacre began.[383]

165. The Appeals Chamber first considers the Appellant's submissions regarding alleged errors in the assessment of alibi evidence.

[381] Trial Judgement, paras. 499-506.
[382] Trial Judgement, para. 466.
[383] Trial Judgement, paras. 439 (Witness GEK), 441 (Witness GEB).

B. Alleged Errors in the Assessment of Alibi Evidence

166. Before turning to the relevant submissions of the Parties, the Appeals Chamber notes that the Trial Chamber stated in relation to the issue of alibi as follows:

> 83. As has been held by the Appeals Chamber in the *Celibici* [*sic*] *Case*, the submission of an alibi by the Defence does not constitute a defence in its proper sense. The relevant section of the judgment reads:
>
> "It is a common misuse of the word to describe an alibi as a "Defence". If a defendant raises an alibi, he is merely denying that he was in a position to commit the crime with which he is charged. That is not a Defence in its true sense at all. By raising this issue, the defendant does no more [than] require the Prosecution to eliminate the reasonable possibility that the alibi is true."[384]

167. The Trial Chamber correctly[385] stated that an alibi "does not constitute a defence in its proper sense".[386] In general, a defence comprises grounds excluding criminal responsibility although the accused has fulfilled the legal elements of a criminal offence. An alibi, however, is nothing more than the denial of the accused's presence during the commission of a criminal act. In that sense, an alibi differs from a defence in the above-mentioned sense in one crucial aspect. In the case of a defence, the criminal conduct has already been established and is not necessarily disputed by the accused who argues that due to specific circumstances he or she is not criminally responsible, *e.g.* due to a situation of duress or intoxication. In an alibi situation, however, the accused "is denying that he was in a position to commit the crimes with which he is charged because he was elsewhere than at the scene of the crime at the time of its commission".[387] An alibi, in contrast to a defence, is intended to raise reasonable doubt about the presence of the accused at the crime site, this being an element of the prosecution's case, thus the burden of proof is on the prosecution.

168. The Appellant submits that the Trial Chamber erred in law and fact in rejecting his alibi. In support of this submission he argues that the Trial Chamber erroneously arrived at the following conclusions: (i) that the Appellant contradicted Witness ALS;[388] (ii) that the Appellant

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[384] Trial Judgement, paras. 83-85, citing *Celebici Case* Appeal Judgement, para. 581 (internal citations omitted).
[385] *See also Kajelijeli* Appeal Judgement, para. 41.
[386] This has been agreed upon in similar terms by the Prosecution upon a question from Judge Schomburg, *cf.* T. 19 May 2005 p. 93:
Judge Schomburg: "So you agree that alibi has no longer to be seen as a specific Defence?"
Ms. Reichman: "[I]t isn't raised as a specific defence here. I would say that is true."
[387] *Kajelijeli* Appeal Judgement, para. 42.
[388] Appeal Brief, paras. 248-252.

contradicted his wife;[389] (iii) that Witness ALR's testimony as to the dates of the alibi was not reliable;[390] (iv) that Witnesses ALR and ALB contradicted each other;[391] (v) that the Appellant did not explain what the men who were at Witness ALS's house did during the alibi period;[392] (vi) that the evidence of Witnesses ALB and ALM did not rule out the possibility that the Appellant went to Gikomero;[393] and (vii) that it was incredible that patrols were mounted just to protect the witnesses from looters.[394] The Appellant also argues that the Trial Chamber failed to consider the alibi comprehensively[395] and concludes that his alibi succeeded in casting reasonable doubt on the Prosecution case.[396]

169. The Prosecution responds that the Trial Chamber assessed the alibi correctly.[397] The Prosecution posits that the Trial Chamber rejected the alibi because the alibi evidence was not credible and because the Prosecution case in respect of the arms distribution and the massacre at Gikomero Parish was strong.[398]

170. The Appeals Chamber will now examine in turn the Appellant's arguments in respect of the alibi. The Appeals Chamber will also address in this section related submissions and arguments presented under other grounds of appeal.

C. Alleged Errors in Distorting the Testimonies of Witness ALS and Mrs. Kamuhanda and in Finding That the Appellant Contradicted Their Evidence

171. The Appellant submits that the Trial Chamber erred in law by distorting the testimonies of Witness ALS and Mrs. Kamuhanda and then relied on such distortions in order to reject the witnesses' alibi evidence in violation of Article 20 of the Statute guaranteeing him a fair hearing.[399] The Appellant further submits that the Trial Chamber erred in fact in holding that

[389] Appeal Brief, paras. 253-257.
[390] Appeal Brief, paras. 258-262.
[391] Appeal Brief, paras. 263-265.
[392] Appeal Brief, paras. 266-268.
[393] Appeal Brief, paras. 269-275.
[394] Appeal Brief, paras. 276-279.
[395] Appeal Brief, paras. 280-284.
[396] Appeal Brief, paras. 285-287.
[397] Respondent's Brief, para. 77.
[398] Respondent's Brief, para. 78. *See also* T. 19 May 2005 pp. 85-87.
[399] Appeal Brief, paras. 150, 165-172.

Witness ALS and Mrs. Kamuhanda were not credible in respect of his alibi on the ground that he contradicted their testimonies.[400]

172. In respect of the testimony of Witness ALS, the Appellant recalls that at paragraph 169 of the Trial Judgement, the Trial Chamber found that the witness testified "that the Accused never left her house except on 8 April 1994" and "that she saw the Accused practically 24 hours a day and that the Accused never left the house again until 18 April 1994."[401] The Appellant contends that this is a distortion of Witness ALS's testimony, because she did not state that she saw the Appellant twenty-four hours a day.[402] The Appellant points out that the witness testified as follows, emphasizing the highlighted parts:

> A. No, he didn't go away, apart from that trip when he went to get his son. **We were always together, he was either in front of the house or by the house, so that one could call him -- a very short distance from which one could call him.**
>
> Q. That means that you saw him, that you talked to him; How frequently; once a day, twice a day?
>
> A. I couldn't tell you exactly the number of occasions, but on the whole **we were together all the time because we shared meals in the morning, we shared meals in afternoon and even in evening he was there.** And when he was not with us he was either resting or he was walking around in front of the compound. He was always around.[403]

173. The Appellant then submits that the Trial Chamber, relying on the distorted evidence, erroneously held in paragraph 171 of the Judgement that Witness ALS was not credible since "it was the [Appellant] himself who contradicted the testimony by testifying that he saw her twice or sometimes thrice during the day."[404]

174. The Appeals Chamber notes that the Appellant approves the Trial Chamber's summary of Witness ALS's testimony that "she could not specify the number of times she saw [the Appellant] during the day because they were always together. She stated that she never lost sight of him for longer than a two hour period."[405] However, the Appellant objects to the Trial Chamber's subsequent characterization of this testimony as meaning that Witness ALS testified to seeing the Appellant "practically 24 hours a day".[406] The Appeals Chamber finds that the Appellant has not established an error in such a characterization of the testimony of Witness ALS. In the view of

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[400] Appeal Brief, paras. 248-257.
[401] Appeal Brief, paras. 166, 248.
[402] Appeal Brief, paras. 171, 250, 251. *See also* Reply Brief, paras. 38-42; T. 19 May 2005 p. 53.
[403] T. 29 August 2002 pp. 47-48 (emphasis in the Appeal Brief, para. 249).
[404] Appeal Brief, paras. 172, 248.
[405] Appeal Brief, para. 250, quoting Trial Judgement, para. 102.

the Appeals Chamber, the Trial Chamber's correct conception of the evidence is reflected in its use of the term "practically". The Trial Chamber did not find that Witness ALS testified to having seen the Appellant literally twenty-four hours a day, but, rather, that she claimed to have been with him much more than his testimony supported.[407] The Appeals Chamber finds that the Appellant has not demonstrated an error in this finding and, accordingly, dismisses the sub-grounds of appeal related to Witness ALS.

175. In respect of the testimony of Mrs. Kamuhanda, the Appellant highlights that at paragraph 170 of the Trial Judgement the Trial Chamber stated that Mrs. Kamuhanda "testified that she was always in the company of the Accused, *never taking her eyes off him*."[408] The Appellant submits that this is a distortion of the evidence, for Mrs. Kamuhanda did not tell the Chamber that during the period in question she never took her eyes off her husband, "but rather that he was always within calling distance."[409] The Appellant refers the Appeals Chamber to the hearing of 9 September 2002 where Mrs. Kamuhanda testified as follows:

> Q. What about your husband, specifically, did he participate on a regular basis in these patrols?
>
> A. Yes, he was never absent. All the time he was with the others, they regrouped together. And like I said, he would come to eat something, take a blanket, and then go and join the others. All the time he was with the others, like I said. So, he stayed with us in the house when the shells were very, very intense.
>
> Q. When he was not with you where was he?
>
> A. He was with the others. However, he did not go very far. I must say they stayed around our house … we could even call them because they were walking in the street, and so we could call them. Even in turn something could happen to us inside, they could come to our rescue.[410]

176. The Appellant then submits that the Trial Chamber, relying on the distorted evidence that Mrs. Kamuhanda did not lose sight of her husband, found that the Appellant contradicted her by testifying that he saw her "twice or sometimes thrice during the day."[411] The Appellant thus argues that the Trial Chamber erred by holding Mrs. Kamuhanda not credible on the ground of this contradiction.[412]

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[406] Appeal Brief, paras. 166, 168, 171, citing Trial Judgement, para. 169.
[407] *See* Trial Judgement, para. 171.
[408] Appeal Brief, para. 167 (emphasis in the Appeal Brief).
[409] Appeal Brief, para. 170. *See also* Reply Brief, paras. 43-45.
[410] T. 9 September 2002 pp. 163, 164.
[411] Appeal Brief, para. 253, citing Trial Judgement, paras. 170, 171.
[412] Appeal Brief, para. 257. *See also* T. 19 May 2005 p. 55.

177. In the view of the Appeals Chamber, the Appellant correctly points out that Mrs. Kamuhanda did not testify to never losing sight of her husband, but rather to having him within calling distance.[413] The Appeals Chamber recalls that the Trial Chamber correctly summarized this portion of Mrs. Kamuhanda's testimony in the Judgement,[414] but observes that in a subsequent discussion of this testimony, the Trial Chamber referred to her "never taking her eyes off him."[415] This imprecision does not amount to an error of fact occasioning a miscarriage of justice. A review of the Trial Judgement shows that the Trial Chamber found the alibi evidence in general not credible because it "appeared designed for a purpose".[416] The fact that the Trial Chamber characterized Mrs. Kamuhanda's testimony imprecisely does not undermine this ultimate finding which, fundamentally, was based on the Trial Chamber's reasonable appreciation of the evidence. Accordingly, the Appeals Chamber, Judge Weinberg de Roca dissenting, dismisses the sub-grounds of appeal related to Mrs. Kamuhanda's alibi evidence.

D. Alleged Errors Relating to Witness ALR's Evidence

178. The Appellant submits that the Trial Chamber erred in law and fact when it held that it could not rely on Witness ALR with reference to the dates of the alibi because the witness could not recall the dates on his own.[417] The Appellant argues that the only reason for refusing to rely on the evidence of Witness ALR was that "he had been influenced by a third person", namely his wife, who reminded him of the correct dates, and posits that influence of third parties does not automatically exclude reliance on the evidence.[418]

179. The Appeals Chamber notes the following statement made by the ICTY Appeals Chamber in the *Kupreškic et al*. case:

> As the primary trier of fact, it is the Trial Chamber that has the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses' testimonies. It is certainly within the discretion of the Trial Chamber to evaluate any 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. The presence of inconsistencies in the evidence does not, *per se*, require a reasonable Trial Chamber to reject it as being unreliable. Similarly, factors such as the passage of time between the events and the testimony of the witness, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took

[413] T. 9 September 2002 p. 164.
[414] *See* Trial Judgement, para. 115 ("Thus when her husband was not with the family, he was with the other men, conducting patrols in the neighborhood within calling distance.").
[415] Trial Judgement, para. 170.
[416] *See* Trial Judgement, para. 176.
[417] Appeal Brief, paras. 34-41, 258-262.
[418] Appeal Brief, paras. 36, 258. *See also* Reply Brief, para. 7.

> place do not automatically exclude the Trial Chamber from relying on the evidence. However, the Trial Chamber should consider such factors as it assesses and weighs the evidence.[419]

180. As both parties point out, the Trial Chamber in the present case recalled this statement in paragraph 36 of the Judgement.[420] The Appellant argues, however, that although the Trial Chamber recalled the relevant rule, it refused to rely on Witness ALR's testimony as to alibi dates because he had been influenced by a third person.[421]

181. The Appeals Chamber endorses the above-mentioned statement made in the *Kupreškic et al*. Appeal Judgement and notes that while factors such as influence of third persons or evidentiary inconsistencies do not require the trier of fact to not rely on the evidence, they are to be taken into consideration in weighing the evidence. The trier of fact is bound to consider such factors in deciding whether the evidence is reliable. In the present case, the Trial Chamber noted that Witness ALR stated in a prior written statement that the Appellant left the Kacyiru neighbourhood on 12 April 1994, whereas he testified during trial that the Appellant left on 18 April 1994.[422] The Trial Chamber recalled in the Judgement the witness's explanation that he had made a mistake in his witness statement and that his wife told him subsequently that the Appellant left on the 18th of April.[423] Significantly, during cross-examination on this point, the witness stated the following:

> To show you that I am saying the truth, when the Canadian investigator came this was in 1999, five years after. So it goes without saying that for me the dates were not important. It is only in the evening when I came to my house that when I explained to my wife that somebody visited me, has interviewed me. So when I talked about this date, she reminded me that it was not the 12th but it was the 18th that we left. So that's the truth. So maybe I made mistakes, maybe I made mistakes about the date, but I must state that I do not have in my mind all these dates, especially during that period.[424]

182. In view of the foregoing, the Appeals Chamber finds that it has not been shown that the Trial Chamber erred in law or in fact when it concluded that Witness ALR's testimony as to the alibi dates was not reliable. Accordingly, this sub-ground of appeal is dismissed.

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[419] *Kupreškic et al*. Appeal Judgement, para. 31 (citations omitted).
[420] Appeal Brief, para. 34; Respondent's Brief, para. 36.
[421] Appeal Brief, paras. 36, 41, 258. *See also* T. 19 May 2005 p. 54.
[422] Trial Judgement, paras. 109, 110.
[423] *See* Trial Judgement, paras. 109, 110.
[424] T. 4 September 2002 pp. 29, 30.

E. Alleged Errors in Distorting the Testimonies of Witnesses ALR and ALB and in Finding That Their Testimonies Contradicted Each Other

183. The Appellant submits that the Trial Chamber erred in law and fact when it found at paragraph 173 of the Trial Judgement that the testimonies of Witnesses ALR and ALB contained "some contradictions" which, "[considering] that if these Witnesses were together as they claimed to be, 24 hours a day, seven days a week, then it is most inconsistent that they should have differing accounts of what happened."[425] The Appellant argues that the witnesses did not state that they were together twenty-four hours a day, but rather that they saw each other during patrols.[426] Additionally, the Appellant contends, the Trial Chamber failed to point out the contradictions it found between the testimonies of these two witnesses.[427]

184. The Prosecution responds that the Trial Chamber correctly summarized Witnesses ALR's and ALB's testimonies and that, although the Trial Chamber did not list the contradictions, the two testimonies indeed differed in certain respects.[428]

185. The Appeals Chamber observes that Witnesses ALR and ALB did not claim to have been together twenty-four hours a day. The Trial Chamber's erroneous statement in this regard, made at paragraph 173 of the Trial Judgement,[429] appears to stem from an incorrect summary of the testimony of Witness ALB. When summarizing his evidence, the Trial Chamber wrote: "Defence Witness ALB stated that his family and that of the Accused had, for security reasons, moved to stay in the house of Witness ALS on 8 April 1994."[430] In support of this, the Trial Chamber cited the record.[431] However, the identified portion of the transcript does not support the Trial Chamber's summary of the evidence. As the Appellant points out,[432] Witness ALB never stated that he moved to the house of Witness ALS; rather, it was the family of Witness ALR who did so.[433] Witness ALB testified that he was with the Appellant and with others during nightly

[425] Appeal Brief, para. 173, quoting Trial Judgement, para. 173. *See also* Appeal Brief, paras. 263, 264.
[426] Appeal Brief, paras. 173, 264. *See also* Reply Brief, para. 46.
[427] Appeal Brief, para. 264. *See also* Reply Brief, paras. 59, 60; T. 19 May 2005 pp. 56, 57.
[428] Respondent's Brief, paras. 69-71, 82, 83 (pointing out two contradictions relating to the patrols).
[429] The Trial Chamber stated the following: "The Chamber has considered the testimonies of Witnesses ALR and ALB and finds that there are some contradictions in their testimonies. The Chamber considers that if these Witnesses were together as they claimed to be, 24 hours a day, seven days a week, then it is most inconsistent that they should have differing accounts of what happened." Trial Judgement, para. 173.
[430] Trial Judgement, para. 111.
[431] Trial Judgement, para. 111, n. 122, citing T. 5 September 2002 p. 100.
[432] Appeal Brief, paras. 173, 264.
[433] Trial Judgement, para. 104.

neighbourhood patrols as well as during morning and afternoon periods.[434] Witness ALB did not state or imply that he was together with Witness ALR at all times during the relevant period. The record reveals that Witness ALR did not claim to have been with Witness ALB twenty-four hours a day either, and his testimony could not be reasonably construed to reach such a conclusion.

186. Nevertheless, the Appeals Chamber considers that this mischaracterization of the evidence did not occasion a miscarriage of justice. It is not of vital importance for the appreciation of the alibi evidence whether Witnesses ALR and ALB were together most of the time or only some of the time during the relevant period. What is significant is that the Trial Chamber found, after hearing the alibi witnesses testify before it and considering their testimonies in light of all the evidence, that the witnesses "ended up relating stories that appeared designed for a purpose."[435] As recalled above, it was for this reason that the Trial Chamber found the alibi witnesses' testimonies not credible. The Appeals Chamber finds that the Appellant has not established that the Trial Chamber erred in that overall finding.

187. The Appellant also submits that while the Trial Chamber found that "there are some contradictions" in the testimonies of Witnesses ALR and ALB, it did not point out any contradiction in their accounts.[436] The Appeals Chamber notes that the Appellant has not developed this argument in any way beyond mentioning it in one sentence in the Appeal Brief, failing to specify whether the Trial Chamber's finding amounts to an error of law or fact and provide any support for his contention.[437] The Appeals Chamber reiterates that it cannot be expected to consider submissions that are presented in a vague or insufficient manner.[438] Nevertheless, the Appeals Chamber notes that the testimonies of Witnesses ALR and ALB indeed did differ in certain respects.[439] Consequently, the Trial Chamber's finding of "some contradictions" is not unreasonable. Moreover, the fact that the Trial Chamber did not bother detailing the contradictions is a further indication that it did not intend to rely on them to any

[434] T. 5 September 2002 pp. 109-111, 118-122.
[435] *See* Trial Judgement, para. 176.
[436] Appeal Brief, paras. 263, 264.
[437] The Appeals Chamber notes that the Appellant has reiterated this submission in the Reply Brief and during the hearing of the appeal without, however, clarifying or substantiating it. *See also* Reply Brief, paras. 59, 60; T. 19 May 2005 pp. 56, 57.
[438] *See* Chapter I. *See also Kajelijeli* Appeal Judgement, para. 7; *Blaškic* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 10; *Vasiljevic* Appeal Judgement, para. 12; *Kunarac et al*. Appeal Judgement, paras. 43, 48.
[439] *Cf, e.g.*, T. 3 September 2002 p. 69 (Witness ALR) and T. 5 September 2002 p. 111 (Witness ALB); T. 3 September 2002 p. 66 (Witness ALR) and 5 September 2002 p. 118 (Witness ALB).

significant degree in its conclusion that the alibi witnesses were not credible, but rather relied on its sense that the witnesses' stories seemed concocted.

188. For the foregoing reasons, the Appeals Chamber, Judge Weinberg de Roca dissenting, dismisses the present sub-ground of appeal.

F. Alleged Error in Noting That the Appellant Did Not Fully Explain the Situation at the House of Witness ALS

189. The Appellant submits that the Trial Chamber erred in fact when it noted the following in the Judgement:[440]

> The Chamber has also noted that the Accused in his testimony does not really go into detail as to what the men who were in ALS's house did during that period. The Chamber notes that the Accused just testified that they were together 24 hours a day and that he does not really state what the exact routine was during that 24 hour period.[441]

190. The Appellant, pointing to the record, argues that he provided such details.[442]

191. The Prosecution responds that the Trial Chamber was entitled to make an observation about the vague account the Appellant gave of his time during the alibi period and adds that the observation "merely identifies one factor that the Chamber properly used in assessing the evidence, to determine whether the alibi could reasonably possibly be true…."[443]

192. The Appeals Chamber notes that while the Appellant provided an account of the routine followed during the period of his alibi,[444] the Trial Chamber's characterization of this account as not particularly detailed was reasonable. Accordingly, the Appeals Chamber finds that the Appellant has not established that the Trial Chamber erred in fact in making such an observation.

193. The Appellant also submits, in summary form, that in making the impugned observation about the Appellant's testimony, the Trial Chamber appeared to reverse the burden of proof.[445] The Appeals Chamber disagrees. As discussed in the following sub-section, the Appeals Chamber finds that the Appellant has not demonstrated that the Trial Chamber erred in law in respect of the burden of proof applicable to alibi.

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[440] Appeal Brief, para. 266.
[441] Trial Judgement, para. 173.
[442] Appeal Brief, paras. 266, 268.
[443] Respondent's Brief, para. 86.
[444] *See* T. 21 August 2002 pp. 24, 25, 28; T. 27 August 2002 pp. 48-89.
[445] Appeal Brief, paras. 266, 267.

194. Accordingly, the Appeals Chamber, Judge Weinberg de Roca dissenting, dismisses this sub-ground of appeal.

G. Alleged Error in Finding That Witnesses ALB and ALM Did Not Rule Out the Possibility That the Appellant Was in Gikomero

195. The Appellant submits that the Trial Chamber erred in law and fact in holding that the testimonies of Witnesses ALB and ALM did not rule out the possibility that the Appellant was present in Gikomero.[446] The Appellant argues that such a holding reverses the burden of proof and adds that as regards the testimony of Witness ALB, the Trial Chamber did not state in what way his evidence did not rule out the possibility that the Appellant went to Gikomero.[447]

196. The Prosecution responds that the Trial Chamber's conclusion in respect of the weight and impact of the testimonies of Witnesses ALB and ALM was reasonable.[448] Moreover, in the Prosecution's view, the Trial Chamber did not reverse the burden of proof, "but was merely observing that the defence evidence in question failed to raise a reasonable doubt, when considered in the light of the prosecution case, generally because the evidence proffered by the Appellant was not incompatible, even if accepted, with his guilt, as established by the prosecution evidence."[449]

197. The Appeals Chamber notes that the Trial Chamber formulated the burden of proof regarding the alibi in the following terms:

> 83. As has been held by the Appeals Chamber in the *Celibici* [sic] *Case*, the submission of an alibi by the Defence does not constitute a defence in its proper sense. The relevant section of the judgment reads:
>
> "It is a common misuse of the word to describe an alibi as a "Defence". If a defendant raises an alibi, he is merely denying that he was in a position to commit the crime with which he is charged. That is not a Defence in its true sense at all. By raising this issue, the defendant does no more [than] require the Prosecution to eliminate the reasonable possibility that the alibi is true."
>
> 84. Therefore, as consistently held throughout the jurisprudence of the Tribunal and as asserted by the Defence, when an alibi is submitted by the Accused the burden of proof rests upon the Prosecution to prove its case beyond a reasonable doubt in all aspects. Indeed, the Prosecution must prove "that the accused was present and committed the crimes for which he is charged and thereby discredit the alibi defence". If the alibi is reasonably possibly true, it will be successful.

[446] Appeal Brief, paras. 83, 85, 91, 92, 269-275.
[447] Appeal Brief, paras. 85, 91, 92, 269-273, 275.
[448] Respondent's Brief, para. 87.
[449] Respondent's Brief, para. 46.

> 85. Pursuant to Rule 67(A)(ii), the Defence is solely required at the pre-trial phase—in addition to the notification of his intention to rely on the alibi—to disclose to the Prosecution the evidence upon which the Defence intends to rely to establish the alibi. Thus, during the trial the Defence bears no onus of proof of the facts in order to avoid conviction. But, during the trial, the Accused may adduce evidence, including evidence of alibi, in order to raise reasonable doubt regarding the case for the Prosecution. It must be stressed, however, that the failure of the Defence to submit credible and reliable evidence of the Accused's alibi must not be construed as an indication of his guilt.[450]

198. The Appeals Chamber finds no error in this statement and considers that it indicates the Trial Chamber's correct conception of the burden of proof regarding the alibi. Read against this background, the Trial Chamber's use of terms such as that certain testimony did not "exonerate" the Appellant from being at a crime site,[451] or that certain testimony "cannot foreclose" the possibility that the Appellant was at a crime site,[452] or that certain testimony does not "exclude" the possibility that the Appellant went to the crime site,[453] does not indicate a reversal of the burden of proof. Rather, when considered in the proper context of the entire discussion of such evidence, the Appeals Chamber understands these terms to mean that even if fully accepted as true, such evidence, in the view of the Trial Chamber, would be insufficient to cast a reasonable doubt on the evidence showing that the Appellant was at the crime site. Accordingly, the Appeals Chamber dismisses the Appellant's submission that the Trial Chamber erred in law by reversing the burden of proof regarding the alibi.

199. The Appeals Chamber also rejects the Appellant's contention that the Trial Chamber did not explain in what way the testimony of Witness ALB did not rule out the possibility that the Appellant went to Gikomero. The Appeals Chamber notes that the Trial Chamber devoted an entire paragraph of the Trial Judgement to considering this very matter.[454] The Appellant has failed to demonstrate any error on the part of the Trial Chamber on this point.

200. Accordingly, the Appeals Chamber, Judge Weinberg de Roca dissenting, dismisses the present sub-ground of appeal.

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[450] Trial Judgement, paras. 83-85 (citations omitted).
[451] Trial Judgement, para. 174.
[452] Trial Judgement, para. 174.
[453] Trial Judgement, para. 175.
[454] *See* Trial Judgement, para. 174.

H. Alleged Error in Finding That Patrols Were Mounted to Protect Families From Looters

201. The Appellant submits that the Trial Chamber erred in law and in fact when it found as follows:[455]

> The Chamber has carefully analysed these testimonies and finds it incredible that a patrol as intensive as this would be mounted just to protect the Witnesses and their families from looters. The Chamber finds that in an attempt to provide an alibi for the Accused, the Witnesses ended up relating stories that appeared designed for a purpose and therefore not credible.[456]

202. The Appellant argues that the Prosecution did not challenge the existence of the patrols and that when cross-examining Witnesses ALS and ALF and, in particular, Witness ALB, the Prosecution admitted their existence.[457] He contends that the Tribunal's jurisprudence holds that "a party who fails to cross-examine a witness upon a particular statement tacitly accepts the truth of the witness's evidence on the matter."[458] Consequently, in the Appellant's view, the Trial Chamber committed an error of law when it rejected the evidence of patrols which was not called into question by the Prosecution.[459]

203. The Prosecution responds that it did not accept the account of the night patrols given by the alibi witnesses and that the Trial Chamber made no error in its assessment of the witnesses and evidence on this point.[460] Moreover, the Prosecution points out that it was not the existence of the patrols that was at issue, but rather their intensity.[461] Finally, the Prosecution argues that whatever position the parties may take, the Trial Chamber has the ultimate responsibility for assessing the evidence and making factual findings.[462]

204. The Appeals Chamber considers that regardless of any position which parties may take in respect of certain evidence, it is for the trier of fact alone to assess that evidence and reach its findings accordingly. In other words, whether or not a party challenges certain evidence at trial does not dictate to the trier of fact how it should assess that evidence and what findings it is to reach in respect of it. The Appellant's reliance on the *Rutaganda* Appeal Judgement[463] in support of its allegation of an error of law in this regard is misplaced. The point addressed in *Rutaganda*

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[455] Appeal Brief, paras. 71-78, 276-279.
[456] Trial Judgement, para. 176.
[457] Appeal Brief, para. 73. *See also* Reply Brief, para. 15.
[458] Appeal Brief, para. 77, quoting *Rutaganda* Appeal Judgement, para. 310.
[459] Appeal Brief, para. 78; Reply Brief, para. 19.
[460] Respondent's Brief, paras. 40, 88.
[461] Respondent's Brief, para. 41.
[462] Respondent's Brief, para. 42.
[463] *See* Appeal Brief, para. 77, citing *Rutaganda* Appeal Judgement, para. 310.

was whether the Trial Chamber erred in inferring that where the Defence did not cross-examine a witness on some of his testimony it meant that it did not challenge the truth of the evidence given in that testimony.[464] The Appeals Chamber held that such an inference would not constitute an error of law.[465] However, *Rutaganda* does not stand for the proposition that a trier of fact *must* infer that statements not challenged during cross-examination are true. The Trial Chamber was free to decline to so infer, as it did here.

205. Accordingly, the Appeals Chamber dismisses the present allegation of an error of law.

206. The Appellant also argues that the Trial Chamber's finding constituted an error of fact.[466] He observes that the existence of the patrols was undisputed by the Prosecution and supported by other evidence in the record, including the testimony of Witness ALM, who stated that he participated in a patrol in his neighbourhood, and that of a Defence expert witness who explained the reasons for the patrols.[467] The Appeals Chamber observes that the Appellant did not provide any references to the record which would enable the Appeals Chamber to review the relevant portions of the testimony of the expert witness and Witness ALM on the issue of patrols. The Appeals Chamber again stresses that it cannot assess the merits of submissions which are not presented properly.[468] The Appeals Chamber, Judge Weinberg de Roca dissenting, therefore dismisses this sub-ground of appeal without further consideration.

I. Alleged Error in Finding That the Alibi is Not Credible

207. In conclusion, the Appellant submits that the Trial Chamber erred in its overall assessment of the alibi.[469] The Appellant asserts that the Trial Chamber assessed the alibi in a fragmented fashion, failed to assess the alibi evidence thoroughly, and misrepresented testimonies of witnesses.[470] The Appellant submits that the alibi witnesses confirmed, without contradictions, that he was in Kacyiru from 7 to 18 April 1994, only leaving on 8 April to pick up his son and on 18 April to go to Gitarama, and that the Trial Chamber erred in finding the alibi not credible and

[464] *Rutaganda* Appeal Judgement, para. 310.
[465] *Rutaganda* Appeal Judgement, para. 310.
[466] *See* Appeal Brief, paras. 276-279, referring to Trial Judgement, para. 176.
[467] Appeal Brief, para. 279.
[468] *See* Chapter I.
[469] Appeal Brief, paras. 280-287.
[470] Appeal Brief, paras. 112, 280, 283, 284. *See also* T. 19 May 2005 p. 60.

dismissing it.[471] The Appellant urges the Appeals Chamber to set aside the Trial Chamber's findings on the alibi and assess the alibi evidence on its own.[472]

208. The Prosecution responds that the Trial Chamber's rejection of the alibi was reasonable.[473] In the Prosecution's view, the Trial Chamber acted within the scope of its recognized discretion in assessing the testimony of the witnesses and determining what weight to give to their evidence.[474] The Prosecution argues that the Trial Chamber did not assess the alibi in a fragmented fashion, but rather "weighed all of the different testimonies that [had] been adduced" in order to reach its conclusion.[475]

209. Having addressed the allegations of errors relating to the Trial Chamber's assessment of the testimonies of individual alibi witnesses in the foregoing sections, the Appeals Chamber considers here whether, as the Appellant asserts, the Trial Chamber assessed the alibi in a fragmented fashion, leading it to err in its overall evaluation. The Appeals Chamber notes the Appellant's reference to the *Kayishema and Ruzindana* Appeal Judgement, stating that whenever a Trial Chamber's approach to the assessment of evidence "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."[476]

210. The Appeals Chamber finds that a review of the Trial Judgement disproves the Appellant's present contention of error. After reviewing the alibi evidence at length, the Trial Chamber concluded as follows:

> The Chamber has weighed all the different testimonies that have been adduced and comes to the following conclusion as to the alibi of the Accused. In coming to its conclusion about the alibi of the Accused, the Chamber noted in particular the testimonies of the different Witnesses as to the patrols that took place in the quarter from 7 April 1994 to 17 April 1994. The Chamber noted the testimonies of these Witnesses that these patrols were mounted primarily to protect them and their families from looters. The Chamber has also noted from the testimonies that these patrols were very intensive and around the clock. The Chamber has carefully analysed these testimonies and finds it incredible that a patrol as intensive as this would be mounted just to protect the Witnesses and their families from looters. The Chamber finds that in an attempt to provide an alibi for the Accused, the Witnesses ended up relating stories that appeared designed for a purpose and therefore not credible. The Chamber finds that the Accused may have been at the

[471] Appeal Brief, paras. 284-287.
[472] Appeal Brief, para. 284.
[473] Respondent's Brief, para. 90.
[474] Respondent's Brief, para. 90.
[475] Respondent's Brief, para. 51, quoting Trial Judgement, para. 176. *See also* T. 19 May 2005 p. 86.
[476] *Kayishema and Ruzindana* Appeal Judgement, para. 119 (referred to in Appeal Brief, paras. 242, 243, 281; T. 19 May 2005 pp. 60, 61).

> house of Defence Witness ALS at times during 7 to 18 April 1994. The Chamber finds, however, that the Accused was able to travel to and from Gikomero *commune* between 6 and 17 April 1994. The Chamber refers to its earlier findings that it was not impossible for the Accused to move around from 6 April 1994 to 17 April 1994. The Chamber therefore finds that the alibi of the Accused from 6 April 1994 to 17 April 1994 is not credible.[477]

This discussion plainly shows that rather than considering the alibi evidence in a fragmented fashion, the Trial Chamber considered it as a whole. The Appeals Chamber, Judge Weinberg de Roca dissenting, therefore finds that the Appellant has not demonstrated any error in the Trial Chamber's method of assessing the alibi evidence and, accordingly, dismisses this last sub-ground of appeal relating to the alibi.

J. Additional Evidence

211. The Appeals Chamber will now turn to the examination of the Trial Chamber's finding in relation to the Appellant's presence at the Gikomero Parish Compound. With regard to this finding, the Appeals Chamber has admitted the additional evidence of two witnesses, Witnesses GAA and GEX.[478] The Appeals Chamber heard these witnesses together with two witnesses called in rebuttal, Witnesses GAG and GEK.[479]

1. Witness GAA

212. Witness GAA testified before the Trial Chamber that he had seen the Appellant at the Gikomero Parish Compound on 12 April 1994.[480] In fact, the Trial Chamber held that he was one of the three witnesses who had prior knowledge of the Appellant and were therefore capable of identifying him when he arrived at the compound.[481] With his motion to admit additional evidence, the Appellant presented a written declaration in which Witness GAA stated that he had never gone to Gikomero Parish in April 1994, that he had not seen the Appellant there, that many Prosecution witnesses had colluded prior to testifying to avoid contradictions, and that it was upon receiving information from Witness GEK that he had agreed to testify falsely.[482]

213. During the evidentiary hearing before the Appeals Chamber, Witness GAA testified that he had lied during trial when he stated that he had been at the Gikomero Parish Compound and that he had seen the Appellant there. In fact, the witness testified, he had sought refuge in Kibara,

[477] Trial Judgement, para. 176.
[478] Rule 115 Decision, para. 74.
[479] *See* T. 18 May 2005; T. 19 May 2005.
[480] Trial Judgement, paras. 330-334.
[481] Trial Judgement, para. 445.

not in Gikomero, and had never seen the Appellant in Gikomero.[483] When asked about his motive for giving allegedly false testimony at trial, Witness GAA testified that he had lost many members of his family. Therefore, when he was told by Witness GEK that the Appellant had been the leader of the attack, Witness GAA decided to do everything to have him prosecuted.[484] He agreed to help Witness GEK by locating survivors of the massacre. However, some of them declared that they had not seen the Appellant at the massacre. Only later did Witness GAA discover that the Appellant had never been at the parish.[485] Witness GAA denied that he had discussed the details of his trial testimony with other witnesses before testifying.[486]

214. The Appellant argues that, since Witness GAA retracted his evidence, his conviction by the Trial Chamber rests on the testimony of only two witnesses who allegedly knew him prior to the events in 1994.[487]

215. If additional evidence admitted on appeal is subsequently determined by the Appeals Chamber to be irrelevant or not credible, it provides no basis for disturbing the Trial Chamber's judgement, since it could not have been a decisive factor if the Trial Chamber had considered it.[488]

216. The Appeals Chamber notes first that Witness GAA's testimony during the additional evidence hearing showed clear contradictions with his statement of March 2004, which was submitted as part of the Appellant's motion to admit additional evidence.[489] In the statement, Witness GAA explained that, after he had returned to his *cellule*, he had been appointed as *responsable de cellule* by the RPF administration. As part of his duties, Witness GAA stated, he had to investigate the persons responsible for the massacres. Because the majority of Tutsi from his *cellule* had been killed at Gikomero, Witness GAA continued, he went there to make inquiries. In the course of his inquiries, he took part in several meetings in Witness GEK's bar,

[482] Rule 115 Decision, para. 38.
[483] T. 18 May 2005 p. 3.
[484] T. 18 May 2005 p. 4.
[485] T. 18 May 2005 p. 5.
[486] T. 18 May 2005 p. 6.
[487] T. 19 May 2005 pp. 31, 35.
[488] *Kvocka* Appeal Judgement, para. 428. *See also Semanza* Appeal Judgement, paras. 171, 180; *Rutaganda* Appeal Judgement, paras. 488, 489.
[489] Admitted into evidence as Prosecution Exhibit ARP 1. T. 18 May 2005 p. 76.

during which, Witness GAA stated, "they" agreed upon the details of their testimonies against the Appellant.[490]

217. Before the Appeals Chamber, Witness GAA's testimony was quite different. He maintained that Witness GEK had taken the initiative to contact him, but stated that this had had nothing to do with his official responsibilities.[491] He also testified that he had had two meetings with Witness GEK. Only during the first meeting was she accompanied by two persons. Further, Witness GAA testified that he was not aware of Witness GEK organizing meetings of a group of people to discuss the case against the Appellant.[492]

218. When Witness GAA was asked during the evidentiary hearing how he knew some of the details which he had given during his allegedly false testimony at trial, he answered that he had invented them. Amongst other details, Witness GAA claimed to have invented the fact, set out in a statement given to the Prosecution in 1999, that the Appellant "headed for his native village". Witness GAA maintained during his testimony before the Appeals Chamber that in fact he did not know the Appellant's native village in 1994. Witness GAA also explained that he had invented the fact that the Appellant arrived in a white truck at the compound.[493]

219. The Appeals Chamber finds it to be highly implausible that Witness GAA would have been able to invent these details, which are corroborated by other evidence. Moreover, his testimony that he invented these details on his own is inconsistent with his own written statement, attached to the Appellant's motion to admit additional evidence, that the witnesses had colluded to harmonize their respective testimony. This inconsistency undermines the credibility of both explanations.

220. The Appeals Chamber notes that Witness GAA was consistent for many years in his statements that he had been at the Gikomero Parish in 1994, and that he had seen the Appellant there. This started with a statement given to the Rwandan authorities in 1995, and continued through 1999, when he gave his statement to the Prosecution, and 2001, when he testified before the Trial Chamber.[494] The Appeals Chamber also notes that Witness GAA, when he allegedly decided to tell the truth in 2004, neither contacted the Prosecution nor the Tribunal, but instead

[490] Prosecution Exhibit ARP 1 ("*Nous nous sommes mis d'accord lors de nos réunions sur les termes que nous devions utiliser pour éviter les contradictions*").
[491] T. 18 May 2005 p. 18.
[492] T. 18 May 2005 p. 31.
[493] T. 18 May 2005 p. 33.

contacted the Defence and subsequently went to a notary in Kigali, whose fee he had to pay himself.[495]

221. The Appeals Chamber therefore finds that Witness GAA's recantation during the evidentiary hearing in May 2005 is not credible. Thus, the Appeals Chamber concludes that Witness GAA's additional evidence could not have been a decisive factor in reaching the decision at trial. Because of the consistency of his earlier statements, and the corroboration by other witnesses, a reasonable trier of fact could still rely on Witness GAA's trial evidence. Thus, the Defence failed to verify those facts presented in its Rule 115 Motion as alleged knowledge of Witness GAA.

2. Witness GEX

222. Prior to the trial phase, Witness GEX provided a statement to the Prosecution stating that the Appellant was present at the Gikomero Parish Compound on 12 April 1994 and that he had started the attack by saying the word "mukore", meaning "to work". The Prosecution disclosed this statement to the Defence, but did not call Witness GEX to testify at trial.[496] With his motion to admit additional evidence, the Appellant submitted a new statement by Witness GEX stating that, in reality, she had not seen the Appellant at the compound, and that several witnesses had colluded to incriminate the Appellant.[497]

223. Witness GEX testified before the Appeals Chamber that she had been at Gikomero and had seen the killing of the preacher Augustin Bucundura. However, she maintained that contrary to her earlier statement given to the Prosecution, she had not seen the Appellant at the scene, nor had she heard his name spoken there.[498] Witness GEX explained that it was only after the events that she had been told by two persons, a man and a woman, that the Appellant was responsible for the massacre.[499] The man, Witness GAA, had told her that he had been given this information by Witness GEK.[500] Prior to making her first statement, she had spoken with Witness GAA and another person about the contents of her statement, and both of them suggested that she claim to

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[494] T. 18 May 2005 p. 26.
[495] T. 18 May 2005 pp. 22, 26, 27.
[496] *Kamuhanda*, Decision on Appellant's Motion for Admission of Additional Evidence on Appeal, 12 April 2005, para. 41.
[497] *Kamuhanda*, Decision on Appellant's Motion for Admission of Additional Evidence on Appeal, 12 April 2005, para. 42.
[498] T. 18 May 2005 p. 45.
[499] T. 18 May 2005 p. 48.
[500] T. 18 May 2005 p. 50.

have heard the Appellant's name from a person called Nzaramba.[501] Witness GEX testified that she had never met Witness GEK personally, but that she was convinced that Witness GEK executed a plan against the Appellant.[502]

224. With regard to Witness GEX, the Appellant submits that her new evidence shows that a certain number of individuals had indicated that the Appellant had been at the Gikomero Parish Compound, although they had never seen him there, thus casting doubt on the testimony of the witnesses who had testified that they had heard that the Appellant led the attack.[503]

225. The Appeals Chamber recalls that Witness GEX's additional evidence was admitted to assist in the assessment of the credibility and reliability of Witness GAA's additional evidence.[504] Witness GEX's testimony before the Appeals Chamber does not support the contention that Witness GEK organized meetings where a conspiracy to get the Appellant convicted was planned.[505] Moreover, the credibility of Witness GEX's testimony at the appeal hearing is undermined by another discrepancy. According to Witness GEX's written statement to the Prosecution, some local traders at the Gikomero Parish Compound shouted "There is Kamuhanda".[506] During her testimony before the Appeals Chamber, Witness GEX emphasized that she had been told to say that the Appellant's name was mentioned by a person called Nzaramba.[507] However, the name "Nzaramba" is not mentioned in her written statement.[508] The Appeals Chamber considers that Witness GEX's confusing attempt to recant a statement that was not in her written statement undermines the credibility of the recantation. Finally, the Appeals Chamber also notes that Witness GEX, like Witness GAA, did not contact the Prosecution to correct her allegedly false earlier statement, but instead went together with Witness GAA to the notary in Kigali to do so by means of an affidavit.[509]

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[501] T. 18 May 2005 p. 52.
[502] T. 18 May 2005 p. 69.
[503] T. 19 May 2005 p. 32.
[504] *Kamuhanda*, Decision on Appellant's Motion for Admission of Additional Evidence on Appeal, 12 April 2005, para. 53.
[505] T. 18 May 2005 p. 68.
[506] Prosecution Exhibit ARP 5, T. 18 May 2005 p. 76. During cross-examination, Witness GEX denied that she stated that the Appellant's name had been shouted by residents of Gikomero. But she was unable to give an explanation as to how this information found its way into her statement, which was read back to her in Kinyarwanda. T. 18 May 2005 pp. 61, 62.
[507] T. 18 May 2005 p. 52.
[508] T. 18 May 2005 p. 61.
[509] T. 18 May 2005 p. 22.

226. The Appeals Chamber concludes that Witness GEX's testimony during the evidentiary hearing in May 2005 is unreliable. The Appeals Chamber finds that there is no evidence supporting a collusion of the Prosecution witnesses with the goal to testify falsely against the Appellant.

3. Evidence in Rebuttal

227. Witnesses GAG and GEK were called by the Prosecution to rebut the additional evidence given by Witnesses GAA and GEX. The Appeals Chamber, having found that the additional evidence could not affect the Trial Chamber's decision, does not consider it necessary to discuss the rebuttal evidence, and notes only that both rebuttal witnesses testified during the evidentiary hearing that they had told the truth before the Trial Chamber.[510]

4. "Additional Information"

228. The Appeals Chamber did not consider the Prosecutor's Filing of Additional Information relating to the rebuttal testimony of Witness GAG.[511]

5. Conclusion

229. In summary, the Appeals Chamber dismissed the additional evidence in its entirety. It will, therefore, rely on the evidence on the trial record in dealing with this appeal.

K. Finding that the Appellant was Present at the Gikomero Parish Compound

230. The Appellant submits that in convicting him, the Trial Chamber relied primarily on the testimony of Witnesses GAF, GES, and GAA, who had attested to having known him prior to the massacre at Gikomero.[512] The Appellant argues that the Trial Chamber erred in fact when it concluded that these witnesses knew him prior to 12 April 1994, and that they were thus able to

[510] T. 18 May 2005 p. 83 (Witness GAG); T. 19 May 2005 p. 3 (Witness GEG).

[511] Prosecutor's Filing of Additional Information in relation to the Rule 115 Evidentiary Hearing Held on 18 and 19 May 2005, 8 July 2005. After the conclusion of the evidentiary hearing on 19 May 2005, the Prosecution could only seek the Appeals Chamber's consideration of the additional information through a motion pursuant to Rule 115 of the Rules. However, the Prosecutor's Filing of Additional Information does not meet the prerequisites of a Rule 115 motion, as it does not include any submission in relation, *inter alia*, to its credibility and relevance, and as to whether it could have been a decisive factor in reaching the decision at trial. Also, as Rule 115 is *lex specialis* for the admission of evidence on appeal, the request of the Prosecution could not be based on the general Rule 54 of the Rules. Finally, the Appeals Chamber did not deem it necessary to act pursuant to Rule 98 of the Rules. It must be also noted that the Appellant is not prejudiced by the non-consideration of the additional information as he sought the dismissal of the Prosecutor's Filing of Additional Information (*cf.* Conclusions en réplique à la requête du Procureur du 8 juillet 2005, p. 7).

identify him on that date.[513] In this context, the Appellant refers to his earlier arguments relating to identification evidence.[514]

231. The Appeals Chamber notes that the Appellant's summary of the Trial Chamber's reasoning is incomplete. The Appellant only refers to his identification by Witnesses GAF, GES, and GAA, and the corroborating evidence provided by other Prosecution witnesses. In addition, the Trial Chamber relied also on Witnesses GEK and GEB, who had testified that they had seen the Appellant in a vehicle in Gikomero Commune on 12 April 1994, shortly before the massacres began.[515] The Appellant does not address the evidence provided by these two witnesses relating to his presence in Gikomero Commune on 12 April 1994. While the Appellant challenges the credibility of Witness GEK in general, the Appeals Chamber recalls its earlier finding that the Appellant has not shown that the Trial Chamber erred in relying on her testimony.[516] With regard to Witness GEB, the Appellant only submits that this witness was not credible because of alleged contradictions in his testimony in general, without particular reference to Witness GEB's testimony about the presence of the Appellant in Gikomero Commune shortly before the massacres.[517]

1. Alleged Errors of Law Relating to the Identification of the Appellant

(a) Reliability and Credibility

232. The Appellant submits that the Trial Chamber erred in law by disregarding the standards established by the jurisprudence of both the ICTR and the ICTY regarding identification evidence. In particular, he argues that although the Trial Chamber correctly recognized that it had to assess the credibility of the witnesses and the reliability of their evidence independently, it failed to adhere to this standard.[518]

233. The Prosecution responds that the Trial Chamber correctly distinguished between the credibility of the witnesses and the reliability of the information provided by them. The

[512] Appeal Brief, paras. 340, 341.
[513] Appeal Brief, para. 345.
[514] Appeal Brief, para. 346.
[515] Trial Judgement, paras. 439 (Witness GEK), 441 (Witness GEB).
[516] *See* Chapter X.
[517] Appeal Brief, para. 123.
[518] Appeal Brief, paras. 96-100.

Prosecution points to the examples of Witness GEM, whose evidence the Trial Chamber found not reliable, and Witness GEI, whom the Trial Chamber found not credible.[519]

234. The Appeals Chamber observes that it is well established in the jurisprudence of the ICTR and the ICTY that "a reasonable Trial Chamber must take into account the difficulties associated with identification evidence in a particular case and must carefully evaluate any such evidence, before accepting it as the sole basis for sustaining a conviction".[520] In particular, the Trial Chamber has to assess the credibility of the witness and determine whether the evidence provided by the witness is reliable.[521] A witness may be credible—*i.e.*, in general worthy of belief[522]—and still not, *in concreto*, trustworthy, because she may simply be mistaken due to difficulties in observation.

235. In paragraphs 445 to 449 of the Trial Judgement, the Trial Chamber analyzed the testimony of Witnesses GAF, GAA, and GES and arrived, with regard to Witness GAF by majority, at the conclusion that they were credible. The Trial Chamber then went on to assess the evidence of Witnesses GAF, GES, and GAA with respect to their identification of the Appellant.[523] In doing so, the Trial Chamber took into account the distance between the witnesses and the Appellant's position and the fact that their observations were made in broad daylight.

236. With regard to the testimony of Witness GEU, the Trial Chamber disregarded it because the basis of his account was "uncorroborated hearsay, and anyhow of questionable credibility".[524] The Trial Chamber found Witness GEM's evidence to be unreliable on issues of time and numbers,[525] and considered Witness GEI's testimony to be implausible and therefore not credible.[526] The Appeals Chamber concludes that the Appellant's assertion that the Trial Chamber did not assess the reliability of the evidence before it is unfounded. The Trial Chamber's method of assessing the evidence as such was beyond reproach. The Trial Chamber correctly distinguished between the credibility of the witnesses and the reliability of the information provided by them. In its assessment of the reliability, it took into account the conditions under

[519] Respondent's Brief, para. 109.
[520] *Kupreškic et al.* Appeal Judgement, para. 34. *See also Niyitegeka* Appeal Judgement, paras. 100, 101.
[521] *Musema* Appeal Judgement, para. 90; *Kupreškic et al.* Appeal Judgement, paras. 138, 139; *Vasiljevi}* Trial Judgement, para. 16; *Kunarac et al.*, Decision on Motion for Acquittal, 3 July 2000, para. 8.
[522] Black's Law Dictionary, 8th edition (St. Paul, West Group, 2004), p. 396. *See also* "credible witness" : a witness whose testimony is believable. *Id.* p. 1633.
[523] Trial Judgement, para. 450.
[524] Trial Judgement, para. 442.
[525] Trial Judgement, para. 459.
[526] Trial Judgement, para. 457.

which the observations were made. Accordingly, the Appellant's arguments in this respect are dismissed.

(b) Corroborative and Circumstantial Evidence

237. In a related argument, the Appellant submits that the Trial Chamber erred by varying its assessment test for the witnesses who did not know him before 12 April 1994. He argues that instead of analyzing the reliability of their identification, the Trial Chamber relied on the corroboration of their accounts.[527] In his view, the mere fact that these witnesses had heard the name of the Appellant when the vehicles arrived at the Gikomero Parish Compound, was insufficient to identify him.[528] The Appellant submits that this approach of the Trial Chamber is inconsistent with its own finding that corroboration does not necessarily establish the credibility of a testimony.[529]

238. The Prosecution argues that the testimonies of the witnesses who lacked prior knowledge of the Appellant constituted corroborative evidence on which the Trial Chamber was free to rely.[530] The Prosecution submits that the evidence of this group was partly circumstantial, but that as such, it is not necessary that it proves the guilt of the Appellant on its own, merely that it forms part of a chain of evidence which establishes guilt.[531]

239. In paragraph 40 of the Trial Judgement, the Trial Chamber quoted the *Musema* Trial Judgement to the effect that a Trial Chamber is not bound by any rule of corroboration, but

> may freely assess the relevance and credibility of all evidence presented to it. The Chamber notes that this freedom to assess evidence extends even to those testimonies which *are* corroborated: the corroboration of testimonies, even by many Witnesses, does not establish absolutely the credibility of those testimonies.[532]

The Appeals Chamber finds that the Trial Chamber's approach to corroborative evidence, as articulated above, is correct.[533] Contrary to the Appellant's assertion, the Trial Chamber's assessment of the evidence is not inconsistent with this approach. The relevant parts of the Trial Judgement have to be read in the light of the statement in paragraph 40 of the Trial Judgement. The Trial Chamber correctly held that it is free to disregard evidence even if it is corroborated by

[527] Appeal Brief, para. 105.
[528] Appeal Brief, para. 105.
[529] Appeal Brief, para. 104.
[530] Respondent's Brief, para. 107.
[531] Respondent's Brief, para. 110.
[532] Trial Judgement, para. 40, quoting *Musema* Trial Judgement, para. 46 (emphasis in original).

other evidence. But this does not by any means suggest that the Trial Chamber is not *permitted* to take corroborative evidence into account; rather, it has discretion to do so. Nothing in the Trial Judgement suggests that the Trial Chamber found itself bound to accept the evidence of Witnesses GAF, GES, and GAA only because it was corroborated by other evidence.

240. The Appeals Chamber notes that evidence given by the witnesses who had not previously seen the Appellant should be accepted with caution.[534] However, the Trial Chamber relied on their testimonies as corroborative evidence of those witnesses who had actually recognized the Appellant.[535] The Trial Chamber concluded in respect of these witnesses that their "identification of the Accused"[536] was credible,[537] because they personally heard the name "Kamuhanda" shouted by other people present. The Appellant's argument that the Trial Chamber did not assess the reliability of their evidence according to the standards applicable to identification evidence is therefore inapposite.

241. The Appeals Chamber finds that a reasonable Trial Chamber could, based on a free assessment of the evidence before it, come to the conclusion beyond reasonable doubt as it did. The fact that the witnesses heard other refugees shouting the name "Kamuhanda" alone is indeed no proof of the fact that it was the Appellant who had arrived at the Gikomero Parish Compound. However, nothing prevents a conviction being based on circumstantial evidence.[538] The Appeals Chamber finds that the Trial Chamber was aware of the specific difficulties which have to be taken into account for the assessment of the mere shouting of "Kamuhanda".[539] The inference drawn from this, *i.e.* that other persons recognized the Appellant, is a possible one and, therefore, has to be accepted on appeal. The Trial Chamber clearly distinguished between the testimony of Witnesses GAF, GES, and GAA (who saw Kamuhanda) on the one hand, and those witnesses who heard the Appellant's name only on the other hand. The fact that, with regard to the latter group, the Trial Chamber found "that their testimonies provide further corroboration

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[533] *See also Musema* Appeal Judgement, paras. 37, 38.
[534] *Kupreški} et al.* Appeal Judgement, paras. 34, 39, 40.
[535] The eight witnesses are: Witness GEE (Trial Judgement, para. 453); Witness GEA (Trial Judgement, para. 454); Witness GEC (Trial Judgement, para. 455); Witness GEG (Trial Judgement, para. 456); Witness GAG (Trial Judgement, para. 458); Witness GEV (Trial Judgement, para. 460); Witness GEP (Trial Judgement, para. 461); Witness GEH (Trial Judgement, para. 462).
[536] *See, e.g.*, Trial Judgement, para. 453 (Witness GEE).
[537] *See* Trial Judgement, para. 465: "Due to the circumstances of the event, the Chamber finds nothing unusual in the fact that these Witnesses could not give the Chamber names of those shouting out the name "Kamuhanda", and therefore finds that this fact does not adversely affect their credibility".
[538] *Cf. Kupreškic et al.* Appeal Judgement, para. 303.
[539] *Cf.* Trial Judgement, para. 465.

regarding the identification of the Accused by other Witnesses with prior knowledge of the Accused"[540] indicates that the Trial Chamber was aware of the lesser probative value of their evidence and duly took it into account. This sub-ground of appeal is therefore dismissed.

2. Alleged Error in Relying on Witnesses GAF's, GES's, and GAA's Identification of the Accused

(a) Courtroom Identification

242. The Appellant argues that his identification in court by some of the witnesses was not sufficient to support the conclusions of the Trial Chamber. The Appellant repeats this argument several times;[541] but as this issue is of importance only regarding the testimony of Witnesses GAF, GES, and GAA, the Appeals Chamber addresses it in this context.

243. Regarding the issue of in-court identification, the Trial Chamber stated:

> The Chamber notes that in Court the Witnesses were not asked to look at a specific part of the Courtroom to identify the Accused. The Chamber is mindful of the fact that the Witnesses were asked to look in the Courtroom as a whole and see if they could identify the Accused. The Chamber notes further that the process of the identification of the Accused in the Courtroom does not stand in isolation: it is rather part of a process, the culmination of which is the identification of the Accused in the Courtroom.[542]

To the extent that the Trial Chamber's language suggests that weight should be given to an identification given for the first time by a witness while testifying, who identifies the accused while he is standing in the dock, it is misleading. Courts properly assign little or no credence to such identifications. The Appeals Chamber notes, for instance, that an ICTY Trial Chamber held in *Kunarac et al.*:

> Because all of the circumstances of a trial necessarily lead such a witness to identify the person on trial (or, where more than one person is on trial, the particular person on trial who most closely resembles the man who committed the offence charged), no positive probative weight has been given by the Trial Chamber to these "in court" identifications.[543]

This view was confirmed by the ICTY Appeals Chamber, which held "that the Trial Chamber was correct in giving no probative weight to in-court identification".[544] It is thus not sufficient to support the credibility of an in-court identification, contrary to the Trial Chamber's suggestion,

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[540] Trial Judgement, para. 465.
[541] *E.g.*, Appeal Brief, paras. 350, 370, 410.
[542] Trial Judgement, para. 63.
[543] *Kunarac et al.* Trial Judgement, para. 562.
[544] *Kunarac et al.* Appeal Judgement, para. 320.

that the witness be able to scan the whole courtroom for the accused, for the context of the trial makes it clear who the accused is.

244. The Appeals Chamber does not consider, however, that this misleading suggestion of the Trial Chamber amounted to an error invalidating the decision. The Trial Chamber made clear that the in-court identification was considered only as one element in a larger "process". Moreover, in the course of its evaluation of the evidence, the Trial Chamber apparently gave little weight to these identifications. The Trial Chamber noted, when it summarized the evidence, that Witnesses GAF, GES, and GAA identified the Appellant in court.[545] When evaluating the evidence, the Trial Chamber, in the case of Witness GAF, did not mention the courtroom identification at all. In the cases of Witnesses GES and GAA it did mention the courtroom identification among other factors without emphasizing this particular factor.[546] Having carefully reviewed the evidence on which the Trial Chamber based its findings that Witnesses GES and GAA identified the Appellant, the Appeals Chamber is satisfied that a reasonable trier of fact could have arrived at the conclusion that this identification was reliable even when disregarding the courtroom identification. The Trial Chamber thus did not commit any error invalidating the decision or occasioning a miscarriage of justice.

(b) Witness GAF

(i) Credibility

245. The Appellant submits that the Trial Chamber erred in fact when it relied on Witness GAF's testimony to establish the Appellant's presence at the Gikomero Parish Compound on 12 April 1994. He argues that the Trial Chamber's reliance on this witness was inconsistent with the fact that it did not believe this witness's testimony that the Appellant was known to be an influential politician before 1994. In addition, the Appellant submits, the witness was unable to relate any details about the Appellant, such as the names of his sisters.[547]

246. The Prosecution responds that the Trial Chamber's approach to Witness GAF's testimony was cautious and fair. It argues that the Trial Chamber was free to accept the fundamental

[545] Trial Judgement, paras. 316 (Witness GAF), 325 (Witness GES), 330 (Witness GAA). The Trial Chamber further noted that Witnesses GEB and GEI identified the Appellant in court (paras. 297, 363), but did not rely on their testimony.
[546] Trial Judgement, paras. 447 (Witness GES), 448 (Witness GAA).
[547] Appeal Brief, para. 353.

features of this testimony, in particular because they were supported by Witnesses GEK and GEB, and at the same time to reject the unsubstantiated parts of Witness GAF's testimony.[548]

247. The Appellant replies that Witness GAF's description of the Appellant as an influential politician in 1994 was related to the core of his testimony.[549] The Appellant submits that the witness had testified that he had seen the Appellant several times when the Appellant was a politician and an influential member of the MRND.[550]

248. The Appeals Chamber notes that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony.[551] Witness GAF had testified that he knew the Appellant because he had met him several times, for instance at the inauguration of the Kayanga Health Centre, and, in addition, that the Appellant "was very well known in his area […] He was known to be a very influential politician".[552] The majority of the Trial Chamber accepted that the witness had met the Appellant at the opening of the Kayanga Health Centre, noting that Witnesses GEK and GEB had confirmed the Appellant's presence at this event. The Appeals Chamber considers that the majority decision of the Trial Chamber to reject Witness GAF's unsubstantiated statement that the Appellant was an influential politician before 1994, but to rely on the testimony that the witness had met the Appellant at the opening of the Kayanga Health Centre and was thus able to identify him, was not unreasonable.

249. In a related argument, the Appellant submits that the Trial Chamber applied an incorrect standard of proof when it relied on Witness GAF's evidence. He argues that the Trial Chamber had accepted that the Appellant was living in Butare from 1990 to 1992. In his view, the Trial Chamber reversed the burden of proof when it found that, even if the Appellant had been posted in Butare at this time, this alone would not demonstrate the impossibility of his presence at the inauguration of the Kayanga Health Centre.[553]

250. The Appeals Chamber rejects this argument. The Trial Chamber observed "that even if the Accused had been posted in Butare at this time, this alone would not demonstrate the impossibility of the Accused's presence".[554] This does not mean that the Trial Chamber

[548] Respondent's Brief, para. 173.
[549] Reply Brief, para. 90.
[550] Reply Brief, para. 89.
[551] *Kupreškic et al*. Appeal Judgement, para. 333.
[552] T. 13 September 2001 p. 46.
[553] Appeal Brief, para. 88.
[554] Trial Judgement, para. 446.

considered that it was incumbent on the Appellant to prove that Witness GAF's testimony was false; the Trial Chamber was simply saying that the fact alone that the Appellant lived at a different place at the relevant time was insufficient to raise reasonable doubt about his presence at the opening of the Kayanga Health Centre, because it was possible for the Appellant to travel from his place of residence to an event in another *commune*.

(ii) Identification of the Appellant

251. The Appellant submits that his identification by Witness GAF was unreliable. He argues that the witness had testified that he had seen the Appellant at the Gikomero Parish Compound for one or two minutes. In the Appellant's view, this was insufficient to allow the witness to make the identification,[555] all the more so because "in all likelihood" panic broke out among the refugees once the attack began.[556] In addition, the Appellant refers to the contradictions in Witness GAF's testimony which were set out in Judge Maqutu's separate opinion, and with which he concurs.[557]

252. The Appeals Chamber is not convinced by the Appellant's arguments. Normally, it is possible to recognize a person within a time-span of one or two minutes, and a reasonable trier of fact can accept such an identification. The Appellant's speculation that "in all likelihood" panic broke out, preventing the witness from identifying the Appellant, is not supported by the Trial Record. Witness GAF testified that he recognized the Appellant when his vehicle was still approaching the Gikomero Parish Compound, whereas the refugees tried to flee after the vehicles had arrived and the attack had begun.[558] With regard to the Appellant's reference to Judge Maqutu's separate opinion, the Appeals Chamber recalls the view expressed by the ICTY Appeals Chamber in the *Tadic* Appeal Judgement that "two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence".[559] It is for the Appellant to show that the testimony in question could not have been accepted by any reasonable trier of fact and that the majority of the Trial Chamber was in error.[560] The Appellant has failed to do so here.

[555] Appeal Brief, para. 356.
[556] Appeal Brief, para. 357.
[557] Appeal Brief, para. 358, referring to Trial Judgement, Judge Maqutu's Separate and Concurring Opinion on the Verdict, paras. 44-47.
[558] T. 17 September 2001 pp. 4, 5, 22, 23.
[559] *Tadic* Appeal Judgement, para. 64.
[560] *Musema* Appeal Judgement, para. 92.

(c) Witness GES

253. The Appellant challenges his identification by Witness GES. He argues that the fact that both the Appellant and the witness had been members of the civil service was not sufficient proof to establish that the witness knew him.[561] Moreover, the Appellant adds, a close reading of Witness GES's testimony reveals that the witness knew only the Appellant's name, whereas the question was whether the witness could identify the Appellant.[562] In addition, the Appellant submits, Witness GES had claimed that he had seen the Appellant regularly between 1989 and 1994, whereas the Trial Chamber had accepted that the Appellant was posted in Butare from 1990 to 1992.[563] Finally, the Appellant argues that it was impossible for Witness GES to observe him on a regular basis, because their offices were located in different parts of the city, and not opposite each other, as the witness claimed.[564] Regarding Witness GES's testimony, the Appellant submits that the Trial Chamber did not assess the reliability of this information, and ignored contradictions between the testimonies of Witness GES and Witness GAF.[565] In a related argument, the Appellant submits that the Trial Chamber erred in fact by not taking into account his own explanations rebutting the testimony of Witness GES.[566]

254. The argument that the Trial Chamber disregarded the Appellant's explanations when it assessed Witness GES's testimony has already been addressed above.[567] Regarding the Appellant's submissions that the witness could not observe him on a regular basis, because their offices were located in different parts of the city, the Appeals Chamber notes that the Trial Chamber was aware of this argument, but was satisfied with Witness GES's explanations as to the location of his and the Appellant's office.[568] The Appellant has not shown that this was unreasonable.

255. Although Witness GES did testify that he knew the Appellant's name, he did not, contrary to the Appellant's contention, testify that this was all he knew of him. Rather, he testified that he had seen the Appellant at the ministry, and had no doubts that the person he had seen at Gikomero was the Appellant.

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[561] Appeal Brief, para. 361.
[562] Reply Brief, paras. 91, 92.
[563] Appeal Brief, para. 363.
[564] Appeal Brief, para. 364.
[565] Appeal Brief, paras. 365, 366.
[566] Appeal Brief, paras. 231, 232.
[567] *See* Chapter VIII.
[568] Trial Judgement, para. 447.

256. Regarding the Appellant's posting to Butare from 1990 to 1992, the Appeals Chamber notes that Witness GES did not testify that he saw the Appellant on a regular basis and emphasized that he did not monitor the Appellant's activities.[569] In addition, the witness estimated that he had known the Appellant for "around three years" when he saw him at the Gikomero Parish in 1994.[570] The Appeals Chamber notes further that Witness GES explained that the Institut de Recherche Scientifique et Technologique (IRST) in Butare, where the Appellant was posted from 1990 to 1992, was a research organization under the responsibility of the Ministry of Higher Education, so that, in the view of the witness, the Appellant still worked for this Ministry.[571] Given these circumstances, the Appeals Chamber finds that it was open to a reasonable trier of fact to conclude that Witness GES had prior knowledge of the Appellant.

257. The Appeals Chamber observes that, with his contention that the Trial Chamber did not assess the reliability of Witness GES's testimony, the Appellant claims that the Trial Chamber's reasoning is insufficient. The Appeals Chamber recalls that the Trial Chamber is not obliged to refer to every piece of evidence in its judgement, nor does it have to articulate every step in its reasoning.[572] When assessing identification evidence, the Trial Chamber "must carefully articulate the factors relied upon in support of the identification of the accused and adequately address any significant factors impacting *negatively* on the reliability of the identification evidence".[573] In the opinion of the Appeals Chamber, the Trial Chamber gave sufficient reasons why it relied on Witness GES's testimony. Having carefully reviewed the Trial Record, the Appeals Chamber does not find any significant factors impacting negatively on the reliability of Witness GES's evidence. Accordingly, this sub-ground of appeal is dismissed. The alleged contradictions between Witness GES's and GAF's testimony will be considered below.[574]

(d) Witness GAA

(i) Prior Knowledge of the Appellant

258. The Appellant submits that the evidence Witness GAA gave to show his prior knowledge of the Appellant has no probative value. In the Appellant's view, the Trial Chamber relied on the

[569] T. 30 January 2002 p. 65.
[570] T. 29 January 2002 p. 116.
[571] T. 30 January 2002 pp. 71, 72.
[572] *See* Chapter VIII. *See also Kupreškic et al*. Appeal Judgement, para. 32.
[573] *Kupreškic* Appeal Judgement, para. 39 (emphasis added).
[574] *See* Chapter XI. K. 3.

fact that Witness GAA knew the Appellant's sister and her husband. This, the Appellant argues, does not mean that the witness knew the Appellant.[575]

259. The Appeals Chamber finds that the Appellant's representation of the relevant part of the Trial Judgement is misleading. The Trial Chamber did not base its finding that Witness GAA knew the Appellant on "the fact that he knew the [Appellant's] sister and her husband", as the Appellant puts it.[576] Rather, the Trial Chamber found that Witness GAA saw the Appellant on two occasions: at the birth of the Appellant's sister's child, and at the burial of the Appellant's sister. The Trial Chamber noted that Witness GAA did not speak to the Appellant on these occasions, but that the Appellant was pointed out to the witness.[577] The Appeals Chamber finds that the Appellant has not shown that it was unreasonable for the Trial Chamber to conclude that Witness GAA knew the Appellant prior to April 1994.

(ii) Identification of the Appellant

260. The Appellant submits that Witness GAA could not identify him with any certainty in court, that on 12 April 1994 the Witness had fled before he was able to identify the Appellant, and that the witness's evidence that the Appellant gave the order to kill the refugees was contradicted by Witnesses GEA, GEE, GEG, GEM, GAG, GEH, GES, and GEV.[578]

261. The Appeals Chamber notes that the Appellant does not provide any reference to support his assertion that Witness GAA could not identify him in court with certainty. When Witness GAA was asked if he had any doubts about his identification of the Appellant, he replied: "I have no doubt".[579]

262. Having reviewed the transcript of Witness GAA's trial testimony, the Appeals Chamber notes that the witness recounted clearly that he saw two vehicles arriving, with the Appellant in the second vehicle, and that he witnessed the start of the massacre and then fled when some persons were killed close to him.[580] The Appellant's argument that the witness was not able to see the Appellant is, therefore, without merit.

[575] Appeal Brief, paras. 370, 371.
[576] Appeal Brief, para. 370.
[577] Trial Judgement, para. 448.
[578] Appeal Brief, para. 372.
[579] T. 19 September 2001 p. 112.
[580] T. 20 September 2001 pp. 32, 33.

263. As to the Appellant's argument that Witness GAA's evidence was contradicted by the testimony of other witnesses, the Appeals Chamber observes that Witness GAA did not say directly that the Appellant gave the order to start the attack. Witness GAA recounted that, when the Appellant came out of his vehicle, he threw his arms up "as though to greet the people".[581] Later, when the attack began, people shouted "[g]et to work, Kamuhanda is here now".[582] The argument that his testimony was inconsistent with the testimony given by other witnesses, because they did not confirm that the Appellant gave the order to attack, is without merit. Given the circumstances in which various witnesses were in different places of the compound, some of them inside the classrooms,[583] a reasonable Trial Chamber could arrive at the conclusion that a certain fact was established, even if this fact was confirmed only by some of the witnesses. The fact that three witnesses[584] recounted that the Appellant gave a direct order to start the attack made it reasonable for the Trial Chamber to find that the Appellant ordered the attack.

3. Alleged Error in Relying on the Testimony of Witnesses GAF, GES, and GAA that the Appellant Participated in the Massacre

264. The Appellant submits that no reasonable trier of fact could have relied on the testimony of Witnesses GAF, GES, and GAA that he was present at the Gikomero Parish Compound because their evidence was inconsistent as to the material facts.[585]

265. With regard to Witness GAF, the Appellant argues that only this witness recounted that four vehicles arrived and that Augustin Bucundura, a Tutsi preacher, was shot while the vehicles were still in motion. Witnesses GES and GAA testified, in contrast, that Augustin Bucundura was shot after the Appellant had left his vehicle and had had a conversation with Pastor Nkuranga.[586] The Appellant further argues that, according to Witness GAF, the Appellant was the only person to leave his vehicle, that he said "Mukore", and that he left with three other vehicles one or two minutes after he had arrived. This, the Appellant argues, is contradicted by Witness GES's testimony that the Appellant left his vehicle together with the other occupants and then had a conversation with Pastor Nkuranga for about ten minutes.[587] In the Appellant's view, Witness

[581] T. 19 September 2001 p. 114.
[582] T. 19 September 2001 p. 115 (Witness GAA).
[583] *See, e.g.*, T. 18 September 2001 p. 8 (Witness GEE).
[584] Witnesses GAF, GEC, and GEP.
[585] Appeal Brief, para. 373.
[586] Appeal Brief, paras. 375-377.
[587] Appeal Brief, paras. 375, 376.

GAF's testimony does not support the findings in paragraphs 500 to 506 of the Trial Judgement.[588]

266. The Appeals Chamber notes that the evidence about the number of vehicles that arrived at the Gikomero Parish Compound on 12 April 1994 is unclear. Witness GAF mentioned four vehicles,[589] whereas other witnesses testified that they saw one,[590] two,[591] or three[592] vehicles. However, given the fact that the vehicles did not arrive at exactly the same time,[593] and that the witnesses observed the events from different locations within the compound, the Appeals Chamber finds that this inconsistency does not affect the core of their testimony.

267. The Appeals Chamber takes the same view in respect of Witness GAF's evidence regarding the shooting of Augustin Bucundura. As the Appellant points out, Witness GAF testified that Bucundura was shot while the vehicles were still moving whereas other witnesses testified that the vehicles had come to a stop at that point.[594] The Appellant also notes that Witness GAF did not mention a conversation between the Appellant and Pastor Nkuranga which was recounted by other witnesses.[595] The Appeals Chamber notes that Witness GAF testified that he had tried to hide near a corner of the church when he saw the vehicles approaching the compound.[596] He was still at this place when he heard the sound of a gunshot: "I was at that place and I heard the sound of gunshot. I turned around and I saw the preacher who was going down."[597] Considering the situation, the Appeals Chamber finds that a reasonable trier of fact could accept the fundamental features of Witness GAF's account of the events.

268. Regarding the argument that Witness GAF testified that only the Appellant left his vehicle, the Appeals Chamber notes that in fact the testimony was to the effect that the Appellant left his vehicle and told *those who came with him* to start to "work"; and the people *he had brought with*

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[588] Appeal Brief, para. 380.
[589] T. 13 September 2001 p. 42. This was confirmed by Witness GEC: T. 24 September 2001 p. 51.
[590] T. 29 January 2002 p. 106 (Witness GES).
[591] *E.g.*, T. 19 September 2001 pp. 104-106 (Witness GAA).
[592] *E.g.*, T. 18 September 2001 p. 6 (Witness GEE); T. 24 September 2001 p. 20 (Witness GEA); T. 25 September 2001 p. 18 (Witness GEG); T. 6 February 2002 p. 18 (Witness GEV).
[593] Most witnesses who had seen three vehicles testified that the Appellant's vehicle arrived first and then, after a short time-span, two others. *See* T. 18 September 2001 p. 6 (Witness GEE); T. 25 September 2001 p. 18 (Witness GEG); T. 6 February 2002 pp. 53, 54 (Witness GEV).
[594] T. 13 September 2001 pp. 45, 51.
[595] *E.g.*, T. 29 September 2001 p. 110 (Witness GES); T. 19 September 2001 p. 30 (Witness GEE); T. 20 September 2001 p. 79 (Witness GEA).
[596] T. 17 September 2001 p. 8.
[597] T. 17 September 2001 p. 19.

him started the killing,[598] implying that they also left the vehicle. This argument is, therefore, unfounded.

269. The Appeals Chamber finds that, contrary to the Appellant's assertion, Witness GAF's testimony supports a number of the findings made by the Trial Chamber in paragraphs 500 through 506 of the Trial Judgement: the Appellant's arrival at the Gikomero Parish Compound in a white vehicle in the early afternoon of 12 April 1994;[599] his order to the attackers to start to "work";[600] and the fact that Augustin Bucundura was shot by someone who arrived with the Appellant, while the Appellant was still at the compound.[601]

270. Also with regard to Witnesses GES and GAA, the Appellant points to the fact that they do not agree about the number of vehicles accompanying the Appellant on 12 April 1994. The Appellant argues that Witness GES testified that the Appellant had a conversation with Pastor Nkuranga for about ten minutes, then they were joined by Augustin Bucundura, who was subsequently shot, whereas Witness GAA recounted that Pastor Nkuranga came out of his house, accompanied by Bucundura, who was shot with three other people. In addition, the Appellant argues that neither Witness GES nor Witness GAA mentioned an order of the Appellant to start the killing.

271. The Trial Chamber was aware of the discrepancy between Witness GES's and Witness GAA's testimony in relation to the moment when Bucundura was killed, but still found that this discrepancy did not affect the substance of their testimony.[602]

272. The Appeals Chamber finds that it was not unreasonable for the Trial Chamber to disregard the discrepancies between Witness GES's and Witness GAA's versions of the events. The fact that the Appellant had a brief conversation with Pastor Nkuranga is well supported by other witnesses.[603] Whether Augustin Bucundura left the house together with Pastor Nkuranga, or whether he joined him a few minutes later, is not significant. The core of Witness GES's and Witness GAA's evidence is that the Appellant arrived, there was some kind of interaction with Pastor Nkuranga, and Augustin Bucundura was the first victim of the massacre, being shot by one

[598] T. 13 September 2001 pp. 47, 52.
[599] Trial Judgement, para. 501; T. 13 September 2001 pp. 41, 43.
[600] Trial Judgement, para. 502; T. 13 September 2001 pp. 47, 52.
[601] Trial Judgement, para. 503; T. 13 September 2001 pp. 45, 51; T. 17 September 2001 p. 19.
[602] Trial Judgement, para. 481.
[603] *E.g.*, T. 19 September 2001 p. 30 (Witness GEE); T. 25 September 2001 p. 20 (Witness GEG); T. 5 February 2002 p. 45 (Witness GAG); T. 6 February 2002 pp. 55, 61 (Witness GEV).

of the persons who accompanied the Appellant. With regard to these facts, Witness GES's and Witness GAA's testimony is consistent. Both witnesses even mentioned the detail hat Pastor Nkuranga told the attackers "I am Pastor Nkuranga" just before Bucundura was killed.[604]

273. The Appeals Chamber recalls that the additional evidence rendered by Witness GAA at the appeal stage was not credible and therefore could not have been a decisive factor in reaching the decision at trial.[605] The Appeals Chamber concludes that a reasonable trier of fact could rely on the trial testimony of Witnesses GAF, GES, and GAA regarding the Appellant's identification and his participation in the massacre.

4. Alleged Error in Relying on the Testimony of Witnesses GEE, GEA, GEC, GEG, GAG, GEV, GEP, and GEH that the Appellant Participated in the Massacre

274. The Appellant submits that Witnesses GEE, GEA, GEC, GEG, GAG, GEV, GEP, and GEH contradicted each other and did not corroborate Witnesses GES's, GAF's, and GAA's evidence. According to the Appellant, the Trial Chamber based the conviction on the following principal facts:

- the Appellant arrived at the Gikomero Parish Compound on 12 April 1994, accompanied by armed people;
- the Appellant stepped out of his vehicle and had a conversation with Pastor Nkuranga;
- after the conversation with the pastor, he gave the order to start the killing of the refugees;
- after the killings had started, the Appellant left.

The Appellant contends that no reasonable court could have relied on the evidence given by Witnesses GEE, GEA, GEC, GEG, GAG, GEV, GEP, and GEH to support these findings.[606]

[604] Witness GES: T. 30 January 2002 p. 48 ("'I am Pastor Nkuranga' and they shot Bucundura dead immediately."); Witness GAA: T. 19 September 2001 p. 114 ("I am Pastor Nkuranga, do not shoot at me").
[605] *See* Chapter XI.J.1.
[606] Appeal Brief, paras. 385, 386.

(a) The Appellant's Arrival at the Gikomero Parish Compound

275. The Appellant submits that only Witness GEG testified that the Appellant carried a rifle when he arrived at the Gikomero Parish Compound on 12 April 1994, showing that Witness GEG was in fact observing someone else.[607]

276. Witness GEG testified that, when the vehicles arrived, the refugees shouted: "That is Kamuhanda. Now that Kamuhanda is here, we are finished."[608] The Appeals Chamber finds that it was reasonable for the Trial Chamber to find that Witness GEG's evidence corroborated the finding that the Appellant led the attackers to the Gikomero Parish Compound. Regarding the question whether the Appellant was armed, the Trial Chamber was aware that Witness GEG was the sole witness to have testified to seeing the Appellant with a weapon at the Gikomero Parish Compound, but was of the opinion that Witness GEG may have been mistaken about that fact.[609] Given that Witness GEG mentioned the weapon only in cross-examination and had not mentioned a weapon in his statement given to the Prosecution before the trial,[610] it was not unreasonable for the Trial Chamber to disregard this part of the witness's evidence. The Appeals Chamber reiterates that a Trial Chamber is entitled to accept some, but reject other, parts of a witness's testimony.[611]

(b) The Appellant's Conversation with Pastor Nkuranga

277. The Appellant submits that Witness GEE did not testify to the conversation between Pastor Nkuranga and the person pointed out to Witness GEE as being the Appellant.[612] The Appeals Chamber notes that Witness GEE explicitly stated about the Appellant that "when his vehicle arrived, he came out of his vehicle and he spoke to a pastor called Nkuranga".[613] This argument is, therefore, without merit.

[607] Appeal Brief, para. 387.
[608] T. 25 September 2001 p. 19.
[609] Trial Judgement, para. 456.
[610] T. 25 September 2001 pp. 79-81.
[611] *See* Chapter XI.K.2.b.i.
[612] Appeal Brief, para. 389.
[613] T. 19 September 2001 p. 30.

(c) The Order to Start the Killing

278. The Appellant submits that the evidence about the order he allegedly gave to start the killing was contradictory.[614] The Prosecution responds that the Appellant is merely trying to renew factual arguments that were rejected by the Trial Chamber. In the Prosecution's view, the Trial Chamber addressed the inconsistencies upon which the Appellant relies to support his argument, and that, despite different vantage points during the massacre, the evidence given by the eight corroborating witnesses bore striking similarities.[615]

279. The Appellant argues that the Trial Chamber accepted Witness GAA's evidence to the effect that the Appellant had raised his hands as if greeting the people, and that the assailants, not the Appellant, had shouted "get to work". Other witnesses, the Appellant adds, did not mention that he made a gesture or gave an order.[616]

280. The Trial Chamber based its findings "on the totality of the evidence".[617] It is therefore misleading to state that the Trial Chamber "accepted" Witness GAA's evidence; the Trial Chamber was aware of the differences between the testimonies of Witnesses GES and GAA, but found they did not prevent it from relying on the substance of their testimonies.[618] The Appellant has not shown that it was unreasonable for the Trial Chamber to do so.

281. The Appellant challenges Witness GAF's testimony, because "it appears that" the witness had testified that the killing had already started when the Appellant said "Mukore".[619]

282. The relevant part of the transcript reads:

> A. As far as [the Appellant] was concerned, he did not carry any weapons but he did raise his arm and ordered or gave orders to the people.
>
> Q. Did they obey his orders?
>
> A. No, but they had already agreed with the people who came with him about what was to be done. He made that gesture, that was to incite the people that were there.
>
> Q. When he made that gesture, did they start killing?
>
> A. Yes.

[614] Appeal Brief, para. 390.
[615] Respondent's Brief, paras. 128, 129.
[616] Appeal Brief, para. 391.
[617] Trial Judgement, para. 502.
[618] Trial Judgement, para. 481.
[619] Appeal Brief, para. 393.

> They almost instantaneously started because these young people he had brought with him had already started killing and the others too. So that they immediately began the killing as soon as he gave the order.[620]

Earlier, Witness GAF had testified:

> Indeed, he used one word, he said: "Mukore". Let me spell: M-U-K-O-R-E. And in a nutshell, let me explain what that means. In view of the fact that he had come with killers and that he was the leader, by so saying, he was telling them that they should begin the killings because, as a matter of fact, it was after he pronounced that word that the killings started and all the vehicles went away except for one.[621]

The Appeals Chamber acknowledges that it is not clear from this testimony if the killing had already started when the Appellant gave the order. A reasonable trier of fact could nevertheless rely on this evidence to establish that at least some of the killers began killing in response to the Appellant's order, even if part of the violence had commenced earlier. The Appeals Chamber notes that Witness GEC had testified that Augustin Bucundura and his family were shot first; the Appellant then raised his hand and said "start working"; then the shooting started and the assailants started to throw grenades.[622] Witness GEP also testified that the Appellant told the attackers to "start working" after Bucundura had been shot.[623] In the view of the Appeals Chamber, it was therefore reasonable to find that, after the first shooting had already occurred, the Appellant gave the order to start the general attack.

283. With regard to Witness GEC, the Appellant argues that she was caught in a crowd and could not see the Appellant clearly when he gave the order. In fact, he argues, the witness did not even know whether the Appellant was present when the killings started.

284. Witness GEC had testified that she had been with other refugees in one of the classrooms, and that the *Interahamwe* had ordered them to leave the classrooms and to lie on the ground when she witnessed the Appellant giving the order "start working":

> We were at the entrance, literally at the door of the classroom, and we were sort of pushing each other when the decision had been made that we go out and lie on the ground. It was at that point in time that we heard those words.
>
> …
>
> Q. Can you remember if Mr. Kamuhanda was still there when shots were fired at the people?

[620] T. 13 September 2001 p. 52.
[621] T. 13 September 2001 pp. 47, 48.
[622] T. 24 September 2001 pp. 53, 57.
[623] T. 7 February 2002 pp. 38, 39.

> A. I immediately went to lay on the ground, so I didn't know whether he was still there or whether he had left. And, by the way, I didn't know him, I just saw someone who raised his arms.[624]

Earlier, Witness GEC had already indicated that she did not know the Appellant, but that the person who gave the order had been identified by other refugees as Kamuhanda: "As for the person who went by the name – who was said to go by the name 'Kamuhanda', well, he was the one who raised his hand and said 'start working'".[625] It was not unreasonable for the Trial Chamber to find that Witness GEC, immediately before lying down, had seen the person identified as Kamuhanda raising his hands and giving the order "start working". The fact that she, after having lain down, could not see whether this person had already left, did not render her testimony as to the earlier events unreliable.

285. In the view of the Appeals Chamber, the fact that some witnesses did not testify about an order or a gesture of the Appellant did not prevent a reasonable trier of fact from concluding that the Appellant gave such an order. The witnesses were scattered about the compound and had different vantage points; it was therefore likely that some of them observed not all the events at the parish.

(d) The Death of Bucundura

286. The Appellant submits that the evidence about the death of Augustin Bucundura was contradictory.[626] The Appellant points to Witness GAF's testimony that Bucundura was shot while the vehicles were still in motion, and argues that this testimony was not credible.[627] In addition, he argues that Witnesses GAG, GEP, and GEH testified that Bucundura was shot after the conversation between the Appellant and Pastor Nkuranga. In the Appellant's view, it was therefore not correct for the Trial Chamber to find that these witnesses corroborated the testimony of Witnesses GAF, GES, and GAA.[628]

287. The Appeals Chamber recalls its earlier finding regarding Witness GAF's testimony about the death of Bucundura and in particular that the Trial Chamber found that Bucundura was shot *after* the arrival of the Appellant, thus disregarding Witness GAF's testimony that he was shot

[624] T. 24 September 2001 pp. 56, 57.
[625] T. 24 September 2001 p. 53.
[626] Appeal Brief, para. 396.
[627] Appeal Brief, para. 397.
[628] Appeal Brief, para. 398.

while the vehicles were still moving.[629] With regard to Witnesses GAG, GEP, and GEH, the Appeals Chamber notes that Witness GES testified that Bucundura was shot after the Appellant spoke with Pastor Nkuranga,[630] so that, contrary to the Appellant's assertion, there is in this regard no discrepancy between the testimony of Witness GES on the one hand and that of Witnesses GAG, GEP, and GEH on the other hand. The Appeals Chamber concludes that, even if there existed some discrepancies in other aspects of the evidence, it was still open for a reasonable trier of fact to rely on Witness GAG's, GEP's, and GEH's testimony as corroborative evidence insofar as they supported the evidence of Witnesses GAF, GES, and GAA.

288. The Appellant contends that Witness GAA could not observe the events, because he fled directly after the arrival of the Appellant. The Appellant provides only a reference to paragraph 332 of the Trial Judgement, where the Trial Chamber found that Witness GAA left the compound as soon as the second vehicle, in which the Appellant traveled, arrived. This shows that the Trial Chamber was aware of this part of Witness GAA's testimony, but still accepted Witness GAA's evidence that he witnessed a soldier shooting Bucundura to be reliable. Given the fact that all witnesses agreed that the events took place in a rather short time-span,[631] the Appeals Chamber finds that a reasonable trier of fact could disregard the apparent inconsistency in Witness GAA's testimony.

289. Further, the Appellant argues that it was difficult for the witnesses to concentrate on the Appellant's actions in this traumatizing situation. As an example, he points to the testimony of Witnesses GEA and GEV, who did not know whether the Appellant was still present when Bucundura was shot.[632]

290. The Appeals Chamber observes that the Trial Chamber was aware of the difficult situation of the witnesses and duly took it into account:

> The Chamber notes that many of the Witnesses who have testified before it have seen and experienced atrocities. They, their relatives, or their friends have, in many instances, been the victims of such atrocities. The Chamber notes that recounting and revisiting such painful

[629] Trial Judgement, para. 503. *See* Chapter XI.K.3.
[630] T. 29 January 2001 pp. 110, 111.
[631] The longest period of time mentioned was ten minutes for the conversation between the Appellant and Pastor Nkuranga (Witness GES: T. 29 January 2002 p. 110); other witnesses spoke in this respect about two or three minutes (Witness GEG: T. 25 September 2001 p. 33; Witness GEV: T. 6 February 2002 p. 61).
[632] Appeal Brief, para. 399.

> experiences may affect the Witness's ability to recount the relevant events fully or precisely in a judicial context.[633]
>
> …
>
> After careful consideration of all the evidence presented, and mindful of the fact that the Witnesses who had taken refuge at the Gikomero Parish Compound were fearful for their lives and were hiding when the attack started on 12 April 1992, the Chamber finds credible the evidence that the Accused spoke with pastor Nkuranga, witnessed the killing of a Tutsi man named Bucundura by an armed person who arrived together with him... [634]

This approach to assessing the effects of trauma on testimony—recognizing that trauma may impair perceptions or memory and may explain apparent inconsistencies, but does not necessarily render it impossible for witnesses to testify credibly and reliably—is consistent with the approach the Appeals Chamber recently affirmed in the *Kajelijeli* case.[635] In addition, the Appellant has not shown that the Trial Chamber's assessment of Witness GEA's and GEV's testimony was unreasonable.

291. The Appellant submits that Witness GEC testified that Bucundura was shot with his family in front of the classrooms, and that she had learned this fact from other refugees. But, the Appellant argues, she had testified that she was about five meters away from the Appellant, so that she should have witnessed Bucundura's death herself.[636]

292. The Appeals Chamber notes that Witness GEC watched the events from within one of the classrooms.[637] She was able to observe the Appellant because he was standing in front of the classrooms.[638] Then the refugees were ordered to leave the classrooms, and Witness GEC saw the bodies of Bucundura and members of his family lying in front of Pastor Nkuranga's home, where they had been shot, as a survivor of the massacre later told Witness GEC.[639] The Appeals Chamber finds that this evidence is consistent. Nothing indicates that Bucundura was killed when he was near the Appellant; some witnesses rather testified that this happened at a certain distance from the Appellant.[640] A reasonable trier of fact could therefore conclude that it was possible for Witness GEC to observe the Appellant standing in front of the classrooms, but not the killing of Bucundura at a different place in the compound.

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[633] Trial Judgement, para. 34.
[634] Trial Judgement, para. 491.
[635] *See Kajelijeli* Appeal Judgement, paras. 10-13.
[636] Appeal Brief, para. 400.
[637] T. 24 September 2001 p. 92.
[638] T. 24 September 2001 p. 93.
[639] T. 24 September 2001 pp. 94, 95.
[640] T. 19 September 2001 p. 30 (Witness GEE); *cf. also* T. 29 September 2001 p. 113 (Witness GES).

293. Finally, the Appellant submits that while Witness GEG testified that Bucundura's wife was shot, other witnesses testified that only Bucundura was shot at that moment. Further, the Appellant submits that the Trial Chamber did not accept Witness GEG's evidence about the death of Bucundura's wife. Therefore, the Appellant appears to argue, the Trial Chamber erred in relying on Witness GEG's testimony.[641]

294. To support his argument, the Appellant relies on paragraph 503 of the Trial Judgement. In this paragraph, the Trial Chamber found that, shortly after the Appellant's arrival at the Gikomero Parish Compound, Augustin Bucundura was shot, while the Appellant was still present. Nothing in this paragraph indicates that the Trial Chamber rejected Witness GEG's evidence about the killing of Bucundura's wife. The death of Bucundura's wife was also mentioned by Witness GEC.[642] Given the fact that immediately after the killing of Bucundura the massacre began, resulting in the death of "a large number of Tutsi refugees",[643] a reasonable trier of fact could disregard the circumstance that the death of one particular victim was mentioned only by some of the witnesses.

(e) Start of the Killings

295. The Appellant contends that neither Witness GAA nor Witness GEG was in a position to witness the Appellant giving the order to start the killings.[644]

296. The Appeals Chamber recalls its earlier observation that Witness GAA, in fact, did not testify that he observed the Appellant giving the order to start the killings.[645] The Trial Chamber observed that "Witness GAA testified that when the Accused alighted from the vehicle he raised his hands up and the shooting began".[646] This paraphrase of Witness GAA's testimony is somewhat misleading, as it suggests that Witness GAA testified that the Appellant's gesture was a signal to start the killings, whereas in fact Witness GAA testified that he understood the gesture as a greeting.[647] It is not clear whether the Trial Chamber actually misinterpreted Witness GAA's testimony on this point, but, in any event, such a misinterpretation would not have occasioned a miscarriage of justice. To support its finding that the Appellant ordered the attack on the refugees

[641] Appeal Brief, para. 401.
[642] T. 24 September 2001 p. 95 (Witness GEC).
[643] Trial Judgement, para. 506.
[644] Appeal Brief, para. 402.
[645] *See* Chapter XI.K.2.d.ii.
[646] Trial Judgement, para. 480.
[647] T. 19 September 2001 p. 114.

the Trial Chamber relied also on the evidence given by Witnesses GAF, GEC, and GEP.[648] The Appellant has not shown that it was unreasonable to do so, even disregarding the evidence of Witness GAA.

5. Alleged Error in Relying on the Identification of the Appellant by Witnesses GEE, GEA, GEC, GEG, GAG, GEV, GEP, and GEH

297. The Appellant contends that the Trial Chamber committed an error when it accepted the evidence of Witnesses GEE, GEA, GEC, GEG, GAG, GEV, GEP, and GEH as corroborative evidence.[649] The Appellant submits a list of factors which, in his view, the Trial Chamber should have taken into consideration with regard to the conditions under which these witnesses claimed to have identified the Appellant.[650] In particular, he argues that his identification in court by some of the witnesses was not sufficient to support the conclusions of the Trial Chamber.[651]

298. The Appeals Chamber recalls that the eight witnesses in question did not "identify" the Appellant in the strict sense of the word, but provided corroborative evidence as to the identity of the person who led the attack.[652] The Appeals Chamber notes that the Appellant acknowledges that neither the Rules nor the jurisprudence of the Tribunal obliged the Trial Chamber to require a particular type of identification evidence.[653] Accordingly, the Appeals Chamber declines to address the general observations of the Appellant, but turns directly to the specific arguments advanced by him. The issue of courtroom identification has already been addressed above.[654]

(a) Witness GEE

299. The Appellant submits that the Trial Chamber did not assess the reliability of his identification by Witness GEE, and that this witness was the only one attesting to a first attack of *Interahamwe* on the refugees, prior to the arrival of the vehicles, and a second attack in the night, rendering his testimony unreliable.[655] He argues that, if there had been a second attack, Witness GAG, who had spent the night at Pastor Nkuranga's home, would have mentioned it.[656]

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[648] Trial Judgement, paras. 478 (Witness GAF), 485 (Witness GEC), 489 (Witness GEP).
[649] Appeal Brief, paras. 405, 406, 412.
[650] Appeal Brief, para. 407.
[651] Appeal Brief, para. 410.
[652] *See* Chapter XI.K.1.b.
[653] Appeal Brief, para. 97.
[654] *See* Chapter XI.K.2.a.
[655] Appeal Brief, para. 414.
[656] Appeal Brief, para. 444.

300. Witness GEE recounted that, when the vehicles arrived, people in the compound shouted "We're going to be killed, Kamuhanda is coming".[657] The Appeals Chamber notes that this witness did not identify the Appellant in the strict sense of the word, but rather testified that other people present identified one of the attackers as a person called "Kamuhanda". As stated earlier, it was not erroneous to rely on this type of hearsay evidence as corroborative evidence.[658] The argument that the Trial Chamber did not address the conditions under which the witness identified the Appellant is, therefore, inapposite.

301. The Appellant does not provide any reference to support the alleged contradictions to the evidence given by other witnesses. Regarding the alleged first attack, Witness GEE mentioned only one attack that took place "[t]he next morning – or, in the afternoon, between 2.00 and 3.00 p.m."[659]. The attack during the following night took place, according to Witness GEE, at 4.00 a.m., when *Interahamwe* came back to kill the survivors.[660] At that time, most other witnesses had already left the compound. Witness GAG, in fact, mentioned that on the morning of 13 April 1994, *Interahamwe* came to search for survivors,[661] thus supporting Witness GEE's testimony. The Appeals Chamber therefore finds that the Appellant did not identify any inconsistencies which made it unreasonable for the Trial Chamber to rely on Witness GEE's testimony.

(b) Witness GEA

302. The Appellant argues that Witness GEA's testimony contained many inconsistencies, that the witness was unable to recognize the church premises, and that he mentioned a veranda attached to the church, although the church did not have a veranda.

303. The Trial Chamber did "not find it unusual that the Witness did not recognise the Church premises from photographs shown to him during his testimony insofar […] as he had been at the Gikomero Parish Compound on this one occasion".[662] The Trial Chamber was also aware of the argument that Witness GEA had mentioned a veranda at the church.[663] The Appeals Chamber

[657] T. 18 September 2001 p. 5.
[658] *See* Chapter XI.K.1.b.
[659] T. 18 September 2001 p. 5. During cross-examination, the witness clarified that there was only one attack on the 12 April. T. 19 September 2001 p. 24.
[660] T. 18 September 2001 p. 11.
[661] T. 4 February 2002 pp. 74, 75.
[662] Trial Judgement, para. 454.
[663] Trial Judgement, para. 454.

finds that the Appellant did not show that the Trial Chamber's explanation of the alleged inconsistencies was unreasonable.

(c) Witness GEC

304. The Appellant argues that Witness GEC's testimony was inconsistent with that of the other witnesses, because she testified that she was five metres from the Appellant when he ordered the assailants to "start working", and that he was in the classroom when other refugees pointed out the Appellant to her, whereas other witnesses placed the Appellant in front of the pastor's house.[664]

305. The Appellant misrepresents Witness GEC's testimony. Witness GEC stated repeatedly that the person pointed out to her stood "in front of the classrooms", not in one of them.[665] Furthermore, the Appellant does not explain why it was unreasonable for the Trial Chamber to find that, from her vantage point near the entrance to one of the classrooms,[666] Witness GEC was able to identify the Appellant. Finally, the Appellant's further observation that Judge Maqutu stated in his separate opinion that he did not find Witness GEC credible is irrelevant, as the Appellant has not shown that it was unreasonable for the majority to rely on her testimony.

(d) Witness GAG

306. The Appellant submits that Witness GAG's testimony was unreliable, because she was the only witness to testify as to several points: the distribution of weapons to *Interahamwe* at the parish, the rape of some of the female refugees by the attackers, and the fact that the Appellant returned to his vehicle and parked it (whereas other witnesses testified that he could not drive).[667] The Appellant argues that the Trial Chamber committed an error when it found that Witness GPE had recognized Witness GAG at the Gikomero Parish Compound, because the question was not whether Witness GAG was at the scene, but whether the Appellant was present. The Appellant adds that Witness GPE testified that Witness GAG made false accusations against Pastor Nkuranga and Witness GPE, thus showing that Witness GAG was not credible.[668]

[664] Appeal Brief, para. 416.
[665] T. 24 September 2001 pp. 63, 93.
[666] T. 24 September 2001 p. 56.
[667] Appeal Brief, para. 421.
[668] Appeal Brief, para. 422.

307. The Appeals Chamber notes that the Trial Chamber found that Witnesses GAG and GEP testified that during the attack, female refugees were taken away by the assailants to be raped later. The Trial Chamber found both witnesses' testimonies credible but, considering the hearsay nature of the evidence as to the rapes, it declined to find the Appellant guilty of this crime.[669] It was therefore not only Witness GAG who testified as to the rapes, but also Witness GEP. The Trial Chamber found both witnesses credible, and the Appellant has not shown that it was unreasonable to do so.

308. With regard to the fact that Witness GAG allegedly testified that the Appellant parked the vehicle in which he arrived, the Appellant does not provide any reference to the record to substantiate this submission. The Appeals Chamber notes that the witness testified that "the [Appellant] moved towards his vehicle and the vehicle moved a little bit away to park near the church",[670] and later, "[t]he vehicle did not move, neither did Kamuhanda or the pastor, they were there. But the driver of the vehicle backed up the vehicle, so the vehicle was a bit away from the group."[671] This testimony clearly indicates that the Appellant was *not* the driver. Consequently, this argument is without merit.

309. The Appellant also failed to provide any reference to the record with regard to the alleged testimony about the distribution of weapons at the parish. Witness GAG, in fact, testified that she had heard from her son, who had temporarily left her, that weapons had been distributed to well-known *Interahamwe*.[672] From the context it is evident that this distribution did not take place in the Gikomero Parish Compound, but somewhere else in the *commune*. Consequently, the Appeals Chamber finds no merit in the argument that other witnesses did not mention this distribution of weapons.

310. With regard to Witness GPE, the Appeals Chamber rejects the Appellant's argument. Of course, the issue before the Trial Chamber was not the presence of Witness GAG at the Gikomero Parish Compound, but that of the Appellant. However, a reasonable trier of fact could find that Witness GPE confirmed that Witness GAG was at the Gikomero Parish Compound on 12 April 1994, thus supporting the credibility of Witness GAG's testimony.

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669 Trial Judgement, paras. 495-497.
670 T. 4 February 2002 p. 54.
671 T. 5 February 2002 p. 45.
672 T. 4 February 2002 p. 49.

311. The Appellant's submission that Witness GAG made false accusations against Pastor Nkuranga and Witness GPF is addressed below.[673]

(e) Witness GEG

312. The Appellant submits that the Trial Chamber erred in accepting the evidence of Witness GEG because he was the only witness to testify that the Appellant was armed.[674] In addition, the Appellant submits that the Trial Chamber erred in relying on his identification evidence because Witness GEG was fifteen to twenty metres from the Appellant, and, moreover, was inside the church, so that it was unclear whether he could see the Appellant talking to Pastor Nkuranga.[675]

313. The Appeals Chamber has already discussed the argument that only Witness GEG testified that the Appellant was armed.[676] Regarding the "identification", the Appeals Chamber notes that the Appellant misrepresents Witness GEG's testimony. The Appellant does not provide any reference to support his assertion that Witness GEG witnessed the events from inside the church; in fact, the witness testified that he was by the side of the church facing the courtyard when the vehicles arrived.[677] With regard to the argument that the Trial Chamber did not take into account the conditions under which the witness "identified" the Appellant, the Appeals Chamber notes that Witness GEG had no prior knowledge of the Appellant, but testified that the refugees shouted when the vehicles arrived: "That is Kamuhanda. Now that Kamuhanda is here, we are finished".[678] The conditions under which Witness GEG observed the Appellant are therefore irrelevant for the evidentiary value of his testimony.

(f) Witness GEP

314. With regard to Witness GEP, the Appellant points to a number of circumstances, among them the fact that only this witness mentioned in her testimony that Hutus arrived in the morning of 12 April 1994 to segregate the Hutu refugees from the Tutsi refugees, and that some girls were taken away from the parish before the Appellant left.[679] In addition, the Appellant contends that her testimony was unreliable, because she neither knew the name of the locality where she took refuge, nor was able to identify the Gikomero Parish Compound on photographs. In sum, the

[673] *See* Chapter XI.L.4.
[674] Appeal Brief, paras. 418, 419.
[675] Appeal Brief, para. 423.
[676] *See* Chapter XI.K.4.a.
[677] T. 25 September 2001 pp. 18, 19.
[678] T. 25 September 2001 p. 19.

Appellant submits that Witness GEP's testimony totally contradicts the testimony of Witnesses GAF, GES, and GAA and was therefore not suited to corroborate it.[680]

315. The Trial Chamber noted that Witness GEP was unable to recognize the Gikomero Parish Compound from photographs presented to her. Nevertheless, the Trial Chamber was satisfied with her description of the compound as it was on 12 April 1994.[681] The Appellant has not shown that this conclusion was unreasonable.

316. With regard to circumstances mentioned only by this witness, the Appeals Chamber observes that they do not affect the core of Witness GEP's testimony. The Appellant himself identified four principal points on which his conviction was based: (1) his arrival at the compound, accompanied by armed people, (2) his alighting from the vehicle and his conversation with Pastor Nkuranga, (3) his order to start the killing, (4) his departure after the start of the massacre.[682] Witness GEP confirmed all four points:

1) a vehicle with *Interahamwe* arrived, and one man, who was identified by the refugees as "Kamuhanda", left the vehicle;[683]

2) he spoke to another man;[684]

3) the man identified as Kamuhanda told the people "start working", meaning to kill;[685] and

4) he left after the beginning of the killing.[686]

The Appeals Chamber finds that a reasonable trier of fact could have accepted Witness GEP's testimony as corroborative evidence.

6. Alleged Change of Approach by the Trial Chamber

317. The Appellant argues that the Trial Chamber changed its approach during the course of the Trial Judgement by rejecting the testimony of a number of witnesses and, therefore, acquitting

[679] Appeal Brief, para. 424.
[680] Appeal Brief, paras. 425, 426.
[681] Trial Judgement, para. 461.
[682] Appeal Brief, para. 385.
[683] T. 7 February 2002 pp. 33, 34.
[684] T. 7 February 2002 p. 37.
[685] T. 7 February 2002 p. 39.

the Appellant, for example, of the massacre at Gishaka Catholic Parish.[687] In the Appellant's view, it should have done likewise with regard to the events at the Gikomero Parish Compound. In particular, he submits that the Trial Chamber assessed the witnesses' evidence from the time the witnesses arrived at the Gishaka Catholic Parish, and did not restrict itself only to the evaluation of the testimony about the attack proper, as it did for the witnesses testifying about the massacre at the Gikomero Parish Compound.[688]

318. The Trial Chamber found that an analysis of the Prosecution witnesses' testimony "reveals irreconcilable differences in relation to the events at the Gishaka Parish Church".[689] The differences the Trial Chamber quoted related to the central elements of the alleged attack, for example the fact whether the doors of the church were shut by the assailants or the refugees, or whether grenades were thrown through the windows into the church.[690] This reasoning does not support the Appellant's argument that the Trial Chamber changed its approach. In the case of the events at the Gikomero Parish Compound, the Trial Chamber was satisfied that the substance of the testimonies was consistent.[691]

319. The Appellant specifies a number of alleged inconsistencies in the evidence relating to the events before and after the attack at the Gikomero Parish Compound:

- Only Witnesses GES and GEP mentioned that Hutus arrived prior to the attack; no other witness provided corroboration of this fact.[692]

- Only Witnesses GAP and GEG testified that girls were chosen by the assailants and taken away to be raped. The Appellant points to the fact that Witness GEP testified that the Appellant did not leave until the girls were chosen, whereas according to Witness GAG, the girls were taken away only after the end of the massacre.[693]

[686] T. 7 February 2002 p. 43.
[687] Appeal Brief, paras. 430-432.
[688] Appeal Brief, paras. 432, 433.
[689] Trial Judgement, para. 565.
[690] Trial Judgement, para. 565.
[691] *See* Trial Judgement, para. 481.
[692] Appeal Brief, paras. 436, 437.
[693] Appeal Brief, paras. 439-441.

- Only Witness GEC testified that the locals continued to loot the refugees' property after the assailants left. In the Appellant's view, Witnesses GEE and GAG should have mentioned this fact also, because they left the compound only some time after the attack.[694]

- Only Witness GEE testified that a second attack occurred in the following night.[695]

The Appeals Chamber finds that these alleged inconsistencies do not affect the core of the evidence given by the witnesses. Regarding the looting of the refugees' property, the Appeals Chamber notes that Witness GAG testified that she fell unconscious after she had been attacked by two of the assailants with machetes, and that she regained consciousness only around 5.00 p.m.,[696] therefore making it impossible for her to testify about the events in the afternoon. Regarding the second attack allegedly mentioned only by Witness GEE, the Appeals Chamber refers to the earlier discussion of this argument.[697]

320. With regard to the alleged inconsistencies between Witness GAG's and Witness GEP's accounts of the selection of girls by the attackers, the Appeals Chamber notes that both witnesses were trying to hide in the classrooms during this particular phase of the attack,[698] and were thus unable to observe the whole area. A reasonable trier of fact could therefore rely on the other parts of their evidence, notwithstanding any inconsistencies in this part of their testimony.

321. Accordingly, the Appeals Chamber dismisses the Appellant's submission that the Trial Chamber's approach as to the evidence regarding the Gikomero Parish Compound was unreasonable.

L. Alleged Errors in Conclusions in Respect of Defence Witnesses

322. Under his fourteenth ground of appeal, the Appellant submits "that the Trial Chamber committed an error of fact occasioning a miscarriage of justice" when it dismissed Defence evidence which raised doubt about his guilt.[699] In support of this submission, the Appellant made several arguments which are summarized and considered in turn below.

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[694] Appeal Brief, para. 443.
[695] Appeal Brief, para. 444.
[696] T. 4 February 2002 pp. 63, 64.
[697] *See* Chapter XI.K.5.a.
[698] T. 7 February 2002 p. 37 (Witness GEP); T. 4 February 2002 p. 59 (Witness GAG).
[699] Appeal Brief, para. 448.

1. Witness GPC

323. The Appellant submits that the Trial Chamber erred in law and in fact because it rejected Witness GPC's testimony on the sole ground that the witness held the Appellant "in high esteem".[700] Even if Witness GPC's testimony was interpreted in this way, the Appellant argues, the Trial Chamber should have given reasons why it found the testimony to be unreliable or incredible.[701]

324. The relevant paragraph of the Trial Judgement reads as follows:

> Defence Witness GPC asserted that because he had not seen Kamuhanda in Gikomero between 6 April 1994 and 12 April 1994, Kamuhanda was not there. The Chamber finds his testimony to be unsubstantiated. The Witness holds the Accused in high esteem, and the objective of his testimony was to protect him.[702]

Witness GPC testified that the Appellant was well-known in the region, that he was useful for the region, for example because he worked for the improvement of education, and that he - Witness GPC - would have liked to be like the Appellant.[703] The Appeals Chamber finds that a reasonable trier of fact could conclude from this evidence that the witness held the Appellant in high esteem. In addition, having carefully reviewed the relevant parts of the trial transcript, the Appeals Chamber is satisfied that the Trial Chamber's conclusion that Witness GPC was biased in favour of the Appellant and tried to protect him was reasonable.

325. The Appeals Chamber finds that, contrary to the Appellant's assertion, the Trial Chamber did not dismiss Witness GPC's testimony on the sole ground that the witness held the Appellant in high esteem, but, in the first instance, because it found the testimony to be unsubstantiated. According to the Appellant, Witness GPC arrived fifteen minutes after the start of the massacre,[704] whereas the Trial Chamber found that the Appellant left the compound a short time after the massacre began.[705] To support his conclusion about the Appellant's absence, the witness argued that "other people [would] have seen him", and they would have informed the witness about the Appellant's presence.[706] This is, of course, speculation on the part of the witness. In addition, Witness GPC relied on the fact that the attackers' vehicles were still there when he

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[700] Appeal Brief, paras. 44, 45, 450.
[701] Appeal Brief, paras. 44, 450.
[702] Trial Judgement, para. 474.
[703] T. 22 January 2003 pp. 35, 36.
[704] Appeal Brief, para. 451. Witness GPC was about one kilometre away when he heard gunshots from the direction of the compound and went there to inquire. T. 22 January 2003 pp. 16, 17.
[705] Trial Judgement, para. 493.

arrived; thus, the witness concluded, if the Appellant had arrived with one of these vehicles, he could not have left.[707] This conclusion, however, rests on the assumption that the vehicles the witness noted were the same which had been observed by the Prosecution witnesses fifteen minutes earlier – an assumption that is not secure, particularly because it is unclear how many vehicles arrived during the attack.[708]

326. The Appeals Chamber therefore finds that the Appellant has not demonstrated an error on the part of the Trial Chamber with regard to Witness GPC.

2. Witness GPB

327. With regard to Witness GPB, the Appellant submits that the Trial Chamber "committed a manifest error of assessment".[709] The Trial Chamber noted that Witness GPB was in the first group of attackers to arrive at the Gikomero Parish Compound, but that he had not seen Pastor Nkuranga. The Trial Chamber concluded that Witness GPB may have missed seeing both Pastor Nkuranga and the Appellant.[710] The Appellant argues that Witness GPB had seen the attackers' vehicles arrive and leave, and that the witness was present throughout the massacre.[711]

328. In the view of the Appeals Chamber, this argument lacks merit. Given the fact that almost all Prosecution witnesses testified that the leader of the attackers had a short conversation with Pastor Nkuranga,[712] a reasonable trier of fact could draw from Witness GPB's statement that he had not seen Pastor Nkuranga the conclusion that he may have missed the Appellant, who was present at the parish only for a short time.

3. Witness GPT

329. The Appellant submits that the Trial Chamber erred when it disregarded the testimony of Witness GPT, who had testified that he made a number of inquiries about the attack on the Gikomero Parish Compound and that the name of the Appellant was never mentioned during these inquiries.[713] In the Appellant's view, this testimony was corroborated by Witness GPC who

[706] T. 22 January 2003 p. 50.
[707] T. 22 January 2003 p. 50.
[708] *Cf.* Chapter XI.K.3.
[709] Appeal Brief, para. 457.
[710] Trial Judgement, para. 471.
[711] Appeal Brief, para. 457.
[712] The exceptions are Witnesses GAF and GEP.
[713] Appeal Brief, paras. 460-463.

had testified that one of the attackers did not name the Appellant as one of his accomplices.[714] Finally, the Appellant argues, the Trial Chamber failed to take into account Witness GPT's testimony that local persons did not take refuge in the Gikomero Parish Compound, so that no one in the compound would have been able to identify the leader of the attack as the Appellant.[715]

330. The Appeals Chamber finds that the Appellant has not demonstrated an error on the part of the Trial Chamber in its assessment of Witness GPT's testimony. The witness was not present during the attack on the Gikomero Parish Compound, but recounted only the results of later investigations. Moreover, he admitted that he had not specifically asked those he interviewed whether the Appellant was present during the attack, but only supposed he would have been told if the Appellant had been present.[716] A reasonable trier of fact was entitled to attach little weight to this evidence. The same applies to the argument that there were no local persons present. The Appeals Chamber considers that it would have been impossible for Witness GPT to know exactly whether, among the "large number of men, women and children mainly of Tutsi origin"[717] who had taken refuge at the Gikomero Parish Compound on 12 April 1994, there were people from the Gikomero Commune or not.

4. Witnesses GPE, GPF, and GPR

331. The Appellant submits that the Trial Chamber erred in its assessment of Witnesses GPE's, GPF's, and GPR's testimonies.[718] The Trial Chamber found that these witnesses "may have arrived on the scene of the events after the man identified as Kamuhanda had already left. In such a case, even if the Chamber were to believe these Witnesses, it would not demonstrate that the Accused was not there".[719] The Appellant argues that the witnesses lived close to the Gikomero Parish Compound and testified that they had never heard anyone say that the Appellant participated in the massacre.[720] In addition, the Appellant submits that Witness GPE testified about the circumstances of Pastor Nkuranga's arrest and subsequent release, and that Pastor Nkuranga stated clearly that the Appellant was not present during the attack.[721] With regard to

[714] Appeal Brief, para. 464.
[715] Appeal Brief, paras. 465-467.
[716] Trial Judgement, para. 392; T. 14 January 2003 p. 31.
[717] Trial Judgement, para. 499.
[718] Appeal Brief, para. 470.
[719] Trial Judgement, para. 470, referring to Witnesses GPE, GPF, GPK, and GPB.
[720] Appeal Brief, para. 470.
[721] Appeal Brief, para. 471.

Witness GPF, the Appellant submits that this witness testified that Witness GAG accused Pastor Nkuranga and Witness GPF to have taken her effects in order to obtain compensation.[722]

332. In response, the Prosecution submits that Witness GPR arrived only after the end of the attack; Witness GPE did not see the attackers arrive; and Witness GPF, who was allegedly involved in the massacre himself and was biased towards the Appellant, fled when he heard the attackers arrive.[723]

333. The Appeals Chamber notes that Witness GPR testified that when she arrived at the Gikomero Parish Compound on 12 April 1994, the refugees had already been killed, and the attackers were engaged in looting and slaughtering the cattle.[724] Witness GPE was inside a house when she heard the attackers' vehicles arrive and then fled.[725] Similarly, Witness GPF did not see the attackers, but fled immediately after he had been told that the attack had started.[726] The Appeals Chamber concludes that even if these witnesses testified that nobody accused the Appellant after the massacre of having participated in it, it was open for a reasonable trier of fact to attach more weight to the testimony of witnesses who had been present during the attack and had testified that they had seen the Appellant.

334. With regard to Witness GPF's testimony about the proceedings initiated by Witness GAG against Pastor Nkuranga and Witness GPF himself, the Appeals Chamber notes that, according to Witness GPF, Witness GAG claimed compensation for a suitcase which she had left at Pastor Nkuranga's house and which was pillaged by the attackers. Although her claim was rejected at first, later she received some compensation from Witness GPF.[727] Witness GPF indeed testified that Witness GAG accused Pastor Nkuranga of bringing the attackers to the Gikomero Parish Compound only after her initial claim against him had been rejected.[728] Witness GAG, on the other hand, confirmed that she had asked Pastor Nkuranga to give her back her belongings, but that he had refused to do so. Only then, she continued, was it necessary for her to bring the matter before the authorities, and there she was asked to testify about Pastor Nkuranga's involvement in the massacre at the Gikomero Parish Compound.[729] After reviewing the evidence

[722] Appeal Brief, para. 472.
[723] Respondent's Brief, paras. 235, 236.
[724] T. 15 January 2003 p. 10.
[725] T. 15 January 2003 p. 57; T. 16 January 2003 p. 3.
[726] T. 20 January 2003 pp. 17, 18.
[727] T. 20 January 2003 pp. 10, 13, 14.
[728] T. 20 January 2003 pp. 10, 11.
[729] T. 6 February 2002 p. 26.

of Witnesses GPF and GAG, the Appeals Chamber concludes that it was open to a reasonable trier of fact to find that Witness GPF's testimony did not raise sufficient doubt as to the credibility of Witness GAG.

5. Witness GPK

335. The Appellant contends that the Trial Chamber's findings with regard to Witness GPK's testimony are "highly questionable".[730] The relevant section of the Trial Judgement reads as follows:

> The Chamber finds Witness GPK to be entirely lacking in credibility on the material facts. The Chamber does not find it credible that GPK was unable to flee during the forty minutes from the time he was apprehended to the time he arrived at the Gikomero Parish Compound. The Chamber is not satisfied that GPK could observe the attack, without participating, but could not flee at any time during the attack, a period of approximately one and a half hours. Neither was he able to help the three young refugee children who he was asked to help after the attack, nor was he able to recognise most of the attackers. The Chamber is not satisfied that the Witness saw Karekezi, a cousin of Kamuhanda, arrive on the scene of the massacre after the attack. According to the Witness, Karekezi had come to find out what had happened. The Chamber found his demeanour in court to be evasive and finds that his aim in testifying was to protect the Accused. This was particularly evident by his insistence that as he did not see Kamuhanda in Gikomero at the relevant time, he could not have been there. Witness GPK did not give truthful testimony about the events of 12 April 1994, and the Chamber rejects his evidence.[731]

The Appellant submits that the Trial Chamber's arguments regarding the unreliability of Witness GPK's evidence are unfounded. He argues that, contrary to the Trial Chamber's reasoning, Witness GPK was forced to accompany the *Interahamwe* to the Gikomero Parish Compound and did not participate himself in the attack, as the Trial Chamber had assumed.[732] In the Appellant's view, the fact that Witness GPK did not help three little children is not detrimental to his credibility; Witness GPK had decided correctly that the best he could do was to entrust the children to Pastor Nkuranga.[733] The Appellant challenges the Trial Chamber's observation that Witness GPK was unable to recognize the attackers; in fact, he argues, the witness facilitated the arrest of some of the attackers.[734] Finally, the Appellant argues that the Trial Chamber could not reject Witness GPK's testimony that a cousin of the Appellant, Karekezi, arrived at the scene

[730] Appeal Brief, para. 475.
[731] Trial Judgement, para. 473.
[732] Appeal Brief, paras. 478, 479.
[733] Appeal Brief, para. 481.
[734] Appeal Brief, paras. 482, 483.

after the massacre, when it accepted Witness GAF's testimony that Karekezi came to the compound.[735]

336. The Prosecution responds that the Trial Chamber's assessment of Witness GPK's testimony was reasonable and supported by the whole of the evidence before it.[736] To support the Trial Chamber's conclusion, the Prosecution points out that Witness GPK admitted only during cross-examination that he had a family relationship with the Appellant, thus originally withholding information about a possible source of bias.[737]

337. The Appellant merely seeks to substitute his own evaluation of the evidence for that of the Trial Chamber, without showing that the Trial Chamber's findings were unreasonable or wholly erroneous. This cannot form the basis of an appeal. In addition, the Appeals Chamber observes that Witness GPK arrived at the scene of the massacre approximately forty minutes after he had heard the first gunshots from the direction of the Gikomero Parish Compound and acknowledged that it was possible that he arrived there after Augustin Bucundura was killed.[738] Witness GPK, therefore, could give no direct evidence about the Appellant's presence during the initial phase of the attack.

6. Witness GER (Pastor Nkuranga)

338. The Appellant submits that the Trial Chamber erred in not taking into proper account two written statements by Pastor Nkuranga.[739] The Trial Chamber did not accept this witness's evidence and observed that he was under investigation for the crimes with which the Appellant is charged.[740] The Appellant argues that Pastor Nkuranga had already been released from custody and was no longer under investigation when he made the statements. Moreover, in the Appellant's view, the mere fact that the witness was under investigation did not render his evidence *per se* unreliable.[741] The Appellant submits that one of the statements was disclosed to the Defence by the Prosecution, and that the Defence did not challenge it, apparently arguing that the Trial Chamber was bound to accept it. In addition, the Appellant submits that neither the

[735] Appeal Brief, para. 484.
[736] Respondent's Brief, paras. 238-240.
[737] Respondent's Brief, para. 238.
[738] T. 21 January 2003 p. 36; T. 22 January 2003 p. 5. Witness GPK observed only two vehicles used by the attackers (T. 22 January 2003 p. 8), leaving the possibility open that the Appellant had already left with another one.
[739] Appeal Brief, para. 488.
[740] Trial Judgement, para. 475.
[741] Appeal Brief, para. 490.

second statement, given by Pastor Nkuranga to the Rwandan authorities, nor Defence Exhibit D 39, containing a list of the presumed perpetrators of genocide, mentions the Appellant's name.[742]

339. By decision of 20 May 2003, the Trial Chamber admitted two statements of the deceased Pastor Nkuranga into evidence.[743] He gave one of these statements to the Rwandan authorities in 1996 and another to investigators of the Prosecution on 15 March 2000.[744] In the Trial Judgement, the Trial Chamber found,

> [h]aving considered the evidence of all the other Witnesses who testified in relation to this event, the Chamber does not accept Pastor Nkuranga's evidence. Moreover, the Chamber finds the observations of Pastor Nkuranga to be unreliable, as he was under investigation for the crimes with which the Accused is charged.[745]

340. The Trial Chamber had to assess the credibility and reliability of the two statements in the light of the entire evidence. The Appeals Chamber finds that the Appellant did not demonstrate an error on the part of the Trial Chamber. In particular, it has to be borne in mind that Pastor Nkuranga's statements were not tested through cross-examination. It was reasonable, therefore, for the Trial Chamber to prefer the testimony of witnesses who testified orally before the Trial Chamber.

7. Witnesses NTD and GPG

341. The Appellant relies on the testimonies of Witnesses NTD and GPG to show that the people who launched the attack on the Gikomero Parish Compound on 12 April 1994 came from Rubungo *commune*. He argues that both witnesses testified that they had met a policeman from Rubungo who had sworn to take revenge on the Tutsi refugees.[746]

342. The Trial Chamber found that there was no conclusive evidence that the attackers came from Rubungo, and, moreover, that this issue was not material to the criminal responsibility of

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[742] Appeal Brief, paras. 492, 493.
[743] *Kamuhanda*, Decision on Kamuhanda's Motion to Admit into Evidence Two Statements by Witness GER in Accordance with Rules 89(C) and 92*bis* of the Rules of Procedure and Evidence, 20 May 2003, filed 21 May 2003, ("Decision of 20 May 2003"); *Kamuhanda*, Corrigendum to the Decision on Kamuhanda's Motion to Admit into Evidence Two Statements by Witness GER in Accordance with Rules 89(C) and 92*bis* of the Rules of Procedure and Evidence, 22 May 2003.
[744] Decision of 20 May 2003, para. 1.
[745] Trial Judgement, para. 475.
[746] Appeal Brief, para. 496.

the Appellant.[747] The Appeals Chamber finds that the Appellant has not shown that this conclusion was erroneous.

M. Conclusion

343. The Appellant concludes that the entire body of evidence presented by him raised reasonable doubt regarding the Prosecution's charges against him. The Trial Chamber emphasized repeatedly that it relied on the evidence in its entirety to support its finding that the Appellant was present at the Gikomero Parish Compound on 12 April 1994 and that he initiated the attack on the refugees assembled there.[748] These findings were supported by the evidence of a number of direct and corroborative witnesses, whereas none of the Defence witnesses was present during the initial phase of the attack.[749] The Appellant has not shown that the Trial Chamber committed an error occasioning a miscarriage of justice in its assessment of the evidence. The Appeals Chamber therefore rejects the submissions considered in this chapter.

[747] Trial Judgement, para. 67.
[748] Trial Judgement, paras. 476, 505.
[749] With the exception of Witness GER, who did not testify before the Trial Chamber. *See* Chapter XI.L.6.

XII. SENTENCING (GROUND OF APPEAL 15)

344. The Appellant submits that should the Appeals Chamber decide not to overturn his conviction on the basis of the foregoing grounds of appeal, the Appeals Chamber should revise the sentences imposed by the Trial Chamber and sentence him to a term of imprisonment of five years.[750] The Appellant contends that the Trial Chamber, while it stated that it took into account his "individual circumstances, the aggravating and mitigating circumstances, its general sentencing practices and those of the Rwandan courts",[751] neither "applied the applicable rules"[752] nor gave the "legal and factual reasons for the sentences imposed",[753] that is, it did not provide a "reasoned opinion".[754] He specifically draws the attention of the Appeals Chamber to the qualification by the Trial Chamber of his high position as an aggravating circumstance,[755] to the importance given by the Trial Chamber to national reconciliation and the restoration of peace,[756] to the alleged failure of the Trial Chamber to take his "individual circumstances" into account,[757] and to the alleged disregard by the Trial Chamber of the "individualisation and proportionality test".[758]

345. The Prosecution responds that the Appellant does not explain why the sentence of five years which he proposes would be appropriate and that, in any case, such sentence for the offences of genocide and extermination is "so absurdly lenient that it could not possibly be considered to amount to condign punishment".[759] It contends that "[t]he Appellant's essential point appears to be centered on an alleged failure to balance the gravity of the offence with matters personal to [him]" and that, in its view, "there was no error in the approach of the Trial Chamber".[760]

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[750] Appeal Brief, paras. 501, 526. This ground of appeal is proposed by the Appellant "[a]s a further alternative" (in the original French text "[t]rès subsidiairement"), that is, "in the unlikely event that the Appeals Chamber should uphold the verdict."
[751] Appeal Brief, para. 503.
[752] Appeal Brief, para. 504.
[753] Appeal Brief, para. 505.
[754] Appeal Brief, paras. 504, 507.
[755] Appeal Brief, paras. 505, 507.
[756] Appeal Brief, paras. 503, 508, 509.
[757] Appeal Brief, para. 510.
[758] Appeal Brief, paras. 511, 515.
[759] Respondent's Brief, para. 276.
[760] Respondent's Brief, para. 278.

A. The Appellant's High Position as an Aggravating Circumstance

346. The Appellant argues that the Trial Chamber failed to provide a reasoned opinion in support of its conclusion that the high position he held as a civil servant was an aggravating circumstance.[761]

347. The Trial Chamber, in the part of the Trial Judgement dealing with the aggravating circumstances, indeed found that the Appellant's "high position […] as a civil servant can be considered as an aggravating factor".[762] The high position of an accused has previously been considered as an aggravating factor both before the ICTR and the ICTY. In *Kambanda*, for example, the Appeals Chamber found the fact that "Jean Kambanda, as Prime Minister of Rwanda was entrusted with the duty and authority to protect the population and he abused this trust", to constitute an aggravating circumstance.[763] In *Aleksovski*, the ICTY Appeals Chamber maintained that the Appellant's "superior responsibility as a warden seriously aggravated the Appellant's offences, [and that] instead of preventing it, he involved himself in violence against those whom he should have been protecting.…"[764] The Appeals Chamber in *Kayishema and Ruzindana* further clarified that a position of authority by itself does not amount to an aggravating factor, but that the "the manner in which an accused exercises his command"[765] can justify a finding of a high position of authority as an aggravating circumstance. More recently, in *Ntakirutimana*, the Appeals Chamber affirmed the Trial Chamber's holding that the abuse of the Appellant's personal position in the community to commit the crimes was an aggravating circumstance.[766]

348. In light of the above and contrary to the Appellant's submissions, the Appeals Chamber does not find that the finding of the Trial Chamber that his high position is an aggravating circumstance "lacks merit".[767] Further, the Appeals Chamber does not consider that there is anything "disturbing"[768] or otherwise inadequate in the Trial Chamber's reasoning and does not

[761] Appeal Brief, para. 507.
[762] Trial Judgement, para. 764.
[763] *Kambanda* Trial Judgement, paras. 61(B)(vii), 62, quoted with approval in *Kambanda* Appeal Judgement, para. 119.
[764] *Aleksovski* Appeal Judgement, para. 183, quoted in *Kayishema and Ruzindana* Appeal Judgement, para. 357.
[765] *Kayishema and Ruzindana* Appeal Judgement, para. 358.
[766] *Ntakirutimana* Appeal Judgement, para. 563.
[767] Appeal Brief, para. 507.
[768] Appeal Brief, para. 506.

find any element that would indicate that the Appellant was sentenced to life imprisonment solely on the basis of this aggravating factor.[769]

349. For the foregoing reasons, this part of the Appellant's ground of appeal is dismissed.

B. National Reconciliation and Restoration of Peace

350. The Appellant submits that the Trial Chamber, while it stated that it was "mindful" of the aims of the United Nations Security Council in creating the Tribunal, including national reconciliation and restoration of peace, as expressed in Resolution 955,[770] nevertheless sentenced him to life imprisonment, "notwithstanding the Dissenting Opinion of Judge Maqutu, according to which the Accused should not have been given the heaviest sentence, precisely because the wisdom derived from his severe experience could benefit the aim of national reconciliation".[771] In his view, the Trial Chamber "ostentatiously first outlined the rules it purported to have applied. However, it did not apply those rules."[772] In support of this assertion, the Appellant contends that the Trial Chamber "gave no explanation whatsoever as to what extent […] the sentence it imposed would help restore peace and national reconciliation".[773] The Prosecution responds that "[i]t is unclear from the Appellant's argument how the Trial Chamber failed to assess this subject properly, or how a reconsideration of it would lead to the sentences being reduced to the level the Appellant now seeks",[774] and therefore argues that this submission must fail.[775]

351. The Appeals Chamber first notes that while national reconciliation and the restoration and maintenance of peace are important goals of sentencing, they are not the only goals. Indeed, the Trial Chamber correctly referred to "deterrence, justice, reconciliation, and the restoration and maintenance of peace" as being among the goals consistent with Security Council Resolution 955 of 8 November 1994[776] which set up the Tribunal.[777] These goals cannot be separated but are intertwined, and, in any case, nothing in Resolution 955 indicates that the Security Council intended that one should prevail over another. The Appellant contends that sentencing him to life

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[769] Appeal Brief, paras. 506, 514. The Appellant was found guilty of genocide and extermination as a crime against humanity. It is only after considering each charge individually that the Trial Chamber reached such verdict.
[770] Appeal Brief, para. 502.
[771] Appeal Brief, para. 503. *See also* Appeal Brief, para. 508.
[772] Appeal Brief, para. 508. In the original French text: "[…] c'est de pure forme que la Chambre avait au préalable indiqué les règles de droit sur lesquelles elle se serait fondée".
[773] Appeal Brief, para. 508.
[774] Respondent's Brief, para. 282.
[775] Respondent's Brief, para. 283.
[776] S.C. Res. 955, U.N. Doc. S/RES/955 (1994) ("Resolution 955").

imprisonment would deprive "both his fellow Rwandans and their country of what they could learn from him upon his release"[778] and therefore not serve the goal of national reconciliation. The Appeals Chamber is not persuaded by this argument. The Trial Chamber was free to conclude that any advantage in terms of national reconciliation gained by the Appellant's eventual release was either minimal or was outweighed by the harms to both general deterrence and national reconciliation that would be created by a lenient sentence that was not perceived to reflect the gravity of the crimes committed. Moreover, too lenient a sentence might also undermine other fundamental principles of sentencing, in particular proportionality,[779] by giving the impression that the punishment does not reflect the gravity of the crimes committed. In any case, it is not a matter – as the Appellant contends – of "the triumph of the law over the barbarous acts that were committed"[780] or of whether or not "sentencing [him] to life imprisonment [would] contribute, even momentarily, to the restoration of peace or national reconciliation, which is one of the Tribunal's goals".[781] It is settled case law before both the ICTR and the ICTY that the underlying principle is that Trial Chambers must tailor the penalty to fit the individual circumstances of the accused and the gravity of the crime.[782] The Appellant has neither demonstrated that the Trial Chamber committed any error in its assessment of the goals behind the creation of the Tribunal, nor that the Trial Chamber improperly exercised its discretion in determining the appropriate sentence.

352. For the foregoing reasons, this part of the Appellant's fifteenth ground of appeal is dismissed.

C. The Appellant's "Individual Circumstances"

353. The Appellant argues under this part of his ground of appeal that the Trial Chamber failed to fulfil its obligation, pursuant to Article 23(2) of the Statute, to take into account his "individual circumstances".[783] He points out, for example, that he is "relatively young in age" and is "the father of four young children".[784] The Prosecution responds that the Trial Chamber did consider the Appellant's personal circumstances at paragraphs 756 to 758 of the Trial Judgement and, in

[777] Trial Judgement, para. 753, quoting, in part, Resolution 955, Preamble.
[778] Appeal Brief, para. 509.
[779] *Blagojevi} et al.*, Decision on Dragan Obrenovi}'s Application for Provisional Release, para. 37.
[780] Appeal Brief, para. 508.
[781] Appeal Brief, para. 508.
[782] *See Celebici Case* Appeal Judgement, para. 717; *Akayesu* Appeal Judgement, para. 407.
[783] Appeal Brief, para. 510.
[784] Appeal Brief, para. 510.

particular, held that he had previously been of good character.[785] It further argues that the Appellant's personal circumstances are in any case "wholly unexceptional" in the sense that the fact that he has a young family and had been of a previous good character "could be said of many accused persons and could not be given significant weight in a case of this gravity".[786]

354. The Appeals Chamber recalls that Trial Chambers indeed have an obligation, pursuant to Article 23(2) of the Statute, to take into account the individual circumstances of accused persons, as well as, pursuant to Rule 101(B)(ii), mitigating circumstances. Despite the fact that the Defence did not address sentencing matters in its closing brief, and also expressed its reluctance to do so during the oral arguments,[787] the Trial Chamber devoted paragraphs 756 and 757 to its determination of the mitigating circumstances. Left with the trial record as the sole basis for its reasoning, it did note that the Appellant was, prior to his involvement in the genocide, "widely regarded as a good man, who did a lot to help his *commune* and his country".[788] The fact that it decided that there are insufficient reasons to conclude that there are any mitigating factors in this case was clearly within its discretion[789] and the Appellant does not attempt to challenge this specific issue. The Appellant merely attempts to bring on appeal arguments he failed to put forward at the trial stage. The Appeals Chamber recalls in that respect that the appeal process is not a trial *de novo*. As noted by the ICTY Appeals Chamber, an Appellant cannot expect the Appeals Chamber to consider new mitigating circumstances on appeal:

> As regards additional mitigating evidence that was available, though not raised, at trial, the Appeals Chamber does not consider itself to be the appropriate forum at which such material should first be raised.[790]

The Appeals Chamber need not therefore address the Appellant's contention that his young age and his family situation should have been taken into account by the Trial Chamber as a mitigating circumstance.

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[785] Respondent's Brief, para. 280.
[786] Respondent's Brief, para. 281, referring to *Furund`ija* Trial Judgement, para. 284.
[787] Trial Judgement, para. 756. The parties have an obligation, pursuant to Rule 85(A)(vi), to put forward "[a]ny relevant information that may assist the Trial Chamber in determining an appropriate sentence." As stated by the ICTY Appeals Chamber, "[i]f an accused fails to put forward any relevant information, the Appeals Chamber does not consider that, as a general rule, a Trial Chamber is under an obligation to hunt for information that counsel does not see fit to put before it at the appropriate time." *Kupre{ki} et al.* Appeal Judgement, para. 414.
[788] Trial Judgement, para. 757.
[789] *See Niyitegeka* Appeal Judgement, para. 266; *Musema* Appeal Judgement, para. 396. *See also Kayishema and Ruzindana* Appeal Judgement, para. 366 ("?Wgeighing and assessing aggravating and mitigating factors in sentencing lies primarily within the discretion of the Trial Chamber, and […] the Appellant bears the burden of demonstrating that the Trial Chamber abused its discretion.").
[790] *Kvocka et al.* Appeal Judgement, para. 674, referring to *^elebi}i Case* Appeal Judgement, para. 790.

355. For the foregoing reasons, this part of the appeal is dismissed.

D. Individual and Proportional Sentencing

356. The Appellant further alleges that the Trial Chamber "totally disregarded the individualisation and proportionality test that is paramount in determining sentences in criminal cases".[791] He asserts that Judges, in imposing a sentence, "must be mindful of the need for the punishment to be proportional to the offence" and that the sentence "must be consistent with the basic principle of individualisation of the punishment".[792] The Appellant then compares his sentence with that of other accused before the ICTR.[793] The Prosecution responds that the Trial Chamber "expressly took into account the applicable sentencing range [and that] there has been nothing advanced, which discloses an error in its approach".[794] The Appeals Chamber will address the Appellant's arguments in turn.

1. The Trial Chamber's Duty to Individualize the Penalty

357. The principle of individualization requires that each sentence be pronounced on the basis of the individual circumstances of the accused and the gravity of the crime.[795] The gravity of the crime is a key factor that the Trial Chamber considers in determining the sentence.[796] The Trial Chamber in this case was cognizant of this obligation:

> In sentencing Kamuhanda, the Chamber will take into account the gravity of the offences pursuant to Article 23 of the Statute and Rule 101 of the Rules, the individual circumstances of Kamuhanda, aggravating and mitigating circumstances as well as the general sentencing practice of the Tribunal.[797]

While arguing that the Trial Chamber "totally disregarded"[798] this obligation, the Appellant does not draw the attention of the Appeals Chamber to any specific error. He merely argues, without supporting his assertion, that a sentence of life in prison "may only be justified if the wrong occasioned by the crime is such that, in the interest of public law and order, the accused cannot

[791] Appeal Brief, para. 511.
[792] Appeal Brief, para. 512.
[793] Appeal Brief, paras. 516-523.
[794] Respondent's Brief, para. 285.
[795] *Celebici Case* Appeal Judgement, para. 717. *Ntakirutimana* Appeal Judgement, para. 551.
[796] *See Musema* Appeal Judgement, para. 382; *Celebici Case* Appeal Judgement, para. 847.
[797] Trial Judgement, para. 755, in part (citations omitted).
[798] Appeal Brief, para. 511.

be released even after several years".[799] Domestic courts in some countries have held that an accused should be given the possibility of release, even if he is sentenced to imprisonment for the remainder of his life. As the German Federal Constitutional Court stated the argument: "One of the preconditions of a humane penal system is that, in principle, those convicted to life sentences stand a chance of being freed again."[800] The Appeals Chamber considers that, whatever its merits in the context of domestic legal systems, where it may apply "in principle", this view is inapplicable in a case such as this one which involves extraordinarily egregious crimes. For instance, the Trial Chamber took into account the facts that the attack was directed against a place "universally recognized to be a sanctuary, the Compound of the Gikomero Parish Church", and that "many people were massacred".[801] The Appeals Chamber therefore finds that the Appellant's contention that the sentence in the present case was "imposed in a purely perfunctory manner without taking account of the circumstances of the case […]" is without merit.

2. The Principle of Proportionality

358. The Appellant argues that "[a] case-law analysis reveals that such a sentence is entirely disproportionate to those imposed in other cases, where the crimes the accused were charged with have no comparison with those Jean de Dieu Kamuhanda was charged with".[802]

359. The Appeals Chamber notes that the Appellant's argument arises out of a misunderstanding of the principle of proportionality. The principle of proportionality "by no means encompasses proportionality between one's sentence and the sentence of other accused".[803] Rather, it implies that sentences "must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender".[804]

360. Therefore, the Appeals Chamber finds that the Appellant's argument in this respect is misguided.

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[799] Appeal Brief, para. 513. The original French text reads as follows: "[L'emprisonnement à vie] ne peut valablement se justifier que si le trouble inhérent au crime commis, rend à jamais incompatible avec les nécessités de l'ordre public, la libération de l'accusé même après plusieurs années."
[800] BVerfGE 45, 187 [228, 229].
[801] Trial Judgement, para. 764.
[802] Appeal Brief, para. 516.
[803] *Dragan Nikolic* Judgement on Sentencing Appeal, para. 21.
[804] *Akayesu* Appeal Judgement, para. 414.

3. Comparison with Other Cases

361. The Appellant contends that his sentence is excessive when compared to that of other persons convicted by the Tribunal. The question of the guidance that may be provided by previous sentences rendered before the ICTR and the ICTY has been extensively dealt with by the ICTY Appeals Chamber in the *Dragan Nikolic* case:

> The guidance that may be provided by previous sentences rendered by the International Tribunal and the ICTR is not only "very limited" but is also not necessarily a proper avenue to challenge a Trial Chamber's finding in exercising its discretion to impose a sentence. The reason for this is twofold. First, whereas such comparison with previous cases may only be undertaken where the offences are the same and were committed in substantially similar circumstances, when differences are more significant than similarities or mitigating and aggravating factors differ, different sentencing might be justified. Second, Trial Chambers have an overriding obligation to tailor a penalty to fit the individual circumstances of the accused and the gravity of the crime, with due regard to the entirety of the case, as the triers of fact. The Appeals Chamber recalls that it does not operate as a second Trial Chamber conducting a trial *de novo*, and that it will not revise a sentence unless the Appellant demonstrates that the Trial Chamber has committed a "discernible error" in exercising its discretion.[805]

362. The Appeals Chamber does not find the Appellant's attempts to compare his own case with others to be compelling. Some of the cases he mentions are too dissimilar from his to provide guidance: in *Ruggiu*, the accused was sentenced on the basis of a guilty plea, which was taken into account as a mitigating factor,[806] while in the case of *Elizaphan Ntakirutimana*, the accused was convicted of genocide and extermination only as an aider and abetter, and his advanced age and poor health were taken into account in mitigation.[807] Moreover, a review of the ICTR's case law finds that those who, like the Appellant, have been convicted of genocide as a principal perpetrator have frequently been sentenced to life imprisonment.[808] In any case, the Trial Chamber is not bound by previous sentencing practices. Here, the Trial Chamber made clear in paragraph 765 of the Trial Judgement that it not only had "taken into consideration the sentencing practice in the ICTR and the ICTY", but also that it considered that "the penalty must first and foremost be commensurate to the gravity of the offence".[809] A review of the Appellant's

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[805] *Dragan Nikolic* Judgement on Sentencing Appeal, para. 19 (citations omitted).
[806] *See Ruggiu* Trial Judgement, paras. 53-55.
[807] *See Ntakirutimana* Appeal Judgement, para. 569; *Ntakirutimana* Trial Judgement, paras. 895-898.
[808] These include a number of persons whose life sentences for genocide have been affirmed by the Appeals Chamber (Jean-Paul Akayesu, Jean Kambanda, Clément Kayishema, Alfred Musema, Eliezer Niyitegeka, Georges Rutaganda) and others whose appeals have not yet been decided (Mikaeli Muhimana, Ferdinand Nahimana, Emanuel Ndindabahizi, Hassan Ngeze). In other cases, Chambers have found that the convicted person's conduct merited a sentence of life imprisonment, but that the sentence should be reduced on the basis of violations of his rights (Juvénal Kajelijeli and Jean-Bosco Barayagwiza; Barayagwiza's appeal is pending). The Appeals Chamber of course expresses no view on cases presently under appeal.
[809] Trial Judgement, para. 765.

arguments does not show that the Trial Chamber committed a discernible error in the exercise of its sentencing discretion by wrongly assessing the particular circumstances of his case.

363. Finally, the Appeals Chamber has to determine whether vacating the Trial Chamber's findings concerning instigating and aiding and abetting genocide should have an impact on the Appellant's sentence. The Appeals Chamber finds that this is not the case. The Trial Chamber had the full picture of the case before it, and this picture, based on the trial evidence, remains unchanged. In fact, the Appellant remains liable under Article 6(1) for both genocide and extermination. Life imprisonment is certainly a reasonable sentence for ordering genocide and extermination, and, specifically, for the Appellant's ordering of the massacre at Gikomero Parish Compound. The Trial Chamber would not have arrived at another sentence even if it had convicted the Appellant for ordering alone.

E. Conclusion

364. In sum, the Appellant has failed to show that the Trial Chamber committed any error in sentencing him as it did. The Appeals Chamber's decision to vacate the findings that the Appellant instigated and aided and abetted genocide and extermination does not require the imposition of a lesser sentence. Accordingly, the Appeals Chamber dismisses in its entirety the appeal in respect of sentencing.

XIII. DISPOSITION

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

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

NOTING the written submissions of the parties and their oral arguments presented at the hearing on 19 May 2005;

SITTING in open session;

VACATES the Appellant's convictions for instigating genocide and extermination under Counts 2 and 5, respectively;

VACATES, Judge Shahabuddeen dissenting, the Appellant's convictions for aiding and abetting genocide and extermination under Counts 2 and 5, respectively;

AFFIRMS, Judge Weinberg de Roca dissenting, the Appellant's convictions for genocide and extermination as a crime against humanity pursuant to Article 6(1) of the Statute;

DISMISSES, Judge Weinberg de Roca dissenting, the appeal in all other respects;

AFFIRMS, Judge Weinberg de Roca dissenting, the sentences imposed by the Trial Chamber;

ORDERS, pursuant to Rule 101(D) of the Rules, that credit shall be given to the Appellant for the period already spent in detention from 26 November 1999;

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

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

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

Theodor Meron	Mohamed Shahabuddeen
Presiding Judge	Judge
Florence Ndepele Mwachande Mumba	Wolfgang Schomburg
Judge	Judge

Inés Mónica Weinberg de Roca

Judge

Presiding Judge Meron appends a separate opinion.

Judge Schomburg appends a separate opinion.

Judge Shahabuddeen appends a separate and partially dissenting opinion.

Judge Weinberg de Roca appends separate and dissenting opinions.

Issued on the 19th day of September 2005

at The Hague, The Netherlands.

[**SEAL OF THE TRIBUNAL**]

XIV. SEPARATE OPINION OF PRESIDING JUDGE THEODOR MERON

366. I regard our paragraph 77 as a determination relevant only to the factual findings of this particular case. As regards Judge Shahabuddeen's Separate and Partially Dissenting Opinion, it is not my view that paragraph 77 in anyway extends the reach of *Celebici*. In that respect, I agree with Judge Shahabuddeen that "there is no reason why a single crime cannot be perpetrated by multiple methods".[810] On this basis I also do not consider that paragraph 77 has any relevance to the *Blaškic* holding which, as Judge Shahabuddeen notes[811], was based on the illogicality of holding in that case the Appellant responsible under Article 7(1) for having ordered a subordinate to commit an illegal act and responsible as a superior under Article 7(3) for failing to prevent or punish the subordinate for the commission of that illegal act. In short, paragraph 77 does not make any change to the law of the Tribunal concerning multiple modes of liability.

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

Dated this 19th day of September 2005,
At The Hague, The Netherlands

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Theodor Meron

Presiding Judge

[**SEAL OF THE TRIBUNAL**]

[810] Separate and Partially Dissenting Opinion of Judge Shahabuddeen, Judgement, para. 405.
[811] *Ibid*, para. 410.

XV. SEPARATE OPINION OF JUDGE WOLFGANG SCHOMBURG

367. While I agree with the decision of the majority of the Appeals Chamber to uphold the verdict for ordering genocide[812] and extermination in general, I respectfully disagree with the decision of the majority to quash the Trial Chamber's finding that the Appellant also physically and psychologically substantially assisted in the massacre at Gikomero Parish Compound on 12 April 1994 through the distribution of weapons. I am convinced that a reasonable trier of fact could have come to this conclusion as the Trial Chamber in my view correctly did.

A. Aiding and Abetting Through the Distribution of Weapons

368. In paragraph 68 of the Judgement, the Appeals Chamber

> agrees with the Appellant that the evidence does not support any connection between the distribution of weapons and the subsequent attack on the Gikomero Parish Compound. It was neither established that the persons present during the meeting in the house of the Appellant's cousin took part in the attack, nor that the weapons he distributed were used at all. The Appeals Chamber recalls again that the Trial Chamber did not rule out the possibility that the attackers did not come from Gikomero, but from another location.[813]

369. I disagree with the finding "that the evidence does not support any connection between the distribution of weapons and the subsequent attack". On the contrary, I believe that the Trial Chamber indeed accepted evidence which reasonably proves such a connection, and that the Trial Chamber did not err when it found that the Appellant aided and abetted the killings at Gikomero Parish Compound on 12 April 1994 through the distribution of weapons at the meeting which took place between 6 and 10 April 1994 at the home of two of the Appellant's cousins in Gikomero.

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[812] There is no need to discuss "ordering" as a mode of responsibility relating to genocide in this case. However, as a matter of principle it should not be forgotten that Article 2 of the Statute as such does not penalize "ordering genocide". This Article incorporates *verbatim* Articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, describing exhaustively the punishable acts and modes of liability, thus containing its own exclusive "general part". With a view to the fundamental principle of substantive criminal law not to penalize a conduct retroactively (*nullum crimen, nulla poena sine praevia lege poenali*) in my understanding Article 2 of the Statute provides a closed system, and it has to be noted that "ordering" is not listed as a separate mode of liability. However, this question has not been appealed by either party. Also, the Appeals Chamber, unanimously, did not see any reason to decide on this issue *proprio motu*. It was not decisive for the assessment of the totality of the criminal conduct of the Appellant, and, more importantly, there is no prejudice to the Appellant, whose criminal conduct amounts in any event to genocide, punishable pursuant to Article 2 (3) (a) of the Statute (see already *Semanza* Appeal Judgement, Disposition in relation to the genocidal events at Musha Church, and para. 364). The picture of the criminal conduct remains the same as it was before the Trial Chamber. Therefore, there is no need to discuss in this case a requalification of the conviction for genocide without any reference to Article 6 (1) of the Statute.

[813] Trial Judgement, para. 67.

370. The Trial Chamber made a finding on the nexus between the distribution of the weapons and the massacre based on the entirety of the evidence which was before it.

371. This can be particularly demonstrated in paragraph 648 of the Trial Judgement, where the Trial Chamber held

> ?ogn the basis of its factual findings and legal findings above, ?...g that the Accused participated in the killings in Gikomero Parish Compound in Gikomero *commune* by ?...g aiding and abetting in the commission of the crime through the distribution of weapons and by leading the attackers to the Gikomero Parish Compound. (emphasis added)

In this paragraph, the Trial Chamber explicitly referred to its findings made earlier in the Trial Judgement. Thus, the necessary nexus between the distribution of weapons and the massacre has to be seen in the Trial Chamber's words "?ogn the basis of its factual findings and legal findings above" which form an introduction to the Trial Chamber's finding that the distribution of weapons aided and abetted the massacre.

372. What are these factual findings? For instance, under the heading "Distribution of Weapons at the Homes of the Accused's Cousins" the Trial Chamber had come to the conclusion that the Appellant distributed grenades, guns and machetes to people present at the meeting that occurred sometime between 6 April and 10 April 1994 at the home of two of his cousins in Gikomero.[814]

373. The Trial Chamber described these weapons in detail and mentioned the people to whom they were distributed:

> Prosecution Witness GEK testified that there were four people in the room with the Accused and her husband. She identified those people as Ngiruwonsanga, Kamanzi, Karakezi and Ngarambe, who was just a neighbour. ?...g She testified that the Accused told Kamanzi that the killing had not yet started in Gikomero *commune* and went on to say that "…those who were to assist him to start had married Tutsi women…" She said that the Accused went on, saying that he would bring equipment for them to start, and that if their women were in the way they should first eliminate them.[815]
>
> Prosecution Witness GEK, when asked if she knew whether any weapon or item was handed over in that room, testified, "When I went outside I was able to see firearms, grenades, and machetes, which they distributed when he went outside the house." She said that the Accused distributed firearms and grenades inside the house before they went outside and she saw her husband carrying "four grenades that resembled a hammer ?...g".[816]
>
> The Chamber has found that at a meeting occurring sometime between 6 April 1994 and 10 April 1994, at the home of his cousins in Gikomero *commune*, the Accused addressed those present, incited them to start killing Tutsi, and distributed grenades, machetes and guns to them

[814] Trial Judgement, para. 273. See also *ibid.*, para. 637.
[815] Trial Judgement, para. 253 (footnotes omitted).
[816] Trial Judgement, para. 255 (footnotes omitted).

> to use and to further distribute. He also told the participants that he would return to see if they had started the killings, or so that the killings could start.[817]

374. Also, the Trial Chamber held that the Appellant had told those present

> that the killings in Gikomero *commune* had not yet started and that "those ?whog were to assist him to start had married Tutsi women". ?Heg told them that they should distribute those weapons and that he would return to assist them. He also said that he would return to see if they had begun the killings, or so that the killings could start.[818]

375. The Trial Chamber mentions on numerous occasions the same sort of weapons as the one being used during the massacre:

> As to the attack itself, the Chamber notes the evidence that after the killing of Bucundura, the people who came with the Accused attacked the refugees using rifles, grenades and traditional weapons. ?...g The Chamber is further satisfied that this was carried out by attackers brought by and led by the Accused, though the Accused left as the attack had just started.[819]

> The Chamber finds that the Accused arrived on 12 April 1994 at the Gikomero Parish Compound with a group of *Interahamwe*, soldiers, policemen and local population armed with firearms, grenades and other weapons and that he led them in the Gikomero Parish Compound, Kigali-Rural *préfecture*, to initiate the attack. The Chamber finds on the basis of the totality of the evidence that the Accused initiated the attack and the Majority further finds that the Accused said the word "work" to give an order to the attackers to start the killings.[820]

> The Chamber finds that at the Gikomero Parish Compound on 12 April 1994, the attackers used traditional weapons, guns and grenades to kill and injure a large number of Tutsi refugees. The killings were committed by armed *Interahamwe*, soldiers, policemen and the local population, and were committed in the Compound, Church and classrooms.[821]

> The Chamber has found on the basis of the totality of the evidence that the Accused initiated the attack. ?...g The Chamber has found that the Accused arrived at the school with a group of individuals, soldiers, policemen and *Interahamwe* armed with firearms, grenades and other weapons and that he led them in the Gikomero Parish Compound and gave them the order to attack.[822]

376. The Trial Chamber also made it clear that it was indeed those weapons that were used during the massacre at Gikomero Parish Compound. It stated that Witness GEK

> said that she saw *what happened to the weapons* when the Accused returned to arrange for the killing to start.[823]

377. It is important to note in this context that the Trial Chamber found that "Witness GEK is highly credible".[824] Thus, the fact that the Trial Chamber mentioned this part of her testimony

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[817] Trial Judgement, para. 637 (footnote omitted).
[818] Trial Judgement, para. 273. See also Trial Judgement, para. 637.
[819] Trial Judgement, para. 493.
[820] Trial Judgement, para. 505.
[821] Trial Judgement, para. 506.
[822] Trial Judgement, para. 643.
[823] Trial Judgement, para. 256 (emphasis added; footnote omitted).

demonstrates the Trial Chamber's view that the distribution of weapons amounted to aiding and abetting the massacre at Gikomero Parish Compound.

378. This finding must also be seen in light of the Indictment. With regard to the massacre at Gikomero Parish Compound on 12 April 1994, the Indictment alleged:

> ?...g Kamuhanda had family ties to Gikomero commune, Kigali-Rural préfecture. During the month of April 1994, he *supervised the killings in the area*. On several occasions he personally distributed firearms, grenades and machettes ?sicg to civilian militia in Kigali-Rural *for the purpose of* "killing all the Tutsi ?...g".[825]
>
> Furthermore, ?...g Kamuhanda personally led attacks of soldiers and Interahamwe against Tutsi refugees in Kigali-Rural préfecture, notably on or about April 12th at the parish church and adjoining school in Gikomero. On that occasion Jean de Dieu Kamuhanda arrived at the school with a group of soldiers and Interahamwe armed with firearms and grenades. He directed the militia into the courtyard of the school compound and gave them the order to attack. The soldiers and Interahamwe attacked the refugees. Several thousand persons were killed.[826]

In particular, paragraph 6.44 shows that the Trial Chamber was called upon to decide, *inter alia*, on the alleged distribution of weapons by the Appellant, not as an independent or self-contained incident, but in light of the allegation that the Appellant intended and organized the genocide and the extermination of the Tutsi population in at least the area under his influence. As the Trial Judgement must be seen as a "response" to the Indictment, it becomes clear that the Trial Chamber made its findings on the distribution of the weapons in the context of the massacre at Gikomero Parish Compound, a context which is clearly set out in the Indictment's words that "firearms, grenades and machettes ?...g ?were distributedg to civilian militia in Kigali-Rural for the purpose of 'killing all the Tutsi ?...g'". This allegation was not refuted by the Trial Chamber. Instead, the quotes mentioned above demonstrate that the Trial Chamber was convinced beyond a reasonable doubt that the allegations in paragraph 6.44 of the Indictment were proven.

379. As to the persons who participated in the massacre at Gikomero Parish Compound, the majority of the Appeals Chamber held that "?igt was neither established that the persons present during the meeting in the house of the Appellant's cousin took part in the attack", and "the Trial Chamber did not rule out the possibility that the attackers did not come from Gikomero, but from another location".[827] I do not agree with these findings.

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[824] Trial Judgement, para. 272.
[825] See Indictment, para. 6.44 (emphasis added).
[826] See Indictment, para. 6.45.
[827] Appeal Judgement, para. 68.

380. The Trial Chamber held "that there is no conclusive evidence that the attackers came from Rubungo".[828] This finding, however, was not made in order to indicate that the attackers may have come from another location than Gikomero. Rather, it was made when deciding on the Defence submission that the attackers came from Rubungo and that, consequently, the Appellant was not in any way connected to the massacre.[829] The fact that the Trial Chamber refuted this Defence submission is fully in line with the numerous other findings in which the Trial Chamber established a link between the persons to whom the Appellant distributed weapons and the participation of these persons in the massacre:

> Prosecution Witness GEK testified that the Accused distributed the weapons to Karekezi ?sicg, Kamanzi, Njiriwonga and Ngarambe. She testified on cross-examination that Ngiruwonsanga was a well-known *Interahamwe* and when the ?Appellantg came to distribute arms Ngiruwonsanga was present. She said that Ngiruwonsanga was present at all the locations where attacks were carried out. Witness GEK testified that she personally saw ?Ngarambeg and Ngiruwonsanga cutting up people at the trade center.[830]

This evidence shows that, *inter alia*, Ngarambe and Ngiruwonsanga were among the perpetrators of the massacre at Gikomero Parish Compound. As the Trial Chamber deemed Witness GEK's testimony to be highly credible, this part of her testimony must also be seen as having been accepted by the Trial Chamber.

381. In relation to the role of Karakezi, Witness GEK testified that she saw the Appellant again when he came on the day of the massacre, "to arrange for the killings to start ?...g at the primary school".[831] She stated: "I saw him arrive, but he did not come to our house. He went to the house

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[828] Trial Judgement, para. 67.

[829] Trial Judgement, para. 66.

[830] Trial Judgement, para. 257 (emphasis added; footnotes omitted). See also T. 4 September 2001, pp 50, 51 (ICS) (GEK).

Q.: Did you at any time see people being actually killed or attacked in the village?

A.: Yes, I saw some people being taken to the centre where we lived, for the purpose of killing them.

Q.: And how many days after the shooting at the school did you see that occur?

A.: On that day, when they came back from the killings, they killed the survivors at that very place and even the next day and the following day, they continued to execute people at the trade centre where we lived. (T. 4 September 2001, pp 9, 10 ?ICSg ?GEKg)

?...g

Q.: You mentioned in your evidence that you saw Mr. Kamuhanda and that there were four names of people that he was with. There was a man called ?Ngarambeg, ?Karakezig, ?Ngiruwonsangag and ?...g Kamanzi; is that right or not?

A.: Yes, that is correct I saw them together.

Q.: Did you see at any time any of those four men attack or kill individuals either at the trade centre or around the school area?

A.: Yes, I saw them. I personally saw ?Ngarambeg and ?Ngiruwonsangag that were cutting up people at the trade centre. (T. 4 September 2001, pp 12, 13 ?ICSg ?GEKg)

[831] T. 3 September 2001, p. 180 (ICS) (GEK). See also Trial Judgement, para. 439.

of a neighbour named Karakezi."[832] The Prosecution then asked: "Is that the same Karakezi that you have seen on the weapon distribution day?" In her answer, witness GEK explicitly acknowledged this: "Yes, it's the same Karakezi."[833] Witness GEK further testified that the Appellant then went in the direction of the primary school (part of Gikomero Parish Compound).[834] The Prosecution then asked Witness GEK whether the Appellant was alone or with other persons at that time. Witness GEK answered: "Well, in fact everybody jumped into a vehicle when he was heading for the school. When he was heading for the school, Karekezi [sic] went on board."[835] Again, read in the overall context of the evidence and all the findings set out above, it becomes clear that the Trial Chamber relied on this part of Witness GEK's evidence when it found that the Appellant aided and abetted the massacre when he distributed weapons to the persons at the home of his two cousins.

382. Based on the entirety of the aforementioned evidence, it becomes clear that Witness GEK's testimony did not solely concern the distribution of weapons by the Appellant in her house days before the massacre. Rather, Witness GEK testified about the distribution of weapons by the Appellant as part of his role in the preparation and execution of the massacre at Gikomero Parish Compound. It was also in this context that Witness GEK was examined by the Prosecution. In particular, the Prosecution asked questions concerning the connection between the meeting of the Appellant and others in GEK's house between 6 April and 10 April 1994 and the massacre at Gikomero Parish Compound on 12 April 1994. The Trial Chamber took all this into account and held that there was a substantial connection between these two incidents. In the light of the above-mentioned evidence and findings, and read together with the relevant allegations in the Indictment, it was not necessary for the Trial Chamber to make any further explicit finding as to the connection between the distribution of weapons and the massacre. This is also supported by the fact that Judge Maqutu did not dissent on this issue, although he dissented on other parts of the Trial Judgement.[836]

383. These factual findings, on the basis of which the Trial Chamber accepted a connection between the distribution of weapons and the massacre, were reasonable ones. They are supported by factual findings made in other parts of the Trial Judgement:

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[832] T. 3 September 2001, p. 180 (ICS) (GEK). See also Trial Judgement, para. 439, and Judge Maqutu's Separate and Concurring Opinion on the Verdict, para. 31.
[833] T. 3 September 2001, p. 180 (ICS) (GEK).
[834] T. 3 September 2001, p. 182 (ICS) (GEK).

- The Trial Chamber held that the meeting at the home of the Appellant's cousins took place in Gikomero, *i.e.* in the close vicinity of Gikomero Parish Compound;

- The massacre at Gikomero Parish Compound took place on 12 April 1994, *i.e.* only a few days after the meeting;

- "The Accused told those present that he would bring 'equipment' for them to start ?,g that they should distribute those weapons and ?…g that he would return to see if they had begun the killings, or so that the killings could start."[837]

The Appellant's words, when considered in the close temporal and geographical context of the massacre at Gikomero Parish Compound, allow a reasonable trier of fact to find that the distribution of weapons substantially contributed – both physically and psychologically – to the massacre, a finding the Trial Chamber did indeed make.

384. As to the legal findings of the Trial Chamber, it is clear that the Trial Chamber was aware of the nexus requirement for criminal liability as an aider and abetter.[838] The Trial Chamber correctly held that while "'?agiding' signifies providing assistance to another in the commission of the crime", "'?agbetting' signifies facilitating, encouraging, advising or instigating the commission of a crime".[839] It further found that

> ?tghe contribution of an aider and abetter before or during the fact may take the form of practical assistance, encouragement or moral support, which has a substantial effect on the accomplishment of the substantive offence. Such acts of assistance before or during the fact need not have actually caused the consummation of the crime by the actual perpetrator, but must have had a substantial effect on the commission of the crime by the actual perpetrator.[840]

Thus, even if the weapons that were distributed by the Appellant had not been used at all, their mere distribution amounts to psychological assistance, as it was an act of encouragement that contributed substantially to the massacre, thus amounting to abetting if not aiding.

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[835] T. 3 September 2001, p. 183 (ICS) (GEK).
[836] *Cf.* Judge Maqutu's Separate and Concurring Opinion on the Verdict, paras 24-39.
[837] Trial Judgement, para. 273.
[838] According to Black's Law Dictionary, aiding and abetting means "?tgo assist or facilitate the commission of a crime", 8th ed. (St. Paul, West Group), p. 76. Black's also clarifies the difference between physical assistance ("to aid") and psychological assistance ("to abet"). In German law, a similar distinction is made between physical and psychological assistance (*physische* and *psychologische Beihilfe*), *cf.* Cramer/Heine in Schönke/Schröder, Strafgesetzbuch Kommentar, 26th ed. 2001, § 27, mn 12.
[839] Trial Judgement, para. 596 (footnotes omitted; emphasis added). This is an almost *verbatim* quotation from Charles E. Torcia, Wharton's Criminal Law, § 29, p. 181 (15th ed. 1993), cited in Black's Law Dictionary, *supra* note 838, p. 76.
[840] Trial Judgement, para. 597 (footnotes omitted).

385. It is evident from the legal findings that the Trial Chamber considered the nexus requirement for "aiding and abetting" in evaluating the evidence, and that, as a result, it found the Appellant guilty of aiding and abetting in the massacre through the distribution of weapons. This is also shown by the Trial Chamber's reliance on Witness GEK's credibility. The Trial Chamber did not reject any part of her testimony. Neither did it reject the connection between the distribution of weapons and the massacre, a connection provided by Witness GEK. Thus, although it would have been preferable if the Trial Chamber had made more explicit findings on the nexus requirement, it must be emphasized once more that a Trial Chamber is not required to articulate in its judgement every step of its reasoning in reaching a finding,[841] in particular when this nexus is self-evident.

B. Cumulative Convictions

386. The Appeals Chamber has unanimously held that

> [t]he factual findings of the Trial Chamber support the Appellant's conviction for aiding and abetting as well as for ordering the crimes.[842]

These factual findings refer to five of the six findings enumerated in paragraph 71 of the Appeal Judgement. The first of these enumerated findings, referring to the distribution of weapons, was disregarded by the majority as an act of aiding and abetting.[843] As described above, I disagree with this finding of the majority.

387. The majority of the Appeals Chamber upheld the conviction for ordering on the basis of the aforementioned five factual findings, but not the conviction for aiding and abetting, because this would be impermissibly cumulative. This finding of the majority, which is limited solely to the abovementioned five factual findings, raises the question of whether the conviction for the distribution of weapons is also based on the same facts, thus rendering also this sixth part of the conviction impermissibly cumulative. In my opinion, the Appellant can be convicted solely for ordering, encompassing exhaustively all the acts qualified by the Trial Chamber as aiding and abetting.

388. The acts of the Appellant, both at the meeting in the home of his cousins and concluding with the massacre of Tutsi a few days later, form a natural unity of action consisting of a series of

[841] *Celebici* Appeal Judgement, para. 481; see also *Musema* Appeal Judgement, paras 18-19.
[842] Appeal Judgement, para. 77.
[843] *Cf.* Appeal Judgement, para. 72.

individual acts. This is particularly demonstrated by the finding of the Trial Chamber that at the meeting,

> the Accused addressed those present, incited them to start killing Tutsi, and distributed grenades, machetes and guns to them to use and to further distribute. He also told the participants that he would return to see if they had started the killings, or so that the killings could start.[844]

This finding shows that the Appellant's acts at the meeting and subsequently at Gikomero Parish Compound are inextricably intertwined. It would amount to an undue splitting of this natural unity of action to distinguish between these acts underlying the conviction for both aiding and abetting and ordering. Thus, the conviction for aiding and abetting, which is based, *inter alia*, on the Appellant's distribution of weapons, is based on acts which are not different from those underlying the conviction for ordering. As the latter is the more specific mode of liability, only the Appellant's conviction for ordering genocide and extermination has been correctly upheld. In my view this includes the distribution of weapons, this being the fundamental prerequisite for these acts of genocide and extermination.

389. In this context, it is important to note that this outcome has nothing to do with the fact that there is only one conviction for multiple modes of liability under Article 6(1) of the Statute. On the one hand, a conviction for several modes of liability has to reflect the entirety of the criminal conduct. On the other hand, a conviction must not give even the impression of punishing an accused twice for the same conduct under two heads of liability. Thus, it would be both a violation of this latter fundamental principle of criminal law and a violation of the principle of logic to punish a person for having ordered *and* aided and abetted at the same time and in relation to the same offence, if ordering and aiding and abetting are based on the same criminal conduct.

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

Dated this nineteenth day of September 2005,

At The Hague, The Netherlands

Wolfgang Schomburg

[844] Trial Judgement, para. 637.

Judge

?Seal of the Tribunalg

XVI. SEPARATE AND PARTIALLY DISSENTING OPINION OF JUDGE MOHAMED SHAHABUDDEEN

390. I support the judgement of the Appeals Chamber generally, save for one point. I state my views on that point and take the opportunity to give a concurring opinion on another, beginning with the latter.

A. The Extent to Which There was Aiding and Abetting

391. In respect of paragraph 68 of today's judgement, was the Appeals Chamber correct in agreeing with the appellant that the evidence did not support any connection between the distribution of weapons in the house of the appellant's cousin and the subsequent attack on Gikomero Parish Compound? In particular, was the Appeals Chamber also correct in holding that the Trial Chamber did not find that the appellant's interlocutors in that house were among the assailants at the subsequent genocide and that those weapons were used at that genocide?

392. The Trial Chamber found that, at a meeting at the home of his cousin in Gikomero between 6 and 10 April 1994, the appellant distributed weapons to some people. More particularly, "[t]he Accused told those present that he would bring 'equipment' for them to start […] that they should distribute those weapons […] that he would return to see if they had begun the killings, or so that the killings could start".[845]

393. On these findings, the Trial Chamber found that the appellant aided and abetted the genocide which later took place at Gikomero Parish Compound on 12 April 1994. However, the Trial Chamber did not find that any member of the meeting at the home of the cousin (excluding the appellant) was present at the massacre; also the Trial Chamber did not find that any of the weapons distributed by the appellant to the gathering at that meeting had been used at the massacre. In the light of these circumstances, the Appeals Chamber is reversing Trial Chamber's finding that the appellant aided and abetted the genocide by distributing the weapons and by using the words at the meeting at the home of the cousin.

394. Leaving aside the strict question of causality, the law, as understood in various jurisdictions, seems to be uniformly to the effect that aiding and abetting requires proof that the

[845] *Kamuhanda* Trial Judgement, ICTR-99-54A-T, of 22 January 2003, para. 273.

act of aiding and abetting substantially contributed to the eventual crime ("nexus"). No doubt, in this case, such a nexus could be proved if members of the gathering at the home of the appellant's cousin had participated in the massacre and/or if the weapons distributed to them had been used in the massacre. But, as has been noted, the Trial Chamber made no findings to either effect.

395. An attractive argument is that it is reasonable to infer a nexus between the meeting at the cousin's house and the subsequent massacre: the meeting occurred in Gikomero, very near the massacre site and just a few days before the massacre occurred. The argument is worthy of consideration. However, I am not persuaded. I agree that it would have been reasonable for the Trial Chamber to find that, based on this circumstantial evidence, the required nexus had been proved. But, my opinion being that the Trial Chamber did not make that finding, I am not able to support the view that the Appeals Chamber should itself make it and should proceed, on that basis, to affirm the Trial Chamber's conclusion.

396. The problem is that, there being an obligation on the part of the prosecution to prove all elements of its case beyond reasonable doubt, the expectation is that relevant findings of fact would be made clearly by the Trial Chamber. It is not sufficient, in my view, that evidence supporting such a nexus be found in the transcripts. It is true that the Trial Chamber need not articulate every step of its reasoning, but, when it comes to an element of the offence, a clear finding is necessary.

397. Here, it is possible that the Trial Chamber would have made the relevant findings, but it is also possible that it would not have done so. The Trial Chamber might not have been satisfied that the evidence before it established the matters in question beyond reasonable doubt (that is, either that the distributed weapons were used at the massacre or that the interlocutors at the home of the cousin were among the attackers at the massacre), especially because there was a suggestion that the attackers had come from a different part of the country. If the Trial Chamber was not so satisfied, then its finding of aiding and abetting would have been based on the mere distribution of weapons and on the words used by the appellant at the cousin's home. These circumstances by themselves are not enough to support a finding of aiding and abetting the perpetration of the subsequent crime of genocide, and about this there appears to be no divergence of views within the Appeals Chamber.

398. The Trial Chamber having, in my view, made no findings one way or another on the question of nexus, there is no basis for the Appeals Chamber to assume which way the Trial

Chamber would have gone. Principles of deference do not require the Appeals Chamber to uphold a judgement on the basis that the Trial Chamber *could* reasonably have made the necessary factual findings when, as it seems to me, the Trial Chamber did not in fact do so. If a Trial Chamber is relying on circumstantial evidence to support a finding against the accused, it is only fair to expect it to outline its reasoning so as to afford the accused a fair chance to appeal. Findings of such critical importance as those relating to nexus must be made by the Trial Chamber; it is not for the Appeals Chamber to fill in that lacuna in the trial judgement.

399. An argument is that the material shows that the Trial Chamber in fact made a determination that the appellant's interlocutors at the home of his cousin were among the assailants at the subsequent genocide and that the weapons which he distributed at the home of his cousin were used at the genocide. In my respectful view, the material relied upon for this view is altogether too thin to support such an argument.

400. For these reasons, I agree with the judgement of the Appeals Chamber on the point in issue. This does not mean that the appellant cannot be found to have aided and abetted in other respects.

B. Whether a Finding of Ordering Excludes a Finding of Aiding and Abetting

401. I must begin by regretting my failure to grasp the intended meaning of paragraph 77 of the judgement. The Appeals Chamber states that, having vacated the finding that the weapons distribution constituted aiding and abetting, it "does not find the remaining facts sufficiently compelling to maintain the conviction for aiding and abetting". This statement seems to reverse the Appeals Chamber's own holding, in paragraphs 67 through 72 of the judgement and in the first sentence of paragraph 77 itself, to the effect that the Trial Chamber was right to hold that the appellant's actions at Gikomero Parish (but not at the earlier meeting) did constitute aiding and abetting. In light of this contradiction, for which no explanation is given, I conclude that it cannot be that the Appeals Chamber is holding that, on the facts, the Trial Chamber was in error in finding that there was aiding and abetting.

402. The only other possible reading of paragraph 77 of the Appeals Chamber's judgement is that there was indeed aiding and abetting but that, where findings of responsibility for aiding and abetting and for ordering the same substantive crime are based on the same underlying facts, both findings cannot stand. The Appeals Chamber seems to be holding that the less specific finding (here, the holding concerning aiding and abetting) must be vacated, on the basis that the more

specific finding (concerning ordering) subsumes the other. This is not a factual holding, despite the language of the Appeals Chamber suggesting that it is. It seems, instead, to be putting forward a new legal principle—a significant extension of the Appeals Chamber's previous holdings concerning concurrent convictions. I cannot agree with this extension.

403. In the first place, I note there were no arguments on the question of specificity by the parties; there were no arguments on the question because the question was not raised in the appeal. The Appeals Chamber can consider a matter *proprio motu*, but obviously only in clear cases calling for exceptional treatment. In this case, the argument in question would extend the law to a situation to which it did not previously apply. I know of no reason for setting aside the powerful restraint exerted by the fact that the point has not been taken in the appeal and by the resulting absence of argument. The Appeals Chamber is deciding without the valuable benefit of the views either of the Trial Chamber or of the parties.

404. In the second place, assuming that the question is open, I consider that the Trial Chamber's judgement should be upheld.

405. The rule requiring conviction only for the more specific offence operates as between crimes. This is illustrated by *Celebici*. In that case, the ICTY Appeals Chamber established a principle that an accused may not be convicted simultaneously, based on the same underlying conduct, of two crimes unless each possesses an element not possessed by the other. For instance, the Appeals Chamber found that this was not the case with the crime of wilful killing and that of murder, and that it was thus appropriate to convict only for wilful killing, the more specific crime.[846] No similar issue is presented here. As referred to in article 6(1) of the Statute, ordering and aiding and abetting (like the other acts mentioned in that provision) are merely modes of liability in the sense of methods of engaging individual responsibility for a crime referred to in articles 2 to 4 of the Statute; it is the latter which is the crime. There is no reason why a single crime cannot be perpetrated by multiple methods.

406. That does not mean that account does not have to be taken of the law relating to those methods, or that in fixing sentence regard should not be had to the extent to which they contributed to the crime referred to in those articles of the Statute. But their relevance remains

[846] IT-96-21-A, 20 February 2001, para. 423.

that of methods of establishing whether the accused has engaged individual responsibility for such a crime. This is borne out by the text of article 6(1) of the Statute, which reads thus:

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

407. This signifies that an accused is "individually responsible for the crime" referred to in articles 2 to 4 of the Statute if he does any of the acts mentioned in article 6(1). Thus, the prescribed acts (though of a criminal nature) are merely the methods through which the accused engages responsibility for a "crime referred to in articles 2 to 4 of the present Statute", these being genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II. Obviously, that responsibility can result from the doing of one or more of the prescribed acts.

408. That the accused does several such acts may affect the appropriate penalty, but does not have the effect of multiplying his conviction for responsibility for the crime referred to in the Statute; his conviction for this remains one and singular. The fact that more than one method is employed does not mean that there is more than one conviction for the crime. No doubt, language is sometimes used which conveys the impression that each method employed[847] constitutes a separate crime. Such instances can be construed in keeping with the view now advanced, i.e., the conviction is really for responsibility for the crime referred to in articles 2 to 4 of the Statute by the particular method employed (e.g., planning).

409. In this case, there was only one conviction in respect of each relevant count of the indictment (genocide and extermination). The Trial Chamber merely made legal findings explaining that each of these convictions could be supported by multiple legal theories corresponding to the various methods or modes of liability prescribed by article 6(1). These findings were appropriate.

410. Nor is the Trial Chamber's approach inconsistent with *Blaškic*.[848] The *Blaškic* rule is based on the illogicality of holding, under article 7(1) of the ICTY Statute, that the crime committed by a subordinate was in the first instance ordered by the accused himself, and of at the same time

[847] The Trial Chamber in *Kordic and Cerkez* seemed to be of the view that the various modalities prescribed by article 7(1) [ICTY] created discrete crimes. See *Kordic and Cerkez* Trial Judgement, para. 386. With respect, I do not think so.
[848] IT-95-14-A, of 29 July 2004, paras. 91-92.

holding, under article 7(3), that the accused, as the superior, failed to prevent the commission of the crime by the subordinate or failed to punish the subordinate for committing it. The assumption of the ordering situation under the article 7(1) is that the accused actively advanced the commission of the crime; the assumption of the command responsibility situation under article 7(3) is that he did not. The Appeals Chamber, in effect, held that instead of entering simultaneous convictions (under both provisions) based on such assumptions, the superior/subordinate relationship should be considered as an aggravating factor in sentencing the accused for ordering, for which alone he should be convicted.

411. Here, in contrast, there is no illogicality arising from contradictory assumptions of fact in holding that the accused can both aid and abet another to commit a crime and can order that other to commit that crime. On the facts of this case, the accused, a man of influence in the community, may be understood to have ordered others to commit genocide. In addition, however, he led others to the massacre site and himself participated in the acts of genocide. In these ways, he gave encouragement – vivid and practical encouragement – to others to kill. This constitutes aiding and abetting. No known principle of law exempts him, just because it has been found that he ordered them, from a formal finding that he also aided and abetted them.

412. The matter may be illustrated further by *Kordic and Cerkez*. In that case, the Trial Chamber found that Kordic had planned, instigated, and ordered a crime against humanity,[849] but only one conviction was entered under the relevant count. In its turn, the Appeals Chamber did not suggest that this finding (that multiple methods had been employed in perpetrating the crime) implied that several convictions had been made, and this despite the fact that it expressly applied the *Blaškic* rule with respect to simultaneous convictions under article 7(1) and article 7(3).[850]

413. Thus, a finding that multiple methods had been used by the accused does not signify that he has been subjected to separate convictions for multiple crimes. A Trial Chamber is free to find that the accused engaged responsibility for a crime referred to in the Statute by doing several of the acts mentioned in article 6(1). Were it otherwise, there would be failure to define the true measure of the criminal conduct of the accused. To the extent that the same conduct is covered by the various methods used, this should not result in any duplication of penalty, the conviction being one and singular; if there is any difficulty, this can be taken into account in sentencing.

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[849] *See, e.g., Kordic and Cerkez* Trial Judgement, para. 834 ("His role was as a political leader and his responsibility under Article 7(1) was to plan, instigate and order the crimes").
[850] *Kordic and Cerkez* Appeal Judgement, paras. 33-35.

414. In short, there being only one conviction, there is no basis on which to apply the law relating to the subsuming of a conviction for one crime by a conviction for another crime which rests on a more specific provision. Cases in which there were multiple convictions can be set aside as not being pertinent.

415. A final point. If the opposing argument has merit, then there is little, if any, prospect of a conviction for a crime referred to in articles 2 to 4 of the Statute resting on more than one of the various methods prescribed by article 6(1). In practically all cases, if not all, recourse to any one method would exclude parallel recourse to another. Thus, a conviction for ordering genocide would exclude a conviction that the accused also instigated that genocide. So amputated an approach is not mandated by considerations of fairness or by anything in the Statute.

416. For these reasons, I regret my inability, under either possible interpretation of the Appeal Chamber's judgement, to agree with its decision not to maintain both the finding of ordering and the finding of aiding and abetting. In my opinion, the Trial Chamber's judgement on the point should be upheld.

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

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Mohamed Shahabuddeen

Judge

Dated 19 September 2005
At The Hague
The Netherlands

[**Seal of the Tribunal**]

XVII. SEPARATE OPINION OF JUDGE INÉS MÓNICA WEINBERG DE ROCA ON PARAGRAPH 77 OF THE JUDGEMENT

417. I agree with Judge Shahabuddeen that a conviction based on more than one of the modes of responsibility enumerated at Article 6(1) of the Statute is not impermissibly cumulative.

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

Dated this 19th day of September 2005,
At The Hague, The Netherlands

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Inés Mónica Weinberg de Roca

[**Seal of the Tribunal**]

XVIII. DISSENTING OPINION OF JUDGE INÉS MÓNICA WEINBERG DE ROCA

418. The Appeals Chamber finds that although the Trial Chamber committed some errors in assessing the alibi evidence,[851] this did not amount to a miscarriage of justice. The Appeals Chamber affirms the Trial Chamber's conclusion that the alibi evidence did not raise a reasonable doubt as to the Appellant's presence in Gikomero in April 1994.[852]

419. I would not have affirmed that conclusion.

A. The Trial Chamber's Assessment of the Alibi

420. In my opinion, the Trial Chamber committed several errors in its assessment of the alibi, which cast doubt on the reliability of its conclusion concerning the alibi.

1. There Were No Contradictions between the Testimony of the Appellant and those of Witness ALS and Mrs. Kamuhanda

421. The Appeals Chamber finds that the Trial Chamber did not commit any error in summarizing Witness ALS's testimony.[853] It finds that the use of the term "practically" in paragraph 169 of the Trial Judgement ("she testified that she saw the Accused practically 24 hours a day") shows that Witness ALS's evidence was correctly assessed.[854]

422. Leaving aside the question of the meaning of the qualifier "practically" (used by the Trial Chamber and approved by the Appeals Chamber), the important point (which was not addressed by the Appeals Chamber) is that the Trial Chamber erred in concluding that Witness ALS's testimony was at odds with that of the Appellant. Indeed, Witness ALS testified that the Appellant was always within calling distance, and that she saw him often because they shared meals

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[851] *See*, for instance, paras. 177 and 185 of the Judgement.
[852] Judgement, paras. 166-210.
[853] Trial Judgement, para. 169:

> The Chamber particularly notes the testimony of Witness ALS. She testified that the Accused never left her house except on 8 April 1994 when the Accused attempted twice to retrieve his son René from Kimihurura, succeeding only on the second attempt. She testified that she saw the Accused *practically* 24 hours a day and that the Accused never left the house again until 18 April 1994. She testified that it was impossible for the Accused to have left the house without her knowledge, considering especially that she was always in the company of the Accused's wife. [Emphasis added]

[854] Judgement, para. 174.

together.[855] The Appellant said that he would only come inside and see the women two or three times a day, when he was not on the road nearby with the other men.[856] No reasonable trier of fact would have found that these testimonies were contradictory.

423. The same error was made when considering the testimony of Mrs. Kamuhanda. Mrs. Kamuhanda did not claim that she "never [took] her eyes off"[857] the Appellant: she only said that she saw the Appellant when he came in to eat, take a blanket, or when the shelling was very

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[855] T. 29 August 2002, pp. 47-48 (closed session):

> A. No, he didn't go away, apart from that trip when he went to get his son. We were always together, he was either in front of the house or by the house, so that one could call him -- a very short distance from which one could call him.
>
> Q. That means that you saw him, that you talked to him; How frequently; once a day, twice a day?
>
> A. I couldn't tell you exactly the number of occasions, but on the whole we were together all the time because we shared meals in the morning, we shared meals in afternoon and even in evening he was there. And when he was not with us he was either resting or he was walking around in front of the compound. He was always around.

See also T. 29 August 2002, p. 49 (closed session) ("I saw him very often and at no occasion [ ] was there a period of two hours during which I did not see him, even one hour. I know that he was always on the road, that is, in the street or in the surrounding areas.")

[856] T. 21 August 2002, pp. 25-26 (closed session). The relevant part of the Appellant's testimony is as follows:

> Q. How often did you see your wife and [name deleted], that is, Witness ALS?
>
> A. My wife and [Witness ALS] and the wife of [Witness ALR], I saw them on very short occasions during some of the meals that we had.
>
> Q. So, you saw them just once a day?
>
> A. In the morning for a cup of coffee -- cup of coffee or cup of tea. At noon or thereabouts for lunch, and occasionally in the evening for dinner or de supper to use a Belgian word.
>
> Q. So, when you were not with the men you were in the house, is that what I am supposed to understand?
>
> A. Yes, when I was not on the road with the men I referred to here I was with those three women and their kids.

[857] *See* Trial Judgement, para. 170.

intense.[858] The testimony of Mrs. Kamuhanda is therefore consistent with that of the Appellant, and no reasonable trier of fact would have concluded otherwise.[859]

2. Witness ALR and Witness ALB Did Not Claim to Have Been Together 24 Hours a Day Nor Did they Contradict Each Other

424. I agree with the Appeals Chamber that the Trial Chamber erred in finding that Witnesses ALR and ALB claimed to have been together twenty-four hours a day.[860]

425. Regarding the absence of contradictions between the accounts of Witnesses ALB and ALR, the Appeals Chamber considers that the Appellant's argument has not been developed sufficiently in the Appeal Brief.[861] In any case, the Appeals Chamber refers to excerpts in the record to say that there were differences and that it was therefore reasonable for the Trial Chamber to conclude that there were contradictions between the accounts of Witnesses ALB and ALR.[862]

426. I have some problems with this. At the outset, it is unclear how the Appellant should have developed his argument further: it is not the Appellant's responsibility to identify and refute

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[858] T. 9 September 2002, pp. 163, 164 (cited in Appeal Brief, para. 254):

> Q. What about your husband, specifically, did he participate on a regular basis in these patrols?
>
> A. Yes, he was never absent. All the time he was with the others, they regrouped together. And like I said, he would come to eat something, take a blanket, and then go and join the others. All the time he was with the others, like I said. So, he stayed with us in the house when the shells were very, very intense.
>
> Q. When he was not with you where was he?
>
> A. He was with the others. However, he did not go very far. I must say they stayed around our house [...] we could even call them because they were walking in the street, and so we could call them. Even in turn something could happen to us inside, they could come to our rescue.

[859] In this connection, the Appeals Chamber recognizes the "imprecision" of the Trial Chamber in recalling the testimony of Mrs. Kamuhanda (*see* Judgement, para. 177). Nonetheless, the Appeals Chamber considers that, even if there were errors, these errors did not occasion a miscarriage of justice as "the Trial Chamber found the alibi evidence in general not credible because it 'appeared designed for a purpose.'" (Judgement, para. 177, citing Trial Judgement, para. 176). This argument will be addressed *infra*, section XVIII. A. 6.

[860] Judgement, para. 185, referring to Trial Judgement, para. 173. Despite finding that neither the testimony of Witness ALB nor that of Witness ALR could reasonably be construed as affirming that the two were together all the time, the Appeals Chamber concludes that this mischaracterization of the evidence did not occasion a miscarriage of justice because in the end, "[w]hat is significant is that the Trial Chamber found, after hearing the alibi witnesses testifying before it and considering their testimonies in light of all the evidence, that the witnesses 'ended up relating stories that appeared designed for a purpose.'" (Judgement, para. 186, referring to Trial Judgement, para. 176). This argument will be addressed *infra*, section XVIII. A. 6.

[861] Judgement, para. 187. In paras. 263-264 of the Appeal Brief, the Appellant refers to the relevant paragraph of the Trial Judgement (para. 173), and points out that "the Chamber merely found that there were contradictions in the witnesses testimonies without pointing out the contradictions in question." He then suggests what the Appeals Chamber ought to do (Appeal Brief, para. 265).

contradictions that the trial judges possibly had in mind. Secondly, the excerpts referred to by the Appeals Chamber do not support its finding that the testimonies of Witnesses ALR and ALB did differ in certain respects.

427. The Appeals Chamber first refers to Witness ALR's testimony that "[t]he men would *stay together* at night when they were patrolling"[863] and to Witness ALB's testimony that "after midnight, to allow one and all to rest, we *subdivided ourselves into two groups*."[864] When looking more closely at the transcripts, however, it appears that both Witnesses ALR and ALB said that some of the men went to sleep (or rest) while the others continued to patrol.[865] The alleged contradiction thus disappears and, in fact, the two accounts seem extremely consistent.

428. The Appeals Chamber also refers to the following excerpts: Witness ALR testified that the men regrouped on the road after their rest around 3 p.m., and added that "when I say that we met on the road [after our rest around three], I do not mean in the middle of the road"[866]; Witness ALB testified that "at around 10 o'clock, 10 a.m. to midday, we once again got together in the neighborhood and generally at the middle of the road between the houses in the neighborhood and we walked around together among our houses."[867] Considering that the two excerpts do not refer to the same period of the day (after 3 p.m. for Witness ALR, after 10 a.m. for Witness ALB), however, there is no contradiction here either.[868]

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[862] Judgement, para. 187, more particularly footnote 439.
[863] T. 3 September 2002, p. 69 (closed session, emphasis added).
[864] T. 5 September 2002, p. 111 (emphasis added).
[865] Both witnesses say that some of the men would sleep while the others stayed awake, and that they changed roles more or less every hour:
Witness ALB (T. 5 September 2002, p. 111):

> Now, after midnight, to allow one and all to rest, we subdivided ourselves into two groups. There was a group that stayed under a tree to rest, and our group continued to patrol the neighbourhood around our various houses. […] We changed every one or two hours, *practically each hour we changed roles*; in other words, the group that came around came to rest, and the other that rested went around. (Emphasis added)

Witness ALR (T. 3 September 2002, p. 69 (Closed session)):

> The men would stay together at night when they were patrolling. They slept together, *except that some would sleep and some would stay awake*. […] [I]t was organized in such a manner that some would sleep *for about an hour* and they would only pretend to sleep, really, and during that time others would remain awake so that if something were to happen those who were meant to be awake would have the opportunity to wake up those who were trying to sleep. (Emphasis added)

[866] T. 3 September 2002, p. 66 (closed session).
[867] T. 5 September 2002, p. 118.
[868] Witness ALR did not say anything as to where the men met after 10 a.m. Witness ALB testified that, when the men met after having had lunch, it was not at any specific point in the street. T. 5 September 2002, p. 121:

3. The Appellant's Account of the Routine during the Alibi Period was Detailed

429. The Appeals Chamber finds that, even though the Appellant did provide an account of the routine followed during the relevant period, it was open to the Trial Chamber to find that the Appellant's account of the routine was not particularly detailed.[869]

430. I am not persuaded by this assessment. During his testimony, the Appellant began by giving an overview of life at Witness ALS's house[870] and of the organization of the patrols.[871] He then provided a wealth of details as to (i) whether the patrollers were armed;[872] (ii) the purpose of the patrols;[873] (iii) the rotation among the patrollers;[874] and (iv) where precisely the men patrolled.[875] The Appellant also provided further explanations in cross-examination.[876]

> During the day, we got together usually in the street and we walked around our houses. It was somewhere on the road, it was not a special spot, generally in the street.

[869] Judgement, para. 192, referring to Trial Judgement, para. 173.

[870] T. 21 August 2002 (closed session), pp. 22-23 (who stayed in Witness ALS's house, where they slept, what they ate) and 25-26 (contacts with the women).

[871] T. 21 August 2002, pp. 24-25 (closed session):

> Yes, because as from the 7th, fighting having started there were robbers, all types of delinquents were spreading chaos. So we stood together to protect ourselves against those bandits. We were making sure our families were protected and we were by the roadside whether it be during the day or at night. […]
>
> In fact there is no typical day because all days were all the same. During the day we were on the road. We might go off, well, to go and take a cup of coffee or tea, or go for a meal quickly, and then go back to the road then spend the night together. So that was our whole day, and so on and so forth. The only day that just might be different was that of the 8th of April when I went to fetch my kid at Kmimihurura [sic]. Otherwise all the days were the same.

[872] T. 21 August 2002, p. 26 (closed session):

> I was not armed. I have never had a weapon and no one was armed in my area. No one had a weapon.

[873] T. 21 August 2002, p. 26 (closed session):

> Our surveillance system was to enable us [to] feel a bit secure -- make our families feel secure. If there was an attack by the robbers -- I dare not talk about a military attack or an armed attack, we could not do anything about that. But if, for instance, there were bandits who came, we could try to stand up to them. Of course, if they were armed -- if they were not armed then there was something else. There could be -- sound an alert in the area and every one would be required to take some steps.

[874] T. 21 August 2002, p. 27 (closed session):

> Well, rotation [of the patrols], except at night or when we were going to eat because it was never -- the road was never abandoned. When some were going for their meals, others continued to stand guard. And at night when there were some who were asleep there, others were awake.

[875] T. 21 August 2002, p. 27-28 (closed session):

> I am talking about the road, or the street, actually, it is not a road, it was not highly frequented. We are talking about the street between my house, that of [Witness ALS] and that of [name deleted], as well as that of [Witness ALR] and [Witness ALB]. So it was a road that separated our houses, and that is the road on which we were moving, as it were, up and down. It was not

4. Incorrect Application of the Burden of Proof

431. In the Judgement, the Appeals Chamber discusses whether the Trial Chamber applied an incorrect burden of proof when it found that the evidence of Witnesses ALB and ALM did not "exonerate", "foreclose" or "exclude" the possibility that the Appellant was at Gikomero.[877] The Appeals Chamber finds that, at paragraphs 83 to 85 of the Trial Judgement, the Trial Chamber correctly formulated the burden of proof regarding the alibi, and that

> [r]ead against this background, the Trial Chamber's use of terms such as that certain testimony did not "exonerate" the Appellant from being at a crime site, or that certain testimony "cannot foreclose" the possibility that the Appellant was at a crime site, or that certain testimony does not "exclude" the possibility that the Appellant went to the crime site, does not indicate a reversal of the burden of proof. Rather, when considered in the proper context of the entire discussion of such evidence, the Appeals Chamber understands these terms to mean that even if fully accepted as true, such evidence, in the view of the Trial Chamber, would be insufficient to cast a reasonable doubt on the evidence showing that the Appellant was at the crime site.[878]

432. I find, however, that although the Trial Chamber properly outlined the law on the question of alibi,[879] it then used language which is *prima facie* inconsistent with the correct legal test for assessing alibi ("does not exonerate", "cannot foreclose" and "could not afford an alibi which

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> a roadblock, it was just to be on that road so as to be, as it were, to monitor movements there. We did not mount a roadblock on the road. So, we were strolling up and down for surveillance purposes.
>
> Q. Some other clarification. On that road, were there some specific spot where you stood or not?
>
> A. No, there was no particular spot where we were, where we stood.
>
> Q. You were just -- moved top to bottom, up and down?
>
> A. We stalled on that road. So, between the house of [Witness ALR] and further on, close to [name deleted]'s house, it was on that road, so we were moving up and down, like this.

[876] T. 27 August 2002, pp. 87-89 (closed session):

> We were not warred to the street you can go back to the house, drink a little bit of water. I don't know, probably shave. We were not wearied to the street. […]
>
> During the day one went and one came back. You can go in and come out but during the night we were out. […]
>
> If you are talking about the 8th to the 12th, the monotony was the same. The system so to speak was the same. If you are talking about the period or another period I can give you the answers. […]
>
> The system that we instituted – I explained to you. It was thus, during the day we were on the street that you saw. That didn't prevent us from being able to go into the houses for certain needs and in the night we stayed outside not on the street but on the sides of the street, to watch the street. […]
>
> We slept outside and during the day we were on that street or we would go and come back to the house and I was at Witness ALS's house.

[877] Judgement, para. 198, referring to paras. 174-175 of the Trial Judgement.
[878] Judgement, para. 198 (references omitted).

would exclude the possibility").[880] The repetitive use of such terms (there are many similar examples throughout the judgement[881]) raises the possibility that, even though the Trial Chamber properly outlined the applicable law at the beginning of its discussion, its subsequent application thereof is not beyond reproach.

5. The Problematic Finding that it was Incredible that Patrols were Mounted just to Protect the Families from Looters

433. I agree with the Appeals Chamber that the Trial Chamber was legally entitled to find that it was incredible that the patrols were mounted just to protect the families from looters.[882] However, I regret the Appeals Chamber's refusal to assess the merits of the Appellant's contention that the Trial Chamber erred in fact when it made this finding.[883]

434. It is true that, in order to facilitate the review of the Appellant's arguments here, it would have been preferable if the Appellant had provided precise references to the record in relation to the testimony of Witness ALM and to that of his Expert Witness. Nevertheless, a failure to do so does not constitute an absolute bar to the examination of the arguments of the Appellant.[884] The Appeals Chamber's reluctance to do so is especially troubling given that, in assessing whether the Trial Chamber erred in concluding that Witnesses ALR and ALB contradicted each other, it did

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[879] At paragraphs 83 to 85 of the Trial Judgement.

[880] At paragraphs 174-175 of the Trial Judgement.

[881] Other examples of language in the Trial Judgement which suggest a shift in the burden of proof: paras. 167 ("this did not *preclude* him from travelling to the Gikomero commune"), 271 ("the Chamber notes that the testimonies of these two Witnesses, that they did not see the Accused in Gikomero, *does not exclude* that he could have been there"), 470 ("the Chamber notes that the Defence Witnesses may have arrived on the scene of the events after the man identified as Kamuhanda had already left. [..] [I]t would not *demonstrate* that the Accused was not there"), 472 ("it *does not rule out the possibility* that a man identified as Kamuhanda had been at the Gikomero Parish Compound") and 476 ("it would *not provide a sufficient basis to rule out the possibility* that the Accused was present at the Gikomero Parish Compound").

[882] *See* Judgement, paras. 204-205.

[883] *See* Judgement, para. 206.

[884] As stated by the Appeals Chamber at para. 10 of the *Niyitegeka* Appeal Judgement and para. 7 of the *Kajelijeli* Appeal Judgement (To the same effect, *see also Kayishema and Ruzindana* Appeal Judgement, para. 137; *Rutaganda* Appeal Judgement, para. 19):

> In order for the Appeals Chamber to assess the appealing party's arguments on appeal, the appealing party *is expected* to provide precise references to relevant transcript pages or paragraphs in the Judgement to which the challenge is being made. [Emphasis added]

Failure to do so "makes it difficult for the Appeals Chamber to assess fully the party's arguments on appeal" (*Ntakirutimana* Appeal Judgement, para. 14; *Semanza* Appeal Judgement, para. 10) but does not prohibit the Appeals Chamber from assessing the arguments.

not hesitate to comb through the transcripts as demonstrated by the fact that it identified a "contradiction" that had not been raised by either party or by the Trial Chamber.[885]

435. Having examined the record, I have concerns about the Trial Chamber's conclusion. It appears that Witness ALR's house was invaded and robbed twice on the same day that the patrols started and that the families moved in Witness ALS's house.[886] The Appellant[887] and Witnesses ALR,[888] ALM,[889] ALS[890] and ALF[891] testified that the patrols were needed to (i) protect the families, (ii) protect their property, and (iii) create a feeling of togetherness. Further, the Expert Witness called by the Defence at trial, Mr. Nkiko Nsengimana, also described the terror in Rwanda during that period and the initiative of citizens to ensure security in their

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[885] *See supra* section XVIII. A. 2. At para. 83 of the Respondent's Brief, the Prosecution submitted that the evidence of Witnesses ALR and ALB was contradictory in two respects, but it did not allege that their evidence was inconsistent as to whether the patrollers subdivided into smaller groups at night.

[886] T. 3 September 2002, pp. 45-49 (closed session, Witness ALR); T. 29 August 2002, pp. 23-24 (closed session, Witness ALS).

[887] T. 27 August 2002, p. 58 (closed session):

> [Their] presence in the street was dissuasive. When people see you during the day and even if they are bandits -- the bandits see you, they become more careful, so that it was a deterrent and even if there was a problem there would be a general alert and everybody would know what the problem was at the same time.

And T. 21 August 2002, p. 26:

> Our surveillance system was to enable us feel a bit secure -- make our families feel secure. If there was an attack by the robbers -- I dare not talk about a military attack or an armed attack, we could not do anything about that. But if, for instance, there were bandits who came, we could try to stand up to them. Of course, if they were armed -- if they were not armed then there was something else. There could be -- sound an alert in the area and every one would be required to take some steps.

[888] T. 3 September 2002, pp. 73 (closed session) ("These patrols, we wanted to have a feeling of togetherness, of being together so that we would be able to support ourselves morally, and during this period you always had criminals who would exploit the situation. So given that we were there, if, for instance, something abnormal happens we would then be able, for example, to shout.") and 88 ("moral support").

[889] T. 4 September 2002, pp. 80-81:

> Now, those patrols, as I pointed out, was made up of people of the area, the immediate neighbours, not people from very far. We are in our houses facing each other. People in the neighbourhood who knew each other very well, who pooled their efforts, who came together to protect the neighbourhood, and we were there. In the event there was an attack or people who came to steal, if we were in a group it was our hope that we would act as a deterrent to prevent anyone from coming to do anything whatsoever, and it is in that framework that we organized patrols. Nothing else beyond that could be done. Just come together. As they say, "United we stand" or "Our strength is in unity"; protect houses, particularly of those who had been killed, because there were things and there were people who had not been killed. So we tried to see, make sure that their property was not stolen by people who could come from outside.

[890] T. 29 August 2002, p. 40 (closed session):

> Given the insecurity atmosphere which prevailed, you had young men – the young men and the men agreed on a manner of protecting their houses, and they formed patrol groups.

[891] T. 9 September 2002, p. 160:

> No, the men slept outside. […] for purposes of protection – their own protection, protection of the families. They wanted to be on the alert at any point in time so that our families are not attacked by anyone whomsoever. I would say it was a system of protection. They slept not too far from home but outside. […] It was called patrols. The men stayed outside the whole night, came back in the morning or at daylight.

neighborhoods.[892] Therefore, it seems that the Trial Chamber might have underestimated the insecurity and chaos prevalent at that time in Rwanda, belittling the perceived need to set up such mechanisms of protection as that discussed by the alibi witnesses.

6. The Trial Chamber's Conclusion on the Alibi

436. As noted above,[893] the Appeals Chamber finds that, even if the Trial Chamber did err in assessing some of the alibi evidence, this did not result in a miscarriage of justice because the Trial Chamber concluded that "in an attempt to provide an alibi for the Accused, the Witnesses ended up relating stories that appeared designed for a purpose and therefore not credible."[894]

437. In the end, however, I believe that the Trial Chamber concluded that the "Witnesses ended up relating stories that appeared designed for a purpose" based on what it perceived to be problems with the alibi evidence.[895] But, as shown above, the Trial Chamber committed several errors in assessing the alibi. Some of the premises underpinning the Trial Chamber's conclusion were thus wrong, and there is therefore a real risk of miscarriage of justice in this case.[896] The Appeals Chamber should not have endorsed the conclusion of the Trial Chamber on the alibi as it was unsafe.

B. Conclusion

438. Pursuant to Rule 118(C) of the Rules of Procedure and Evidence, I would order a retrial.

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

Dated this 19th day of September 2005,
At The Hague, The Netherlands

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[892] *See* "Few Elements of Political Expert Analysis on the Rwandan Massacre of 1994, Expert Report for the International Criminal Tribunal for Rwanda in the Case: The Prosecutor Versus Jean De Dieu Kamuhanda", report by Niko Nsengimana, filed on 8 May 2003 as Defence Exhibit 87B, pp. 39-41 (at p. 41, it is stated: "Like in the period preceding 6 April, people ensured their own security in residential areas. In the beginning, [in] areas not dominated by the *'Interahamwe,'* Tutsis and Hutus could be seen together, day and night, like in the preceding period, ensuring the tranquillity of the residential area.").

[893] *See supra* footnotes 859 and 860.

[894] *See, e.g.*, paras. 177 and 186 of the Judgement, referring to para. 176 of the Trial Judgement.

[895] Indeed, it would be odd if the Trial Chamber had arrived at this conclusion completely independently of its earlier findings.

[896] The fact that some of the premises of the argument were false does not necessarily imply that the conclusion was also false. Nonetheless, it makes the conclusion unsafe.

Inés Mónica Weinberg de Roca

[**Seal of the Tribunal**]

XIX. ANNEX A - PROCEDURAL BACKGROUND

439. The main aspects of the appellate proceedings in this case are summarized below.

A. Notice of Appeal and Briefs

440. The Trial Judgement was delivered in English on 22 January 2004. On 3 February 2004, the Appellant filed a motion seeking an extension of time for filing his Notice of Appeal, Appellant's Brief and any motion for admission of additional evidence under Rule 115 on the ground that the French text of the Trial Judgement was not yet available.[897] On 8 March 2004, the Pre-Appeal Judge granted the requested extension and ordered the Appellant to file his Notice of Appeal no later than thirty days from the date of filing of the French translation of the Judgement; the Appellant's Brief, within seventy-five days from the date of filing of the Notice of Appeal; and to file the motion for Additional Evidence before the Appeals Chamber, no later than seventy-five days from the date of filing of the French translation of the Judgement.[898] The Pre-Appeal Judge also directed the Registrar to serve on the Appellant and his Counsel the French translation of the Judgement as soon as practicable.[899] On 12 May 2004, because of the continued unavailability of the French version of the Trial Judgement, the Pre-Appeal Judge, requested the Registrar, through a scheduling order, to indicate a date for the filing of the French version of the Judgement.[900] Subsequent to a Report from the Registrar[901] indicating the date of filing of the French version of the Trial Judgement which was filed on 6 July 2004, the Appellant filed his Notice of Appeal and Appeal Brief on 5 August 2004 and 19 October 2004, respectively.[902] The Prosecution filed its Respondent's Brief[903] on 29 November 2004 and the Appellant filed his Brief in Reply on 27 April 2005.[904]

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[897] Requête aux fins de prorogation de délai pour le dépôt de l'acte d'appel et du mémoire en appel en application des articles 108, 111, 115 et 116 du règlement de Procédure et de Preuve, 3 February 2004. *See also* Erratum – Rectification d'Erreur Matérielle, filed 9 February 2004.

[898] Decision on Motion for Extension of Time for Filing of Notice of Appeal and Appellant's Brief Pursuant to Rules 108, 111, 115 and 116 of The Rules of Procedure and Evidence, 8 March 2004, p. 4.

[899] *Id.*

[900] Scheduling Order, 12 May 2004, p. 2.

[901] Report of the Registrar in Compliance With the Orders of the Pre-Appeal Judge Dated 12 May 2004, filed 25 May 2004, p. 2.

[902] These were filed in French and were entitled "Acte d'appel du jugement du 22 Janvier 2004" and "Mémoire en appel – en Application de l'Article 111 du RPP" (Confidential).

[903] Respondent's Brief, 29 November 2004.

[904] Duplique au Mémoire en Appel, 27 April 2005. *See* also Decision on Jean de Dieu Kamuhanda's Motion for an Extension of Time, 19 April 2005, granting an extension to file a Brief in Reply until 27 April 2005.

B. Assignment of Judges

441. On 9 February 2004, the Presiding Judge of the Appeals Chamber assigned the following Judges to hear the appeal: Judge Theodor Meron, Judge Mohamed Shahabuddeen, Judge Florence Ndepele Mwachande Mumba, Judge Wolfgang Schomburg, and Judge Inés Mónica Weinberg de Roca.[905] Judge Mumba was designated the Pre-Appeal Judge.[906]

C. Additional Evidence

442. On 20 September 2004, the Appellant filed a motion for the admission of additional evidence.[907] The Appeals Chamber granted the motion in part, admitting new statements of Witnesses GAA and GEX and ordering that these witnesses be heard together with any rebuttal evidence submitted by the Prosecution.[908] On 18 May 2005, Witnesses GAA and GEX were heard together with Witnesses GEK and GAG called by the Prosecution in rebuttal.[909] In an oral decision rendered at the close of the hearing of the additional evidence on 19 May 2005, the Appeals Chamber directed the Prosecutor, pursuant to Rule 77(C)(i) of the Rules, to investigate allegations made during the hearing that Tribunal employees have attempted to interfere with witnesses, and, pursuant to Rule 91(B) of the Rules, to investigate discrepancies emanating from testimony given during the hearing and the consequent possibility of false testimony.[910]

D. Hearing of the Appeal

443. The hearing of the appeal took place on 19 May 2005 in Arusha, Tanzania.[911] At the close of the hearing, the Appellant made use of the opportunity to address the Appeals Chamber himself.

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[905] Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 9 February 2004.
[906] Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 9 February 2004, p. 2.
[907] Requête aux fins d'admission de moyens de preuve supplémentaires en application de l'article 115 du règlement de Procédure et de Preuve, Confidential, 20 September 2004. *See also* Prosecutor's Response to Requête aux fins d'admission de moyens de preuves supplémentaires en application de l'article 115 du règlement de Procédure et de Preuve, 30 September 2004 ; and Duplique de la Défense aux fins de présentation de moyen de preuve supplémentaires en application de l'article 115 du règlement de Procédure et de Preuve , 1 February 2005.
[908] Decision on Appellant's Motion for Admission of Additional Evidence on Appeal, 12 April 2005, paras 50 and 74.
[909] Scheduling Order, 18 April 2005; Order for the Transfer of Detained Witness GEK, 13 May 2005.
[910] Oral Decision on Rule 115 and Contempt of False Testimony, 19 May 2005.
[911] Scheduling Order, 18 April 2005.

E. Delivery of the Judgement

444. The Judgement was delivered on 19 September 2005 at the Seat of the ICTY at The Hague, The Netherlands as authorized, pursuant to Rule 4 of the Rules, by the President of the Tribunal.[912]

[912] *See* The President's Authorisation to Hold Appeals Hearing Away From the Seat of the Tribunal, 5 September 2005; Variation of Scheduling Order, 19 August 2005.

XX. ANNEX B – CITED MATERIALS/DEFINED TERMS

A. Jurisprudence

1. ICTR

AKAYESU

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

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

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

BAGILISHEMA

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

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

KAJELIJELI

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

KAMBANDA

The Prosecutor v. Jean Kambanda, Case No. ICTR-97-23-S, Judgement and Sentence, 4 September 1998 ("*Kambanda* Trial Judgement")

Jean Kambanda v. The Prosecutor, Case No. ICTR-97-23-A, Judgement, 19 October 2000 ("*Kambanda* Appeal Judgement")

KAMUHANDA

The Prosecutor v. Jean de Dieu Kamuhanda, Case No. ICTR-99-54A-T, Decision on Kamuhanda's Motion to Admit into Evidence Two Statements by Witness GER in Accordance with Rules 89(C) and 92*bis* of the Rules of Procedure and Evidence, 20 May 2003, filed 21 May 2003

The Prosecutor v. Jean de Dieu Kamuhanda, Case No. ICTR-99-54A-T, Corrigendum to the Decision on Kamuhanda's Motion to Admit into Evidence Two Statements by Witness GER in Accordance with Rules 89(C) and 92*bis* of the Rules of Procedure and Evidence, 22 May 2003

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

Jean de Dieu Kamuhanda v. The Prosecutor, Case No. ICTR-99-54A-A, Decision on Appellant's Motion for Admission of Additional Evidence on Appeal, 12 April 2005

KAYISHEMA AND RUZINDANA

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

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

MUSEMA

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

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

NIYITEGEKA

The Prosecutor v. Eliézer Niyitegeka, Case No. ICTR-96-14-T, Decision on Two Defence Motions Pursuant to, *Inter Alia*, Rule 5 of the Rules and the Prosecutor's Motion for Extension of Time to File the Modified Amended Indictment Pursuant to the Trial Chamber II Order of 20 November 2000; Warning to the Prosecutor's Counsel Pursuant to Rule 46(A), 27 February 2001

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

Eliézer Niyitegeka v. The Prosecutor, Case No. ICTR-96-14-A, Decision on Defence Motion for Variation of the Notice of Appeal, 29 January 2004

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

NTAKIRUTIMANA

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

The Prosecutor v. Elizaphan and Gérard Ntakirutimana, Case Nos. ICTR-96-10-A & ICTR-96-17-A, Reasons for the Decision on the Request for Admission of Additional Evidence, 8 September 2004 ("*Ntakirutimana* Reasons for Rule 115 Decision")

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

RUGGIU

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

RUTAGANDA

The Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Case No. ICTR-96-3-T, Judgement and Sentence, 6 December 1999 ("*Rutaganda* Trial Judgement")

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

SEMANZA

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

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

2. ICTY

ALEKSOVSKI

The Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999

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

BLA[KI]

The Prosecutor v. Tihomir Blaškic, Case No. IT-95-14-T, Decision on the Production of Discovery Materials, 27 January 1997

The Prosecutor v. Tihomir Blaškic, Case No. IT-95-14-A, Judgement, 20 July 2004 ("*Blaškic* Appeal Judgement")

BLAGOJEVI] ET AL.

The Prosecutor v. Vidoje Blagojevi} et al., Case No. IT-02-60-PT, Decision on Dragan Obranovi}'s Application for Provisional Release, 23 July 2002

BR\ANIN AND TALI]

The Prosecutor v. Radoslav Brðanin and Momir Talic, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001

“CELEBICI CASE”/DELALI] ET AL.

The Prosecutor v. Zejnil Delalic, et al., Case No. IT-96-21-A, Judgement, 20 February 2001 (“*Celebici Case* Appeal Judgement”)

FURUNDŽIJA

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

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

JELISIC

The Prosecutor v. Goran Jelisic, Case No. IT-95-10-A, Judgement, 5 July 2001 (“*Jelisic* Appeal Judgement”)

KORDIC AND CERKEZ

The Prosecutor v. Dario Kordic and Mario Cerkez, Case No. IT-95-14/2-T, Judgement, 26 February 2001 (“*Kordic and Cerkez* Trial Judgement”)

The Prosecutor v. Dario Kordic and Mario Cerkez, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004 (“*Kordic and Cerkez* Appeal Judgement”)

KRSTIC

The Prosecutor v. *Radislav Krstic*, Case No. IT-98-33-A, Judgement, 19 April 2004 (“*Krstic* Appeal Judgement”)

KUNARAC ET AL.

The Prosecutor v. Dragoljub Kunarac, et al., Case Nos. IT-96-23-T & IT-96-23/1-T, Decision on Motion for Acquittal, 3 July 2000

The Prosecutor v. Dragoljub Kunarac, et al., Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001 (“*Kunarac et al.* Trial Judgement”)

The Prosecutor v. Dragoljub Kunarac, et al., Case Nos. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 (“*Kunarac et al.* Appeal Judgement”)

KUPREŠKIC ET AL.

The Prosecutor v. Zoran Kupreškic, et al., Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 (“*Kupreškic et al.* Appeal Judgement”)

KVO^KA ET AL.

The Prosecutor v. Miroslav Kvocka, et al., Case No. IT-98-30/1-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999

The Prosecutor v. Miroslav Kvocka, et al., Case No. IT-98-30/1-A, Appeal Judgement, 28 February 2005 ("*Kvocka et al.* Appeal Judgement")

DRAGAN NIKOLI]

The Prosecutor v. Dragan Nikoli}, Case No. IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005 ("*Dragan Nikoli}* Judgement on Sentencing Appeal")

TADIC

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

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

VASILJEVIC

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

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

C. Defined Terms and Abbreviations

Appeal Brief

The Prosecutor v. Jean de Dieu Kamuhanda, Case No. ICTR-99-54-A, Appeal Brief – Pursuant to Rule 111 of the Rules of Procedure and Evidence, filed 19 October 2004

Appellant

Jean de Dieu Kamuhanda

BVerfGE

Official Collection of Decisions of the German Constitutional Court (Bundesverfassungsgericht), followed by number of volume and page.

Defence Pre-Trial Brief

The Prosecutor v. Jean de Dieu Kamuhanda, Case No. ICTR-99-54-I, Defence Pre-Trial Brief Pursuant to Rule 73*ter* of the Rules of Procedure and Evidence, 25 July 2002

ICTR

International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of

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

ICTR Statute

Statute of the International Tribunal

ICTY

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

Indictment

The Prosecutor v. Jean de Dieu Kamuhanda, Case No. ICTR-99-54-A, Indictment, filed 15 November 2000

Prosecution Pre-Trial Brief

The Prosecutor v. Jean de Dieu Kamuhanda, Case No. ICTR-99-54-I, Prosecutor's Pre-Trial Brief Pursuant to Rule 73*bis* of the Rules of Procedure and Evidence, 30 March 2001

Reply Brief

The Prosecutor v. Jean de Dieu Kamuhanda, Case No. ICTR-99-54-A, Brief in Reply to the Respondent's Brief, filed 27 April 2005

Resolution 955

U.N. Security Council Resolution 955, U.N. Doc. S/RES/955 (1994).

Respondent's Brief

The Prosecutor v. Jean de Dieu Kamuhanda, Case No. ICTR-99-54-A, Respondent's Brief, filed 29 November 2004

RPF

Rwanda Patriotic Front

Rule 115 Decision

The Prosecutor v. Jean de Dieu Kamuhanda, Case No. ICTR-99-54-A, Decision on Appellant's Motion for Admission of Additional Evidence on Appeal, 12 April 2005

Rules

Rules of Procedure and Evidence of the Tribunal

T.

Transcript. All references to the transcript are to the official, English transcript, unless otherwise indicated.

Trial Judgement

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

Tribunal

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