UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Fausto Pocar, Presiding** **Judge Mehmet Güney** **Judge Liu Daqun** **Judge Theodor Meron** **Judge Wolfgang Schomburg**
Registrar:	**Mr. Adama Dieng**
Judgement of:	**27 November 2007**

ALOYS SIMBA

v.

THE PROSECUTOR

Case No. ICTR-01-76-A

JUDGEMENT

Counsel for Aloys Simba:

Mr. Sadikou Ayo Alao
Mr. Wenceslas de Souza
Mr. Jean Kiwallo
Mr. Salim A. Kolawolou

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. James Stewart
Mr. George William Mugwanya
Ms. Inneke Onsea
Ms. Evelyn Kamau

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I. INTRODUCTION

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of appeals by Aloys Simba ("Appellant") and the Prosecution against the Judgement and Sentence rendered by Trial Chamber I on 13 December 2005 in the case *The Prosecutor v. Aloys Simba* ("Trial Judgement").[1]

A. Background

2. The Appellant, Aloys Simba, was born in 1938 in Musebeya Commune, Gikongoro Prefecture, Rwanda. The Appellant is a retired lieutenant colonel, a member of the "Comrades of the fifth of July", who participated in the *coup d'état* that brought former President Juvénal Habyarimana to power in 1973, and was a member of parliament from 1989 to 1993.[2]

3. The Appellant was tried on the basis of an amended indictment dated 10 May 2004 ("Indictment"),[3] which charged him with individual criminal responsibility for his alleged participation in five massacres committed against the Tutsi population in the Gikongoro Prefecture and in the Butare Prefecture between 14-29 April 1994.[4] At the close of trial, the Prosecution withdrew the charges of complicity in genocide (Count 2) and of murder as a crime against humanity (Count 4) and declined to pursue a conviction for superior responsibility under Article 6(3) of the Statute of the Tribunal ("Statute").[5] The Trial Chamber found the Appellant guilty of genocide (Count 1) based on his participation in a joint criminal enterprise ("JCE") to kill Tutsi civilians at Murambi Technical School and Kaduha Parish.[6] It also convicted him of extermination as a crime against humanity (Count 3), based on the same facts underlying the count of genocide.[7] It imposed a single sentence of 25 years' imprisonment,[8] with credit being given for time already served since he was arrested in Senegal, on 27 November 2001.[9]

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[1] *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Judgement and Sentence, 13 December 2005 ("Trial Judgement"). For ease of reference, two annexes are appended to this Judgement: Annex A: Procedural Background; Annex B: Cited Materials/Defined Terms.
[2] Trial Judgement, paras 7, 54, 56.
[3] The Trial Judgement erroneously refers to the "Indictment of 6 May 2004" (Trial Judgement, para. 4). The Amended Indictment annexed to the Trial Judgement was filed on 10 May 2004.
[4] Trial Judgement, para. 10.
[5] Trial Judgement, para. 13.
[6] Trial Judgement, paras 419, 427.
[7] Trial Judgement, paras 426-427.
[8] Trial Judgement, para. 445.
[9] Trial Judgement, paras 444, 446.

B. The Appeals

4. The Appellant appeals his convictions and challenges his sentence.[10] He alleges several errors of law relating to his right to a fair trial (Ground 1), the burden of proof (Ground 2) and the assessment of evidence (Ground 3). The Appellant submits that the Trial Chamber erred by making contradictory findings (Ground 4) and failing to give a reasoned opinion on certain elements of evidence (Ground 5). He alleges several errors relating to the Trial Chamber's findings concerning his criminal responsibility as a participant in a JCE (Ground 6), and in particular his responsibility for genocide (Ground 7) and extermination as a crime against humanity (Ground 8). He submits that the Trial Chamber committed errors of fact, in particular regarding his presence at Murambi Technical School and Kaduha Parish on 21 April 1994 (Ground 9) and the Public Meeting in Ntyazo on 22 May 1994 (Ground 10). He further submits that the Trial Chamber erred by distorting facts (Ground 11), in assessing his alibi (Ground 12), and in taking certain interlocutory decisions (Ground 13). Finally, the Appellant presents several challenges to the verdict and the sentence of 25 years' imprisonment imposed upon him (Ground 14).

5. The Prosecution responds that all grounds of appeal raised by the Appellant should be dismissed.[11]

6. The Appeals Chamber points out that several aspects of the Appellant's grounds of appeal are inextricably intertwined. Therefore, for ease of analysis, related grounds of appeal have been grouped together. Further, the Appeals Chamber will address the Appellant's grounds of appeal in an order different from that presented.

7. The Prosecution presents two grounds of appeal.[12] The Prosecution claims that the Trial Chamber erred when not finding the Appellant criminally responsible for his participation in the Cyanika Parish Massacre of 21 April 1994 (Ground 1). It also submits that the Trial Chamber erred

[10] Notice of Appeal, filed in French on 22 June 2006 ("Simba Notice of Appeal"); Appellant's Brief, originally filed in French on 6 September 2006 and refiled in French on 16 October 2006 ("Simba Appeal Brief"); Simba Brief in Reply, filed in French on 2 March 2007 ("Simba Reply").

[11] Respondent's Brief, originally filed on 24 November 2006 and refiled on 1 December 2006 following the Order Concerning the Prosecution's Respondent's Brief, 30 November 2006 ("Prosecution Response").

[12] Prosecutor's Notice of Appeal, filed on 12 January 2006 ("Prosecution Notice of Appeal"); Prosecutor's Appellant's Brief, filed on 27 March 2006, as amended by the Corrigendum to Prosecutor's Appellant's Brief, filed on 28 March 2006 ("Prosecution Appeal Brief"); Prosecutor's Brief in Reply, filed on 31 October 2006 ("Prosecution Reply"). On 17 August 2006, the Appeals Chamber dismissed a Prosecution request to add two new grounds of appeal (*see The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-A, Decision on 'Prosecutor's Motion for Variation of Notice of Appeal Pursuant to Rule 108', 17 August 2006 ("Decision on Motion for Variation of Notice of Appeal of 17 August 2006")). Accordingly, the Appeals Chamber will not consider the arguments made in the Prosecution Appeal Brief which are related to these additional grounds of appeal.

in imposing a single sentence of 25 years' imprisonment on the Appellant (Ground 2). The Appellant objects to the grounds of appeal raised by the Prosecution.[13]

C. Standards of Appellate Review

8. The Appeals Chamber recalls some of the applicable standards of 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. A party alleging an error of law must advance arguments in support of the submission and explain how the error invalidates the decision. However, even if the appellant's arguments do not support the contention, the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[14]

9. 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 an erroneous finding of fact is alleged, the Appeals Chamber will give deference to the Trial Chamber that received the evidence at trial, as it is best placed to assess the evidence, including the demeanour of witnesses. The Appeals Chamber will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, an erroneous finding of fact will be quashed or revised only if the error occasioned a miscarriage of justice.[15]

10. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the Trial Chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber. Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[16]

11. In order for the Appeals Chamber to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.[17] 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

[13] Simba Respondent Brief, filed in French on 18 October 2006 ("Simba Response").
[14] *Muhimana* Appeal Judgement, para. 7; *Ntagerura et al.* Appeal Judgement, para. 11.
[15] *Ntagerura et al.* Appeal Judgement, para. 12; *Semanza* Appeal Judgement, para. 8; *Niyitegeka* Appeal Judgement, para. 8.
[16] *Muhimana* Appeal Judgement, para. 9; *Ndindabahizi* Appeal Judgement, para. 11; *Gacumbitsi* Appeal Judgement, para. 9; *Naletilić and Martinović* Appeal Judgement, para. 13; *Blaškić* Appeal Judgement, para. 13; *Kordić and Čerkez* Appeal Judgement, para. 21.
[17] Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005 ("Practice Direction on Appeals of 4 July 2005"), para. 4(b). *See also Muhimana* Appeal Judgement, para. 10; *Ndindabahizi* Appeal Judgement, para. 12; *Gacumbitsi* Appeal Judgement, para. 10.

and obvious insufficiencies.[18] Finally, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing and will dismiss arguments which are evidently unfounded without providing detailed reasoning.[19]

[18] *Muhimana* Appeal Judgement, para. 10; *Ndindabahizi* Appeal Judgement, para. 12.
[19] *Muhimana* Appeal Judgement, para. 10; *Gacumbitsi* Appeal Judgement, para. 10.

II. THE APPEAL OF ALOYS SIMBA

A. Interlocutory Decisions

12. The Appellant challenges, on various grounds, a series of interlocutory decisions made by the Trial Chamber. The Appeals Chamber notes that none of the errors alleged was pleaded properly in the Appellant's Notice of Appeal, which merely lists the decisions challenged and states with respect to each one that the Trial Chamber "erred" or "erred in law" in denying the defence motions underlying these decisions.[20] The notice thus fails to indicate the substance of the alleged errors and the relief sought as required by Rule 108 of the Tribunal's Rules of Procedure and Evidence ("Rules").[21] However, the Prosecution does not object to this failure, arguing instead that the Appeal Brief itself suffers from similar shortcomings. Where an Appellant fails to properly raise its argument and the Prosecution fails to object, the Appeals Chamber possesses the discretion to consider the Appellant's arguments in order to ensure the fairness of the proceedings. It chooses to do so in the instant case.

1. Decisions on Site Visits (31 January and 4 May 2005)

13. The Appellant alleges that the Trial Chamber erred in law by rejecting two Defence requests for on-site visits in Rwanda.[22] Based on the "discovery of new information" he submits that such an on-site visit would have enabled the Trial Chamber to obtain this information at the time when he made the requests.[23] This would have had presumably cast doubt on the Trial Chamber's findings regarding the Appellant's presence at both Murambi Technical School and Kaduha Parish.[24]

14. The Prosecution responds that the interlocutory decisions were not subject to any application by the Appellant for leave to appeal.[25] It submits that the Trial Chamber's decisions denying the requests are supported by the Tribunal's established jurisprudence and that the Trial Chamber did not commit any error in taking these decisions.[26]

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[20] Simba Notice of Appeal, III-1 to III-6.
[21] *See also* Practice Direction on Appeals of 4 July 2005, para. 1(c)(i), providing that a Notice of Appeal shall contain "the grounds of appeal, clearly specifying in respect of each ground of appeal [...] any alleged error on a question of law invalidating the decision [...]".
[22] Simba Notice of Appeal, III-1 and III-2; Simba Appeal Brief, paras 395-397, referring to *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Decision on the Defence Request for Site Visits in Rwanda, 31 January 2005 ("Decision on Site Visits of 31 January 2005"); *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Decision on Renewed Request for Site Visits in Rwanda, 4 May 2005 ("Decision on Site Visits of 4 May 2005").
[23] Simba Appeal Brief, para. 396.
[24] Simba Appeal Brief, para. 396. *See also* Simba Reply, paras 136, 138,139, 141.
[25] Prosecution Response, para. 191.
[26] Prosecution Response, paras 196-198.

15. In its Decision of 31 January 2005, the Trial Chamber dismissed the Defence request for on-site visits, noting that "a number of photographs and maps have been tendered into evidence" and that "[a]s the trial proceeds, it is expected that more evidence from Defence witnesses will shed light on the relevant locations and that additional photographs, maps and measurements will be submitted for consideration".[27] It concluded that at that stage of the trial it was not persuaded that the requested visits would "be instrumental in the discovery of the truth and determination of the matter before the Chamber", but left it open to the Defence to renew its request later if required.[28] On 4 May 2005, the Trial Chamber dismissed a renewed Defence request for site visits, finding that "the evidence on the record is sufficient to allow the Chamber to make a proper assessment of the credibility of the witnesses and the charges against the Accused".[29]

16. The Appeals Chamber notes that "managerial decisions, such as whether to make a site visit, are left to the discretion of the Trial Chamber".[30] In the instant case, the Appellant does not demonstrate that the Trial Chamber abused its discretion in finding that site visits were unnecessary to assess the credibility of the evidence and the charges against the Appellant. The Appellant's challenge to the Trial Chamber's decisions solely rests on purportedly "newly discovered material" which does not form part of the trial record, and which the Appeals Chamber will therefore not consider.[31] No further argument is submitted by the Appellant on this issue. Accordingly, these sub-grounds of appeal are dismissed.

2. Decision on the Admission of Certain Exhibits (7 July 2005)

17. The Appellant challenges the Trial Chamber's Decision on the Admission of Certain Exhibits,[32] in which it denied the Appellant's request to admit several exhibits on the ground that the Appellant had not been questioned on the basis of these documents, despite having identified them during his examination-in-chief. These exhibits include two written statements of a person whom the Appellant intended to call as a witness in his defence but who eventually refused to testify (BJK1), a *pro justitia* statement of Simon Bikindi as well as a copy of his passport, and a letter from Marcel Gatsinzi.[33] The Appellant claims, however, that he had indeed been questioned

[27] Decision on Site Visits of 31 January 2005, para. 2.
[28] Decision on Site Visits of 31 January 2005, para. 3.
[29] Decision on Site Visits of 4 May 2005, para. 2.
[30] *Galić* Appeal Judgement, para. 50.
[31] The Appeals Chamber will consider below under Sections D and E the Appellant's arguments related to the credibility of the Prosecution and Defence witnesses who testified in relation to the massacres at Murambi Technical School and Kaduha Parish.
[32] Simba Notice of Appeal, III-3, referring to *The Prosecutor v. Aloys Simba*, Case No. ICTR-2001-76-T, Decision on the Admission of Certain Exhibits (Corrigendum), 7 July 2005 ("Decision on the Admission of Certain Exhibits of 7 July 2005").
[33] Simba Appeal Brief, para. 399, referring to Decision on the Admission of Certain Exhibits of 7 July 2005, paras 9-10.

during his examination-in-chief about the documents relating to Simon Bikindi[34] and the letter from Marcel Gatsinzi,[35] and submits that he referred to BJK1 during his testimony several times.[36] He affirms that the Trial Chamber violated his right to a fair trial by rejecting these pieces of evidence.[37] The Appellant finally asserts that BJK1 was the only witness able to corroborate the Appellant's entire alibi and since BJK1 refused to testify before the Tribunal, the admission of his statements was crucial to the Appellant's defence.[38]

18. The Prosecution responds that the Appellant's challenge to the Decision on the Admission of Certain Exhibits of 7 July 2005 suffers from deficiencies which render it inadmissible under Article 24 of the Statute.[39] It further submits that, given that the Appellant was not questioned on the basis of these documents, it was well within the Trial Chamber's discretion not to "require their admission to provide additional context for the Accused's examination".[40] The Prosecution submits that the Appellant fails to demonstrate any error in the exercise of the Trial Chamber's discretion which would necessitate appellate intervention.[41]

19. The Appeals Chamber recalls that the decision to admit or exclude evidence pursuant to Rule 89(C) of the Rules is one that falls within the discretion of the Trial Chamber and therefore, warrants appellate intervention only in limited circumstances.[42] It further recalls that in exercising its discretion to admit witness testimony, the Trial Chamber shall be guided by the general principle, enshrined in Rule 90(A) of the Rules, that witnesses be heard directly by the Chambers.

20. The Appeals Chamber recognises, however, that there are well established exceptions to the Tribunal's preference for direct, live, in-court testimony[43] and agrees with the Trial Chamber's reasoning that, as a matter of law, statements of non-testifying individuals used during cross-examination may be admitted into evidence, even if they do not conform to the requirements of

[34] Simba Appeal Brief, para. 401.
[35] Simba Appeal Brief, para. 402.
[36] Simba Appeal Brief, para. 400.
[37] Simba Appeal Brief, para. 403.
[38] Simba Appeal Brief, para. 400.
[39] Prosecution Response, para. 202.
[40] Prosecution Response, para. 205, quoting Decision on the Admission of Certain Exhibits of 7 July 2005, para. 10.
[41] Prosecution Response, paras 206-207, 209.
[42] *Prosecutor v. Théoneste Bagosora et al.*, Case Nos. ICTR-98-41-AR93 & ICTR-98-41-AR93.2, Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, 19 December 2003, para. 11. *See also Naletilić and Martinović* Appeal Judgement, para. 257; *Kordić and Čerkez* Appeal Judgement, para. 236.
[43] For instance, Rule 90(A) of the Rules provides that a Chamber may order that a witness be heard by means of deposition under Rule 71 of the Rules, and Rule 92 *bis* of the Rules allows for the admission of written witness statements in lieu of oral testimony which do not go to proof of the acts and conduct of the accused as charged in the indictment.

Rules 90(A) and 92*bis* of the Rules, provided the statements are necessary to the Trial Chamber's assessment of the witness's credibility and are not used to prove the truth of their contents.[44]

21. The Appeals Chamber notes that the Trial Chamber, after having reviewed the transcript of the examination-in-chief and cross-examination of the Appellant, found that he had not been questioned on the basis of BJK1's statements, the *pro justitia* statement or passport of Simon Bikindi, or the letter from Marcel Gatsinzi and therefore did "not require their admission to provide additional context for the [Appellant's] examination".[45]

22. The Appeals Chamber observes, however, that the Appellant was in fact questioned on the basis of the documents relating to Simon Bikindi[46] and the letter of Marcel Gatsinzi during his examination-in-chief.[47] Despite this, and putting aside the relevance of the distinction, if any, between the Appellant being questioned on the basis of the documents during his examination-in-chief rather than during his cross-examination, the Appeals Chamber considers that the Appellant has failed to demonstrate how the Trial Chamber's decision to exclude these documents affected the verdict.[48] The Appeals Chamber recalls that arguments of a party that 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.[49]

23. Turning to the Appellant's claim that the contents of BJK1's statements would have corroborated his alibi, the Appeals Chamber observes that the Appellant does not allege that he was questioned on the basis of these statements but rather claims that they should have been admitted "if only pursuant to Rule 93(C) (*sic*) of the Rules […], especially as the Appellant referred to […] BJK1 several times during his testimony".[50]

24. The Appeals Chamber notes that the Trial Chamber could have admitted BJK1's statements solely on the basis that they had been necessary to the assessment of the Appellant's testimony. The Appellant, however, fails to provide any specific reference to BJK1's statements which would have provided the necessary additional context to his testimony. Moreover, it should be recalled that

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[44] Decision on the Admission of Certain Exhibits of 7 July 2005, para. 7. *See also* T. 3 November 2004 pp. 37-38; *Akayesu* Appeal Judgement, para. 134.
[45] Decision on the Admission of Certain Exhibits of 7 July 2005, para. 10.
[46] Simba Appeal Brief, para. 401.
[47] T. 23 March 2005 pp. 23-29 and 43-48.
[48] The Appeals Chamber notes that the letter of Marcel Gatsinzi merely establishes that the Appellant and Marcel Gatsinzi only met once, after 5 July 1994, without providing any information which could support the Appellant's case (Simba Appeal Brief, Annex 37); the admission of the documents related to Simon Bikindi was sought in order to challenge Witness KEI's testimony relating to the allegations of paragraphs 67 and 68 of the Indictment under Count 4, Murder as a Crime Against Humanity (T. 23 March 2005 p. 41), for which the Appellant was found not guilty by the Trial Chamber (Trial Judgement, para. 427.)
[49] S*ee above* Chapter I, Section C, para. 10.
[50] Simba Appeal Brief, para. 400.

"[c]orroboration is simply one of many potential factors in the Trial Chamber's assessment of a witness's credibility".[51] It is indeed well established that the trier of fact is far better suited to the task of assessing the credibility of witnesses,[52] and here the Appellant has not demonstrated any error on the part of the Trial Chamber in assessing his credibility.

25. Accordingly, this sub-ground of appeal is dismissed.

3. Decisions on Defence Requests related to Witnesses YH and KXX (23 September and 10 November 2004)

26. The Appellant claims that the Trial Chamber erred when it rejected his oral motions requesting the Prosecution to investigate Prosecution Witness YH, "for crimes and false testimony" in relation to alleged discrepancies between the witness's self-incriminating testimony before the Trial Chamber and his confession given to officials in Rwanda.[53] The same error is alleged in relation to Prosecution Witness KXX, for similar reasons.[54] The Appellant submits that the Trial Chamber further erred when it denied his request for a report on whether prosecutions were underway against Witnesses YH and KXX.[55] The Appellant finally requests that the Appeals Chamber invalidate their testimonies, pursuant to Rule 95 of the Rules, "as well as their effects on the [Trial] Judgement".[56]

27. The Prosecution responds that the Trial Chamber properly exercised its discretion when assessing the evidence provided by Witnesses YH and KXX[57] and that the Appellant fails to show how the Trial Chamber's denial of the Appellant's request for a report on the Prosecution's investigation on these two witnesses constitutes an error capable of invalidating the Trial Chamber's verdict. It further affirms that the Trial Chamber correctly based the challenged decisions on Articles 15(2) and 17 of the Statute, according to which the Prosecution evaluates and decides independently whether to initiate proceedings.[58]

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[51] *Ntakirutimana* Appeal Judgement, para. 132.
[52] *Ntakirutimana* Appeal Judgement, para. 177. *See also Musema* Appeal Judgement, para. 18.
[53] Simba Notice of Appeal, III-4, III-6, referring to *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Decision on Defence Request for Information Related to Witnesses YH and KXX, 10 November 2004 ("Decision on the Request for Information Related to Witnesses YH and KXX of 10 November 2004"), and to the oral decision of 23 September 2004 ("Simba Oral Decision of 23 September 2004"). *See also* Simba Appeal Brief, paras 404-405.
[54] Simba Appeal Brief, para. 406.
[55] Simba Notice of Appeal, III-6; Simba Appeal Brief, paras 407-408, referring to *The Prosecutor v. Aloys Simba*, Case No. ICTR-2001-76-I, *Requête de la défense en vue d'enjoindre au Procureur d'avoir à fournir la preuve que des poursuites judiciaires ont été engagées contre les témoins "KXX" et "YH" lesquels se sont accusés du crime de génocide*, 25 October 2004 ("Simba Defence Motion of 25 October 2004") and Decision on the Request for Information Related to Witnesses YH and KXX of 10 November 2004, paras 4-5.
[56] Simba Appeal Brief, paras 409-411.
[57] Prosecution Response, paras 214-215, referring to Trial Judgement, paras 164-169.
[58] Prosecution Response, para. 216.

28. The Appeals Chamber notes that the oral motion brought by the Appellant before the Trial Chamber on 23 September 2004 sought directions by the Trial Chamber to the Prosecution to initiate investigations concerning Witness YH's alleged participation in the genocide and his alleged false testimony.[59] On the same day, in an oral decision, the Trial Chamber rejected both requests. In relation to Witness YH's alleged participation in the genocide, the Trial Chamber stated that the Prosecutor has the discretionary power to initiate investigations with respect to crimes that fall within the Tribunal's mandate. With regard to the allegation of false testimony, the Trial Chamber did not find it expedient to make any order under Rule 91 of the Rules.[60] The next day, the Appellant requested that the Trial Chamber "consider the implementation of Rule 91 of the Rules […]" in relation to Witness KXX's testimony.[61] The Trial Chamber dismissed the Appellant's request to implement Rule 91 of the Rules in respect of Witness KXX on the same basis that it had rejected the Appellant's request in respect of Witness YH, namely, that it did not find it expedient to make an order under Rule 91, reserving its position on the merits of any alleged discrepancies until after having heard the totality of the evidence.[62]

29. On 25 October 2004, the Appellant filed a request seeking a report, within one month, on the measures and judicial actions the Prosecution had taken against Witnesses YH and KXX.[63] The Trial Chamber dismissed the Defence Motion of 25 October 2004 in its Decision on the Request for Information Related to Witnesses YH and KXX of 10 November 2004 on the basis that the Prosecution had not initiated any proceedings and had no intention of doing so.[64]

30. The Appeals Chamber dismisses the Appellant's contention that the Trial Chamber erred in its Decision on the Request for Information Related to Witnesses YH and KXX of 10 November 2004. With regard to the Appellant's request for a report, the Appeals Chamber considers that given that the Prosecution had not initiated any proceedings against these witnesses and had no intention to do so the Appellant's request for such a report was not yet ripe for adjudication at the time of the decision. With regard to the Appellant's contention that the Trial Chamber "erred in denying […] the Defence motion to order the Prosecutor to investigate Witness KXX for participation in genocide",[65] the Appeals Chamber notes that at the trial the Appellant limited his argument to the implementation of Rule 91 of the Rules with respect to Witness KXX and thus failed to raise this argument before the Trial Chamber.

[59] T. 23 September 2004 p. 28.
[60] T. 23 September 2004 p. 29.
[61] T. 24 September 2004 p. 60.
[62] Decision on the Request for Information Related to Witnesses YH and KXX of 10 November 2004, para. 4.
[63] Simba Defence Motion of 25 October 2004, prayer, p. 4.
[64] Decision on the Request for Information Related to Witnesses YH and KXX of 10 November 2004, disposition.
[65] Simba Notice of Appeal, III-6.

31. Turning to the Appellant's contention in relation to Witness YH,[66] the Appeals Chamber recalls that the Prosecutor has independent authority to initiate investigations on statutory crimes and to assess whether the information forms a sufficient basis to proceed against persons suspected of having committed such crimes.[67] However, Rule 91(B)(i) of the Rules specifically provides that "[i]f a Chamber has strong grounds for believing that a witness has knowingly and wilfully given false testimony, it may direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony". Such action lies within the discretion of the Trial Chamber and is contingent on its conviction that a witness "has knowingly and wilfully given false testimony".[68] On the other hand, a credibility determination may be based, but does not necessarily depend, on a judicial finding that a witness has given false testimony.[69]

32. The Appeals Chamber stresses that the mere existence of discrepancies between a witness's testimony and his earlier statements does not constitute strong grounds for believing that a witness may have knowingly and wilfully given false testimony.[70] In the instant case, it is apparent from the Trial Chamber's reasoning that it did not believe Witness YH to have wilfully given false testimony. Indeed, the Trial Chamber accepted Witness YH's explanation that he planned to make a full confession before the *Gacaca* courts and considered "that he simply attempted, at earlier stages of his proceeding in Rwanda, to minimize his involvement in the genocide".[71] Therefore, the Appellant does not show that the Trial Chamber erred in not directing the Prosecution to investigate Witness YH for false testimony.

33. In any event, the Appeals Chamber is only required to grant relief for a violation of the Rules where a party has objected in a timely manner and has suffered material prejudice.[72] The Appellant clearly fails to show how the Oral Decision of 23 September 2004 has prejudiced him. The Appeals Chamber recalls that an investigation for false testimony is only ancillary to proceedings and does not necessarily affect the rights of an accused.[73]

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[66] Simba Notice of Appeal, III-3 and III-6.
[67] *See* Articles 15(2) and 17(1) of the Statute.
[68] The Appeals Chamber finds the following statement persuasive: "[F]alse testimony is a deliberate offence which requires wilful intent on the part of the perpetrator to mislead the Judge and thus to cause harm" (*Rutaganda* Trial Judgement, para. 20).
[69] *The Prosecutor v. Georges Anderson Nderumwe Rutaganda*, Case No. ICTR 96-3-A, Decision on Appeals Against the Decisions by Trial Chamber I Rejecting the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witnesses "E" and "CC", 8 June 1998 ("*Rutaganda* Decision Rejecting the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witnesses "E" and "CC" of 8 June 1998"), para. 28.
[70] *Rutaganda* Trial Judgement, para. 20.
[71] Trial Judgement, para. 165.
[72] *Gacumbitsi* Appeal Judgement, para. 11, fn. 24, referring to Rule 5 of the Rules.
[73] *See The Prosecutor v. Georges Anderson Nderumwe Rutaganda*, Case No. ICTR 96-3-A, Decision on Appeals Against the Decisions by Trial Chamber I Rejecting the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witnesses "E" and "CC", 8 June 1998, para. 28.

34. For the foregoing reasons, this sub-ground of appeal is dismissed.

4. Decision on the Defence Request to Preclude the Testimony of Witness KDD under Oath (28 October 2004)

35. The Appellant submits that the Trial Chamber erred in law by denying the Defence objection to the admission of Prosecution Witness KDD's testimony under oath.[74] The Appellant submits that Witness KDD had been condemned to death by Rwandan courts and, therefore, under Rwandan law, was deprived of his civil rights, including his ability to testify. According to the Appellant, Witness KDD's testimony could thus only be considered as simple information.[75]

36. The Prosecution responds that the Trial Chamber denied the motion by finding that, in accordance with Rule 89(A) of the Rules and Appeals Chamber's jurisprudence, a Trial Chamber is not bound by national rules of evidence.[76] Recalling the margin of discretion accorded to Trial Chambers in the admission, assessment and evaluation of evidence, it submits that the Appellant fails to demonstrate how the Trial Chamber exceeded its discretion.[77] The Prosecution avers that in any event, the Trial Chamber's reliance on the witness's testimony, if any, was limited, and caused the Appellant no prejudice.[78]

37. In its Decision of 28 October 2004, the Trial Chamber denied the Defence motion to preclude the anticipated testimony of Witness KDD. The Trial Chamber noted that

> according to Rule 89 (A) the Tribunal is not bound by national rules of evidence. The witness's legal status in Rwanda in no way impacts his capacity to testify or the manner in which he would give evidence before this Tribunal. The Chamber is also unwilling to pre-judge the credibility and reliability of a witness's anticipated testimony.[79]

38. The Appeals Chamber notes that this sub-ground of appeal is limited to the Trial Chamber's decision to admit Witness KDD's evidence, and is not concerned with the assessment of its reliability or credibility. It is well established that according to Rule 89 of the Rules, a Trial Chamber is not bound by national rules of evidence and has the discretion to admit any relevant evidence it deems to have probative value.[80] The Appellant does not attempt to demonstrate an abuse of the Trial Chamber's discretion. The Appellant's argument that the loss of Witness KDD's

[74] Simba Notice of Appeal, III-5, referring to the *The Prosecutor v. Aloys Simba*, Case No. ICTR-2001-76-T, Decision on the Defence Request to Preclude the Testimony of Prosecution Witness KDD under Oath, 28 October 2004 ("Decision of 28 October 2004"); Simba Appeal Brief, paras 412-415; Simba Reply, para. 147.
[75] Simba Appeal Brief, para. 412.
[76] Prosecution Response, para. 219.
[77] Prosecution Response, para. 220.
[78] Prosecution Response, para. 221.
[79] Decision of 28 October 2004, para. 3 (footnotes omitted).

civil rights under Rwandan law warrants *per se* the preclusion of his evidence is evidently unfounded and warrants the dismissal of the sub-ground.

39. In light of the foregoing, this ground of appeal is dismissed in its entirety.

B. Alleged Violation of the Appellant's Right to Call Witnesses in his Defence

40. The Appellant submits that he did not receive a fair trial since he was prevented from calling two individuals to testify in his defence, HBK and BJK1, who, due to interference by Rwandan government officials, refused to appear before the Tribunal. The Appellant claims that these testimonies would have been crucial for his defence,[81] and that the Trial Chamber erred in law by failing to acquit him under those circumstances. Moreover, the Appellant contends that the Trial Chamber committed an error of law in making contradictory findings as to whether Rwandan authorities interfered with HBK and BJK1.[82] The Prosecution responds that the Appellant's right to a fair trial was not violated and that the Trial Chamber did not err by convicting the Appellant.[83]

41. The Appeals Chamber can conceive of situations where a fair trial is not possible because witnesses crucial to the Defence case refuse to testify due to State interference. In such cases, it is incumbent on the Defence to, first, demonstrate that such interference has in fact taken place and, second, exhaust all available measures to secure the taking of the witness's testimony.[84]

1. BJK1

42. The Appellant submits that BJK1 refused to testify in the instant case due to interference by Rwandan authorities, and that, as a consequence, he was deprived of the only witness who could have corroborated his alibi in its entirety.[85] In support of this argument, the Appellant submits that the Witness and Victims Support Section ("WVSS") confirmed that BJK1 refused to testify because of threats to his security[86] and that, based on a report of that section, the Trial Chamber acknowledged that it was futile to issue a subpoena because its implementation required the

[80] *The Prosecutor v. Édouard Karemera et al.,* Case No. ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007 ("*Karemera* Decision on Interlocutory Appeal Regarding Witness Proofing of 11 May 2007"), para. 11; *Akayesu* Appeal Judgement, fn. 577.
[81] On 21 May 2007, the Appeals Chamber issued a confidential decision in which it rejected, *inter alia*, the Appellant's request, brought pursuant to Rule 115 of the Rules, that BJK1 and HBK be subpoenaed to testify before the Appeals Chamber. *See Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Decision on Appellant Aloys Simba's Request to Present Additional Evidence, 21 May 2007 ("Decision on Rule 115 Evidence of 21 May 2007").
[82] Simba Notice of Appeal, I-A-1, I-D-2, I-D-3, II-C-2, II-C-3; Simba Appeal Brief, paras 20-45, 257-258, 365; Simba Reply, paras 49-50.
[83] Prosecution Response, paras 9-34, 106.
[84] *See Tadić* Appeal Judgement, para. 55.
[85] Simba Notice of Appeal, I-A-1(a); Simba Appeal Brief, paras 21, 22, 25, 27; AT. 22 May 2007 pp. 10-12, 41-42.
[86] Simba Appeal Brief, paras 24, 25; Simba Reply, paras 10, 11.

cooperation of Rwandan authorities.[87] In the Appellant's view, the fact that the Trial Chamber subsequently ordered the Registry to subpoena the witness and requested the Rwandan authorities to take all appropriate measures to ensure BJK1's protection, was merely a "last-ditch effort" which the Trial Chamber knew in advance was futile.[88] In this respect, the Appellant points out that following the Trial Chamber's decision, the Rwandan authorities failed to comply with the Trial Chamber's request[89] and BJK1 remained unwilling to testify.[90]

43. The Prosecution responds that the Appellant's submission is misleading.[91] It argues that BJK1 could not have testified to the entire alibi, that his testimony would not have raised a reasonable doubt with respect to the Prosecution's case, and that the Appellant suffered no prejudice since the testimony would not have had any impact on the verdict.[92] The Prosecution further submits that it was always open for the Appellant to seek an adjournment or other forms of redress in order to ensure that BJK1 be heard.[93]

44. The Appeals Chamber observes that, contrary to the Appellant's submissions, WVSS did not at any time confirm the existence of threats against BJK1. It is clear from the communication issued by WVSS on 24 March 2005[94] and the oral submissions made by a representative of this section on 29 March 2005,[95] that WVSS merely informed the Trial Chamber that BJK1 himself cited security concerns as the reason for his refusal to come to Arusha to testify. The fact that, during the status conference held on 29 March 2005, the Trial Chamber initially stated that it would be futile to subpoena BJK1[96] is immaterial since it subsequently reconsidered its position.[97] Moreover, in a written decision issued on 4 May 2005, the Trial Chamber ordered the Registry to issue subpoenas to BJK1 and HBK, and requested the Rwandan authorities to take all appropriate measures to ensure their protection and to provide any other assistance requested by the Registry to

[87] Simba Appeal Brief, para. 24.
[88] Simba Reply, para. 17.
[89] Simba Appeal Brief, para. 26; Simba Notice of Appeal, II-C-2 (second part).
[90] Simba Reply, paras 17-18.
[91] Prosecution Response, paras 13-14.
[92] Prosecution Response, paras 29-31.
[93] Prosecution Response, para. 14; AT. 22 May 2007 pp. 25-26.
[94] Simba Appeal Brief, Annex 2 (E-mail of 24 March 2005 by Ms. Sylvie Becky, WVSS, addressed to Mr. Alao, Defence. The relevant section reads: "Le témoin BJK1 a rencontré à plusieurs reprises des représentants de notre Section en vue de son témoignage dans le procès Simba. Il n'est ni disposé à voyager à Arusha aux fins de témoignage, ni prêt à témoigner par vidéo-conférence à Kigali. Au regard des confidences faites par le témoin à nos officiers, celui-ci ne souhaite à aucun prix se rendre à Arusha ni témoigner par vidéo-conférence pour des raisons sécuritaires même s'il faisait l'objet d'une citation à comparaître.").
[95] Representation made by WVSS representative Mr. Essombe on 29 March 2005 (T. 29 March 2005 pp. 23, 24, 26).
[96] T. 29 March 2005 p. 28.
[97] T. 29 March 2005 p. 31. It is noteworthy that the Trial Chamber gave every assistance the Appellant requested to ensure the taking of the witness's testimony. While, on 4 February 2005, it denied a Defence request to subpoena BJK1 along with two other Defence witnesses, it authorised the taking of their testimony via video-link from Kigali in order to allay their reluctance to appear voluntarily, *see The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link, 4 February 2005. ("Decision of 4 February 2005").

facilitate the proposed witnesses' attendance at trial.[98] The Appellant has not advanced any evidence to support his contention that the Rwandan authorities did not comply with the Trial Chamber's Decision, and has failed to demonstrate that any interference with BJK1 occurred.

45. For the foregoing reasons, these sub-grounds of appeal are dismissed.

2. HBK

46. The Appellant further contends that he did not receive a fair trial since he was prevented from calling HBK, who refused to testify due to interference by Rwandan authorities.[99] In support of this contention, the Appellant presents several arguments which the Appeals Chamber will address in turn.

47. The Appellant argues that the Trial Chamber erred in considering that the onus was on him to prove that Rwandan authorities had interfered with HBK.[100] The Appeals Chamber notes however that the Trial Chamber found that interference by Rwandan authorities with HBK had indeed occurred.[101] Accordingly, this matter is not contentious and the Appeals Chamber declines to consider it.

48. The Appellant further submits that the Trial Chamber erred in finding that the Defence failed to request a stay of proceedings until appropriate arrangements could be made for the witness to come to testify.[102] In particular, he argues that it would have been "offensive" and "foolhardy" on his part to make such a request since the Trial Chamber had emphasised that the dates set for the submission of final trial briefs and closing arguments would not be changed, and since it had stated that HBK was unwilling to testify.[103] In this respect, the Appellant refers to paragraph 4 of the Decision on Subpoenas of 4 May 2005,[104] where the Trial Chamber held:

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[98] *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Decision on Defence Request for Subpoenas, 4 May 2005 ("Decision on Subpoenas of 4 May 2005"), Disposition. On 13 July 2007, the Appeals Chamber ordered the Registrar, pursuant to Rule 33(B) of the Rules, to submit a detailed written submission on the steps taken by the Registry in order to secure the attendance of BJK1 at trial no later than 13 August 2007, *see Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Order to Registrar Regarding BJK1, 13 July 2007 ("Order to Registrar Regarding BJK1 of 13 July 2007"). On 13 August 2007, the Registry confidentially filed the requested submission (The Registrar's Submission Pursuant to Rule 33(B) of the Rules of Procedure and Evidence Regarding Securing the Attendance at Trial of Defence Witness BJK1, 13 August 2007). In light of the Registrar' s submission, the Appeals Chamber is satisfied that WVSS and the Tribunal undertook all possible steps to secure BJK1's testimony and that BJK1's failure to testify was due to personal reluctance and concerns on the part of the witness, and beyond the control of WVSS and the Tribunal.
[99] Simba Notice of Appeal, I-A-1(b) to I-A-1(c), I-D-3, II-C-2 (first part), II-C-3; Simba Appeal Brief, paras 21, 28-45, 258; AT. 22 May 2007 p. 12.
[100] Simba Appeal Brief, para. 30.
[101] Trial Judgement, paras 49-50.
[102] Simba Appeal Brief, paras 28, 31-36.
[103] Simba Notice of Appeal, I-A-1(b); Simba Appeal Brief, paras 33-35.
[104] Simba Appeal Brief, para. 33.

> The timing for hearing of the evidence of these witnesses [HBK and BJK1] does not alter the deadlines for submission of the final trial briefs on 22 June 2005 or closing arguments on 7-8 July 2005 … [T]he prospective evidence of these witnesses may be fully discussed during oral arguments (emphasis omitted).[105]

49. In response, the Prosecution argues that the Appellant was given every opportunity to call HBK to testify.[106] It submits that the passage of the Decision on Subpoenas of 4 May 2005 referred to by the Appellant shows that the Trial Chamber allowed the hearing of the testimony of HBK and BJK1 after the filing of the closing briefs but before closing arguments, following a procedure similar to that under Rule 115 of the Rules.[107] In this regard, the Prosecution refers to footnote 4 of the Decision on Subpoenas of 4 May 2005, which reads as follows:

> Hearing additional witnesses after the filing of final briefs and prior to argument would be consistent with the practice of the Appeals Chamber when it takes additional evidence on appeal.[108]

The Prosecution concludes that since the Appellant failed to seek appropriate measures to secure the witness's testimony and instead accepted to close the case, he waived his right to raise the matter on appeal.[109]

50. The Appeals Chamber notes that the Trial Chamber's statement that the hearing of HBK would "not alter the deadlines for submission of the final trial briefs on 22 June 2005 or closing arguments" was made in its Decision on Subpoenas of 4 May 2005, two months ahead of the date scheduled for closing arguments. The Appeals Chamber does not accept that in light of this statement it was reasonable for the Defence to presume that the dates were irrevocably fixed and that the Trial Chamber would not grant a request for postponement of closing arguments.[110] Moreover, at the outset of the hearing of the parties' closing arguments on 7 July 2005, the Presiding Judge noted that HBK had expressed his willingness to testify but that it had been impossible to arrange his transfer to Arusha before closing arguments.[111] He recalled that the parties had been informed of the situation earlier that week and that the Defence had not objected to proceeding and closing the case.[112] The Presiding Judge's statement suggests that the Trial

[105] While quoting paragraph 4, the Appellant erroneously points to paragraph 5 of the Decision on Subpoenas of 4 May 2005.
[106] Prosecution Response, paras 11, 18-24.
[107] Prosecution Response, paras 18, 19.
[108] Prosecution Response, para. 18, quoting Decision on Subpoenas of 4 May 2005, fn. 4.
[109] Prosecution Response, paras 12, 16, 25.
[110] On that basis the Appeals Chamber dismisses the allegation in Ground I-D-3 that paragraph 52 of the Trial Judgement contradicted the Decision on Subpoenas of 4 May 2005 by faulting the Appellant for not requesting a stay of the proceedings until the appearance of HBK (*See* Notice of Appeal, I-D-3 (first part); Simba Appeal Brief, para. 258).
[111] T. 7 July 2005 pp. 1-2.
[112] T. 7 July 2005, pp. 1-2. Following this statement, the Appellant did not intervene and the Prosecution made its closing arguments (T. 7 July 2005 pp. 2-13). *See also* T. 8 July 2005 p. 10. The Appeals Chamber recalls its Decision on Rule 115 Evidence of 21 May 2007. At paragraph 32 of said decision, the Trial Chamber found that at that stage of the proceedings, at least two avenues were open to the Appellant to secure the hearing of HBK's testimony. In particular, the Appellant could have requested a stay of proceedings until appropriate arrangements were made to move

Chamber would have been ready to duly consider any such request. The Appeals Chamber therefore considers that the Trial Chamber did not err when it found that the Defence failed to request a stay of proceedings until appropriate arrangements could be made for the proffered witness to come to testify.[113]

51. Finally, the Appellant appears to argue that it was apparent from the circumstances that HBK would never agree to testify and that a request for a stay of proceedings would have been futile.[114] The Appeals Chamber cannot agree. As noted above, the Presiding Judge had informed the parties before 7 July 2005, the date of closing arguments, that HBK had expressed his willingness to testify but that it had been impossible to arrange his transfer to Arusha before closing arguments.

52. The Appellant further submits that the Trial Chamber erred in law[115] in finding that in any event HBK's failure to testify did not cause him material prejudice.[116] He emphasises that HBK is being prosecuted in Rwanda for the massacres at Kaduha Parish of 21 April 1994.[117] He also argues that by virtue of his position at the time and his involvement in the events, HBK had information concerning the massacres and was therefore able to testify to whether the Appellant was present at Kaduha Parish on 21 April 1994.[118] In this regard, the Appellant points out that the Trial Chamber had acknowledged that HBK's testimony "may be of interest".[119] He further claims that since Witness KXX's testimony would have supported that of HBK, the Trial Chamber "discounted the testimony of Witness KXX, so as to render moot that of […] HBK**".**[120]

53. The Prosecution responds that the Appellant was not convicted for the events at the Kaduha Trading Centre, that the Trial Chamber did not accept the testimony of Witness KXX with respect to the events at the Trading Centre, and that accordingly the testimony of HBK in this regard could not have had an impact on the verdict.[121] The Prosecution emphasises that the Appellant confirmed that HBK was not an alibi witness.[122]

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the proposed witness to Arusha, or he could have requested the taking of the witness's testimony via video-link from Kigali.

[113] Trial Judgement, para. 52.

[114] Simba Notice of Appeal, I-A-1(b) (first part) and I-D-3 (second part). The Appellant highlights that a period of one and a half months to two months had elapsed between the issuance of the Decision on Subpoenas of 4 May 2005 and the date envisaged for the witness's testimony without the witness being released for trial, and that WVSS failed to give any indication as to when HBK could be transferred (Simba Reply, paras 7-8).

[115] The Appeals Chamber notes that according to the structure of the Simba Appeal Brief, the Appellant is alleging an error of law. It however appears from the nature of his submission that he is alleging an error of fact.

[116] Simba Appeal Brief, paras 37-45.

[117] Simba Appeal Brief, para. 39 (a).

[118] Simba Appeal Brief, paras 39 (b), 40.

[119] Simba Appeal Brief, paras 41-42, 44, quoting Decision on Subpoenas of 4 May 2005, para. 3.

[120] Simba Reply, para. 26; Simba Appeal Brief, paras 37, 42.

[121] Prosecution Response, para. 34.

[122] Prosecution Response, para. 34, referring to T. 29 March 2005 p. 30.

54. The Trial Chamber provided the following reasoning in concluding that HBK's failure to testify did not cause material prejudice to the Appellant:

> In any event, […] HBK's intended testimony dealt primarily with the events surrounding the massacre at Kaduha Parish on 21 April 1994. His proposed testimony about the massacre would have been second-hand and therefore of limited probative value. The Chamber is mindful that Prosecution Witness KXX placed […] HBK with Simba in the Kaduha Trading Centre in the days before the attack. […] HBK's testimony would have been relevant and direct in this respect. However, the Chamber did not find Witness KXX to be credible on matters relating to […] HBK. Therefore, the Chamber can find no material prejudice.[123]

55. The Appellant's argument that due to his position, HBK was aware of the massacres and was therefore able to testify to whether the Appellant was at Kaduha Parish on 21 April 1994 is without merit. It appears from HBK's pre-trial statements[124] that he was not present during the massacres at Kaduha Parish,[125] and that he would have been restricted to giving testimony to the effect that he had never heard anyone else mentioning the Appellant's name in relation to this event.[126] The Trial Chamber's finding that the witness's testimony would have been of limited probative value was therefore reasonable.

56. The Appeals Chamber notes that HBK's testimony would also have concerned the events at Kaduha Trading Centre. It was reasonable for the Trial Chamber to conclude that while HBK's testimony would have been direct in this respect, no conviction was entered on the basis of these events and accordingly the witness's failure to testify was not prejudicial to the Appellant.

57. The Appeals Chamber finally notes that the Appellant fails to submit any argument in support of his contention that the Trial Chamber discounted the testimony of Witness KXX so as to render moot that of HBK. The Appeals Chamber accordingly declines to consider it.

58. The Appellant has not shown any error in the Trial Chamber's finding on this point. Accordingly, these sub-grounds of appeal are dismissed.

3. Alleged Contradiction in the Trial Judgement

59. The Appellant submits that the Trial Chamber contradicted itself when it considered, on the one hand, that the Defence failed to establish that Rwandan authorities had interfered with the

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[123] Trial Judgement, para. 53 (footnote omitted).
[124] R.P. 3178*bis*, 3177*bis*.
[125] HBK's pre-trial statement of 27 July 2004, R.P. 3178*bis* : « Les massacres à la paroisse de Kaduha ont eu lieu dans la nuit du 20 au 21 avril. Pendant ce temps, je suis resté chez moi. »
[126] HBK's pre-trial statement of 11 January 2005, R.P. 3177*bis*: « Mais, je n'ai jamais vu SIMBA sur les lieux et je n'ai jamais entendu parler de lui à cette époque. » *See also* Decision on Rule 115 Evidence of 21 May 2007, para. 35.

proceedings, while, on the other hand, it recognized that such interference had in fact taken place.[127] The Prosecution responds that the Appellant misrepresents the Trial Chamber's finding.[128]

60. The Appeals Chamber observes that the Appellant's argument clearly rests on a misreading of the Trial Chamber's finding. The Trial Chamber made different findings with respect to the two proffered witnesses. It found that Rwandan government authorities had interfered with HBK,[129] while it found with respect to BJK1 that the Defence had not established such interference on the balance of probabilities.[130] The Appellant's argument on this point is therefore without merit.

61. Accordingly, this sub-ground of appeal is dismissed.

C. Alleged Defects in the Form of the Indictment

62. The Appellant makes several submissions to the effect that the Indictment failed to clearly plead the theory of JCE as well as the material facts supporting that theory. The Appellant further contends that the Trial Chamber erred in law by making findings on several material facts not pleaded in the Indictment and in finding that, as a matter of law, post-indictment communications may cure defects in the Indictment. The Appellant argues that since he lacked notice of the charges against him, his trial was rendered unfair and, accordingly, his convictions should be reversed.[131] The Prosecution responds that the Appellant was informed in detail of the nature and cause of the charges against him.[132]

63. Charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in the indictment so as to provide notice to the accused.[133] Whether particular facts are "material" depends on the nature of the Prosecution's case.[134] In cases where the Prosecution intends to rely on a theory of JCE, the Prosecution must plead the purpose of the enterprise, the identity of its participants, the nature of the accused's participation in the enterprise and the period of the enterprise.[135] The Indictment should also clearly indicate which form of JCE is

[127] Simba Notice of Appeal, I-D-2; Simba Appeal Brief, para. 257, referring to Trial Judgement, paras 48-50.
[128] Prosecution Response, para. 105.
[129] Trial Judgement, paras 49-50.
[130] Trial Judgement, para. 48.
[131] Simba Notice of Appeal, I-A-2 to I-A-5, I-D-1, I-F-1 to I-F-5, I-F-11; Simba Appeal Brief, paras 46-79, 256, 273-283, 294-298; Simba Reply, para. 79.
[132] Prosecution Response, paras 35-58, 117-138.
[133] *Muhimana* Appeal Judgement, paras 76, 167, 195; *Gacumbitsi* Appeal Judgement, para. 49; *Simić et al.* Appeal Judgement, para. 20.
[134] *Naletilić and Martinović* Appeal Judgement, para. 24.
[135] *Simić et al.* Appeal Judgement, para. 22; *Ntagerura et al.* Appeal Judgement, para. 24.

being alleged.[136] Failure to specifically plead JCE, including the supporting material facts and the category, constitutes a defect in the indictment.[137]

64. If the indictment is found to be defective because it fails to plead material facts or does not plead them with sufficient specificity, the Trial Chamber must consider whether the accused was nevertheless accorded a fair trial.[138] Where the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges, defects in the indictment may be considered cured.[139] In determining whether a defective indictment was cured, the Appeals Chamber has previously looked at information provided in the Prosecution's pre-trial brief,[140] its opening statement,[141] as well as the witness charts annexed to the Prosecution pre-trial brief.[142] The Appeals Chamber has furthermore held that an accused's submissions at trial, for example the motion for judgement of acquittal, final trial brief or closing arguments, may assist in some instances in determining to what extent the accused was put on notice of the Prosecution's case.[143]

65. As a preliminary matter, in light of the applicable law set out above, the Appellant's argument that the Trial Chamber erred by finding that, as a matter of law, post-indictment communications may cure defects in the Indictment, is readily dismissed.[144]

1. Alleged Errors Relating to JCE

(a) Theory of JCE

66. The Appellant submits that the Trial Chamber misinterpreted the Indictment, in particular paragraphs 14 and 58, in order to find that he was charged with JCE liability and to enter a conviction on that basis, while the only possible interpretation was that he was charged with

[136] *Simić et al.* Appeal Judgement, para. 22; *Gacumbitsi* Appeal Judgement, para. 162, referring to *Kvočka et al.* Appeal Judgement, paras 28, 42.
[137] *Simić et al.* Appeal Judgement, para. 22; *Gacumbitsi* Appeal Judgement, para. 162; *Kvočka et al.* Appeal Judgement, paras 43-54.
[138] *Naletilić and Martinović* Appeal Judgement, para. 26, referring to *Kvočka et al.* Appeal Judgement, para. 33.
[139] *Muhimana* Appeal Judgement, paras 76, 195, 217; *Simić et al.* Appeal Judgement, para. 23; *Gacumbitsi* Appeal Judgement, para. 49; *Ntagerura et al.* Appeal Judgement, para. 28.
[140] *Naletilić and Martinović* Appeal Judgement, para. 27, referring to *Kupreskić et al.* Appeal Judgement, paras 115-117.
[141] *Naletilić and Martinović* Appeal Judgement, para. 27, referring to *Kordić and Čerkez* Appeal Judgement, para. 169.
[142] *Muhimana* Appeal Judgement, paras 81, 82, 200, 201; *Gacumbitsi* Appeal Judgement, paras 56-58; *Naletilić and Martinović* Appeal Judgement, paras 40-42. Pursuant to Rule 73 *bis*(B)(iv) of the Rules, the Prosecution may be ordered at the Pre-Trial conference, to file a list of witnesses it intends to call including, *inter alia*, a summary of the facts on which each witness is expected to testify.
[143] *Simić et al.* Appeal Judgement, para. 24; *Naletilić and Martinović* Appeal Judgement, para. 27, referring to *Kvočka et al.* Appeal Judgement, paras 52-53; *Kordić and Čerkez* Appeal Judgement, para. 148.
[144] Simba Notice of Appeal, I-A-4, I-D-1, I-F-2, I-F-3 (in part); Simba Appeal Brief, paras 70-79, 256, 281, 282(c).

planning, preparing and committing the massacres "as a head or leader, not as an executant".[145] In addition, the Appellant submits that it was not clear from the Indictment that the Prosecution intended to rely on JCE liability since paragraphs 14 and 15 thereof clearly charged him with complicity in genocide, which is incompatible with other forms of participation.[146] The Prosecution responds that the Appellant was put on notice that he was charged with JCE liability.[147]

67. The Appellant's argument on this point is readily dismissed. Under each Count of the Indictment the Appellant is explicitly charged for his participation in a JCE.[148] It is clear from the concise statement of facts that the alleged common criminal purpose comprised the killing of Tutsi at Murambi Technical School, Kaduha Parish, Cyanika Parish, and Kibeho Parish in Gikongoro prefecture, and Gashoba Hill and Rugongwe Trading Centre in Butare prefecture. The fact that the material facts underpinning this theory of responsibility reflect that he was charged with taking a leading position within the JCE is not in any way incompatible with his participation in that enterprise. Moreover, the Appeals Chamber notes that commission and complicity in genocide are two different punishable acts of genocide[149] which may both be pleaded in an Indictment.[150]

68. For the foregoing reasons, the Appeals Chamber is satisfied that the Indictment put the Appellant adequately on notice that he was being charged with participation in a JCE. Accordingly, the Appellant's argument on this point is dismissed.

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[145] Simba Notice of Appeal, 1-A-5, I-F-1 and I-F-3 (in part); Simba Appeal Brief, paras 274-280, 282(d). In support of this contention, the Appellant argues that while the Prosecution alleges that he "acted in concert" with the individuals listed at paragraph 14 of the Indictment, including *Interahamwe*, gendarmes, and soldiers, it nonetheless considered him as leader of this group and did not clearly plead a case of JCE (Simba Appeal Brief, para. 275). The Appellant further submits that while paragraph 58 of the Indictment reads: "Aloys Simba intended to commit the acts […], this intent being shared […]", the Trial Chamber altered its meaning by considering that it was alleged that "Simba shared the same intent" with the other individuals (Simba Appeal Brief, paras 278-279, 282, quoting Trial Judgement, para. 393 (emphasis in the Simba Appeal Brief)).

[146] Simba Appeal Brief, para. 282(b); Simba Reply, para. 80. The Appeals Chamber notes that the alleged error was not pleaded in the Notice of Appeal. However, since the Prosecution does not object to this failure and responds to the Appellant's submission, the Appeals Chamber will exercise its discretion to consider the Appellant's argument.

[147] Prosecution Response, paras 123-127.

[148] Under each Count, the Indictment states the Appellant's alleged responsibility "in concert with others as part of a joint criminal enterprise" (*See* Indictment, pp. 2, 11, 12). As will be discussed in further detail below, the Appellant was also given notice that the Prosecution intended to rely on JCE liability in the Prosecution Pre-Trial Brief as well as in a series of pre-trial decisions regarding the form of the Indictment (*See* Indictment Decision of 26 January 2004, para. 8; Decision on the Defects in the Form of the Indictment of 6 May 2004, paras 9-12, Disposition; Decision on Amended Indictment of 14 July 2004, paras 5-11).

[149] *Semanza* Appeal Judgement, para. 316.

[150] The Appeals Chamber has previously held that both cumulative and alternative charging on the basis of the same acts is generally allowed on the basis that "prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven" (*Naletilić and Martinović* Appeal Judgement, para. 103, quoting *Kupreskić et al*. Appeal Judgement, paras 385-386. *See also Semanza* Appeal Judgement, paras 307-309).

(b) Identity of the Participants in the JCE

69. The Appellant challenges the Trial Chamber's finding that the identities of the participants in the JCE were adequately pleaded. He contends that the Prosecution failed to put the Appellant on notice that it intended to allege the participation of the physical perpetrators in the JCE.[151] In this respect, the Appellant submits that the Trial Chamber erred by finding that the Prosecution Pre-Trial Brief and opening statement confirmed that the physical perpetrators were also considered as participants in the JCE since the Prosecution's opening statement merely referred to the persons "named in his Indictment".[152] The Appellant argues that the fact that the Prosecution included, without explanation, a new list of participants in its Final Trial Brief, adding seven names and removing one name as well as the reference to individuals "unknown to the Prosecution", reveals that the identity of the participants in the JCE had not been adequately pleaded.[153] Finally, the Appellant submits that the Indictment fails to refer to any sort of "organization" among these individuals.[154]

70. The Prosecution responds that it did not amend the list of participants in the JCE in its Final Trial Brief, but that the names listed there already appeared in various paragraphs throughout the Indictment.[155] It submits that the Appellant does not demonstrate how the Trial Chamber erred in finding that, given the nature of the Prosecution's case, the Prosecution had adequately pleaded the identity of the participants in the JCE.[156]

71. A review of the Trial Judgement reveals that the Trial Chamber discussed in detail whether the Appellant had been adequately put on notice of the identity of the participants in the JCE. The Trial Chamber found as follows:

> 392. With respect to the participants in the joint criminal enterprise, paragraph 14 of the Indictment lists eight officials with whom, the Prosecution claims, Simba "planned" and "prepared" the genocide. The paragraph states that these named individuals "acted in concert" with Simba, echoing the language used in the count along with the specific reference to joint criminal enterprise. The Indictment also adequately identifies the participants alleged to have materially committed the crimes forming part of the common criminal purpose. Some are named in various paragraphs throughout the Indictment in connection with planning of the attacks.
>
> 393. In most cases, the participants who physically perpetrated the crimes are identified in each section of the Indictment dealing with a particular massacre site by broad category, such as *Interahamwe* or gendarmes, and then further identified with geographic and temporal details. In the context of this case and given the nature of the attacks, the Chamber is not satisfied that the Prosecution could have provided more specific identification. The Indictment alleges Simba's

[151] Simba Notice of Appeal, I-F-4, I-F-5, I-F-11; Simba Appeal Brief, paras 294-298; AT. 22 May 2007 pp. 7-8.
[152] Simba Reply, paras 71, 72. The Appellant refers to footnote 403 of the Trial Judgement which in turn quotes an excerpt of the Prosecution's opening statement.
[153] Simba Appeal Brief, paras 294, 296-298, quoting Trial Judgement, para. 393; Simba Reply, paras 70, 73.
[154] Simba Appeal Brief, para. 295.
[155] Prosecution Response, para. 137.
[156] Prosecution Response, para. 137.

> interactions with the attackers in such a way as to reflect concerted action. In addition, paragraph 58 of the Indictment affirms that the attackers are participants when it pleads the *mens rea* for the basic form of joint criminal enterprise by stating that Simba shared the same intent to commit the pleaded crimes with "all other individuals involved in the crimes perpetrated". Moreover, the Prosecution Pre-trial Brief and opening statement also confirm that the named individuals as well as the attackers should be considered as participants in the joint criminal enterprise.[157]

72. The Appellant has not advanced any reason why the notice provided through paragraphs 14 and 58 of the Indictment read together with the different sections of the Indictment[158] identifying the physical perpetrators by category for each particular massacre site was insufficient to put him on notice that the Prosecution intended to plead the physical perpetrators as participants in the JCE. Accordingly, the Appeals Chamber cannot find the Indictment defective in this respect. It further observes that the Trial Chamber stated that "the Prosecution Pre-trial Brief and opening statement also confirm that […] the attackers should be considered as participants in the joint criminal enterprise".[159]

73. With respect to the participants listed in the Prosecution Final Trial Brief,[160] the Appeals Chamber finds the Appellant's argument misconceived. Prosecution final trial briefs are only filed at the end of a trial, after the presentation of all the evidence, and are therefore not relevant for the preparation of an accused's case.

74. Finally, the Appeals Chamber cannot find any merit in the Appellant's argument that the Indictment fails to refer to any sort of "organization" among these individuals. It is well established that a JCE need not be previously arranged or formulated and may materialise extemporaneously.[161] Since "organization" is not an element of JCE, it need not be pleaded in the Indictment.

75. For the foregoing reasons, the Appellant's submission that he was not adequately put on notice of the identity of the participants in the JCE is dismissed.[162]

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[157] Trial Judgement, paras 392-393 (internal footnotes omitted).
[158] The Appeals Chamber recalls that in order to determine whether an accused was adequately put on notice of the nature and cause of the charges against him the indictment must be considered as a whole (*Gacumbitsi* Appeal Judgement, para. 123).
[159] Trial Judgement, para. 393.
[160] *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, The Prosecutor's Closing Brief, filed on 22 June 2005 ("Prosecution Final Trial Brief"), para. 35.
[161] *Kvočka et al.* Appeal Judgement, para. 117; *Tadić* Appeal Judgement, para. 227 (ii). *See* also *Vasiljević* Appeal Judgement, para. 100.
[162] The Appellant also argues that the Trial Chamber erred when it considered paragraph 14 of the Indictment in its factual findings since this paragraph was impermissibly vague (Simba Notice of Appeal, I-A-3; Simba Appeal Brief, paras 60-69; Simba Reply, para. 43). As discussed above, the Trial Chamber did not make any finding on the basis of this paragraph alone. It considered paragraph 14 as "introductory paragraph" providing "a summary list of various individuals that are mentioned elsewhere in the Indictment interacting with Simba in the context of specific events" which needed to be "read in the context of the Indictment as a whole" (Trial Judgement, para. 18). Therefore, the Appellant's contention on this point need not be discussed any further.

(c) Category of JCE

76. The Appellant submits that the Indictment fails to indicate the category of JCE on which the Prosecution intended to rely, and that only the Prosecution Final Trial Brief specified the Prosecution's intention to rely on the basic category.[163] The Appellant further claims that the Prosecution did not give notice of the constituent elements of all three categories of JCE and that this would have also been a "mission impossible" since the categories are mutually incompatible.[164] In addition, he submits that the Trial Chamber erred in finding that paragraph 58 of the Indictment adequately pleaded the *mens rea* for the basic form of JCE.[165] The Prosecution concedes that the Indictment fails to specify the category of JCE it intended to rely on but that it was apparent to the Appellant from the Prosecution Pre-Trial Brief as well as the Decision on Amended Indictment of 14 July 2004 that it intended to rely on all three categories of JCE.[166]

77. The Appeals Chamber recalls that while the JCE categories are mutually incompatible to the extent that a defendant may not be convicted of multiple categories based on the same conduct, an indictment may charge a defendant cumulatively with multiple categories.[167] The Appeals Chamber notes that the Appellant was convicted for his participation in a JCE based on the first category, and therefore restricts its inquiry to whether he was put on notice that the Prosecution intended to rely on that specific category.[168] In this regard, the Appeals Chamber recalls that the three categories of JCE vary only with respect to the *mens rea* element, not with regard to the *actus reus*.[169] Accordingly, an accused will have sufficient notice of the category of JCE with which he is being charged where the indictment pleads the *mens rea* element of the respective category.

78. The Appeals Chamber observes that in the instant case, the Indictment indeed failed to specifically name the category of JCE the Prosecution intended to rely on. However, paragraph 58 of the Indictment states that "Aloys Simba intended to commit the acts above, this intent being shared by all other individuals involved in the crimes perpetrated." Read together with the paragraphs of the Indictment which set out the acts and crimes alleged,[170] the Appeals Chamber is

[163] Simba Appeal Brief, para. 282(c); Simba Reply, para. 90; AT. 22 May 2007 pp. 6-7.
[164] Simba Reply, paras 87-88.
[165] Simba Notice of Appeal, I-F-5; Simba Appeal Brief, para. 279; Simba Reply, para. 83.
[166] Prosecution Response, paras 132-134.
[167] *See, e.g. Delalic et al.* Appeal Judgement, para. 400 ("Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence. In addition, cumulative charging constitutes the usual practice of both this Tribunal and the ICTR.").
[168] The Appellant's arguments concerning the other categories, including the contention that it is a "mission impossible" to prove the elements of all three categories since they are mutually incompatible, need not be addressed as they could not have had any impact on the verdict.
[169] *Tadić* Appeal Judgement, paras 227, 228.
[170] Indictment, paras 26-57.

satisfied that the specific state of mind of the first category of JCE was explicitly pleaded. Consequently, the Appellant had sufficient notice that he was being charged on that basis.

79. This conclusion is also reached when viewing the notice provided to the Appellant against the backdrop of a series of pre-trial decisions regarding the form of the Indictment. On 6 May 2004, the Trial Chamber issued a decision in which it ordered the Prosecution, *inter alia*, "to amend the amended Indictment by providing (…) details (…) with respect to the *mens rea* element of joint criminal enterprise."[171] On 10 May 2004, and in response to the Trial Chamber's decision, the Prosecution filed a second amended Indictment which included the above-cited paragraph 58. On 14 July 2004, the Trial Chamber dismissed a Defence motion challenging the Second Amended Indictment and found, *inter alia*, that the Second Amended Indictment pleaded with sufficient precision the *mens rea* element of all three forms of JCE.[172] It is also noteworthy that the Trial Chamber explicitly stated with respect to the material facts pleaded at paragraph 23 of the Indictment that these are "*also* relevant to establishing the general intent to commit the underlying crimes."[173] Moreover, the Prosecution explicitly stated in the Pre-Trial Brief that it intended to rely on all three categories of JCE.[174]

80. For the foregoing reasons, the Appellant's submissions on this point are dismissed.

2. Alleged Errors Relating to Other Material Facts Not Pleaded in the Indictment

(a) The Appellant's Stature as an Aggravating Factor

81. The Appellant submits that the Trial Chamber erred in finding that he was not an "ordinary citizen" and that this constituted an aggravating circumstance. He submits that this fact was not pleaded in the Indictment and should therefore not have been considered by the Trial Chamber in

[171] *The Prosecutor v. Aloys Simba*, Case No. ICTR-2001-76-I, Decision on Preliminary Defence Motion Regarding Defects in the Form of the Indictment, 6 May 2004, Disposition. The Appellant's participation in a joint criminal enterprise was not explicitly pleaded in the Initial Indictment. On 26 January 2004, the Trial Chamber granted a Prosecution's motion to amend the Indictment, *see The Prosecutor v. Aloys Simba,* Case No. ICTR-2001-76-I, Decision on Motion to Amend Indictment, 26 January 2004 ("Simba Indictment Decision of 26 January 2004"). The Trial Chamber noted, *inter alia*, that "the specific allegation of a joint and criminal enterprise gives the Accused clear notice that the Prosecution intends to argue this theory of commission of crimes" (Simba Indictment Decision of 26 January 2004, para. 8). On 16 February 2004, the Prosecution filed an amended indictment which specified with respect to each count that it intended to rely on joint criminal enterprise liability.
[172] Decision on Amended Indictment of 14 July 2004, paras 8-11.
[173] Decision on Amended Indictment of 14 July 2004, fn. 8 (emphasis added).
[174] *The Prosecutor v. Aloys Simba*, Case No. ICTR-2001-76-I, The Prosecutor's Pre-Trial Brief Pursuant to Article 73 *bis* (B)(i) of the Rules of Procedure and Evidence, filed on 16 February 2004 ("Prosecution Pre-Trial Brief"), paras 125-136.

sentencing.[175] The Prosecution responds that the Appellant's stature in Rwanda was pleaded in detail in the Indictment.[176]

82. The Appeals Chamber recalls that the charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in the Indictment so as to provide notice to the accused.[177] By the same token, for sentencing purposes, a Trial Chamber may only consider in aggravation circumstances pleaded in the Indictment.[178]

83. A review of the Indictment reveals that it specifies that before 1994, the Appellant had held the positions of Colonel of the Rwandan Armed Forces, *Deputé* in the National Assembly and President of the *Mouvement révolutionnaire national pour la démocratie et le développement* ("MRND") in Gikongoro Prefecture; and that from mid-May 1994, he was designated by the Minister of Defence of the interim government as *Conseiller* of the civil defence for Gikongoro and Butare prefectures.[179] The Indictment describes the Appellant as one of the wealthiest citizens in Gikongoro Prefecture and alleges that he also derived authority from his close association with President Habyarimana.[180] All of these clearly allege that the Appellant was no ordinary citizen. The Appellant's contention is therefore without merit.

(b) The Distribution of Weapons

84. The Appellant challenges the Trial Chamber's findings that he distributed weapons to the physical perpetrators of the crimes at Murambi Technical School and Kaduha Parish, and that he had a cache of weapons for distribution, which certainly would have come from civilian or military authorities.[181] The Appellant submits that neither the fact that he had a cache of weapons nor the source of these weapons appears in the Indictment, the trial record or in any of the Trial Chamber's

[175] Simba Notice of Appeal, I-A-2-(a); Simba Appeal Brief, paras 47, 49.
[176] Prosecution Response, paras 38-41.
[177] *Gacumbitsi* Appeal Judgement, para. 49; *Simić et al.* Appeal Judgement, para. 20.
[178] *Delalić et al.* Appeal Judgement, para. 763 ("The Appeals Chamber agrees that only those matters which are proved beyond reasonable doubt against an accused may be the subject of an accused's sentence or taken into account in aggravation of that sentence."); *Kunarac et al*. Trial Judgement, para. 850 ("Only those circumstances directly related to the commission of the offence charged and to the offender himself when he committed the offence, such as the manner in which the offence was committed, may be considered in aggravation. In other words, circumstances not directly related to an offence may not be used in aggravation of an offender's sentence for that offence. To permit otherwise would be to whittle away the purpose and import of an indictment.").
[179] Indictment, p. 1.
[180] Indictment, p. 3.
[181] Trial Judgement, para. 404.

findings.[182] The Prosecution responds that the source of the weapons is not a material fact which the Prosecution was required to plead.[183]

85. The Appeals Chamber notes that paragraph 32 of the Indictment states that during the attack at Kaduha Parish, "Aloys SIMBA replenished the ammunition of the attackers on several occasions." By the same token, paragraph 42 of the Indictment states that the Appellant arrived in Murambi "in a truck loaded with machetes which he subsequently distributed to the Interahamwe." The Appellant's argument that the Indictment failed to plead the Appellant's distribution of weapons is therefore without merit. The fact that the weapons distributed by the Appellant originated from "civilian and military authorities" and had been stored by the Appellant in a cache was not a material fact which the Prosecution was required to plead to put the Appellant on notice of the charges against him. Rather, the material fact was the Appellant's distribution of the weapons. Accordingly, the Appellant has failed to demonstrate that the Indictment was defective with respect to the Appellant's distribution of weapons.

86. Accordingly, this sub-ground of appeal is dismissed.

(c) The Appellant's Motive

87. The Appellant argues that his motive with respect to genocide or crimes against humanity was not pleaded in the Indictment.[184] Moreover, he contends that the Trial Chamber's finding relating to his motive is merely an assumption leading to a doubt which must be considered in favour of the Appellant.[185] The Prosecution responds that an accused's motive does not constitute an element of an international crime and therefore need not be pleaded in the Indictment.[186]

88. The Trial Chamber did not consider motive to be an element of the crimes at issue, but considered that a possible motive did not preclude the possession of genocidal intent.[187] This finding is in accordance with established jurisprudence.[188] As a result there was no need for the Prosecution to plead the motive in the Indictment. Accordingly, this sub-ground of appeal is dismissed.

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[182] Simba Notice of Appeal, I-A-2(b); Simba Appeal Brief, para. 51; Simba Reply, paras 34, 51. The Appeals Chamber will address the Appellant's argument that this finding is without support in the evidence (Simba Notice of Appeal, II-C-14) below under Chapter II, Section F-1.
[183] Prosecution Response, para. 44; AT. 22 May 2007 pp. 33-34, 52-53.
[184] Simba Notice of Appeal, I-A-2-(c); Simba Appeal Brief, para. 53; Simba Reply, para. 37; AT. 22 May 2007 p. 20.
[185] Simba Appeal Brief, paras 54-55.
[186] Prosecution Response, paras 46-47.
[187] Trial Judgement, para. 417.
[188] *Kvočka et al.* Appeal Judgement, para. 106; *Niyitegeka* Appeal Judgement, para. 53; *Jelisić* Appeal Judgement, para. 49; *Kayishema and Ruzindana* Appeal Judgement, para. 161; *Tadić* Appeal Judgement, para. 269.

(d) The Formulation of a Genocidal Plan

89. The Appellant contests the Trial Chamber's finding that it "is also possible that local authorities formulated a plan of attack and then requested Simba to assist in implementing it", on the basis that no such plan was pleaded in the Indictment.[189] The Prosecution responds that "planning" is not an element of JCE liability and thus need not be pleaded in the Indictment.[190]

90. The Appeals Chamber notes that, contrary to what the Appellant seems to suggest, the Trial Chamber did not enter any conviction on the basis of the contested finding. To the contrary, having considered that it was not the only reasonable inference available from the evidence, it dismissed the allegation that the Appellant participated in the planning of the massacres of 21 April 1994 at Murambi, Cyanika, and Kaduha.[191] Moreover, it is well established that "planning" is not an element of a JCE.[192] The material element of a JCE is the "common purpose", and it is on this basis that the Trial Chamber convicted the Appellant for his participation in a JCE. Accordingly, this sub-ground of appeal is dismissed.

(e) Appellant's Presence and Utterances at Kaduha Parish as a Sign of Approval of the Attackers' Conduct

91. The Appellant submits, without elaboration, that the Trial Chamber erred in law by finding, at paragraph 403 of the Trial Judgement, that the attackers perceived the Appellant's alleged presence at Kaduha Parish and the remarks he made as a sign that he and the government approved of their conduct, since he had not been put on notice of this allegation.[193]

92. As a preliminary matter, the Appeals Chamber finds that the invocation of the government by the Appellant was not a material fact which the Prosecution was required to plead in the Indictment. Rather, the material fact was that the Appellant encouraged the assailants by his presence, acts and utterances. A review of the Indictment shows that it provided detailed information with respect to both the Appellant's presence, acts, and utterances at Kaduha Parish and his position of "power" and "authority" in Rwanda, and in particular in Gikongoro and Butare prefectures.[194] The Appeals Chamber is therefore satisfied that the Appellant was properly given

[189] Simba Notice of Appeal, I-A-2 (d); Simba Appeal Brief, paras 56-59; Simba Reply, para. 38.
[190] Prosecution Response, para. 48.
[191] Trial Judgement, para. 405.
[192] *Kvočka et al.* Appeal Judgement, para. 117 ("Joint criminal enterprise requires the existence of a common purpose which amounts to or involves the commission of a crime. The common purpose need not be previously arranged or formulated; it may materialize extemporaneously" (footnote omitted)). *See also* Section C-1(b), fn. 167.
[193] Simba Notice of Appeal, I-F-8. The Appellant does not develop this claim in his Appeal Brief.
[194] Indictment, paras 3, 5, 7-11, 27-34.

notice by the Indictment that the Prosecution intended to plead that his presence at Kaduha Parish and his acts and utterances encouraged the assailants.

93. In any event, the Prosecution Pre-Trial Brief repeatedly describes the Appellant's presence at the massacre sites as tacit encouragement and demonstration of his support to the attackers. A whole subsection in the Prosecution Pre-Trial Brief is entitled "Presence at or in the vicinity of Crime Scenes: Tacit Encouragement of the Crimes" and deals with this issue.[195] Similarly, paragraphs 89 and 147 of the Prosecution Pre-Trial Brief read:

> 89. Aloys SIMBA was present at or in the vicinity of various massacre sites/scenes. He knew that widespread and systematic killings targeting Tutsis were taking place throughout Gikongoro and in some communes in Butare prefecture bordering Gikongoro. He did not take any action to prevent or oppose the massacres. As a person in authority, his failure to take action amounts to tacit encouragement of the killings and other acts of violence.[196]
>
> (…)
>
> 147. Although Aloys SIMBA knew that throughout Rwanda, Tutsi civilians were being targeted and systematically and massively killed on ethnic grounds, he did not publicly disavow the killings, thereby demonstrating his support for the massacres.[197]

94. Consequently, the Trial Chamber found at paragraph 403 as follows:

> Simba participated in the joint criminal enterprise through his acts of assistance and encouragement to the physical perpetrators of the crimes at Murambi Technical School and Kaduha Parish. In the Chamber's view, Simba's actions at those two sites had a substantial effect on the killings which followed. Witness KSY noted that the attackers at Murambi continued with renewed enthusiasm after Simba's departure. Moreover, the use of guns and grenades, which Simba distributed at Kaduha Parish, was a decisive factor in the success of these assaults. The Chamber notes that Simba was a respected national figure in Rwandan society and well-known in his native region. Therefore, the assailants at those places would have viewed his presence during the attacks, however brief, as approval of their conduct, particularly after Simba's invocation of the government.[198]

95. The Trial Chamber further found at paragraph 406 of the Trial Judgement that the Appellant "shared the common purpose of killing Tutsi at Murambi Technical School and Kaduha Parish based on his presence and specific actions at the two sites."[199]

96. It is apparent from the language of paragraph 403 of the Trial Judgement quoted above, that the Trial Chamber correctly treated the Appellant's actions in aggregate, finding that taken together, they clearly indicated the Appellant's intent to participate in and to encourage the massacres. In light of the above, the Appeals Chamber is also satisfied that the Appellant was put on notice regarding the nature of the charges for which he was convicted.

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[195] Prosecution Pre-Trial Brief, paras 169-174.
[196] Prosecution Pre-Trial Brief (Section D(i): Prosecutor's Case Theory, General theory), para. 89.
[197] Prosecution Pre-Trial Brief (Section D(iv)(a): Prosecutor's Case Theory, Article 6(1) Applied to the Facts of the Case, Participation in a Joint or Common Criminal Enterprise), para. 147.

97. The Appellant's argument that he lacked notice regarding the effect of his apparent presence and utterances at Kaduha Parish, including his invocation of the government, is therefore without merit. Accordingly, this sub-ground of appeal is dismissed.

D. Alleged Errors in the Assessment of the Prosecution Evidence

98. The Appellant submits, under various sub-grounds of appeal, that the Trial Chamber committed errors of law and fact in finding that he was present during and participated in the attacks at Murambi Technical School and Kaduha Parish on 21 April 1994.

99. The Appeals Chamber notes that some of the Appellant's submissions are advanced without any supporting argument.[200] The Appeals Chamber declines to address these submissions as they do not meet the minimum criteria for a challenge on appeal. Moreover, the Appeals Chamber will not address alleged errors with respect to the assessment of Prosecution Witness KDD's testimony,[201] given that no factual findings in the Trial Judgement are based on the evidence challenged**.**

100. The Appeals Chamber will consider in turn the Appellant's allegations of error relating to the respective weight the Trial Chamber accorded to oral evidence and documentary evidence; the Appellant's presence at and participation in the attacks at Murambi Technical School and Kaduha Parish; the impossibility to drive between these two places in the lapse of time compatible with the evidence; and the speech given by the Appellant at a public meeting in Ntyazo Commune on 22 May 1994.

1. Alleged Error Relating to the Hierarchy of Evidence

101. The Appellant contends that the Trial Chamber erred in law in giving more weight to the testimony of Prosecution witnesses than to documentary evidence used to confront them during

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[198] Footnotes omitted.
[199] Trial Judgement, para. 406.
[200] These include submissions to the effect that (i) "[i]t is contradictory to acknowledge that Prosecution witnesses had credibility problems and nevertheless to accept certain aspects of their testimonies and to go as far as to explain their inconsistencies and contradictions" (Simba Appeal Brief, paras 165-166, 261 in relation to Simba Notice of Appeal, I-C-6 and I-D-6); (ii) the Trial Chamber erred in finding, in relation to the assessment of the credibility of Witness YH, "that the issue of the RPA attack was not developed further by the Defence" (Simba Notice of Appeal, I-B-5. Neither the Defence nor the Trial Judgement clarifies "RPA". The Trial Judgement at paragraph 167 appears to point to the armed branch of the RPF); (iii) the Trial Chamber applied a standard lower than "beyond a reasonable doubt" to find that he was present at Murambi Technical School and Kaduha Parish on 21 April 1994 and participated in criminal activities (Simba Notice of Appeal, I-B-6); (iv) the Trial Chamber erred in failing to disqualify Witnesses YH, KEI and KXX on the ground that the Prosecution dropped Count 4 (Murder as a crime against humanity) (Simba Notice of Appeal, I-C-8; Simba Appeal Brief, paras 171-173); (v) the Trial Chamber erred in using a different standard for assessing the evidence of Witness KEL, on the one hand, and Witnesses YH and KSY, on the other hand (Simba Notice of Appeal, I-C-9); and (vi) the Trial Chamber erred in failing to apply the "notion of any reasonable doubt must benefit to the Accused"(Simba Notice of Appeal, I-C-13).
[201] Simba Notice of Appeal, III-5, I-C-4; Simba Appeal Brief, paras 109-111, 412-415.

cross-examination.[202] To this end he asserts that in all legal systems the rule for assessing evidence ranks documentary evidence above oral evidence.[203] He contends that by failing to apply this legal standard to the assessment of the evidence of Prosecution Witnesses KEI,[204] KSY,[205] YH,[206] and KXX,[207] the Trial Chamber erred in giving more weight to their in-court testimony than to their prior statements.[208]

102. The Prosecution responds that contrary to the Appellant's claim it has been set out by the Appeals Chamber that live testimony is primarily accepted as being the most persuasive evidence before a court.[209]

103. The Appeals Chamber limits its analysis at this stage to the assertion that the rule for assessing evidence ranks documentary evidence above oral evidence.[210] The Appeals Chamber recalls that pursuant to Rule 89(C) of the Rules, a chamber may admit any relevant evidence which it deems to have probative value. Contrary to the Appellant's submissions, there is a general,[211] though not absolute,[212] preference for live testimony before this Tribunal. As stated in the *Akayesu* Appeal Judgement,

> the general principle is that Trial Chambers of the Tribunal shall hear live, direct testimony [and] prior statements of witnesses who appear in court are as a rule relevant only insofar as they are necessary to a Trial Chamber in its assessment of the credibility of a witness. It is not the case […] that they should or could generally in and of themselves constitute evidence that the content thereof is truthful. For this reason, live testimony is primarily accepted as being the most persuasive evidence before a court. [...] [I]t falls to the Trial Chamber to assess and weigh the evidence before it, in the circumstances of each individual case, to determine whether or not the evidence of the witness as a whole is relevant and credible.[213]

This is consistent with Rule 90(A) of the Rules which states in part that witnesses shall, in principle, be heard directly. 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 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. It may do this by relying on live testimony or documentary

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[202] Simba Notice of Appeal, I-C-5; Simba Appeal Brief, para. 112. *See also* Simba Reply, para. 47.
[203] Simba Appeal Brief, para. 117.
[204] Simba Appeal Brief, paras 113-115, 118.
[205] Simba Appeal Brief, para. 119.
[206] Simba Appeal Brief, paras 120-127.
[207] Simba Appeal Brief, para. 133.
[208] Simba Notice of Appeal, I-C-6.
[209] Prosecution Response, paras 81-82.
[210] Other errors alleged in relation to the assessment of the evidence of Prosecution Witnesses KEI, KSY, YH and KXX and Exhibit D 147 will be addressed below under Sections D-2 and D-3.
[211] *See The Prosecutor v. Pauline Nyiramasuhuko et al.*, Joint Case No. ICTR-98-42-A15*bis*, Decision In the Matter of Proceedings under Rule 15 *bis*(D), 24 September 2003, para. 25.
[212] *See* Rules 71, 89(C), 92 *bis*, 94 *bis*(C) of the Rules.
[213] *Akayesu* Appeal Judgement, paras 134-135.

evidence.[214] The Appeals Chamber finds no merit in the Appellant's contention and, accordingly, this sub-ground of appeal is dismissed.

2. Alleged Errors Relating to the Appellant's Presence at and Participation in the Attack at Murambi Technical School on 21 April 1994

104. The Appeals Chamber will now consider the Appellant's arguments relating to the alleged errors made in the assessment of the respective testimonies of Witnesses KSY and KEI.

(a) Witness KSY

105. The Appellant makes several submissions to the effect that the Trial Chamber committed errors of law and fact in its assessment of Prosecution Witness KSY's evidence. The Prosecution submits that the Trial Chamber's assessment of Witness KSY's credibility and reliability, in light of his whole testimony, was correct, careful and detailed.[215] The Appeals Chamber will consider the Appellant's submissions in turn.

(i) Alleged Discrepancies Between Witness KSY's Oral Testimony and Pre-Trial Statement of 16 June 2000

106. The Appellant alleges that Witness KSY's in-court testimony contradicts his statement to Prosecution investigators dated 16 June 2000 ("Statement of 16 June 2000") as to whether he was standing or lying down when he saw the Appellant at Murambi.[216] The Prosecution responds that the Trial Chamber discussed the alleged inconsistencies at length and gave a reasoned and reasonable explanation as to why it accepted his evidence as being credible.[217]

107. The alleged discrepancy was addressed by the Trial Chamber at paragraph 118 of the Trial Judgement which reads:

> The Chamber notes, however, that the witness explained that when the Accused arrived, the attackers shouted: "Here's our Simba". Witness KSY also observed Simba during a lull in the fighting, which lasted around fifteen minutes. The witness was at a slightly elevated area and standing at various times. During cross-examination, the Defence pointed out that the witness indicated in his 16 June 2000 statement to Tribunal investigators, that he was lying down when Simba arrived, not standing up. The witness responded that he was both lying down and standing up when he saw Simba. The Chamber accepts this explanation.

108. The Trial Chamber then considered the totality of the witness's evidence, including his explanations with regard to alleged inconsistencies; the fact that he heard the attackers shouting

[214] *Kupreškić et al.* Appeal Judgement, para. 31.
[215] Prosecution Response, para. 186.
[216] Simba Notice of Appeal, I-C-6, and II-A-1(c); Simba Appeal Brief, para. 119.
[217] Prosecution Response, para. 82.

"Here's our Simba"; his observation of the Appellant during a lull in the fighting; as well as his prior familiarity with the Appellant and his ability to identify him in court.[218] The Trial Chamber concluded its assessment of Witness KSY's credibility by finding that he "provided a consistent and convincing firsthand narrative of the attacks against the Tutsi refugees at Murambi Technical School" and that "[c]ontrary to Defence suggestions, [his] testimony about [the Appellant] was generally in conformity with his previous statement to Tribunal investigators, dated 16 June 2000."[219]

109. The Appeals Chamber notes that at trial Witness KSY gave a much more detailed account of these events than in his Statement of 16 June 2000, where this sequence of events is summarised in only a few lines.[220] During his examination-in-chief, Witness KSY specified that he was standing in the courtyard of the Murambi Technical School when the Appellant arrived around 7 a.m. and that he saw him from an approximate distance of 70-100 metres. During cross-examination, Witness KSY was questioned extensively on the circumstances of his sighting of the Appellant. Witness KSY explained that, before the arrival of the Appellant at the site, he was lying down "pretending to be dead", but that he stood up in order to assist the refugees who were coming back to the front to resume the fight against the assailants.[221] He later clarified that he stood up after the Appellant's arrival and that he could see him from the slightly elevated area where he was standing, despite the presence of around 100 refugees at the front.[222] The Appeals Chamber finds that the Trial Chamber's assessment of the credibility of Witness KSY is consistent with the evidence on the record and that it did not exceed its discretionary power when finding that, contrary to the Appellant's contention, Witness KSY's testimony was in general conformity with his Statement of 16 June 2000.

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[218] Trial Judgement, para. 118.
[219] Trial Judgement, para. 114.
[220] In the Statement of 16 June 2000 Witness KSY stated: "On the 21st April, we were attacked (…). [A]t about 6:00 hrs from where I was lying, I saw the Prefet BIKIBARUTA, Capt SEBUHURA and SEMUKWAVU coming to the entrance. SEBUHURA gave more ammunition to the gendarmes and those Interahamwe who had guns. The prefet then directed that some of the Interahamwe should go to reinforce those who were attacking and killing Tutsi refugees at Cyanika. They then left, and after about one hour, Lt Col SIMBA came to the entrance. He was dressed in military uniform and he was being driven in a red pickup which was carrying a lot of pangas (machetes). He then distributed some machetes to the Interahamwe militiamen and left thereafter. I was lying about 100 metres away and I recognised him very well. I knew Simba well – he had on many times campaigned in our area for election to parliament before" (Exh. D 1A, p. 4 (filed strictly confidentially)).
[221] T. 30 August 2004 pp. 27-30, 57-62.
[222] T. 30 August 2004 pp. 57-62. Still during cross-examination, Witness KSY was questioned on the alleged contradiction between his in-court testimony and the Statement of 16 June 2000 with regard to his posture. He explained the following: "I have told you that I did not spend the whole day lying down. I would stand up every now and then, and then I would lie down, and even while lying, I could see what was happening. […] While I was lying down I saw him, and when I stood up, I still saw him" (T. 31 August 2004 pp. 10-11).

110. The Appellant has failed to demonstrate that the Trial Chamber erred, in light of the totality of Witness KSY's evidence, when accepting the witness's explanations. Accordingly, this sub-ground of appeal is dismissed.

(ii) The Omission from Prior Statements of the Appellant's Name with Respect to Events at Murambi on 21 April 1994

111. The Appellant contends that the Trial Chamber misrepresented the facts when it accepted Witness KSY's explanation that he had omitted the Appellant's name from a previous statement "because he intended to provide evidence against persons in his neighbourhood".[223] The Appellant submits that according to Witness KSY's testimony the Appellant had not been seen at the site.[224]

112. The Trial Chamber considered this issue at paragraph 115 of the Trial Judgement, which reads:

> The Defence referred to three *pro justitia* statements to Rwandan authorities, where the witness made no mention of Simba. In relation to two of the statements, the witness expressed doubts as to whether they were his statements. Leaving aside the issue of their authenticity, the Chamber observes that the first of these two documents, dated 9 September 1996, was a complaint against Israel Nsengiumva involving several locations. Another statement of 22 November 1996 related to a person who allegedly had killed a relative of the witness and did not concern the Murambi massacre in particular. Consequently, the lack of reference to Simba in these two documents is not significant. However, his *pro justitia* declaration of 22 November 1996 dealt generally with the massacre in Murambi. The Chamber accepts the witness's explanation that he intended to provide evidence against persons in his neighbourhood and, therefore, did not include Simba. The witness also observed that some of his statements to Rwandan authorities appeared forged. The Chamber does not find these explanations convincing.[225]

113. As a preliminary matter, the Appeals Chamber notes that there appears to be an inconsistency in the way certain statements are referred to by the Appellant and the Trial Chamber: where the former refers to the statements of 22 September 1996[226] and 20 November 1996,[227] the Trial Chamber refers to a "*pro justitia* declaration of 22 November 1996".[228] According to the trial record, there is no *pro justitia* declaration of 22 November 1996, which clearly indicates that the Trial Chamber erred in labeling the statement at issue. While proper identification of the statement is not aided by the fact that the Trial Chamber did not specify the exhibit number of the document, the Appeals Chamber has been able to establish, on the basis of the translation of Exhibits D3, D4

[223] Simba Appeal Brief, para. 369.
[224] Simba Notice of Appeal, II-C-7; Simba Appeal Brief, paras 369-370.
[225] Trial Judgement, para. 115 (footnotes omitted).
[226] Simba Appeal Brief, para. 119. The Appeals Chamber notes that the Appellant refers to the statement of 22 September 1996 as "Exhibit D4".
[227] Simba Appeal Brief, paras 369-370. The Appeals Chamber notes that the Appellant refers to the statement of 20 November 1996 as "Exhibits D5A, D5B".
[228] Trial Judgement, para. 115.

and D5, that the Trial Chamber intended to refer to the statement of 22 May 1996, admitted as Exhibit D4.[229] The subsequent analysis is therefore undertaken on this basis.

114. The Appeals Chamber notes that in reaching its conclusion that the omission of the Appellant's name from the statement of 22 May 1996 was not significant, the Trial Chamber relied solely on the explanation by Witness KSY that his intention in the statement was to provide evidence against persons in his neighborhood. During cross-examination, Witness KSY explained that he mentioned the names of the people who were present when he was lodging his complaint and that he did not mention the people who had been absent. He was thinking that as soon as he saw them, he would be able to lodge his complaint against them.[230]

115. As stated by the Trial Chamber, Witness KSY explained that he intended to mention only the names of persons whom he could see at the time of the interviews. He explained that regarding the other people from the other localities, he was thinking that if questions were put to him concerning them, he was going to respond. According to him, in fact, when one gives a statement, one does not remember all the names; "[i]t is only later on that if [one] remember[s] names, if it is necessary, [one] can mention them."[231] It was in this context that the witness specified that he was complaining against the people who were his neighbours. Thus, while Witness KSY's later explanations for the omission may have focused on him only mentioning persons who were "well known" in the area,[232] it does not follow that the Trial Chamber misrepresented Witness KSY's earlier explanation that he intended to provide evidence against persons in his neighbourhood.

116. The Appeals Chamber will not lightly overturn findings of a trier of fact who was able to directly assess the demeanor of a witness giving live testimony.[233] The Appellant has not shown that no reasonable Trial Chamber could have accepted Witness KSY's explanation that "he intended [in this statement] to provide evidence against persons in his neighbourhood and, therefore, did not include [the Appellant]".[234] Accordingly, this sub-ground of appeal is dismissed.

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[229] The Appeals Chamber notes that at paragraph 115 of the Trial Judgement, the Trial Chamber considered three statements made by Witness KSY to Rwandan authorities and also stated that the "pro justicia declaration of 22 November 1996 dealt generally with the massacre in Murambi" (Trial Judgement, para. 115). Indeed, the statement of 22 May 1996, admitted as Exhibit D4 is the only one of the three statements made by Witness KSY to the Rwandan authorities and admitted as exhibit, that dealt principally with the massacre at Murambi. Exhibits D3 and D5 do not mention this massacre (*See* Regisrar's Submissions under Rule 33(B) of the Rules on Order for Translation, 16 July 2007). *See also* T. 31 August 2004 pp. 36-38.
[230] T. 31 August 2004 pp. 20-21.
[231] T. 31 August 2004 p. 21.
[232] T. 31 August 2004 pp. 22-24.
[233] *Ndindabahizi* Appeal Judgement, para. 42; *Kajelijeli* Appeal Judgement, para. 50; *Kamuhanda* Appeal Judgement, para. 7; *Ntakirutimana* Appeal Judgement, para. 12; *Niyitegeka* Appeal Judgement, para. 8.
[234] Trial Judgement, para. 115.

117. In conclusion, the Appeals Chamber finds that the Appellant has failed to show that the Trial Chamber abused its discretion in finding Witness KSY credible and erred in relying on his testimony with regard to the presence of the Appellant at Murambi Technical School on 21 April 1994.

(b) Witness KEI

118. The Appellant alleges that the Trial Chamber minimised the inconsistencies between Prosecution Witness KEI's testimony and his prior statements made to Prosecution investigators and Rwandan judicial authorities in which he did not implicate the Appellant in the distribution of weapons.[235] The Appellant submits that the Trial Chamber violated his right to a fair trial when it justified "the inconsistencies of Witness KEI in the Respondent's stead".[236]

119. The Appellant further alleges that the Trial Chamber erred by relying on Witness KEI's testimony despite the doubts it expressed about his credibility.[237] The Appellant asserts that Witness KEI "was unable to explain why in a camp where there were gendarmes, some of whom were among the killers in Murambi, the Appellant, Captain Sebuhura and *Préfet* Bucyibaruta preferred his services (though he was not a gendarme) to those of their subordinates", and though he claimed to have been a butcher at the gendarmerie camp, he did not know the camp's cooks, the commander or any gendarme at the camp.[238] In addition, the Appellant contends that the Trial Chamber did not take into account existing contradictions between Witnesses KEI's and KSY's respective testimonies.[239]

120. The Prosecution responds that the Trial Chamber did not minimise the alleged inconsistencies in Witness KEI's testimony and submits that, on the contrary, in view of his questionable credibility, the Trial Chamber declined to accept his testimony without corroboration.[240] The Prosecution further states that the Appellant's submission is misguided "given that the Trial Chamber did not rely on Witness KEI to convict the Appellant".[241]

121. The Appeals Chamber finds that, contrary to the Appellant's assertion, the Trial Chamber did not minimise or justify the contradictions between Witness KEI's testimony and his prior statements. After having acknowledged the existence of contradictions, the Trial Chamber carefully reviewed them and concluded that, in the absence of convincing explanations, they called into

[235] Simba Notice of Appeal, I-C-5, I-C-6; Simba Appeal Brief, paras 113-118, 176-177.
[236] Simba Appeal Brief, para. 115.
[237] Simba Appeal Brief, paras 176-177. *See also* Simba Reply, paras 47-48.
[238] Simba Notice of Appeal, I-C-6; Simba Appeal Brief, paras 137-143.
[239] Simba Appeal Brief, para. 144.
[240] Prosecution Response, para. 82.
[241] Prosecution Response, para. 109.

question the credibility of the witness.[242] The Trial Chamber accordingly considered Witness KEI's testimony with caution[243] and concluded that in "view of Witness KEI's questionable credibility, [it] declines to accept his testimony without corroboration".[244] The Appeals Chamber sees no error in this approach particularly as there is no legal requirement for the corroboration of evidence. In the instant case, the Appeals Chamber notes that the Trial Chamber's findings related to these events are primarily based on evidence given by Witness KSY, a witness whose credibility has not been successfully challenged on appeal. In preferring the evidence of Witness KSY where it differed from that of Witness KEI, the Trial Chamber clearly took into account differences in the testimony of the two witnesses. Accordingly, these sub-grounds of appeal are dismissed.

3. Alleged Errors Relating to the Appellant's Presence at and Participation in the Attack at Kaduha Parish on 21 April 1994

122. The Appeals Chamber will in turn consider the Appellant's arguments to the effect that the Trial Chamber erred in assessing the evidence of Witnesses YH, KXX and KSK and that the testimonies of Witnesses YH and KXX are contradictory with respect to the time of arrival of the Appellant at Kaduha Parish.

(a) Witness YH

123. The Appellant alleges that the Trial Chamber erred in finding Witness YH's testimony credible with respect to the Appellant's presence at and participation in the attack at Kaduha Parish on 21 April 1994. In this effect, the Appellant submits that the error is twofold: first, concerning the discrepancies between Witness YH's testimony at trial and his pre-trial statement of 1 October 1997 (regarding the duration of his military service and his purported detention from April to July 1994); and, second, the failure to consider Exhibit D147 authoritative as to the location of the officer whom Witness YH claimed to have accompanied to Gikongoro prefecture in April 1994. [245]

124. The Prosecution responds that the Trial Chamber duly acknowledged problematic aspects and discrepancies in Witness YH's testimony, carefully assessed them and decided that they did not call into question the witness's first-hand account at trial.[246]

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[242] Trial Judgement, paras 107-112.
[243] Trial Judgement, paras 106-107.
[244] Trial Judgement, para. 112.
[245] Simba Notice of Appeal, I-C-5, I-C-7, II-C-8, II-C-9; Simba Appeal Brief, paras 122-127, 371-376. The Appeals Chamber will not consider the Appellant's contention that the Trial Chamber distorted the evidence of Witness YH in relation to his prosecution in Rwanda in 1995, for "the sole purpose of lending to [him] credibility" (Notice of Appeal, II-C-8; Simba Appeal Brief, paras 371-373). The Appellant does not explain how the purported distortion would in any way affect the credibility of Witness YH.
[246] Prosecution Response, paras 82, 186.

(i) Alleged Discrepancies Between Witness YH's Testimony and His Statement of 1 October 1997

125. The Appellant contends[247] that the Trial Chamber erred "by ruling that Witness YH's testimony in court is credible and reliable as regards the Appellant's participation in the Kaduha massacre, even though the Trial Chamber had found the witness's testimony doubtful and had particularly noted discrepancies between his testimony and prior statements".[248] In support, the Appellant alleges contradictions between Witness YH's testimony and his prior statements in relation to the period he spent in the army,[249] and between the witness's oral assertion that he participated in the Kaduha attacks and the statement of 1 October 1997 in which he stated that he was in jail between April and July 1994.[250] The Appellant submits that the latter contradiction and the fact that Witness YH never confessed to and was never prosecuted in Rwanda for genocide in Kaduha, demonstrate that the witness admitted his participation in the Kaduha massacre for the sole purpose of implicating the Appellant in that massacre.[251]

126. The Appellant further contends that the Trial Chamber erred in finding, at paragraph 166 of the Trial Judgement, that "the discrepancies between [Witness YH's] testimony and his 1 October 1997 statement to Rwandan authorities simply reflected the witness's attempts to distance himself from the crimes which he later acknowledged".[252]

127. At trial, Witness YH gave evidence that his military service lasted from 1991 until mid-April 1994 and that he participated in events at Kaduha Parish in April 1994. This evidence contrasted with his statement of 1 October 1997 which indicated that he left the army in August 1993 and was in prison from April to July 1994.[253] When cross-examined, the witness explained that he was beaten by Rwandan officials during his interview of 1 October 1997 and that some passages of this statement were given under duress.[254] He stated that the portion of the statement mentioning that he was in the Kigali prison from April to July 1994, when he was transferred to Nyanza, was "invented",[255] and that he never said that he left the army in August 1993.[256] He further asserted that during the period from April to July 1994 there were no prisoners in

[247] Simba Notice of Appeal, I-C-5, I-C-18, II-C-9, II-A-2(b) where the Appellant reiterates similar assertions in the context of his allegation that it was impossible for him to be present at both Murambi Technical School and Kaduha Parish on 21 April 1994 between 7 a.m. and 9 a.m.; AT. 22 May 2007 pp. 15-17.
[248] Simba Appeal Brief, para. 120 (emphasis omitted).
[249] Simba Appeal Brief, para. 121.
[250] Simba Appeal Brief, paras 122-123.
[251] Simba Appeal Brief, paras 123, 125.
[252] Simba Appeal Brief, para. 124.
[253] Trial Judgement, paras 140, 166; Exh. P 12.
[254] T. 22 September 2004 pp. 13-14.
[255] T. 22 September 2004 p. 15.
[256] T. 22 September 2004 p. 16.

Rwanda.[257] The witness could not say why the Rwandan authorities might want to indicate that he left the Rwandan army in August 1993, rather than April 1994.[258]

128. At the outset of its assessment of Witness YH's testimony, the Trial Chamber expressly stated that because the witness was an alleged accomplice of the Appellant, his testimony would be viewed with appropriate caution.[259] With respect to the issue of credibility, the Trial Chamber acknowledged "that there [were] some problematic aspects of Witness YH's testimony", notably his failure to disclose his own role in the Kaduha Parish massacre to Rwandan authorities and the discrepancy between his trial testimony and prior statements concerning his military service,[260] but concluded that "Witness YH provided a convincing, credible and reliable first-hand testimony concerning [the Appellant's] participation in the massacre at Kaduha Parish".[261] The Trial Chamber also noted that Witness YH had prior familiarity with the Appellant and identified him in court. The Trial Chamber concluded "that the problematic aspects of Witness YH's testimony […] [did] not call into question his first-hand account at trial".[262]

129. Thus, having considered all the existing discrepancies in Witness YH's testimony, the Trial Chamber concluded that his explanations "simply reflect[ed] the witness's attempts to distance himself from the crimes which he [had] later acknowledged".[263] This conclusion is consistent with the explanation given by Witness YH in relation to his failure to disclose his role in the Kaduha Parish massacre to the Rwandan authorities. He said that he was "awaiting the *gacaca* court system to confess that crime".[264] The Trial Chamber accepted this explanation and found that the witness "simply attempted, at earlier stages of his proceeding in Rwanda, to minimize his involvement in the genocide".[265] The Appeals Chamber notes that the witness also acknowledged that his limited confession facilitated his provisional release as a criminal of the "second category".[266] The Appeals Chamber finds that the Appellant has not demonstrated that the Trial Chamber exceeded its discretion when finding that the discrepancies between Witness YH's testimony and his statement of 1 October 1997 could be explained by his attempt to distance himself from the crimes which he later acknowledged.

130. This sub-ground of appeal is dismissed.

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[257] T. 23 September 2004 p. 12.
[258] T. 22 September 2004 pp. 16-17.
[259] Trial Judgement, para. 164.
[260] Trial Judgement, paras 165-167.
[261] Trial Judgement, para. 168.
[262] Trial Judgement, para. 168.
[263] Trial Judgement, para. 166.
[264] T. 23 September 2004 p. 19.
[265] Trial Judgement, para. 165.
[266] T. 23 September 2004 p. 19.

(ii) Exhibit D147

131. The Appellant submits that the Trial Chamber erred in finding that Exhibit D147 did not necessarily reflect the location of all officers in mid-April.[267] He submits that this document "is authentic, since it was produced by the Prosecution in another case of this Tribunal" and contends that "judicial notice should have been taken thereof under Rule 94(B) of the Rules".[268] The Appellant asserts that Exhibit D147 as well as the prior statements of Witness YH prove that this witness did not go to Kaduha on 21 April 1994. The Appellant further contends that the Trial Chamber erred by according lower probative value to these documents than to the in-court evidence of Witness YH, thereby violating Rule 89(B) and (C) of the Rules.[269]

132. The Appeals Chamber recalls that it has already dismissed the argument that as a matter of law documentary evidence should be preferred to oral testimony.[270] Here the Appellant further submits that because the Prosecution presented a document in evidence in another case before the Tribunal, it must be authentic, probative and subject to judicial notice.[271] The Appeals Chamber rejects this argument as a matter of principle: the probative value of a document may be assessed differently in different cases, depending on the circumstances. In the instant case, the Trial Chamber considered Exhibit D147,[272] a document allegedly showing the location of Rwandan Army officers as of 5 March 1994, and found that, in the context of the events which followed the death of the President of Rwanda, the locations of officers in mid-April 1994 could have been different from those mentioned in this document.[273] The Appellant has failed to demonstrate that no reasonable Trial Chamber could have reached the same conclusion. Accordingly, this sub-ground of appeal is dismissed.

(b) Witness KXX

133. The Appellant contends that the Trial Chamber erred by relying on Prosecution Witness KXX's testimony.[274] He submits that in prior statements before the Rwandan authorities, Witness KXX never mentioned his own participation in the massacre at Kaduha Parish,[275] and that in court

[267] Simba Notice of Appeal, I-C-7; Simba Appeal Brief, paras 126-127.
[268] Simba Appeal Brief, paras 126-127.
[269] Simba Appeal Brief, para. 127. *See also* Simba Reply, paras 47-48.
[270] *See above* Section D-1, paras 101-103.
[271] Simba Appeal Brief, paras 126-127.
[272] Exh. D147, admitted on 29 March 2005. The document itself is dated 5 March 1994. It arguably emanates from the "Ministère de la Défense Nationale, Armée Rwandaise, *Etat-Major* G1" and shows the situation of the officers of the Rwandese army as of 1 March 1994.
[273] Trial Judgement, para. 167.
[274] Simba Notice of Appeal, I-C-6, I-C-18. II-A-2(c) where the Appellant reiterates similar assertions in the context of his allegation that it was impossible for him to be present at both Murambi Technical School and Kaduha Parish on 21 April 1994 between 7 a.m. and 9 a.m. *See also* Simba Reply, paras 47, 132-133; AT. 22 May 2007 p. 17.
[275] Simba Appeal Brief, para. 130.

he was unable to give a consistent chronology of the attack against Kaduha[276] or to identify the Appellant.[277] The Appellant asserts that the falsity of Witness KXX's testimony was demonstrated when he admitted that at Kaduha Parish he had stood at a place where he could not see events a hundred metres away.[278] He submits that, in accordance with the case law, in such circumstances Witness KXX should have been disqualified.[279]

134. The Appellant also submits that the Trial Chamber erred in finding at paragraph 169 of the Trial Judgement that there was no evidence of the witness's prior knowledge of the Appellant.[280] He further contends that the Trial Chamber erred in giving more weight to Witness KXX's in-court testimony than to the discrepancies in his prior statements.[281]

135. The Prosecution responds that the Trial Chamber's approach to the assessment and application of Witness KXX's evidence is correct, careful and detailed, and, therefore, reasonable.[282]

136. The Appeals Chamber notes that Witness KXX is one of three witnesses, together with Witnesses YH and KSK, who placed the Appellant at Kaduha Parish during the attack on 21 April 1994. As Witness KXX was an alleged accomplice of the Appellant, the Trial Chamber stated that it viewed his testimony with "appropriate caution".[283] It also identified a number of problems with Witness KXX's testimony,[284] and stated that it would "only accept his testimony, if it [was] adequately corroborated, as where it [was] consistent with Witness YH's account".[285]

137. As the question whether the Trial Chamber erred in relying on Witness KXX's testimony is closely linked to alleged contradictions between the respective testimonies of Witnesses YH and KXX, the Appeals Chamber considers that it would be best addressed below in the context of the

[276] Simba Appeal Brief, paras 131, 160.
[277] Simba Appeal Brief, paras 131, 157-159.
[278] Simba Appeal Brief, para. 161.
[279] Simba Appeal Brief, para. 132.
[280] Simba Appeal Brief, para. 158. The Appellant makes a related submission that the Trial Chamber erred in fact in finding that no evidence was presented to show that Witness KXX had prior knowledge of the Appellant establishing that he was able to accurately identify him during the genocide (Simba Notice of Appeal, II-C-10).
[281] Simba Appeal Brief, para. 133.
[282] Prosecution Response, paras 82, 186.
[283] Trial Judgement, para. 164.
[284] Trial Judgement, para 169. The Trial Chamber noted that Witness KXX "had problems providing a clear chronology of the events surrounding the Kaduha Parish massacre"; there was no evidence of his prior knowledge of the Appellant establishing that he was able to accurately identify him during the events; he could not identify the Appellant in court; and in prior statements, he did not specifically mention the Appellant's presence at Kaduha Parish on the morning of 21 April 1994.
[285] Trial Judgement para. 169. On this basis, the Trial Chamber declined to accept "Witness KXX's […] uncorroborated testimony that [the Appellant] addressed a crowd in Kaduha Trading Centre and delivered weapons to the sub-prefecture office in the days before the attack on Kaduha Parish".

analysis of the possible contradictions.[286] The Appeals Chamber will not consider the Appellant's submission regarding the alleged error in the Trial Chamber's finding that there was no evidence of Witness KXX's prior knowledge of the Appellant, as no conviction was entered on the basis of the Trial Chamber's allegedly erroneous finding and the Appellant's claim does not have the potential to cause the verdict to be reversed or revised.

(c) Witness KSK

138. The Appellant submits that the Trial Chamber erred in relying on the evidence of Witness KSK to conclude that the Appellant was at Kaduha on 21 April 1994 and in finding that Witness KSK was credible and corroborative of Witness KXX's account despite noting inconsistencies and expressing doubt as to their testimonies.[287] He also contends that the Trial Chamber showed more leniency towards Witness KSK than towards alibi witnesses.[288] The Prosecution does not present any specific argument in response.

139. The Appeals Chamber observes that, contrary to the Appellant's assertion, the Trial Chamber did not rely on Witness KSK's testimony to find that the Appellant was at Kaduha Parish on 21 April 1994. While not calling into question Witness KSK's general credibility, the Trial Chamber found that there was insufficient evidence showing "a satisfactory basis of knowledge" which would have allowed the witness to identify the Appellant at the crime site.[289] With respect to her estimate that the attack started around 5:00 a.m., the Trial Chamber found that this was not inconsistent with the accounts of Witnesses YH and KXX. The Appellant has failed to demonstrate that the Trial Chamber erred in so finding. Neither has the Appellant demonstrated how the Trial Chamber might have showed more leniency toward Witness KSK than toward alibi witnesses. Accordingly, these sub-grounds of appeal are dismissed.

(d) Alleged Contradictions between the Testimonies of Witnesses YH and KXX

140. The Appellant submits that the respective testimonies of Witnesses YH and KXX regarding the Appellant's arrival time at Kaduha Parish are inconsistent. He argues that while Witness YH testified that the Appellant arrived at Kaduha Parish at 8.20 a.m., Witness KXX testified that the Appellant only arrived around 9 a.m. The Appellant contends that the testimonies of Witnesses YH

[286] *See below* Section D-3(d).
[287] Simba Notice of Appeal, I-C-6, I-C-12, II-A-2(a), II-A-2(d); Simba Appeal Brief, paras 163-164, 167, 170, 181, 183, 236, 333.
[288] Simba Notice of Appeal, I-C-12.
[289] Trial Judgement, paras 170-175.

and KXX were not corroborative and therefore could not form the basis of a conviction beyond reasonable doubt.[290]

141. The Prosecution responds that the Appellant fails to demonstrate any error in the Trial Chamber's assessment of the evidence. In particular, it submits that the Trial Chamber applied the correct approach with respect to Witnesses YH and KXX, alleged accomplices of the Appellant, in stating that it "viewed their testimonies with appropriate caution".[291]

142. The Appeals Chamber notes that the witnesses' testimonies do in fact differ as to the time of the Appellant's arrival at Kaduha Parish. While according to Witness KXX, Simba arrived at Kaduha Parish "around 9.00 a.m.", Witness YH testified that the Appellant arrived at around 8.20 a.m.[292] As noted above, the Trial Chamber identified a number of problems in Witness KXX's testimony and therefore decided to only accept it if adequately corroborated by Witness YH.[293] The Trial Chamber, however, ignored its own holding by finding that the Appellant arrived at Kaduha Parish "around 9 a.m.",[294] thereby relying solely on the testimony given by Witness KXX.

143. The Appeals Chamber finds that the Trial Chamber committed an error of law in making this finding. While a trier of fact is not obliged to detail every step of its reasoning, in view of its concerns regarding the credibility of Witness KXX and its decision to accept his testimony only where corroborated,[295] the Trial Chamber was compelled to explain why it relied on the uncorroborated account of Witness KXX instead of Witness YH's testimony with regard to the time of the Appellant's arrival at Kaduha Parish. The Appeals Chamber will consider below whether, and if necessary, to what extent, the Trial Chamber's error affects its findings relating to the Appellant's participation in the attacks at Murambi Technical School and Kaduha Parish on 21 April 1994 within the time frame emerging from the relevant testimonies.

[290] Simba Notice of Appeal, I-C-6, II-A-2(a), II-C-5; Simba Appeal Brief, paras 167-170. While the Appellant alleges several inconsistencies between the respective testimonies of Witnesses YH, KXX and KSK, he specifies only one alleged contradiction between the testimonies of Witnesses YH and KXX, to which the Appeals Chamber will limit its consideration. The Appeals Chamber will not consider the Appellant's argument to the effect that the case law requires that when a conviction is based on uncorroborated testimony it must be established beyond reasonable doubt (Simba Appeal Brief, para. 169), since that standard does not vary according to whether the testimony is corroborated or not.
[291] Prosecution Response, para. 86 .
[292] Trial Judgement, para. 142.
[293] *See above* Section D-3(b), para. 136.
[294] Trial Judgement, para. 175.
[295] Trial Judgement, para. 169.

4. Alleged Errors Relating to the Possibility of the Appellant's Presence at Both Murambi Technical School and Kaduha Parish on 21 April 1994 in the Lapse of Time Accepted by the Trial Chamber

144. The Appellant alleges that the Trial Chamber erred in fact[296] in finding that he took part in the massacres at Murambi Technical School and Kaduha Parish on 21 April 1994, thereby ignoring the Appellant's submissions that it was physically impossible for him to be present at both sites within the time frame which emerges from the relevant testimonies.[297] The Appellant also submits that his presence at both sites was not proven beyond reasonable doubt.[298]

145. The Appellant points out that he was allegedly seen at Murambi Technical School from 7 a.m. (by Witness KSY) to 8.20 or 8.30 a.m. or even 9.20 to 9.30 a.m. at the latest (by Witness KEI), while he allegedly arrived at Kaduha Parish at 8.20 a.m. (according to Witness YH) or around 9 a.m. at the latest (following Witness KXX's account).[299] He submits that in the "most optimistic scenario" it could be inferred that he traveled from Murambi Technical School to Kaduha Parish in less than 40 minutes.[300] He alleges that the distance between the two places is either 72 or 79 kilometers by road; the shortest road takes nearly three hours to travel;[301] and the road conditions, particularly in April during the heavy rainy season, in addition to the restrictions on movements in April 1994, would have rendered this scenario impossible.[302]

146. The Appellant also submits that, when finding that the three massacre sites were located "not far from one other",[303] the Trial Chamber might have been misled by the maps in the Prosecution Investigator's file.[304] He submits that, while one of these maps "indicates an area called

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[296] The Appeals Chamber notes that the Appellant alleges an error of fact. However, it appears from the nature of his submission that he alleges both an error of law (failure to provide a reasoned opinion) and an error of fact (findings that the Appellant had been successively at Murambi Technical School and Kaduha Parish on 21 April 1994).
[297] Simba Notice of Appeal, II-A-3; Simba Appeal Brief, paras 333-355; AT. 22 May 2007 pp. 13, 20-22, 45.
[298] Simba Notice of Appeal, II-A-1, II-A-2; Simba Appeal Brief, paras 333, 343-344. Under Grounds II-A-1 and II-A-2, the Appellant also makes submissions which do not point strictly toward the impossibility to be present at both sites in the lapse of time accepted by the Trial Chamber. These sub-grounds were dealt with above under Sections D-1to D-3.
[299] Simba Appeal Brief, para. 344.
[300] Simba Appeal Brief, para. 345.
[301] The Appellant submits that his arguments are supported by the Defence Expert Report which states that it "took at least three hours to travel from Murambi to Kaduha" (Simba Appeal Brief, para. 347, referring to Defence Expert Report of 27 March 2005 (Exh. D 156), p. 49).
[302] Simba Appeal Brief, paras 345-346, 349-353.
[303] Trial Judgement, para. 401.
[304] Simba Appeal Brief, para. 353. The English version of Simba Appeal Brief mentions "Exhibits 7 and 8". However, it seems that the Appellant is referring to maps numbered 7 and 8 annexed to the Investigator's file titled "Documents relating to the Investigator's testimony". This file contains documents prepared by the Prosecution's Investigator, Mr. Karugaba ("Witness Karugaba"), and was disclosed on 11 May 2004 (R.P. 1572-2086). The Appeals Chamber further notes that these maps were not admitted as exhibits. Exhibits P18, P19 and P20 are the only maps, which were admitted before the Trial Chamber.

'Murambi' as being close to Kaduha Parish", the actual site of Murambi Technical School is between 72 and 79 kilometers away from Kaduha.[305]

147. The Prosecution responds that the Appellant has not demonstrated any error committed by the Trial Chamber in assessing the relevant evidence and merely tries to re-litigate matters that were fully explored at trial.[306] According to the Prosecution, the Trial Chamber closely considered factors such as the distance between the two locations, the credibility of Prosecution witnesses, and the Appellant's participation in the crimes at the two locations. In particular, the Prosecution submits that the Trial Chamber "was fully alive to the issue of time-gap between the Appellant's participation in the perpetration of crimes at the two locations".[307]

148. The Prosecution further submits that the Appellant misrepresents the Trial Chamber's findings in relation to the time-frame within which he was found to have participated in the crimes at Murambi Technical School and Kaduha Parish, in particular by representing this as a maximum of 40 minutes[308] and by engaging in "some arithmetic exercise, which attempts to provide rather exact time-frames".[309] In addition, the Prosecution submits that the Appellant's allegations with regard to the time necessary for driving from Murambi Technical School and Kaduha Parish are based on estimations which can vary from one driver to the other, and that his assertion regarding the state of the roads during the rainy season is not sustained by any evidence.[310]

149. In reply, the Appellant contends that the Trial Chamber "failed to display objectivity" when finding that the Appellant was seen at Murambi Technical School at 7:00 a.m. on 21 April 1994 and at Kaduha Parish at 9:00 a.m. the same day, when it should have considered "all possible time-sequence combinations", including the distance between the places and the time necessary to travel between them.[311] He further submits that the Trial Chamber erred by failing to question the credibility of the Prosecution witnesses given that Witness KEI did not testify that the Appellant went to Kaduha Parish after leaving Murambi Technical School.[312] With respect to the issue of the time necessary to travel from one crime scene to the other, the Appellant submits that there is a clerical mistake in the Defence Expert Report and that it should read that the alleged distance travelled by the Appellant on 21 April 1994 could only be done in 5 "hours" rather than "days".[313] The Appellant seeks the admission of Witness TER's statement as additional evidence and submits

[305] Simba Appeal Brief, para. 353.
[306] Prosecution Response, paras 167, 169-170, 181.
[307] Prosecution Response, para. 169.
[308] Prosecution Response, para. 179.
[309] Prosecution Response, para. 174. *See also* para. 179.
[310] Prosecution Response, paras 179-180.
[311] Simba Reply, paras 111-115.
[312] Simba Reply, paras 115-118.
[313] Simba Reply, para. 128.

that refusing this new evidence would occasion a miscarriage of justice. In the alternative, he requests that the Appeals Chamber visit the crime sites or assign an independent expert to do so.[314]

150. At the outset, the Appeals Chamber notes that it has already dismissed the Appellant's arguments regarding the credibility of Prosecution witnesses who testified in relation to the massacres at Murambi Technical School and Kaduha Parish, with the exception of the contention that the Trial Chamber erred in relying on Witness KXX with regard to the time of the Appellant's arrival at Kaduha Parish.[315] These arguments will not be revisited here. Moreover, the Appeals Chamber recalls that some of the Appellant's requests related to this issue have previously been considered and rejected in the Decision on Rule 115 Evidence of 21 May 2007. Witness TER's statement was neither found to be part of the trial record nor admitted as additional evidence on appeal. Similarly, the Appellant's requests for the Appeals Chamber to either conduct a site-visit or assign an independent expert to do so were rejected.[316] The Appeals Chamber therefore restricts its consideration here to the issue of the alleged impossibility for the Appellant to be present at both massacres sites in the time-frame emerging from the credible evidence.

151. With regard to the Appellant's argument that the Trial Chamber might have been misled by a map annexed to the Prosecution investigator's file which shows that there is another place named Murambi located closer to Kaduha than the actual Murambi Technical School, where the massacre took place on 21 April 1994, the Appeals Chamber finds this to be mere speculation unsupported by any evidence. Under these circumstances, the Appeals Chamber can only conclude that the Trial Chamber did not take into account this map in its assessment of the geographical aspects of the case.[317]

152. Turning to the issue of distance and driving time, the Appeals Chamber recalls that a Trial Chamber has the obligation to provide a reasoned opinion,[318] but is not required to articulate the reasoning in detail.[319] Although certain evidence may not have been referred to by a Trial Chamber, in the particular circumstances of a given case it may nevertheless be reasonable to assume that the Trial Chamber took it into account.[320] There is no guiding principle on the question to determine the

[314] Simba Reply, paras 124 -125, 129.
[315] *See above* Sections D-2 and D-3.
[316] Decision on Rule 115 Evidence of 21 May 2007, paras 18-19, 61.
[317] *See above* fn. 304.
[318] Article 22(2) of the Statute and Rule 98(C) of the Rules.
[319] *Kamuhanda* Appeal Judgement, para. 32; *Kajelijeli* Appeal Judgement, para. 59; *Semanza* Appeal Judgement, paras 130, 149; *Niyitegeka* Appeal Judgement, para 124; *Rutaganda* Appeal Judgement, para. 536; *Musema* Appeal Judgement, paras 18, 277; *Delalić et al.* .Appeal Judgement, para. 481.
[320] *Musema* Appeal Judgement, para. 19.

extent to which a Trial Chamber is obliged to set out its reasons for accepting or rejecting a particular testimony.[321]

153. The Appeals Chamber notes that the material fact at issue during trial was whether the Appellant was present at both Murambi Technical School and Kaduha Parish in the early morning of 21 April 1994. The Trial Chamber found that there was evidence of the Appellant's presence there. The issue to be resolved by the Appeals Chamber is therefore whether the Trial Chamber erred in fact by finding that the evidence presented by the Appellant did not cast any reasonable doubt on the Appellant's presence at the two places. One way for the Appellant to cast reasonable doubt on this evidence was to show that it was impossible to travel between the two places in a lapse of time compatible with the time-frame arising from the testimonies of Witnesses KSY and YH.[322] The Trial Chamber's findings that the Appellant was successively at Murambi Technical School and then Kaduha Parish on that morning indicate that it did not view the evidence introduced by the Appellant on this point as being sufficient to cast any reasonable doubt on his presence at either site.[323]

154. The Trial Chamber did not explicitly address the issues of distance and driving times in the Trial Judgement, merely noting that Murambi Technical School, Kaduha Parish and Cyanika Parish were "geographically proximate locations".[324] The Appeals Chamber notes that findings on both the distance between and the time necessary to travel from one site to the other were of importance as they directly affected whether it would have been possible for the Appellant to participate in the massacres at both sites in the relatively short time-frame at issue. The Trial Chamber accepted the time-frame given by the Prosecution witnesses regarding the Appellant's presence at both sites. Relying on Witness KSY, the Trial Chamber concluded that the Appellant was at Murambi around 7:00 a.m. on 21 April 1994.[325] There is no specific finding as to when the Appellant left the area, but the Trial Chamber observed that Witness KSY saw the Appellant for around 15 minutes. On the basis of the testimony of Witness KXX, the Trial Chamber found that the Appellant arrived at Kaduha Parish around 9:00 a.m. the same day, discarding the earlier arrival time (around 8:20 a.m.) suggested by Witness YH.[326]

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[321] *Musema* Appeal Judgement, para. 18.
[322] *See Kamuhanda* Appeal Judgement, para. 40.
[323] *Kamuhanda* Appeal Judgement, para. 40.
[324] Trial Judgement, para. 401. The other paragraphs of the Trial Judgement quoted in the Prosecution Response do not give any relevant information about the Trial Chamber's reasoning in support of its findings that the Appellant was seen successively at Murambi Technical School and Kaduha Parish in the early morning of 21 April 1994. *See* Prosecution Response, para. 169, fn. 250, referring to Trial Judgement, paras 134, 399, 401, 402.
[325] Trial Judgement, paras 113, 117.
[326] The Appeals Chamber has already concluded that this finding is erroneous since it contradicts the Trial Chamber's previous finding that it would rely on Witness KXX only if corroborated (*see above* Section D(3)(d), para. 143).

155. Having made these findings as to times of arrival at the two massacre sites, the Trial Chamber failed to expressly discuss the Defence evidence to the effect that it was impossible for the Appellant to travel from Murambi Technical School to Kaduha Parish within this time-frame. The issue was clearly controversial and the evidence presented by the parties in this respect was contradictory. The Trial Chamber should have been clearer in finding that the Appellant was at both Murambi Technical School and Kaduha Parish, which the Trial Chamber deemed geographically proximate, thereby rejecting his argument regarding impossibility. However, the failure to be more explicit does not indicate the lack of a reasoned judgement, particularly in light of the approximate nature of the evidence offered by Witnesses KSY, YH and AJT1 as discussed in subsequent paragraphs.

156. Contrary to the Appellant's contention, the Trial Chamber was not compelled to question the credibility of the Prosecution witnesses in light of the fact that Witness KEI did not testify that the Appellant went directly to Kaduha Parish after leaving Murambi Technical School. The Trial Chamber expressly rejected all uncorroborated aspects of Witness KEI's testimony; it is thus consistent that it did not accept the witness's account that the Appellant went to the Gendarmerie camp after the attack against Murambi Technical School.[327]

157. According to Prosecution Witness Karugaba, the shortest non-tarmac road between the two massacre sites was 25-30 km long.[328] Defence Witness AJT1 testified that the distance between the two locations could be covered in one and a half hours.[329] This evaluation is not necessarily contradicted by the Defence Expert Report, which stated that during the rainy season this trip could take three hours, with a solid car.[330] No evidence was brought that showed that the road conditions

[327] *See* Trial Judgement, para. 112, read together with paras 100, 107 (on the ground that the credibility of Witness KEI was questionable).
[328] Witness Karugaba pointed out the locations on a map which was admitted as Exhibit P19. He estimated the driving distance between Gikongoro town and Kaduha as 50 km via Cyanika and 25-30 km via Murambi, and the driving distance between Gikongoro town and Murambi as 2 km. (T. 8 November 2004 pp. 7-8).
[329] T. 11 March 2005 p. 27.
[330] According to the Defence Expert Report, it would have taken three hours during the rainy season to travel between them, without taking into account the presence of road-blocks. The Defence Expert Report also asserted that it would have taken five days to travel the distances which the Appellant had, according to the Indictment, travelled on 21 April 1994 (Exh. D 156, Defence Expert Report, p. 47). The Appeals Chamber notes that the Appellant submits that this was in fact a clerical error, and that the expert meant "5 hours" rather than five days, without presenting arguments in support of this submission. However, since the issue at stake is limited to the question of the distance between Murambi and Kaduha and the time necessary to cover that distance, and not the time necessary to travel all the distances which the Indictment alleged that the Appellant covered on 21 April 1994, the Appeals Chamber does not deem it necessary to make any findings on this point. *See also Corrigendum à l'annexe Ia des conclusions de la Défense d'Aloys Simba*, 4 July 2005 (strictly confidentially filed); Prosecution closing arguments (T. 7 July 2005 pp. 11-12); Defence closing arguments (T. 7 July 2005 pp. 57-58).

were affected by rain at the relevant time; the simple fact that April falls within the rainy season is not sufficient to demonstrate that the roads were actually in bad condition on the day at issue.[331]

158. The Appeals Chamber notes that both Witness KSY and Witness YH gave only approximate times of their respective sightings of the Appellant on the 21 April at Murambi Technical School. Witness KSY testified that he saw the Appellant arriving at Murambi Technical School at "around" 7:00 a.m. on 21 April 1994 and that he observed the Appellant during a period of "about" 15 minutes.[332] A reading of the relevant transcripts clearly shows that Witness KSY only intended to give estimated times.[333] Similarly, Witness YH did not give a precise time for the arrival of the Appellant at Kaduha Parish. Witness YH first indicated during the examination-in-chief that he (Witness YH) arrived at Kaduha Parish "between about 8:00 and 9:00 in the morning [of 21 April 1994]"[334] and that the Appellant arrived 20 minutes after his arrival at Kaduha Parish.[335] The Trial Chamber duly acknowledged the fact that these witnesses intended in general to provide an approximate time-frame for the events they reported in their testimony.

159. Similarly, nothing in Defence Witness AJT1's testimony indicates that she intended to provide an exact calculation of the minimum travel time required to go from Kaduha to Murambi.[336] The Appeals Chamber finds that in light of the troubling context of the events reported by the witnesses and the long period of time that elapsed between the events and the taking of the testimony (a decade in the instant case), the times indicated by the witnesses must be considered as mere approximations, the approach taken by the Trial Chamber. In light of the approximations given by the witnesses, a reasonable trier of fact could have found beyond a reasonable doubt that

[331] The Appeals Chamber notes that the Defence failed to ask the witnesses if it was raining on 21 April 1994. It asked Witness Karugaba (T. 9 November 2004 pp. 8-10) and Witness KSY whether it was the rainy season at that time. However, in contrast with the line of questioning pursued by the Defence, Witness KSY answered that indeed it was normally the rainy season, but on the days before 21 April 1994 it had not rained in the area of Murambi (T. 31 August 2004 p. 13).
[332] T. 30 August 204 p. 28; Trial Judgement, para. 92.
[333] Trial Judgement, paras 113, 117, 118. T. 30 August 2004 p. 28 ("Q. Now, at around what time of the morning did Aloys Simba arrive at Murambi Technical Institute? A. It was around 7:00 in the morning."). T. 30 August 2004 p. 29 ("Q. And, approximately, how long did this visit by Simba last, Witness? A. He was there for about 15 minutes."). In cross-examination, the Defence asked Witness KSY to confirm the time of arrival of the Appellant at Murambi Technical School. Witness KSY did not respond directly. The Defence did not enquire further on this question (T. 30 August 2004 p. 47).
[334] T. 21 September 2004 p. 35 ("Q. And at around what time of the day did you see Aloys Simba at Kaduha parish on the 21st of April 1994? A. It was between about 8:00 and 9:00 in the morning.").
[335] T. 21 September 2004 p. 35 ("A. […] So we got up early, between 7 and 9 a.m., and 20 minutes after my arrival, Colonel Simba also arrived there [Kaduha Parish] and I saw him."). T. 21 September 2004 pp. 36-37 (Later, still in examination-in-chief, "A. We got to Kaduha at around 8:00. Q. And approximately how long after your arrival did Colonel Simba arrive at Kaduha parish? A. He got there some minutes after our arrival."). The Defence did not question Witness YH on the times of the Appellant's arrival and stay at Kaduha Parish (T. 22 September 2004; T. 23 September 2004).
[336] T. 11 March 2005 p. 27. During cross-examination, the Prosecution questioned Witness AJT1 on the time it would take to travel between Kaduha Parish and Murambi ("A. [w]ell, Murambi is farther away than Kaduha, and you have to pass through Kaduha to reach Murambi, so you have to add one and an half hour [...]".). The Prosecution did not pursue this line of questioning to Witness AJT1 (T. 11 March 2005 p. 27).

the times articulated by them were, in fact, quite flexible and created a window during which Simba could have been present at both Murambi Technical School and Kaduha Parish on the morning of 21 April 1994. The Appeals Chamber finds, therefore, that the Appellant has not demonstrated that the Trial Chamber erred in so finding.

5. The Ntyazo Public Meeting of 22 May 1994

160. The Appellant contends that the Trial Chamber erred by relying on the uncorroborated testimony of Witness YC to find that the Appellant made an inflammatory speech against Tutsi at a public meeting in Ntyazo Commune on 22 May 1994, and by rejecting the Appellant's account of that speech which was corroborated by Witness GM1.[337] He submits that it is absurd to find that he would have suddenly decided to incite people to kill the Tutsi a moment after he had urged the members of the population to embrace peace and defend their homeland alongside the national army.[338] The Appellant further argues that the fact that Witness YC was better placed than Witness GMI to hear the Appellant's speech does not mean that Witness YC was more credible than the latter.[339] He also contends that the Trial Chamber should have considered Witness YC's testimony with caution since he confessed to having participated in the genocide, and since his cooperation with the Rwandan authorities was clearly an attempt to obtain a reduced sentence.[340] Finally, the Appellant submits that Witness YC's testimony was inaccurate insofar as it described the Appellant as a civil defence advisor in Butare and Gikongoro.[341]

161. The Prosecution responds that the Trial Chamber adopted the correct approach in assessing the testimonies of Witnesses YC and GM1 and that the Appellant has failed to demonstrate any error of fact leading to a miscarriage of justice.[342]

162. The Appeals Chamber notes that the Trial Chamber's finding that the Appellant made an inflammatory speech against Tutsi at a public meeting in Ntyazo Commune on 22 May 1994 does not underlie any conviction, nor does it support any subsequent finding in relation to the sentence. Indeed, the Trial Chamber found that the Prosecution did not prove the allegation that Tutsi were killed as a result of the Appellant's speech. As the Appellant fails to demonstrate that the alleged errors occasioned a miscarriage of justice, this sub-ground of appeal is dismissed.

[337] Simba Notice of Appeal, II-B-1 and II-B-2.
[338] Simba Appeal Brief, para. 357.
[339] Simba Appeal Brief, para. 358.
[340] Simba Notice of Appeal, II-B-1.
[341] Simba Notice of Appeal, II-B-1. *See also* Simba Reply, para. 131.
[342] Prosecution Response, para. 183.

E. Alleged Errors in the Assessment of the Defence Evidence

163. The Appellant submits, under various sub-grounds of appeal, that the Trial Chamber committed errors of law and fact in its assessment of Defence evidence.

164. As a preliminary matter, the Appeals Chamber declines to address a number of the Appellant's submissions for lack of arguments. First, the Appellant alleges that the Trial Chamber contradicted itself in finding that the Appellant was in Kigali and Gitarama from 6-13 April 1994 and that "he might have left Gitarama on 12 April when the Interim Government was being installed there".[343] The Appeals Chamber notes that the Trial Chamber accepted the Appellant's alibi with respect to the period of 6-13 April 1994[344] and no convictions rest on the findings pertaining to this period. As a result, the Appeals Chamber's intervention is not warranted since the alleged error could not have occasioned a miscarriage of justice.

165. Similarly, the Appeals Chamber will not consider the Appellant's claim that the Trial Chamber erred by distorting the facts in finding that the Appellant was on his way to Gikongoro when he met Witness MIB and his wife[345] since he has failed to elaborate on this sub-ground of appeal in his Appeal Brief.[346]

166. Further, the Appellant claims that the Trial Chamber erred by declining to accept in its entirety the alibi for the period of 14-24 April 1994, despite the multiple corroborations of alibi witnesses.[347] In this respect, the Appellant relies on arguments advanced in the context of other sub-grounds of appeal which are addressed elsewhere in the Trial Judgement. As no separate error on the part of the Trial Chamber is advanced, the Appeals Chamber need not address these arguments here.

167. The Appeals Chamber also declines to address the challenge that the Trial Chamber contradicted itself when it allegedly failed to conclude that "the alibi had raised a reasonable doubt

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[343] Simba Notice of Appeal, I-D-9; Simba Appeal Brief, para. 264, referring to Trial Judgement, paras 343-377. *See* Prosecution Response, paras 112-103, 112; Simba Reply, paras 49-50; AT. 22 May 2007 pp. 18-19.
[344] Trial Judgement, paras 341-349
[345] Simba Notice of Appeal, II-C-12. *See also* Simba Appeal Brief, para. 379; Simba Reply, para. 133. In his Appeal Brief (para. 379) the Appellant merely refers to another part of the same brief (paras 191-212), but does not elaborate on the specific contention that the Trial Chamber misrepresented Witness MIB's testimony. The Appeals Chamber notes that the Appellant's submissions point erroneously to paragraph 464 of the Trial Judgement, while paragraphs 374 to 376 of the Trial Judgement seem more relevant to the Appellant's apparent argument. However, contrary to the Appellant's contention, these paragraphs show clearly that the Trial Chamber took into account the evidence that the Appellant was travelling to Gikongoro "in order to see if the roads were sufficiently safe to relocate there" and accepted that he turned back to Gitarama town when he was warned by Witness MIB that it was too dangerous to continue his way with Tutsi accompanying him (Trial Judgement, para. 375).
[346] Simba Appeal Brief, para. 379, referring to Simba Appeal Brief, paras 191-212.
[347] Simba Notice of Appeal, II-D-2; Simba Appeal Brief, para. 384, referring to Simba Appeal Brief, paras 184-252.

in the Prosecution case".[348] The Appellant is in fact asserting that the Trial Chamber erred in law in failing to apply the proper legal standard to the alibi evidence. This general contention overlaps with the Appellant's more specific allegations of error relating to the assessment of the alibi evidence which will be considered below, and does not call for a separate analysis by the Appeals Chamber.

168. The Appeals Chamber further declines to address the Appellant's contention that the Trial Chamber erred in failing to consider the Defence Expert Report in relation to the massacres that occurred at Murambi Technical School and Kaduha Parish, since this report makes only limited submissions to the effect that the Indictment exaggerated the number of victims at these places, an issue which is not at stake on appeal.[349]

169. Finally, the Appeals Chamber will not address the following allegations of error since they fall outside the scope of the grounds set out in the Notice of Appeal: in relation to Prosecution Witness YH's testimony placing the Appellant at a meeting at *Centre Intercommunal de perfectionnement du personnel* ("CIPEP") around 16 April 1994, and the link between these statements and Defence Witness SBL1's testimony;[350] in the assessment of the diary of the Appellant;[351] and in the assessment of the Appellant's letters with respect to dates of his departure from Gikongoro.[352]

170. The Appeals Chamber will now address the remaining arguments in turn.

1. Alleged Failure to Consider Report by Defence Expert Witness Dr. Pascal Ndengejeho

171. The Appellant contends that the Trial Judgement failed to consider the Defence Expert Report of Dr. Pascal Ndengejeho in relation to the massacres that occurred at various sites, the physical impossibility of committing the crimes charged because of the distance between Murambi Technical School and Kaduha Parish, the Appellant's alibi, or his motive.[353] According to the Appellant, the Trial Chamber implicitly suggested that the report was irrelevant[354] when it "touched

[348] Simba Notice of Appeal I-D-8; Simba Appeal Brief, para. 263.
[349] Defence Expert Report, pp. 48-49.
[350] Simba Appeal Brief, paras 224-227, referring to Trial Judgement, para. 378. The latter paragraph refers to Witness YF. This is evidently a typographical error, as confirmed by reference to paragraph 144 of the Trial Judgement where the same testimony is said to have been given by Witness YH.
[351] Simba Appeal Brief, paras 230-232.
[352] Simba Appeal Brief, paras 233-236.
[353] Simba Notice of Appeal, I-C-1, I-C-3, I-E-4, II-D-6; Simba Appeal Brief, paras 102-107, 271-272, 393-394. The Appeals Chamber need not consider here the Appellant's challenge to the extent it relates to the motive of the Appellant to commit the crimes. This is considered above under Section C2(c), paras 87-88 and below under Section H-3, paras 261-270.
[354] Simba Appeal Brief, para. 102.

upon crucial issues" such as the Appellant's alibi.[355] The Appellant claims that this failure occasioned a miscarriage of justice.[356] As a corollary submission, the Appellant contends that the Trial Chamber erred by refusing to admit statements of BJK1, since they were discussed in and annexed to the Defence Expert Report, which was admitted into evidence and not challenged by the Prosecution.[357]

172. The Prosecution responds that the Trial Judgement mentions the evidence of this Defence expert witness and the fact that it was considered and assessed by the Trial Chamber. The Prosecution submits that "[i]n the absence of any substantiated submission of the Appellant supporting an allegation of erroneous assessment of evidence and failure to provide a reasoned opinion, it is reasonable to assume that the Trial Chamber has taken the report into account".[358] With respect to the Appellant's submission regarding BJK1's statements, the Prosecution responds that no error on part of the Trial Chamber is demonstrated.[359]

173. The Appeals Chamber recalls that, while required to give a reasoned opinion, the trier of fact is not obliged to articulate every step of its reasoning.[360] In that light, the Appellant clearly fails to demonstrate how the Trial Chamber erred in not considering the Defence Expert Report in explicit terms. The Appeals Chamber further recalls its earlier finding that the evidence provided in the Defence Expert Report did not necessarily contradict the evidence that the Appellant was present at the two massacre sites within the relevant time-frame.[361] Therefore this challenge can be readily dismissed.

174. The Appeals Chamber further notes that the evidence of an expert witness is meant to provide specialised knowledge that may assist the fact finder to understand the evidence presented.[362] It is for the Trial Chamber to decide whether, on the basis of the evidence presented by the parties, the person proposed can be admitted as an expert witness.[363] Just as for any other

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[355] Simba Appeal Brief, para. 103.
[356] Simba Notice of Appeal, II-D-6; Simba Appeal Brief, paras 393-394. *See also* Prosecution Response, para. 79; Simba Reply, paras 47, 49-50, 134.
[357] Simba Appeal Brief, para. 104.
[358] Prosecution Response, para. 78.
[359] Prosecution Response, para. 79.
[360] *Gacumbitsi* Appeal Judgement, para. 65; *Kajelijeli* Appeal Judgement, para. 147..
[361] *See above* Section D-4, paras 157-159.
[362] *Semanza* Appeal Judgement, para. 303. *See also* The *Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka, Prosper Mugiraneza,* Case No. ICTR-99-50-T, Decision on Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Déo Sebahire Mbonyinkebe (Rule 89(C)), 2 September 2005, para. 11; *The Prosecutor v. Théoneste Bagosora et al.,* Case No. ICTR-98-41-T, Decision on Motion for Exclusion of Expert Witness Statement of Filip Reyntjens, 28 September 2004, para. 8; *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness, 9 March 1998, p. 2.
[363] *The Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-01-64-T, Decision on Expert Witnesses for the Defence, Articles 54, 73, 89 and 94 *bis* of the Rules of Procedure and Evidence, 11 November 2003, para. 8.

evidence presented, it is for the Trial Chamber to assess the reliability and probative value of the expert report and testimony.

175. In the instant case, the Appeals Chamber notes that, contrary to the Appellant's assertion,[364] the Defence Expert Report was admitted subject to express reservations entered by the Prosecution,[365] disputing both the qualifications of the Defence Expert Witness and the contents of the report. However, the Appeals Chamber need not address the question as to whether the Defence Expert Report was validly admitted[366] since the Prosecution is not challenging this point.

176. The Defence Expert Report was mentioned once in the Trial Judgement, in paragraph 12, with the Trial Chamber noting that the Report "focuses primarily on the role of civil defence", a statement consistent with the title of the Defence Expert Report. However, only a limited express reference to the Defence Expert Report does not imply that the Trial Chamber failed to consider it or considered that it was "irrelevant".

177. Regarding the issue of the alibi, the Defence Expert Report was of limited assistance to the Trial Chamber, merely summarising prospective defence evidence and setting out the Appellant's theory that the Appellant was in Gitarama from 13-22 or 23 April 1994 and only arrived in Gikongoro on 23 April 1994.[367] It provided no expert opinion which could have assisted the Trial Chamber in its analysis, but instead ventured beyond the scope of the expertise and provided an opinion on the ultimate issue on the case.

178. The Appeals Chamber further notes that no less than 18 pages of the Trial Judgement address the alibi.[368] On the basis of a careful review of the alibi evidence, the Trial Chamber found it to be convincing with respect to the period 6-13 April 1994,[369] but not for the period 14-24 April 1994. The Trial Chamber considered the evidence given by 10 Defence witnesses (the Appellant, SML2, MIB, FMP1, FKP2, AJT1, AJG7, SIH, GMA3 and GL3).The Appeals Chamber recalls that a trier of fact is not obliged to state in detail, each step of its reasoning. Thus, the absence of

[364] The Appellant claimed that the Expert Report was accepted by the Trial Chamber and the Prosecutor, who at no time criticised its content or its author's qualifications (Simba Appeal Brief, para. 105).
[365] The Prosecution Notice in Respect of the Defence Expert Report of Dr. Pascal Ndengejeho, filed on 29 March 2005, p. 2.
[366] It appears that the Trial Chamber admitted the report as evidence without following the procedure prescribed in Rule 94 *bis* of the Rules which envisages cross-examination of the expert where a report's contents are challenged by the other party. It is unclear whether the Trial Chamber considered before admitting the Defence Expert Report whether Dr. Pascal Ndengejeho had specialised knowledge that could assist the Trial Chamber to understand the evidence presented at trial.
[367] The Defence Expert Report made only a brief reference to the alibi at pages 41-42 (The Simba Appeal Brief refers to pages 41-50, but only page 42 is directly related to the alibi). It refers in passing to the statements of Witness AJT1 and three persons who did not testity at trial: Witnesses HWH, HJT1, and Alison Des Forges.
[368] Trial Judgement, paras 296-384.
[369] Trial Judgement, paras 349-384.

reference to the Defence Expert Report in this respect does not mean that the Trial Chamber did not take it into account in its assessment.

179. With regard to the statements of BJK1, the alleged error concerning the denial of their separate admission has been addressed and dismissed above and will not be revisited here.[370] Concerning their status as annexes to the Defence Expert Report, these statements form part of the trial record only to the extent that they support the Defence Expert's analysis regarding the issues addressed in the Report, which the Appeals Chamber already found to be of limited assistance.

180. The Appellant has not demonstrated that the Trial Chamber erred by failing to consider the Defence Expert Report.

2. Alleged Errors in Relation to the Alibi

181. The Appellant makes several other submissions to the effect that the Trial Chamber erred in relation to the alibi.[371]

(a) Alleged Error Relating to the Burden of Proof

182. The Appellant contends that the Trial Chamber impermissibly reversed the burden of proof with respect to the alibi evidence[372] in particular when it concluded at paragraph 384 of the Trial Judgement as follows:

> However, when considering the evidence of the alibi, together with the Prosecution evidence, the Chamber has no doubt that on 21 April Simba was in Gikongoro prefecture at Murambi Technical School and at Kaduha Parish.

The Appellant submits that the language of this paragraph suggests that the Trial Chamber "compared" the merits of the alibi with the Prosecution evidence, while the correct legal standard required the Trial Chamber to assess whether the alibi evidence cast reasonable doubt on the Prosecution's case.[373] According to the Appellant, the Trial Chamber should have drawn the inference that the alibi had raised a reasonable doubt with respect to the Prosecution case. [374]

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[370] *See above* Chapter II, Section A-2, paras 19-25.
[371] Simba Notice of Appeal, I-B-4, I-B-7; AT. 22 May 2007 pp. 8-9, 44.
[372] Simba Notice of Appeal, I-B-4, I-B-7; Simba Appeal Brief, paras 83, 86, 92, 94. *See also* Prosecution Response, paras 61-63, 111; Simba Reply, paras 49-50. The Appeals Chamber need not consider the unsubstantiated allegation made under Ground I-B-4 that the Trial Chamber erred in its findings at paragraph 378. The Appeals Chamber also declines to consider the Appellant's unsubstantiated contention that the Trial Chamber failed to apply "the principles governing the burden of proof, for [Defence] witnesses [AJT1 and SML2 who] raise a reasonable doubt" as to the Prosecution's allegations (Simba Appeal Brief, para. 219); AT. 22 May 2007 pp. 14-15.
[373] Simba Appeal Brief, para. 94.
[374] Simba Appeal Brief, para. 263.

183. The Prosecution responds that the Appellant has not identified any error in the Trial Chamber's approach, and that his allegations should be dismissed.[375]

184. The Trial Chamber correctly set out the legal standard on alibi evidence when stating:

> In assessing the alibi, the Chamber recalls that it is settled jurisprudence before the two *ad hoc* Tribunals that in putting forward an alibi, a defendant need only produce evidence likely to raise a reasonable doubt in the Prosecution case. The alibi does not carry a separate burden. The burden of proving beyond reasonable doubt the facts charged remains squarely on the shoulders of the Prosecution. Indeed, it is incumbent on the Prosecution to establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true.[376]

185. The Appeals Chamber is further satisfied that the Trial Chamber correctly applied this standard in its subsequent findings on alibi. The Trial Chamber first found that, although the alibi evidence for the period of 6-13 April 1994 "[did] not account for every moment of [the Appellant's time], viewed as a whole and when weighed against the Prosecution evidence, it [provided] a reasonable and satisfactory explanation for [the Appellant's] activities [for this period]."[377] The Appeals Chamber notes that this wording reflects that in assessing the alibi evidence for this period the Trial Chamber did not require the Defence to prove its case beyond reasonable doubt. Instead, the Trial Chamber found that the Prosecution had not eliminated the reasonable possibility that the Appellant was in Kigali between 6-13 April 1994, that this reinforced the doubt the Trial Chamber expressed in relation to Prosecution Witness KEL's testimony, and that there was not "sufficient and reliable evidence to establish that [the Appellant] on or about 9 April urged *Interahamwe* to kill Tutsi in Kibeho, as alleged in paragraphs 23(d) and 56 of the Indictment".[378]

186. It is apparent that the Trial Chamber applied the same standard with regard to the second period of the alibi, 14-24 April 1994, but that, this time, it did not find that the alibi had raised doubt with respect to the Prosecution evidence:

> After viewing the evidence of the alibi in its totality, it is understandable that Simba stayed for a brief period of time in Gitarama town after his arrival on 13 April. In the Chamber's view, however, the concerns outlined above, as well as first-hand corroborated Prosecution evidence, eliminate the reasonable possibility that he remained in Gitarama after 16 April. The Chamber accepts that Simba might have continued to travel to various localities outside of Gikongoro after that time. However, when considering the evidence of the alibi, together with the Prosecution evidence, the Chamber has no doubt that on 21 April Simba was in Gikongoro prefecture at Murambi Technical School and at Kaduha Parish.[379]

The Appeals Chamber sees no error of law in this finding.

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[375] Prosecution Response, paras 61-63.
[376] Trial Judgement, para. 303 (footnote omitted).
[377] Trial Judgement, para. 349.
[378] Trial Judgement, para. 85.
[379] Trial Judgement, para. 384.

187. Similarly, the Appellant fails to show that the Trial Chamber shifted the burden of proof with regard to the allegations in relation to the attacks against Murambi Technical School and Kaduha Parish when it stated that the "numerous inconsistencies in the alibi eliminate the reasonable possibility that [the Appellant] was in Gitarama at the time of the attack[s]".[380] It is clear from paragraph 384 of the Trial Judgement that the Trial Chamber found that the Prosecution had proven the Appellant's presence at Murambi Technical School and Kaduha Parish on 21 April 1994 beyond reasonable doubt. It is equally clear that it found that the alibi relied upon by the Appellant did not cast any doubt on the Prosecution's case. The Appellant's argument on this point is therefore without merit.

188. The Appellant further alleges that at paragraph 121 of the Trial Judgement, the Trial Chamber shifted the burden of proof by finding Prosecution Witness KSY credible based on the sole fact that the alibi contained numerous contradictions.[381]

189. The Appeals Chamber notes that the Appellant's challenge regarding Witness KSY is based on a misreading of paragraph 121 of the Trial Judgement. The Trial Chamber assessed the witness's credibility in detail at paragraphs 114-115 and 117-119 of the Trial Judgement, before it concluded at paragraph 121 that "Witness KSY's reliable testimony and the numerous inconsistencies in the alibi eliminate the reasonable possibility that Simba was in Gitarama at the time of the attack". The conclusion regarding Witness KSY's credibility is based on the detailed analysis of his evidence set out in the Trial Judgement. The reference to inconsistencies in the alibi merely highlights the fact that the alibi failed to raise a reasonable doubt with respect to the Prosecution case.

190. Finally, the Appellant alleges that in paragraph 177 of the Trial Judgement, the Trial Chamber shifted the burden of proof by finding Prosecution Witness YH credible based on the fact that the alibi contained inconsistencies.[382] The Appeals Chamber disagrees. As noted above, the Trial Chamber assessed Witness YH's credibility in detail.[383] The Trial Chamber's conclusion that "Witness YH's reliable and corroborated testimony as well as the numerous inconsistencies in the alibi eliminate the reasonable possibility that Simba was in Gitarama at the time of the attack" reflects only that the Prosecution proved its case beyond reasonable doubt, and that the alibi failed to raise a reasonable doubt in this regard.

191. Accordingly, these sub-grounds of appeal are dismissed.

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[380] Trial Judgement, paras 121, 177.
[381] Simba Notice of Appeal, I-B-4; Simba Appeal Brief, para. 83.
[382] Simba Notice of Appeal, I-B-4; Simba Appeal Brief, para. 86.
[383] Trial Judgement, Chapter II, Section 6-3.

(b) Alleged Errors in the Assessment of the Evidence on Alibi

(i) Alleged Errors Relating to the Assessment of the Evidence of Witnesses AJT1 and SML2

192. The Appellant submits that the Trial Chamber made a number of errors in its assessment of evidence given by Defence witnesses. First, it is submitted that the Trial Chamber distorted the facts in relation to the testimonies of the Appellant and of Defence Witnesses AJT1 and SML2 with regard to the date of his departure for Gikongoro.[384] This claim is not supported by any further argument and is therefore dismissed without further consideration.

193. The Appeals Chamber readily dismisses the contention that the Trial Chamber distorted the evidence of Witness SML2 when it stated at paragraph 377 of the Trial Judgement that "Witness SML2's account of the journey to Gikongoro prefecture also suggests an earlier departure [since she] described *Interahamwe* surrounding Kaduha Parish as the group passed the parish". In his brief the Appellant merely asserts without demonstration that this finding is inconsistent with Witness SML2's testimony.[385]

194. By the same token, the Appeals Chamber readily dismisses the Appellant's submissions that the Trial Chamber erred in both law and fact by failing to consider "the satisfaction expressed by the [Prosecution] regarding [his] alibi" and to draw the proper inferences therefrom, following investigations conducted by the Prosecution in Kigali, Gitarama and Musebeya.[386] The Appellant fails to demonstrate that the Prosecution did indeed accept the alibi evidence of Witness AJT1. The Appellant's submission appears to be based on a misinterpretation of an internal Prosecution e-mail forwarded to the Defence on 16 March 2005 (Defence Exhibit 138). In this message, B. Egbe, Senior Trial Attorney for the Prosecution, declared that photographs taken at a compound shown to him by Witness AJT1 at Gitarama came out blank and that he "was satisfied with the written and signed statement of the witness and therefore saw no need to ask for another mission to repeat the snap shots of the compounds".[387] The satisfaction expressed in this message clearly relates to the description and location of the compound by Witness AJT1 and not to the entire testimony of that witness in relation to the alibi. Contrary to the Appellant's submission, nothing in B. Egbe's statement indicates that the Prosecution accepted the Appellant's alibi. As it is the duration and the continuous nature of the stay of the Appellant at Gitarama between 14 and 24 April 1994 that is at

[384] Simba Notice of Appeal, II-C-11. In his Appeal Brief, the Appellant merely refers to other parts of his brief, without articulating any argument in support of his claim (Simba Appeal Brief, para. 378, referring to paras 213-223).
[385] Simba Appeal Brief, para 221
[386] Simba Notice of Appeal, I-E-2, II-D-5; Simba Appeal Brief, paras 391, 392, 395. *See also* Simba Reply, paras 49-50, 135.
[387] Simba Appeal Brief, para. 95.

issue in the present appeal and not the characteristics of the compound where they stayed, Defence Exhibit 138 was not of relevance to the Trial Chamber in its task.

195. The Appellant submits that the Trial Chamber erred in law by failing to rule on the non-disclosure of pictures taken by the Prosecution investigators in Gitarama and of the Prosecution's investigators report.[388] These pictures were subsequently disclosed during the appeal proceedings,[389] following which the Appellant failed to show how the preparation of his case had been materially prejudiced as a result of the Prosecution's failure to disclose the pictures at trial.[390]

196. The Appellant also submits that the Trial Chamber erred in law in its assessment of the evidence of Witnesses AJT1 and SML2 with regard to the Appellant's stay at Gitarama.[391] He submits that the Trial Chamber failed to take into account the fact that these witnesses gave corroborated accounts as to the Appellant's continuous presence. The Appellant also alleges that the Trial Chamber failed to apply the same "treatment or understanding" in assessing Prosecution and Defence alibi witnesses.[392]

197. With respect to the discrepancy noted by the Trial Chamber "between Witness AJT1's testimony and her statement to Tribunal investigators, which indicates that Simba departed Gitarama around the time the interim government relocated there",[393] the Appellant contends that any mistakes were understandable given the stress associated with the long period of time (nearly 11 years) which had elapsed since the events had occurred, her low level of education and the fact that her concentration might have been impaired by the environment of the Tribunal's courtroom.[394]

198. The Appellant further submits that the Trial Chamber confirmed the difficulties encountered by Witness AJT1 as to the dates[395] but that, contrary to the Trial Chamber's observation, Witness AJT1 never testified that she went to Kabgayi on 1 May 1994.[396] He submits that the Trial Chamber should have concluded that the witness confused the dates, since she could not have been informed

[388] Simba Notice of Appeal, I-E-3. *See also* Prosecution Response, para. 114; Simba Reply, paras 49-50. There is no need to discuss the Appellant's claim related to the non-disclosure of the Prosecution's investigator's report since the Prosecution has informed the Appeals Chamber that such a report does not exist (Prosecution's Memorandum, 18 May 2007, para. 2).
[389] Prosecution's Memorandum, 18 May 2007.
[390] During the appeal hearing, the Appellant claimed that an earlier disclosure of the pictures would have enabled the Defence "to, at the very least, question the witness on specific points, on specific witnesses, and on the sites, so as to consolidate the conviction of the Trial Chamber" (AT. 22 May 2007 pp. 9-10).
[391] Simba Notice of Appeal, I-C-15.
[392] Simba Appeal Brief, para. 184.
[393] Simba Appeal Brief, para. 213, referring to Trial Judgement, para. 378.
[394] Simba Appeal Brief, para. 214.
[395] Simba Appeal Brief, para. 215, referring to Trial Judgement, fn. 371.
[396] Simba Appeal Brief, para. 216.

on 16 April by the Kaduha survivors of events that had taken place on 21 April 1994.[397] The Appellant alleges that the Trial Chamber used the witness's confusion against the Appellant "in defiance of the principles of presumption of innocence", and in breach of Articles 19 and 20 of the Statute and Rule 89 (B) and (C) of the Rules.[398]

199. The Appeals Chamber notes that the Appellant does not explain how the Trial Chamber erred in its assessment of the evidence of Witnesses AJT1 and SML2. He is merely requesting that the Appeals Chamber substitute an alternative and more favourable assessment of the evidence, without showing how the Trial Chamber erred in law. The Trial Chamber correctly took into account Witness AJT1's inconsistencies as to the dates of her journey to Kabgayi, inconsistencies which the Appellant acknowledges. These dates were crucial to the weight and probative value to be given to her testimony, and it was accordingly open to the Trial Chamber to conclude that the testimony was not capable of casting doubt on the Appellant's presence at Kaduha Parish and Murambi Technical School on 21 April 1994.

200. This sub-ground of appeal is accordingly dismissed.

(ii) Alleged Error Relating to the Date of Arrival of the Appellant at Gikongoro

201. The Appellant submits that the Trial Chamber erred in law in its assessment of the evidence of several Defence Witnesses in relation to his date of arrival at Gikongoro.[399] He contends that the Trial Chamber erred in not accepting that the Appellant arrived at the Crête-Zaïre-Nil Project towards the end of April 1994, more specifically on 24 April, on the basis of the concurring testimonies of Witnesses GMA3, GL3, SIH, SML2, AJT1, AJG7 and the Appellant, as corroborated by Annex XVIII (Annexes 15 and 16) of the Defence Expert Report. The Appellant further claims that "at the very least, these corroborating testimonies cast on the Prosecution's theory a doubt that must benefit the Appellant" and that the discretion of a judge should be based on concurring evidence, and not on biased and unfair assumptions.[400]

[397] Simba Appeal Brief, paras 215-218, referring to Trial Judgement, fn. 371, where the Trial Chamber notes in relation to the discrepancies between Witness AJT1's testimony and her prior statements that "[i]n addition, the witness's account of seeing the survivors of the Kaduha Parish massacre at Kabgayi on 16 April suggests that she perhaps instead accompanied Simba there on his visit from Gikongoro prefecture on 1 May".
[398] Simba Appeal Brief, para. 219; Simba Reply, para. 47.
[399] Simba Notice of Appeal, I-C-16; Simba Appeal Brief, paras 210-235. The Appeals Chamber readily dismisses the Appellant's contention that the Trial Chamber's finding that the Appellant arrived in Gikongoro before 21 April 1994 is contradicted by other findings, since it is manifestly unfounded. None of the alleged contradictions are demonstrated (Simba Notice of Appeal, II-D-4(a) to II-D-4(d); Simba Appeal Brief, paras 386-390).
[400] Simba Appeal Brief, paras 239-243. *See also* Simba Reply, para. 134.

202. The Trial Chamber considered the evidence of Witnesses GMA3, AJG7, GL3 and SIH on this point and accorded them "little or no weight, particularly when viewed in the context of the corroborated Prosecution evidence placing [the Appellant] in Gikongoro prefecture during this time".[401]

203. The Appeals Chamber recalls that the Trial Chamber had the discretion to assess the relevance and weight of evidence given by both Prosecution and Defence witnesses when reaching a decision as to the Appellant's date of arrival in Gikongoro. The Appellant has not demonstrated how the Trial Chamber abused its discretion in assessing the totality of the alibi evidence to find that it did not cast any doubt on the fact that the Appellant was at the relevant massacre sites on 21 April 1994.[402] Similarly, the Appellant has not demonstrated that no reasonable trier of fact could have come to the conclusion that the Appellant arrived in Gikongoro on that date. This sub-ground is accordingly dismissed.

(iii) Alleged Error Relating to the Assessment of Witness FKP2's evidence

204. The Appellant claims that the Trial Chamber treated Defence Witness FKP2's testimony unfairly in comparison to Prosecution witnesses, by disallowing the witness's account that he saw the Appellant at a meeting in Gitarama on 20 April on the grounds that, during cross-examination, the witness instead placed that meeting between 13-30[403] April 1994. [404] The Appellant submits that Witness FKP2's testimony raises a doubt that must be of benefit to the Appellant.

205. The Appeals Chamber notes that the Appellant fails to give a full account of the Trial Chamber's relevant findings. The Trial Chamber noted that Witness FKP2, when confronted during cross-examination with his prior statement in which he stated that he had met the Appellant twice in Gitarama between 13-30 April, explained that he had given a broad range of dates because he was not certain of when the second meeting occurred.[405] The Appellant has failed to demonstrate how the Trial Chamber abused its discretion in assessing Witness FKP2's evidence. The Trial Chamber could reasonably conclude that Witness FKP2's evidence with regard to the second meeting with the Appellant was not accurate as to the date and therefore not capable of casting doubt on the

[401] Trial Judgement, para. 383.
[402] Trial Judgement, para. 384.
[403] In the Simba Appeal Brief it is suggested that according to paragraph 382 of the Trial Judgement Witness FKP2 stated in cross-examination that he met the Appellant twice in Gitarama during the period 13 -20 April 1994, when in fact the said paragraph of the Trial Judgement mentions the period 13 -30 April (Simba Appeal Brief, para 238).
[404] Simba Notice of Appeal, I-C-12; Simba Appeal Brief, paras 237-238. *See also* Simba Reply, para. 47.
[405] Trial Judgement, para. 382.

Appellant's presence at Kaduha Parish and Murambi Technical School on 21 April 1994.[406] This sub-ground of appeal is therefore dismissed.

(c) Alleged Error in Failing to Accept the Alibi Evidence in its Entirety and in Taking into Account the Purported Relationship of Witnesses with the Appellant or Members of his Family

206. The Appellant submits that the Trial Chamber erred in law and in fact by holding that certain witnesses were credible with respect to the Appellant's presence in Kigali in April 1994 but not with respect to the Appellant's stay in Gitarama, and also by failing to accept the evidence of the alibi witnesses in their entirety.[407] In addition, the Appellant claims that the Trial Chamber erred in asserting that these alibi witnesses were inclined to testify in a manner favourable to the Appellant because they had a close relationship with him. Similarly, the Appellant submits that the Trial Chamber erred in fact by finding that elements of exaggeration or embellishment in their testimonies could be explained by a desire to assist him.[408]

207. The Appellant submits that purported personal ties between Defence witnesses and the Appellant or members of his family should *a priori* not have any impact on credibility assessments.[409] The Appellant further alleges that it has not been established that all of the alibi witnesses had personal ties to the Appellant or members of his family.[410] By way of example, he submits that he had no personal relationship with Witnesses SIH, FMP1, GMA3, GL3, and Monique Mujawamariya, and that even though he and Witness FKP2 had been colleagues in Parliament, he could not be considered to be close to him.[411]

208. The Prosecution submits that it "was within [the Trial Chamber's] discretion to take certain factors, like the personal relationship with either the Appellant or a member of his family, into consideration in assessing the evidence of the alibi witnesses, and, based upon discrepancies and inconsistencies, to accord little or no weight to their evidence, when viewed in the context of the corroborated Prosecution evidence placing the Appellant in Gikongoro during this time".[412]

209. The Trial Chamber divided its assessment of the alibi into two phases.[413] The Trial Chamber found the alibi evidence sufficiently credible to cast doubt on the evidence supporting the

[406] *See* Trial Judgement, paras 382, 384.
[407] Simba Notice of Appeal, II-D-1 and II-D-2; Simba Appeal Brief, paras 185-188.
[408] Simba Notice of Appeal, II-D-1; Simba Appeal Brief, paras 185-188.
[409] Simba Appeal Brief, paras 185-186.
[410] Simba Appeal Brief, para. 187.
[411] Simba Appeal Brief, para. 187.
[412] Prosecution Response, para. 94.
[413] Trial Judgement, paras 298-299.

Prosecution's allegations in relation to the period 6-13 April 1994,[414] but did not find that a reasonable doubt had been cast on the Prosecution evidence for the period 14-24 April 1994.[415]

210. With regard to the contention that the Trial Chamber erred in law by taking into account the purported links between alibi witnesses and the Appellant or members of his family, the Appeals Chamber notes that, in the course of its assessment of the relevant alibi evidence, the Trial Chamber observed that "most of the Defence witnesses providing evidence in support of the alibi have a close personal relationship with either [the Appellant] or members of his family",[416] and noted that "[w]hile these relationships do not invalidate their testimonies, it does suggest that any lapse in their recollections might be resolved in a manner favorable to [the Appellant]".[417] While these observations suggest that the Trial Chamber viewed with caution the evidence given by Defence witnesses who had close relationships with the Appellant or with members of his family, it does not demonstrate *per se* that the Trial Chamber erred in law in its assessment of this evidence.

211. As for the submission that the Trial Chamber erred in fact by finding elements of exaggeration or embellishment in the witness testimonies with respect to the period 14-24 April 1994, the Appeals Chamber recalls that it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness testimony to prefer.[418] The Appeals Chamber points out that the Trial Chamber, in addressing the alibi for this period, did not find that all the relevant alibi witnesses had personal ties with the Appellant or members of his family, but only that most of them did. The Trial Judgement makes no reference to the nature of the Appellant's relationship with Witnesses SIH, FMP1, GMA3, GL3, and Monique Mujawamariya, contrary to what the Appellant appears to infer. With respect to Witness FKP2, the Trial Judgement merely notes that he had prior professional ties to the Appellant, a view supported by that witness's testimony.[419] Furthermore, it is apparent that the Trial Chamber took into account the purported relationships simply as one of a number of factors which were determinant with respect to the credibility of alibi witnesses for the period of 14-24 April 1994. The Appeals Chamber notes that the Trial Chamber took into consideration, *inter alia*: discrepancies between Witness AJT1's testimony and her prior statements;[420] discrepancies between the Appellant's testimony and his prior statement;[421] the fact that the accounts of the Appellant's "time in Gitarama town provided by [the Appellant himself]

[414] Trial Judgement, paras 347-349.
[415] Trial Judgement, para. 384.
[416] Trial Judgement, para. 381.
[417] Trial Judgement, para. 381.
[418] *Kupreškić et al.* Appeal Judgement, para. 32; quoted in *Kunarac et al.* Appeal Judgement, para. 40.
[419] T. 15 December 2004 p. 11.
[420] Trial Judgement, para. 377.
[421] Trial Judgement, paras 379-380.

and Witnesses AJT1 and SML2 [were] not particularly detailed and convincing";[422] inconsistencies with respect to meeting dates in Witness FKP2's testimony and his prior statement;[423] the lack of detail in and the second-hand nature of the evidence of Witnesses GMA3 and AJG7 on the Appellant's arrival in Gikongoro towards the end of April 1994; the uncertainty with regard to the date and the generally limited probative value of Witness GL3's testimony regarding a sighting of the Appellant; and the limited significance of Witness SIH's testimony with regard to the date of arrival of the Appellant in Gikongoro.[424] On the basis of all of the evidence considered, the Trial Chamber concluded that the factual finding pertaining to the alibi did not cast doubt on the Prosecution's evidence relating to the second period.[425]

212. With regard to the Appellant's submission that the Trial Chamber erred by not accepting the alibi evidence in its entirety, the Appeals Chamber recalls that a party must, when alleging an error of law, identify the alleged error, present arguments in support of its claim and explain how the error invalidates the judgement.[426] In the present case, the Appellant fails to articulate any argument based on applicable law or jurisprudence to the effect that the Trial Chamber was required to accept or reject the alibi evidence in its entirety. In general, it is not unreasonable for a Trial Chamber to accept certain parts of a witness's testimony and reject others.[427] When challenging factual findings made by the Trial Chamber, an appellant has first to identify the alleged error[428] and prove that the challenged factual finding is one which no reasonable trier of fact could have reached.[429] Here, the Appellant does not clearly identify the alleged error of fact which would demonstrate that no reasonable trier of fact could have found that the alibi evidence cast doubt on the finding regarding the first period and not the second.

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[422] Trial Judgement, para. 381, noting that these witnesses remained at the compound where the Appellant stayed at Gitarama, engaged in domestic household matters.
[423] Trial Judgement, para. 382.
[424] Trial Judgement, para. 383.
[425] *See* Trial Judgement, para. 384.
[426] *Limaj et al.* Appeal Judgement, para. 9; *Blagojević and Jokić* Appeal Judgement, para. 7; *Brdanin* Appeal Judgement, para. 9; *Galić* Appeal Judgement, para. 7; *Stakić* Appeal Judgement, para. 8; *Kvočka et al.* Appeal Judgement para. 16, referring to *Krnojelac* Appeal Judgement, para. 10.
[427] *Blagojević and Jokić* Appeal Judgement, para. 82; *Kupreškić et al.* Appeal Judgement, para. 333. *See also Ntagerura et al.* Appeal Judgement, para. 214; *Kamuhanda* Appeal Judgement, para. 248.
[428] *See* for example, *Niyitegeka* Appeal Judgement, para. 172; *Krnojelac* Appeal Judgement, para. 25.
[429] *See Akayesu* Appeal Judgement, para. 178, quoting *Delalić et al.* Appeal Judgement, paras 434-435 ("The test to be applied in relation to the issue as to whether the evidence is *factually* sufficient to sustain a conviction is whether the conclusion of guilt beyond reasonable doubt is one which no reasonable tribunal of fact *could* have reached. If an appellant is not able to establish that the Trial Chamber's conclusion of guilt beyond reasonable doubt was one which no reasonable tribunal of fact could have reached, it follows that there must have been evidence upon which such a tribunal could have been satisfied beyond reasonable doubt of that guilt. Under those circumstances, the latter test of legal sufficiency is therefore redundant, and the appeal must be dismissed. Similarly, if an appellant is able to establish that no reasonable tribunal of fact could have reached a conclusion of guilt upon the evidence before it, the appeal against conviction must be allowed and a Judgment of acquittal entered. In such a situation it is unnecessary for an appellate court to determine whether there was evidence (if accepted) upon which such a tribunal could have reached such a conclusion").

213. The Appellant has not demonstrated that the Trial Chamber erred in law or fact in not accepting the evidence of alibi witnesses in their entirety or in noting personal and family ties. This sub-ground of appeal is accordingly dismissed.

(d) Alleged Error Relating to the Appellant's Purported Influence

214. The Appellant submits that the Trial Chamber erred by "raising the possibility that [he] did not remain in Gitarama for as long as he and his witnesses claimed he did" and in finding that it could "eliminate the possibility that [the Appellant] remained in Gitarama after 16 April" on the basis of, *inter alia,* his purported influence on military and administrative authorities.[430] Specifically, the Appellant appears to allege that the Trial Chamber erred in finding in paragraph 376 of the Trial Judgement that the Appellant's stature in Rwandan society allowed him to obtain the assistance of authorities to facilitate movement[431] and that he admitted that he had little fear of roadblocks in Gikongoro.[432] The Appellant contends that in a situation of widespread chaos, it was not obvious that he would have been respected everywhere, especially since he was traveling with Tutsi.[433] The Appellant also submits that he was not as well-known and influential in the prefecture of Gikongoro as the Trial Chamber held.[434]

215. The Prosecution does not specifically respond to the Appellant's argument.[435]

216. The Trial Chamber made the impugned findings in the context of its assessment of the evidence given by the Appellant and Witness MIB to the effect that the latter had warned the Appellant in Nyanza, Butare Prefecture, on 16 April 1994, of the danger of traveling "any further with the Tutsi accompanying him", with the consequence that the Appellant returned back to Gitarama where he stayed the next eight days. The relevant passage of the Trial Judgement reads as follows:

> 374. As discussed above, Simba provided a reasonable explanation for his activities from 6 until 13 April 1994 when he relocated to Gitarama town. From 14 to 24 April 1994, Simba claimed that he remained in Gitarama town, taking periodic trips during the day to Kigali or other neighbouring localities. His version of the events is corroborated, to varying degrees by several witnesses. However, the evidence for this part of the alibi contains a number of elements which call into serious question the reasonableness of Simba's account and, in fact, lend support for an earlier arrival date in Gikongoro.

[430] Simba Notice of Appeal, II-D-3, referring to Trial Judgement, paras 376-379, 384.
[431] Simba Appeal Brief, paras 190-201.
[432] Simba Appeal Brief, para. 202, referring implicitly to Trial Judgement, para. 376.
[433] Simba Appeal Brief, para. 200.
[434] Simba Appeal Brief, para. 201. The Appeals Chamber will consider below the correlated arguments relating to the alleged marginalisation of the Appellant (*see below* Section F-2, paras 237-242).
[435] The Prosecution addresses the issue of the Appellant's purported influence in relation to the Appellant's ground of appeal on the sentence (*see below* Sections F(2) paras 237-242 and K para. 283).

> 375. In particular, Simba acknowledged travelling with three others toward Gikongoro prefecture on 16 April, in order to see if the roads were sufficiently safe to relocate there. Witness MIB confirmed that Simba was travelling toward Gikongoro prefecture at this time when she met him along the road in Nyanza, Butare prefecture. According to the evidence, Simba then turned back to Gitarama town on the advice of Witness MIB who warned that it was too dangerous to travel any further with Tutsi accompanying him. As a result, Simba returned to Gitarama town. According to the Accused's testimony, and that of Witnesses SML2 and AJT1, Simba spent the next eight days playing cards, going to the market, and making short trips to Kigali or other nearby areas.
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> 376. The Chamber notes that on 16 April, Simba was travelling in southern Rwanda toward his native area. He was a prominent figure in Rwanda based on his prior military and political career. The Chamber is certain that Simba was an imposing figure, particularly when he travelled in uniform. The Accused's own testimony reflects that when confronted at a roadblock between Kigali and Gitarama, he threatened to kill an assailant rather than surrender one of the Tutsi in his care. Though he lacked formal ties to the government and military, the evidence shows that Simba's stature in Rwandan society allowed him to obtain the assistance of authorities to facilitate movement. This point is illustrated by his ability to contact high ranking personnel in Kibungo prefecture to assist Witness SML2 in her return to Kigali. In addition, Simba had no difficulty convincing gendarmes and soldiers to accompany him to rescue various individuals throughout Kigali in the first few days after the death of the president. Simba also acknowledged that he had little fear of roadblocks in Gikongoro prefecture because he was well-known in the area.
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> 377. In this context, it is not plausible that Witness MIB's warning would have dissuaded Simba if he had wanted to relocate to Gikongoro prefecture at the time. The Chamber also notes that, contrary to Simba's testimony, Witness MIB indicated that he was travelling with a number of people under his care, including Witness SML2. Witness SML2's account of the journey to Gikongoro prefecture also suggests an earlier departure. She described *Interahamwe* surrounding Kaduha Parish as the group passed the parish. The Chamber recalls that in the days before the final assault on 21 April against Murambi Technical School, Cyanika Parish, and Kaduha Parish, *Interahamwe* clashed with Tutsi refugees at those sites. Moreover, the Chamber has noted the discrepancy between Witness AJT1's testimony and her statement to Tribunal investigators, which indicates that Simba departed Gitarama around the time the interim government relocated there. [436]

217. The Appeals Chamber notes that the Trial Chamber's findings with respect to the Appellant's stature and influence rest on multiple observations: the Appellant was able to travel on 16 April 1994, he dared to assert his authority in the face of an assailant at a roadblock between Kigali and Gitarama, and he managed to obtain the assistance of gendarmes and other authorities in order to facilitate his movements and the movements of others. The Trial Chamber took into consideration not only his past military and governmental career but also elements contemporaneous to the events which were demonstrative of his prominence.[437] The Appellant's claim that he was seriously marginalised does not demonstrate that the Trial Chamber erred in finding that he was a prominent and imposing figure.

218. With regard to the Appellant's challenge to the finding that he had acknowledged that he did not fear roadblocks in Gikongoro prefecture because he was well-known in the area, the Appeals Chamber notes that the Trial Judgement does not refer to any specific part of the Appellant's testimony in support. However, the Trial Judgement does refer to the Appellant's statement that on

[436] Trial Judgement, paras 374-377 (internal footnotes omitted).
[437] Trial Judgement, paras 56-60, 375-376.

24 April 1994 he was able to pass a roadblock at Kaduha because he was well-known.[438] This passage in turn refers to the transcripts of the Appellant's testimony, which in relevant part read as follows:

> At the roadblock set up at the office of the sub-*préfecture*, I stopped -- of course I was followed by the other vehicle. There were civilians. I asked the whereabouts of the *sous-préfet*. I was told that he was not present, that he had gone hitherto. I continued on my way. I arrived at the other roadblock near the market. Since I was fairly well known, they stopped me, and I stopped and I asked them to open the roadblock. They saw my name Simba, so they allowed me to pass.[439]

219. The Appellant has not demonstrated that no reasonable trier of fact could have found on the basis of this evidence that, due to his notoriety, the Appellant had little fear of roadblocks in the Gikongoro area. In the absence of any demonstration that the Trial Chamber erred in linking the Appellant's ability to travel within Gikongoro at the relevant time to his notoriety or influence, this sub-ground is dismissed.

3. Alleged Errors Relating to the Assessment of Defence Witnesses NGJ2 and SBL1

220. The Appellant submits that the Trial Chamber erred in law "in failing to attach more weight to the testimonies of Defence Witnesses SBL1 [and] NGJ2, veritable informed local figures in Gikongoro, who are, moreover, implicated in the crimes perpetrated in that locality".[440] He asserts that the Trial Chamber further erred in law and contradicted itself in disregarding the testimonies of these witnesses while noting that they were implicated in the attack, without any evidentiary basis.[441] In addition, he submits that the Trial Chamber distorted the facts and thus erred in fact when noting that these witnesses were both implicated in the attack against Murambi Technical School, while no evidence in the trial record supports this assertion.[442]

221. The Appellant submits that Witness SBL1 testified that, as far as he knew, the Appellant did not participate in the massacres at Murambi and Kaduha and that in fact he was not there. The Appellant argues that since this witness was "the most senior administrative authority in Gikongoro *préfecture* at the time of the genocide, [he] must have been fully aware of the events that took place in Murambi and Kaduha". The Appellant also refers to the fact that the Indictment charges both Witness SBL1 and the Appellant as participants in a JCE.[443]

[438] Trial Judgement, para. 357.
[439] T. 22 March 2005 pp. 71-72.
[440] Simba Notice of Appeal, I-C-17, referring to Trial Judgement, paras 120, 137, 163.
[441] Simba Notice of Appeal, I-D-7.
[442] Simba Notice of Appeal, II-C-6, Simba Appeal Brief, para. 368, referring to Simba Appeal Brief, paras 245-252 and Trial Judgement, para. 120.
[443] Simba Appeal Brief, paras 246-248.

222. The Appellant submits that Witness NGJ2, an administrative official in the Gikongoro prefecture with the Murambi Commune under his authority, also testified that the Appellant did not participate in the massacre at Murambi.[444]

223. The Appellant submits that the Trial Chamber "systematically" dismissed the testimonies of these witnesses with regard to his alleged presence at Murambi and Kaduha during the massacres on the ground that their information is second-hand and of questionable probative value, and preferred to rely on the "suspect testimonies of witnesses imprisoned for perpetrating genocide".[445]

224. The Prosecution responds that the Appellant's submission merely suggests an alternative assessment of the respective testimonies of Witnesses SBL1 and NGJ2, more favourable to him. The Prosecution submits that nothing has been shown on appeal to indicate that the Trial Chamber erred in the assessment of these testimonies.[446]

225. The Appeals Chamber is not convinced that the Appellant has demonstrated that the Trial Chamber erred in the exercise of its discretion by failing to attach weight to the assertions of Witnesses NGJ2 and SBL1 that the Appellant was not present at Murambi Technical School and Kaduha Parish during the massacres which took place there on 21 April 1994. The Trial Chamber considered that the evidence of these two witnesses regarding the attacks against Murambi Technical School was "based principally on their assertions that they did not hear about [the Appellant's] involvement".[447] It subsequently found that this evidence was "not a sufficient basis of knowledge for [it] to make any findings concerning [the Appellant's] activities at the relevant time".[448] The Appellant has not demonstrated that the Trial Chamber abused its discretion in making this finding. Similarly, Witness SBL1 gave evidence that he was not present during the attack at Kaduha Parish, limiting his testimony to the fact that he had not heard that the Appellant was involved in the massacre. This being the case, it was within the discretion of the Trial Chamber to conclude that the information given by the witness was second-hand and of questionable probative value.[449]

226. The fact that Witnesses SBL1 and NGJ2 were informed local administrative authorities[450] does not by itself suffice to demonstrate that the Trial Chamber erred in not relying on their second-hand testimonies. Furthermore, and contrary to the Appellant's assertion, the Trial Chamber did not

[444] Simba Appeal Brief, para. 249.
[445] Simba Appeal Brief, para. 250. *See also* Prosecution Response, paras 97-98.
[446] Prosecution Response, paras 97-98.
[447] Trial Judgement, para. 120.
[448] Trial Judgement, paras 104-105, 120.
[449] Trial Judgement, paras 163, 176.
[450] Simba Appeal Brief, paras 245-249.

"systematically" dismiss Witnesses SBL1 and NGJ2 testimonies. In fact, it took these testimonies into account and gave them some credit with respect to other allegations in the Indictment which were dismissed.[451]

227. The Appeals Chamber also dismisses the Appellant's submission that the Trial Chamber contradicted itself in disregarding the testimonies of Witnesses SBL1 and NGJ2 while noting their implication in the attacks at Murambi Technical School and Kaduha Parish. The Trial Chamber's observation that the witnesses were both implicated in attacks[452] in the area is not incompatible with a finding that their testimonies are second-hand regarding the Murambi Technical School and Kaduha Parish massacres, since according to their own testimonies they were not present at these attacks.[453] Accordingly, no legal error has been demonstrated.

228. With regard to the Appellant's related submission that the Trial Chamber erred in fact in finding that Witnesses SBL1 and NGJ2 were implicated in the attacks, the Appeals Chamber first notes that the Trial Chamber did not actually find that they participated in the attacks against Murambi Technical School and Kaduha Parish. It noted only that it had taken into account their implication in the attacks,[454] while assessing the evidence of these witnesses. In any case, both witnesses gave second-hand evidence and neither witness's testimony was of relevance to the issue of the Appellant's participation in the attacks.

229. These sub-grounds of appeal are accordingly dismissed.

4. Alleged Differential Treatment of Prosecution and Defence Witnesses

230. The Appellant submits that the Trial Chamber showed bias in applying different approaches to Prosecution and Defence evidence. He submits that while the Trial Chamber accepted Prosecution witnesses' testimonies even when they "were not credible and on which moreover it expressed serious doubts, the Chamber strove to get the said testimonies to corroborate each other". He contends that the Trial Chamber failed to adopt the same approach regarding Defence witnesses, particularly the alibi witnesses, rejecting Defence witness testimony even when corroborated, while

[451] *See* Trial Judgement, paras 208, 210, with respect to the distribution of weapons at Rukondo Commune; Trial Judgement, paras 256, 258, with respect to the distribution of weapons at Kinyamakara commune office.
[452] *See* Trial Judgement, paras 120, 276 (the latter in relation to the meeting at CIPEP on 26 April 1994).
[453] Witness SBL1 stated that he was not at Kaduha from April to July 1994 and that at the time of the attack against Murambi Technical School, he was at home in Gikongoro, sleeping (T. 23 February 2005 pp. 35-36). Witness NGJ2 stated that when the attack against refugees at Murambi started he heard gunshots from a distance and that he was not a witness to the attack at Murambi (T. 21 March 2005 pp. 15-16). Witness NGJ2 stated that he did not know what happened in Kaduha (T. 21 March 2005 p. 62).
[454] *See* Trial Judgement, paras 120, 276 (the latter in relation to the meeting at CIPEP on 26 April 1994).

"using such testimonies in a biased manner when they corroborated Prosecution witnesses' testimonies".[455]

231. Overall, the Appellant submits that the Trial Chamber was more lenient towards Prosecution witnesses than towards Defence alibi witnesses.[456] Specifically, the Appellant submits that the Trial Chamber treated leniently Prosecution Witnesses KEI, KSY, KSK, KXX, YC and YH while Defence alibi witnesses, such as Witness FKP2[457] and the Appellant himself, did not benefit from the same treatment.[458]

232. In response, the Prosecution submits that the Trial Chamber used the same approach in assessing Defence and Prosecution evidence. It stresses that the Trial Chamber rejected certain Prosecution allegations as unproven because it found a number of Prosecution witnesses not to be reliable and credible, while at the same time it accepted the alibi evidence for the period from 6-13 April 1994. It asserts that, in essence, the Appellant disputes the Trial Chamber's findings which are unfavourable to him without demonstrating that they were so unreasonable that they warrant appellate intervention.[459]

233. Under the present sub-grounds of appeal the Appellant alleges Trial Chamber errors relating to the assessment of both Prosecution and Defence evidence. The Appeals Chamber has already addressed these submissions in previous sections of the Appeal Judgement, and has dismissed all but one.[460] While it found that the Trial Chamber erred in relying on Witness KXX with regard to the time of the Appellant's arrival at Kaduha Parish on 21 April 1994,[461] this error does not demonstrate any bias in the Trial Chamber's assessment of the evidence. Accordingly, the Appeals Chamber does not need to revisit the challenges here. The Appellant's submissions with respect to the biased or differential treatment of Prosecution and Defence evidence are dismissed.

[455] Simba Notice of Appeal, I-C-10 and I-C-11.
[456] Simba Notice of Appeal, I-C-10 to I-C-12.
[457] Simba Appeal Brief, paras 237-238.
[458] Simba Appeal Brief, paras 174-244.
[459] Prosecution Response, paras 91-96.
[460] *See above* Sections D-1 to D-3 and E-1 to E-3.
[461] *See above* Section D-3(d), para. 143.

F. Alleged Distortion of Facts

234. The Appellant makes a number of submissions to the effect that the Trial Chamber erred in fact by distorting the facts before it.[462] The Appeals Chamber notes that most of these submissions have been dealt with elsewhere in this Judgement.

1. The Appellant's Possession of a Cache of Weapons

235. The Appellant alleges that the Trial Chamber erred in finding that he had a cache of weapons, and that this finding is unsupported in the evidence.[463] The Prosecution responds that the Appellant's allegations of error are unmeritorious and should be dismissed.[464]

236. The Appeals Chamber notes that the Trial Chamber found at paragraph 404 of the Trial Judgement that the Appellant "had a cache of weapons, including firearms and grenades for distribution, which certainly would have come from civilian or military authorities". No conviction is based on the finding that the Appellant had a cache of weapons. Rather, the legal findings related to the Appellant's participation in a JCE encompassing the massacres at Murambi Technical School and Kaduha Parish are grounded on his acts and deeds at these places during the attacks, and in particular, that he distributed weapons at Kaduha Parish. This sub-ground is thus without merit and is accordingly dismissed.

2. The Appellant's Stature

237. The Appellant alleges that the Trial Chamber distorted the facts relating to his stature in Rwandan society and his relationship with governmental and military authorities.[465] In particular, he alleges that the Trial Chamber erred by finding that he was a national hero simply because he fought the *Inkotanyi* in the sixties and had been part of the "Comrades of the fifth July 1973" who led the military *coup d'état* in 1973, whereas he had only fought the *Inyenzi* and those who had participated in the *coup d'état* were considered traitors.[466] To this end, the Appellant points to

[462] Simba Notice of Appeal, II-C-1 to II-C-14. Under the present section, the Appeals Chamber will only consider the allegations of errors under sub-grounds II-C-1 and II-C-14. Sub-grounds II-C-2 to II-C-13 are considered elsewhere in the Appeal Judgement.
[463] Simba Notice of Appeal, II-C-14; Simba Appeal Brief, para. 51, 381, referring to Trial Judgement, para. 404; AT. 22 May 2007 pp. 44-45. In his Appeal Brief the Appellant goes beyond his original submission concerning this sub-ground and alleges that the Trial Chamber erred in basing its finding of the Appellant's guilt in the distribution of weapons solely on the finding of his possession of such weapons (Simba Appeal Brief, para. 51). The Appeals Chamber notes that the Appellant's submission is based on a misreading of the Trial Judgement as the Trial Chamber made an independent finding on the Appellant's distribution of weapons, including by relying on Witness KSY's testimony [specifically related to the Appellant's distribution of weapons] (*see* Trial Judgement, paras 113, 117-118, *see also* paras 175, 178). Therefore, the Appellant's submission is clearly unfounded and is readily dismissed.
[464] Prosecution Response, paras 42-45.
[465] Simba Notice of Appeal, II-C-1; Simba Appeal Brief, paras 360-362; Simba Reply, paras 132-133.
[466] Simba Notice of Appeal, II-C-1; Simba Appeal Brief, paras 360-362.

setbacks he suffered in his political and military career.[467] The Appellant further submits that the Trial Chamber distorted the facts by considering the Appellant's appointment to the civil defence as a sign of his special prominence, whereas it had been clearly demonstrated at trial that he was not the only retired officer contacted to become a civil defence advisor.[468] The Appellant requests that the Appeals Chamber exclude these "distortions" as well as the related legal findings.[469]

238. The Prosecution responds that the Trial Chamber made reasonable conclusions with respect to the Appellant's stature and his relationship with governmental and military authorities, based on evidence adduced at trial.[470]

239. The Appeals Chamber notes that in finding that the Appellant was a prominent former political and military figure in Rwandan society, the Trial Chamber provided a detailed analysis and took into consideration numerous factors.[471]

240. It is not clear how the Appellant's first contention, that the Trial Chamber distorted the facts when it found that he fought the *Inkotanyi* in the sixties whereas he had only fought the *Inyenzi*, advances the Appellant's case. Regardless, it is evidently based on a misrepresentation of the Trial Chamber's finding and is therefore readily dismissed. At no point did the Trial Chamber make the finding regarding the *Inkotanyi* suggested by the Appellant. Instead, the Trial Chamber found that "between 1963 and 1967, he led several units fighting against the *Inyenzi* and in 1964 fought alongside President Mobutu Sese Seko of Zaire."[472] By the same token, the Appeals Chamber dismisses the Appellant's related contention that those who had participated in the *coup d'état* were considered traitors. This does not find any support in the material referred to by the Appellant. The

[467] Simba Appeal Brief, para. 362.
[468] Simba Notice of Appeal, II-C-4; Simba Appeal Brief, para. 363.
[469] Simba Appeal Brief, para. 364.
[470] Prosecution Response, para. 186.
[471] In particular, the Trial Chamber took into account:
- the Appellant's military career (namely the fact that he had led several units in the fights against the *Inyenzi* between 1963 and 1967 and had fought alongside President Mobutu Sese Seko of Zaire; his work at Camp Kanombe between 1967 and 1973 where he had earned the military ranks of commander and major; the fact that he had been a member of the "Comrades of the fifth of July", the group which led the military *coup d'état* in 1973; and his position of commander of Camp Kigali between 1980 and 1988) (Trial Judgement, paras 54-56);
- his positions within the national government after the 1973 *coup d'état* (Trial Judgement, para. 55);
- his position as a member of parliament on behalf of Gikongoro prefecture from 1989 to 1993 and as MRND party chairman for Gikongoro prefecture from 1991 to 1993 (Trial Judgement, para. 56);
- his "substantial wealth" (Trial Judgement, para. 59);
- his own testimony that "his military and political career gained him prominence" (Trial Judgement, para. 54).
The Trial Chamber found "that after his resignation [of his post within the MRND, in September 1993], Simba maintained connections with influential officials and continued to garner substantial deference due to his prior professional life". According to the Appellant's testimony, after the 6 April 1994, "he used his connections and stature, for example, to acquire military escorts throughout Kigali, contact military and government authorities to arrange for the evacuation of Witness SML2, and move through roadblocks" (Trial Judgement, paras 57, 58). Finally, the Trial Chamber considered his appointment as Gikongoro's Civil Defense Advisor in May 1994 as one of the factors which underscored "his continued prominence with the Rwandan state at that time" (Trial Judgement, para. 60).
[472] Trial Judgement, para. 54.

Appeals Chamber further observes that the Trial Chamber's consideration of the Appellant's appointment as Gikongoro's Civil Defence Advisor in May 1994 as one of the factors which underscored "his continued prominence with the Rwandan state at that time" is not rendered unreasonable by the contention that the Appellant was not the only retired officer who was contacted to become a civil defence advisor.

241. Finally, the Appeals Chamber understands the Appellant to be arguing that the fact that he suffered setbacks in his political and military career contradicts the Trial Chamber's finding on his prominent position in Rwandan society,[473] a submission with which the Appeals Chamber cannot agree. The Appeals Chamber notes that the Trial Chamber accepted that after the 1973 *coup d'état* the Appellant "began to experience professional and personal difficulties", and acknowledged "the possibility that Simba throughout his life and career suffered some professional setbacks".[474] The Trial Chamber, however, concluded that "the evidence on the record in no way reflects that he was ever simply an ordinary Rwandan citizen".[475] It found that "while he might not have achieved the apex of his own career aspirations, he nonetheless held prominent posts in the military, government, and his political party for most of his professional life, which gained him national recognition".[476] In light of the overall evidence before the Trial Chamber, the Appellant has not demonstrated that no reasonable trier of fact could have reached the same finding on this point.

242. Accordingly, these sub-grounds of appeal are dismissed.

G. Alleged Errors in Convicting the Appellant pursuant to JCE for Crimes Committed at Murambi Technical School and Kaduha Parish

243. The Appellant contends that the Trial Chamber erred in convicting him for genocide and extermination as a crime against humanity under the mode of liability of JCE.[477] The Appellant raises a number of arguments in this regard concerning notice, motive and genocide,[478] which are addressed elsewhere in the Trial Judgement and will not be considered here.[479]

[473] Under sub-ground of appeal I-D-4 the Appellant asserts that the Trial Chamber's assessment of the Appellant's motive for participating in the genocide contradicted its findings that the Appellant had suffered military and political setbacks as well as social marginalisation. The Appeals Chamber will address this sub-ground below under Section H-3.
[474] Trial Judgement, para. 57.
[475] Trial Judgement, para. 57.
[476] Trial Judgement, para. 57.
[477] Simba Notice of Appeal, I-F-1 to I-F-11; Simba Appeal Brief, paras 273-314.
[478] *See* Simba Notice of Appeal, I-F-1 to I-F-5, I-F-8, I-F-11; Simba Appeal Brief, paras 273-283.
[479] *See above* Section C-1 and C-2 and *see below* Section H.

1. Alleged Error in Finding the Appellant Responsible under the Third Category of JCE

244. The Appellant submits that the Trial Chamber erred in finding that the Prosecution had proven beyond reasonable doubt the existence of a JCE and his participation therein.[480] In this respect, he submits that the Trial Chamber erred in finding him responsible under the third category of JCE, when the Prosecution relied on the first category and "various indications in the [Trial] Judgement suggest that what is involved is the first form".[481]

245. In response, the Prosecution submits that the Trial Chamber held the Appellant responsible for crimes pursuant to the first category of JCE, not the third category.[482]

246. The Appeals Chamber is satisfied that, contrary to the Appellant's assertions, the Trial Chamber held the Appellant responsible for genocide and extermination as a crime against humanity pursuant to the first category of JCE, rather than the third category. In its legal findings, the Trial Chamber noted that the Prosecution was primarily pursuing a case based on the first category.[483] It subsequently found the Appellant responsible as a participant in the JCE, for which he "shared the common purpose of killing Tutsi at Murambi Technical School and Kaduha Parish".[484] The Appellant has not indicated how this implies a finding of responsibility pursuant to the third category of JCE. While it is true, as submitted by the Prosecution,[485] that the Trial Chamber at least once used language that is more appropriate to an analysis of the *mens rea* for the third category of JCE, this was with respect to the alleged acts at Cyanika Parish for which the Appellant was not found responsible, and therefore the matter is not contentious on appeal. As all convictions were pursuant to the first category of JCE, the Appeals Chamber will not address the Appellant's further challenges concerning the third category.

2. Alleged Error Relating to Planning

247. The Appellant submits that a conviction for JCE is untenable in law "since the Prosecution failed to adduce evidence of pre-conceived JCE"[486] and the Trial Chamber recognised that the Prosecution did not prove beyond a reasonable doubt the allegations in the Indictment as to prior planning.[487] He specifically challenges as "mere speculation" the finding that it was possible that the local authorities formulated their plan of attack and then requested the Appellant to assist in

[480] Simba Notice of Appeal, I-F-6.
[481] Simba Appeal Brief, paras 290, 292, referring to Trial Judgement, para. 386.
[482] Prosecution Response, para. 140.
[483] Trial Judgement, para. 386.
[484] Trial Judgement, para. 406.
[485] Prosecution Response Brief, para. 149.
[486] Simba Appeal Brief, para. 284.
[487] Simba Notice of Appeal, I-F-7.

implementing it.[488] The Appellant submits that the Trial Chamber erred in assuming that his alleged presence indicated that he would have joined in either the plan of the attackers or that of the government officials.[489]

248. In response, the Prosecution submits that the Appellant's arguments do not demonstrate any error as it is not necessary prior to a conviction as a co-perpetrator in a JCE to establish the existence of an agreement or plan.[490]

249. In this respect, the Trial Chamber held:

> 405. The Prosecution argues that Simba participated in the planning of the three massacres on 21 April. There is no direct evidence of this. Moreover, the Chamber is not satisfied that this is the only reasonable inference available from the evidence. It is also possible that local authorities formulated a plan of attack and then requested Simba to assist in implementing it.[491]
>
> (…)
>
> 435. At the time of the events, Simba had no formal position within the government, military, or political structures of the government. He assumed the post of civil defence adviser on 18 May 1994. However, he is not charged with any criminal conduct based on this position. In addition, the Chamber is not convinced beyond reasonable doubt that Simba was the architect of the massacres at Murambi Technical School and Kaduha Parish or that he played a role in their planning. In addition, the manner in which Simba participated in the joint criminal enterprise did not evidence any particular zeal or sadism on his part. In particular, he did not physically participate in killings and did not remain at the sites of the massacres for more than a brief period.[492]

250. The Appeals Chamber does not find any error on the part of the Trial Chamber. It is well-established that in a JCE, it is not necessary for a participant to have participated in its planning. All that is required is the participation of an accused in the common design involving the perpetration of one of the crimes provided for in the Statute.[493] Further, the Appellant has not demonstrated that the Trial Chamber erred in stating that it was possible that the local authorities formulated their plan of attack and then requested the Appellant's assistance in implementing it. Read in context, the Trial Chamber was merely demonstrating that there was more than one reasonable inference possible from the available evidence. The finding set out above demonstrates that this inference was not held against the Appellant. Accordingly, this sub-ground of appeal is dismissed.

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[488] Simba Notice of Appeal, I-D-10 and I-F-9.
[489] Simba Appeal Brief, para. 312.
[490] Prosecution Response, para. 155.
[491] Trial Judgement, para. 405.
[492] Trial Judgement, para. 435 (internal footnotes omitted).
[493] *Kayshema & Ruzindana* Appeal Judgement, para. 193; *Tadić* Appeal Judgement, para. 227. *See above* Chapter II, Section C-1(b), fn. 161.

3. Alleged Error in Finding the Appellant Responsible under the First Category of JCE

251. The Appellant submits that his responsibility based on the first category of JCE was not established during trial,[494] and that the Trial Chamber erred in finding that he "shared the common purpose of killing Tutsi" in Murambi and Kaduha merely as a result of his presence and conduct there, and that, in any event the Prosecution did not prove his presence there beyond reasonable doubt.[495] He argues that the Trial Chamber erred in finding that the attackers would have viewed his alleged presence at Kaduha Parish and the remarks he made as a sign that he and the government approved of their conduct.[496]

252. The Prosecution submits that the Trial Chamber did not err in finding that the Appellant bore first category JCE liability for the crimes encompassed by the common purpose. The Prosecution argues, that the Trial Chamber's legal analysis of the requirements for establishing the *actus reus* for JCE and the application of the law to the factual findings do not show any error prejudicial to the Appellant. Regarding the *mens rea*, the Prosecution submits that the Trial Chamber did not err in law in finding that the Appellant, as a participant in the first category of JCE, shared the required specific intent for the crime of genocide.[497]

253. The Appeals Chamber finds the Appellant's contention to be without merit. The Trial Chamber took into account various factors in finding generally that a common criminal purpose existed between a plurality of persons to kill Tutsi at Murambi Technical School, Cyanika Parish and Kaduha Parish.[498] With respect to the Appellant's personal participation in the JCE, which was found to be limited to the attacks at Murambi Technical School and Kaduha Parish, the Trial Chamber found both that he was present at the two massacre sites and that his acts of assistance and encouragement provided substantial assistance to the killings which followed.[499] At Murambi Technical School the Appellant distributed traditional weapons to the attackers and addressed the assailants who then proceeded to attack the refugees with "renewed ardour".[500] At Kaduha Parish, the Appellant distributed guns and grenades, which were a decisive factor in the success of the assaults, and urged the attackers to "get rid of the filth".[501] The Trial Chamber also found that the mere presence of the Appellant at both places would have been seen by the assailants as approval of

[494] Simba Appeal Brief, para. 301.
[495] Simba Notice of Appeal, I-F-10; Simba Appeal Brief, paras 299, 312-313.
[496] Simba Notice of Appeal, I-F-8.
[497] Prosecution Response, paras 143-146.
[498] Trial Judgement, para. 402.
[499] Trial Judgement, paras 403, 433.
[500] Trial Judgement, paras 92, 118.
[501] Trial Judgement, paras 403, 406.

their conduct.[502] On this basis, the Trial Chamber found that the Appellant shared the intent to carry out the common purpose of killing Tutsi at Murambi Technical School and Kaduha Parish.

254. The Appellant fails to demonstrate that the Trial Chamber committed any legal error in reaching its conclusion. In addition, the Appeals Chamber has already rejected another challenge to the Trial Chamber's finding of responsibility, based on physical impossibility.[503]

255. These sub-grounds of appeal are accordingly dismissed.

H. Alleged Errors Relating to the Conviction for Genocide

256. The Appellant submits numerous arguments to the effect that the Trial Chamber erred in holding him responsible for genocide with respect to the events at Murambi Technical School and Kaduha Parish when the constitutive elements of the crime, both acts and intent, were not proven beyond reasonable doubt.[504] The Prosecution responds that the Trial Chamber applied the correct legal requirements of the crime of genocide to the facts before it.[505]

257. The Appeals Chamber observes that some of the arguments advanced under this ground of appeal challenge the Trial Chamber's factual findings as well as its findings related to notice.[506] The Appeals Chamber has already discussed these arguments in the respective sections of this Judgement.[507] To the extent that no additional arguments are presented under this ground of appeal, no further discussion is warranted.

1. Alleged Failure to Determine Whether the Killings at Murambi and Kaduha Could Be Legally Characterised as Genocide

258. The Appellant's primary submission is that the Trial Chamber erred by failing to determine whether the large-scale killings at Murambi and Kaduha could be legally characterised as genocide.[508] This contention is evidently unfounded and readily dismissed.[509] The Trial Chamber

[502] Trial Judgement, paras 398, 400, 403.
[503] *See above* Section D-4, paras 144-159.
[504] Simba Notice of Appeal, I-G; Simba Appeal Brief, paras 299, 313, 315-327; Simba Reply, para. 108.
[505] Prosecution Response, para. 151.
[506] These include the Appellant's assertions that the Trial Chamber erred in finding that the Appellant gave encouragement and provided arms (Simba Notice of Appeal, I-G-1; Simba Appeal Brief, para. 319), and that the Trial Chamber breached the Appellant's right to be informed of the charges against him when it dropped the allegation of prior coordination and instead relied on a "spontaneous" JCE (Simba Notice of Appeal, I-G-7; Simba Appeal Brief, para. 320).
[507] *See above* Sections C and D.
[508] Simba Appeal Brief, para. 316. The Appeals Chamber notes that the Appellant does not dispute that large-scale killings occurred at Murambi Technical School and Kaduha Parish (Simba Appeal Brief, para. 317).
[509] The Appeals Chamber also notes that the Appellant fails to raise this argument in his Notice of Appeal.

carefully made this determination[510] and the Appellant does not advance any argument to demonstrate that the Trial Chamber erred in its application of the law to the facts.

2. Alleged Error Relating to the Existence of a Plan or Policy as Element of the *Actus Reus* of Genocide

259. The Appellant argues that the Trial Chamber failed to require the Prosecution to prove the existence of a plan or policy as a fundamental element of the *actus reus* of this crime.[511] In this regard, the Appellant also emphasises that the Trial Chamber found that his involvement in planning the crime had not been established.[512] The Prosecution responds that the Trial Chamber correctly defined the applicable law and applied it to the facts before it.[513]

260. The Appeals Chamber recalls that according to the jurisprudence of this Tribunal as well as that of the ICTY the existence of an agreement or a plan is not an element required for a conviction for genocide.[514] The Appellant's contention on this point is therefore without merit.

3. Alleged Errors Relating to the Requisite *Mens Rea* of Genocide

261. The Appellant makes numerous submissions to the effect that the Trial Chamber erred in finding that he had the requisite specific intent for genocide.[515] The Prosecution responds that the Appellant's assertions are unsubstantiated and that the Trial Chamber did not commit any error.[516]

262. The Appellant submits that the Trial Chamber erred in finding, without any evidence, that he possessed specific intent to commit genocide at the moment of the events.[517] This contention is without merit. The Trial Chamber considered in detail the evidence before it prior to concluding that the Appellant acted with genocidal intent at the moment of the massacres. The relevant passage of the Trial Chamber's analysis reads as follows:

> Simba was physically present at two massacre sites. He provided traditional weapons, guns, and grenades to attackers poised to kill thousands of Tutsi. Simba was aware of the targeting of Tutsi throughout his country, and as a former military commander, he knew what would follow when he

[510] *See* Trial Judgement, paras 415-416.
[511] Simba Notice of Appeal, I-G-10; Simba Appeal Brief, para. 317.
[512] Simba Appeal Brief, para. 318, referring to Trial Judgement, para. 405.
[513] Prosecution Response, paras 152, 155.
[514] *Semanza* Appeal Judgement, para. 260; *Jelisić* Appeal Judgement, para. 48.
[515] Simba Notice of Appeal, I-G-2 to I-G-9; Simba Appeal Brief, paras 320-325. The Appeals Chamber notes that for a few of the Appellant's submissions, the Appellant brings no arguments in support; consequently the Appeals Chamber declines to consider them. Falling into this category is the Appellant's assertion that the Trial Chamber erred in finding that all of the participants in the JCE, including the Appellant, shared the intent to commit genocide by reason of the scale of the massacres and the context within which they were perpetrated (Simba Notice of Appeal, I-G-2).
[516] Prosecution Response, paras 153, 156.
[517] Simba Notice of Appeal, I-G-8 and I-G-9.

> urged armed assailants to "get rid of the filth". The only reasonable conclusion, even accepting his submissions as true, is that at that moment, he acted with genocidal intent.[518]

263. The Appellant next submits, without elaboration, that the Trial Chamber erred in finding that he had the requisite *mens rea* for genocide because it dismissed the allegations of *mens rea* set out in paragraphs 4 and 23 of the Indictment.[519] The Appeals Chamber understands the Appellant to effectively be arguing that, as a result, there was no notice given that could sustain a finding that he possessed the requisite specific intent.

264. The Appeals Chamber finds that the Trial Chamber did dismiss said allegations,[520] as argued by the Appellant. However, it observes that the Appellant has not advanced any argument to show how this dismissal would affect and invalidate the Trial Chamber's assessment of the Appellant's specific intent on the basis of the evidence before it. The Appeals Chamber has previously held that genocidal intent can be proven through inference from the facts and circumstances of a case.[521] Correspondingly, the Appeals Chamber has held that it is sufficient if the evidentiary facts from which the state of mind is to be inferred are pleaded.[522] It is apparent from the above-cited portion of the Trial Judgement that the Trial Chamber inferred the requisite specific intent of the Appellant and the other participants in the JCE from several facts and circumstances that it found established beyond reasonable doubt.

265. The Appellant has not challenged the Trial Chamber's findings from which his genocidal intent is inferred, nor has he challenged the pleading of the material facts forming the basis of these findings. Consequently, the Appeals Chamber can identify no discernible error in the Trial Chamber's decision on that particular point.

266. The Appellant further contests the Trial Chamber's finding that he possessed the requisite *mens rea* for genocide arguing that the Trial Chamber inferred his intent from his alleged presence at the crime sites alongside the assailants whose intent was to kill the Tutsi under a *"spontaneous"*

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[518] Trial Judgement, para. 418.
[519] Simba Notice of Appeal, I-G-4; Simba Appeal Brief, para. 324. Paragraph 4 of the Indictment alleges that in January 1993, Simba directed a rally against the Arusha Accords in the town of Gikongoro. Paragraph 23 of the Indictment lists "various rallies and meetings in Gikongoro and Butare prefectures" where the Appellant allegedly "publicly expressed his intent to destroy the Tutsis and incited others to do likewise" "before and during the events of April to July 1994".
[520] The Trial Chamber expressly declined to make findings with respect to paragraphs 4 and 23(c) and (f) of the Indictment on the basis of the Prosecution's concession that no evidence had been brought in support of these allegations (Trial Judgement, para. 13). It further found paragraph 23(a) of the Indictment defective and noted that the Prosecution did not seek any conviction on that basis (Trial Judgement, fn. 26). Finally, the Trial Chamber found that the Prosecution did not prove the allegations contained in paragraphs 23(b) (Trial Judgement, para. 225) and 23(d) (Trial Judgement, para. 85). The Appeals Chamber notes that while the Trial Chamber considered the allegation in paragraph 23(g) of the Indictment partly established (it found that "Simba addressed a crowd in Ntyazo commune and delivered an inflammatory speech against Tutsi"), the Trial Chamber did not explicitly rely on this finding in its assessment of the Appellant's intent (Trial Judgement, para. 295).
[521] *Gacumbitsi* Appeal Judgement, para. 40; *Rutaganda* Appeal Judgement, para. 525.
[522] *Blaskić* Appeal Judgement, para. 219 (internal footnotes omitted).

JCE.[523] In his view, for the crime of genocide to occur, the intent to commit genocide must be formed *prior* to the commission of genocidal acts.[524] The Appeals Chamber finds no merit in this submission. The inquiry is not whether the specific intent was formed prior to the commission of the acts, but whether at the moment of commission the perpetrators possessed the necessary intent. The Trial Chamber correctly considered whether the Appellant and the physical perpetrators possessed genocidal intent at the time of the massacres.[525] The Appellant's argument on this point is therefore without merit.

267. The Appellant argues that the Trial Chamber erred by ignoring credible evidence of Defence Witness Monique Mujawamariya and the Defence Expert Report of Pascal Ndengejeho that demonstrated that he could not have had the intent to commit genocide.[526] The Appeals Chamber cannot find any merit in the Appellant's argument. It is well established that a Trial Chamber need not articulate in its judgement every factor it considers in reaching a particular finding.[527] In reaching the conclusion that the "genocidal intent was shared by all participants in the JCE, including [the Appellant]",[528] the Trial Chamber explicitly noted that it had "considered the arguments of the Defence that Simba could not have committed genocide, given his close association with Tutsi and his tolerant views, which it suggests resulted in his marginalization and attacks against his family in Gikongoro".[529] A closer review of the Defence arguments in question reveals that these concerned, *inter alia*, the testimony of Monique Mujawamariya as well as the Defence Expert Report of Pascal Ndengejeho.[530]

268. Finally, the Appellant submits that the Trial Chamber erred in affirming, in its attempt to establish his motive, that it could not be excluded that he participated in genocide out of a misguided sense of patriotism or to ensure the protection of himself and those in his care by basing its convictions on these "assumptions".[531] The Appellant contends that the Trial Chamber erred by relying on the *Kvočka* Appeal Judgement in support of this finding.[532] Further, he submits that his alleged presence at the crime scenes was in itself an insufficient motive to commit genocide.[533]

[523] Simba Notice of Appeal, I-G-7; Simba Appeal Brief, para. 320.
[524] Simba Appeal Brief, paras 299, 320.
[525] Trial Judgement, paras 416, 418.
[526] Simba Notice of Appeal, I-G-5; Simba Appeal Brief, para. 324.
[527] *See above* fn. 360. *See also Niyitegeka* Appeal Judgement, para. 115; *Musema* Appeal Judgement, para. 18; *Delalić et al.* Appeal Judgement, para. 48..
[528] Trial Judgement, para. 416.
[529] Trial Judgement, para. 417.
[530] Trial Judgement, fn. 414, referring to Defence Final Trial Brief, paras 1045-1097.
[531] Simba Notice of Appeal, I-G-3; Simba Appeal Brief, paras 321-323, 325.
[532] Simba Notice of Appeal, I-G-6; Simba Appeal Brief, paras 322-323.
[533] Simba Appeal Brief, para. 313.

269. The Appeals Chamber notes that the Appellant's contention clearly rests on a misreading of the Trial Chamber's finding. The Trial Chamber did not find motive to be an element of the crime of genocide. To the contrary, it found, in accordance with established jurisprudence,[534] that a possible personal motive for participating in the JCE did not preclude a finding that he possessed the intent to commit genocide.[535] The Appellant's argument on this issue is therefore evidently unfounded and dismissed. Accordingly, the Appeals Chamber need not address the Appellant's remaining arguments relating to motive.[536]

270. For the foregoing reasons, the Appeals Chamber dismisses the present ground of appeal in its entirety.

I. Alleged Errors Relating to the Conviction for Extermination as a Crime Against Humanity

271. The Appeals Chamber observes that most of the arguments advanced under this ground of appeal concern the Trial Chamber's legal findings on criminal responsibility and genocide as well as its factual findings.[537] These include the Appellant's contentions that the Trial Chamber erred in attributing to him responsibility for his participation in a JCE aimed at killing Tutsi in Kaduha and Murambi, when there was no proof of a JCE or of the Appellant's participation therein, and in presuming his participation based on his presence at the crime sites when such presence was physically impossible.[538] The Appellant further points to his submissions regarding JCE and genocide, which, in his view, invalidate the charges of both genocide and extermination as a crime against humanity.[539] The Appeals Chamber has addressed these arguments in the respective sections elsewhere in this Judgement.[540] No additional arguments are presented in relation to the alleged ground and accordingly no further discussion is warranted.

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[534] *Kvočka* Appeal Judgement, para. 106; *Niyitegeka* Appeal Judgement, para. 53; *Jelisić* Appeal Judgement, para. 49; *Kayishema and Ruzindana* Appeal Judgement, para. 161; *Tadić* Appeal Judgement, para. 269.
[535] Trial Judgement, para. 417.
[536] Under sub-grounds of appeal I-D-4 and I-D-5, the Appellant submits that the Trial Chamber erred in law by making contradictory findings in relation to his motive. He alleges that the Trial Chamber contradicted itself when it found on the one hand that the Appellant had suffered military and political setbacks and social marginalisation and that he was tolerant and entertained close relationships with Tutsi, while on the other hand it supposed that he participated in the genocide out of a sense of patriotism or allegiance (Simba Notice of Appeal, I-D-4 and I-D-5; Simba Appeal Brief, paras 259-260). The Appellant also alleges that the Trial Chamber distorted the facts in making the same supposition (Simba Notice of Appeal, II-C-13; Simba Appeal Brief, para. 380, referring to Simba Appeal Brief, paras 53-55). Under sub-ground of appeal I-E-4, the Appellant submits, *inter alia*, that the Trial Chamber in its assessment of the Appellant's motive failed to consider the Report of Defence Expert Witness Dr. Pascal Ndengejeho (Simba Notice of Appeal, I-E-4; Simba Appeal Brief, paras 271-272). To the extent that sub-grounds of appeal I-D-4 and I-D-5 relate to the Trial Chamber's findings on mitigating circumstances, they will be considered below under Section K.
[537] Simba Notice of Appeal, I-H; Simba Appeal Brief, paras 328-332; Simba Reply, para. 109.
[538] Simba Notice of Appeal, I-H-2; Simba Appeal Brief, para. 329.
[539] Simba Appeal Brief, para. 331, pointing to the Appellant's submissions under Grounds of Appeal, I-F and I-G.
[540] *See above* Section D-4, G and H.

272. Moreover, the Appeals Chamber need not address the Appellant's argument that the Trial Chamber erred by holding him responsible for meetings of other local officials, in which, the Trial Chamber itself confirmed, he did not participate,[541] on the basis that no conviction was entered on that ground.

273. The remaining arguments under this ground of appeal pertain to cumulative charges and cumulative convictions for genocide and extermination as a crime against humanity.[542] These submissions will be dealt with in a separate section below.[543]

J. Alleged Errors Relating to Cumulative Charges and Convictions

274. The Appellant submits that the Trial Chamber erred in law in finding that cumulative charges for extermination as a crime against humanity and genocide could be brought and in entering convictions for both crimes, based on the same underlying conduct.[544] The Prosecution responds that it is settled law that genocide and extermination are composed of different legal elements, and that therefore convictions for both crimes are properly cumulative.[545]

275. Under Count 1 of the Indictment and pursuant to Articles 2(3)(a), 2(2)(a) and 2(2)(b) of the Statute, the Appellant was charged with genocide for killing or causing serious bodily harm to members of the Tutsi population, *inter alia* for his participation in the massacres at Murambi Technical School and Kaduha Parish.[546] In addition, the Appellant was charged under Count 3 of the Indictment, *inter alia* on the basis of these same facts, with extermination as a crime against humanity pursuant to Article 3(b) of the Statute.[547] On the ground that the Appellant was criminally responsible for his participation in a JCE to kill Tutsi civilians at Murambi Technical School and Kaduha Parish the Trial Chamber found him guilty of both genocide (Count 1)[548] and extermination as a crime against humanity (Count 3).[549]

276. The Appeals Chamber recalls that it is established jurisprudence that cumulative charging is allowed on the basis that "prior to the presentation of all of the evidence, it is not possible to

[541] Simba Notice of Appeal, I-H-3; Simba Appeal Brief, para. 332.
[542] Simba Notice of Appeal, I-H-1 and IV-1; Simba Appeal Brief, para. 330.
[543] *See below* Section J.
[544] Simba Notice of Appeal, I-H-1 and IV-1; Simba Appeal Brief, para. 330.
[545] Prosecution Response, para. 160.
[546] Indictment Count 1 and Concise Statement of Facts for Counts 1 and 2 (Indictment, paras 3-58).
[547] Indictment Count 3 and Concise Statement of Facts for Count 3 (Indictment, paras 59-65, incorporating by reference paragraphs 1 through 58 of the Indictment).
[548] Trial Judgement, paras 411, 419, 427. Having noted at paragraph 414 of the Trial Judgement that the Prosecution, in its Final Trial Brief, only pointed to evidence of killing, the Trial Chamber did not consider acts enumerated in Article 2(2)(b) of the Statute.
[549] Trial Judgement, paras 420, 426, 427.

determine to a certainty which of the charges brought against an accused will be proven".[550] Under this reasoning, cumulative charging on the basis of the same set of facts is permissible.

277. Furthermore, it is well established that cumulative convictions entered under different statutory provisions but based on the same conduct are permissible if each statutory provision involved has a materially distinct constitutive element not contained in the other.[551] An element is materially distinct from another if it requires proof of a fact not required by the other.[552] Applying this principle, the Appeals Chamber has previously held that

> the crime of genocide under Article 2 of the Statute and the crime of extermination under Article 3 of the Statute each contained a materially distinct element not required by the other. The materially distinct element of genocide is the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group. The materially distinct element of extermination, as a crime against humanity, is the requirement that the crime was committed as part of a widespread or systematic attack against a civilian population.[553]

Accordingly, convictions for genocide and extermination as a crime against humanity, based on the same facts are, as a matter of law, permissible.[554] The Appellant's argument on this point is therefore without merit.

278. For the foregoing reasons, this ground of appeal is dismissed.

K. Alleged Errors Relating to the Sentence

279. The Appellant contends that the Trial Chamber erred in sentencing him to 25 years' imprisonment and raises a number of arguments in support of this claim.[555] The Prosecution opposes all of the Appellant's arguments.[556] The Appeals Chamber will consider the Appellant's arguments in turn.

280. The Appeals Chamber has already considered and dismissed the Appellant's claims that the Trial Chamber erred in convicting him for genocide and extermination as a crime against humanity on the basis of the same set of facts.[557] In his Appeal Brief,[558] the Appellant merely submits that the same alleged error on the conviction occasioned an additional error on the sentence and provides no

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[550] *Naletilić and Martinović* Appeal Judgement, para. 103, quoting *Kupreskić et al.* Appeal Judgement, paras 385-386.
[551] *Ntagerura et al.* Appeal Judgement, para. 425; *Ntakirutimana* Appeal Judgement, para. 542.
[552] *Ntagerura et al.* Appeal Judgement, para. 425; *Ntakirutimana* Appeal Judgement, para. 542.
[553] *Ntakirutimana* Appeal Judgement, para. 542, referring to *Musema* Appeal Judgement, para. 366.
[554] *Ntakirutimana* Appeal Judgement, para. 542, referring to *Musema* Appeal Judgement, para. 366. The Appeals Chamber also notes that the Trial Chamber explicitly referred to the law applicable to cumulative convictions. It noted that "[a] conviction for genocide or complicity in genocide is not impermissibly cumulative with the convictions for crimes against humanity" (Trial Judgement, fn. 424, quoting *Semanza* Appeal Judgement, para. 318).
[555] Simba Notice of Appeal, IV-1 to IV-6; Simba Appeal Brief, paras 416-435; AT. 22 May 2007 pp. 22-23.
[556] Prosecution Response, paras 226-235.
[557] *See above* Section J.

further elaboration in support. As the basis for this alleged sentencing error has not been demonstrated, this sub-ground is dismissed without further consideration.

281. The Appellant contends that the Trial Chamber erred in the exercise of its discretion in not according greater weight to mitigating circumstances in determining the sentence.[559] The Prosecution responds that this claim is unsupported and that, as the Appellant acknowledges,[560] the Trial Chamber accepted some mitigating circumstances.[561] The Appeals Chamber finds that the Appellant merely presents factual assertions[562] without showing how the mitigating circumstances were undervalued by the Trial Chamber. Therefore, the Appellant has not demonstrated that the Trial Chamber committed a discernible error in its assessment of the individual mitigating circumstances. This sub-ground of appeal is accordingly dismissed.

282. The Appellant's contention that the Trial Chamber erroneously failed to consider, in assessing mitigating circumstances, the fact that the Appellant had family relationships with Tutsi, some of whom he saved, and the tolerance he always showed in his relations with them,[563] is readily dismissed. Contrary to the Appellant's allegation, the Trial Chamber did consider in mitigation the fact that he provided selective assistance to members of his family[564] and acknowledged the evidence showing that the Appellant had a close relationship and worked harmoniously with Tutsi.[565]

283. The Appellant submits that the Trial Chamber misconceived his stature in Rwandan society when stating that he was a prominent former political and military leader, and erred in considering this as an aggravating circumstance.[566] He argues that the evidence adduced at trial showed that, at the time of the events in question, the Appellant had been marginalised and had lost all social and professional standing.[567] The Prosecution responds that the Appellant merely re-argues this point without demonstrating how the Trial Chamber erred.[568]

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[558] Simba Appeal Brief, para. 420. In his Notice of Appeal, the Appellant is only challenging his conviction for both crimes, without challenging specifically the sentence.
[559] Simba Notice of Appeal, IV-2; Simba Appeal Brief, paras 424, 434.
[560] Simba Appeal Brief, para. 425.
[561] Prosecution Response, para. 228.
[562] Simba Appeal Brief, paras 426-432 (stating *inter alia* that the Appellant was marginalised and even considered a traitor by Hutus; that he had suffered professional setbacks; that he had no motive for participating in the genocide; and that he was an isolated, ordinary man, without power or influence over the authorities). The Appellant provides no reference to the trial record.
[563] Simba Notice of Appeal, I-D-5; Simba Appeal Brief, para. 260. This sub-ground of appeal is presented under the heading "Contradiction in the Judgement" together with a correlated argument in relation to motive which has been considered above under Section H-3, paras 261-269.
[564] Trial Judgement, para. 442.
[565] Trial Judgement, para. 61.
[566] Simba Notice of Appeal, IV-3; Simba Appeal Brief, paras 426-427, 429-430, 433.
[567] Simba Appeal Brief, para. 426; Simba Reply, paras 150-151.
[568] Prosecution Response, para. 231.

284. The Appeals Chamber has already considered and dismissed the Appellant's claim that the Trial Chamber erred in concluding that he was a prominent political and military figure and therefore need not address this challenge again.[569] Turning to the question of whether the Trial Chamber erred in taking his stature into account as an aggravating circumstance, the Appeals Chamber recalls that it is settled in the jurisprudence of the Tribunal and the ICTY that a superior position in itself does not constitute an aggravating factor. Rather, it is the abuse of such position which may be considered as an aggravating factor.[570]

285. A review of the Trial Chamber's findings on this point reveals that it not only took into account the Appellant's stature, but also the influence he derived from his stature[571] and the use he made of his influence by lending encouragement and approval to the participants in the killings.[572] The Appeals Chamber finds that the Trial Chamber thus implicitly found that the Appellant abused his position and influence in order to facilitate the commission of the crimes. Accordingly, the Appeals Chamber finds no discernable error in the Trial Chamber's findings. Therefore this sub-ground of appeal is dismissed.

286. The Appellant further claims that the Trial Chamber erred in considering that his participation in the massacres resulted from misguided notions of patriotism and government allegiance rather than extremism and ethnic hatred.[573] The Prosecution submits that this cannot advance his case for a reduction of the sentence.[574] The Appeals Chamber notes that, contrary to what the Appellant seems to suggest, the Trial Chamber actually mentioned this possible motive in its discussion of mitigating factors.[575] The question of whether it took it into account will be determined below.[576]

287. The Appellant further submits that the sentence imposed is unjustified in view of the Appellant's age and health condition.[577] The Prosecution submits that the Appellant's unelaborated claim concerning his age does not justify appellate intervention as his age fails to meet the threshold set by the Appeals Chamber.[578] It further argues that even if the Appellant's age were to be

[569] *See above* Section F-2, paras 237-242.
[570] *Stakić* Appeal Judgement, para. 411, quoting *Kayishema and Ruzindana* Appeal Judgement, paras 358–359; *Babić* Sentencing Appeal Judgement, para. 80; *Kamuhanda* Appeal Judgement, para. 347; *Aleksovski* Appeal Judgement, para. 183; *Ntakirutimana* Appeal Judgement, para. 563; *Krstić* Trial Judgement, para. 709.
[571] Trial Judgement, para. 439.
[572] Trial Judgement, para. 433.
[573] Simba Notice of Appeal, IV-4; Simba Appeal Brief, paras 428, 431.
[574] Prosecution Response, para. 229.
[575] Trial Judgement, para. 441.
[576] *See below* Chapter III, Section B-1(c)(ii), paras 327-330.
[577] Simba Notice of Appeal, IV-6; Simba Appeal Brief, para. 435.
[578] Prosecution Response, para. 234.

considered, it alone, is not decisive.[579] The Appeals Chamber recalls that the age and state of health of an accused person may be relevant factors in sentencing.[580] In the instant case, the Appellant has failed to substantiate his contention concerning his health either in his briefs or at the appeal hearing,[581] and the Appeals Chamber accordingly gives it no further consideration. With regard to his age, the Appellant merely submits that, because he was 65 years old at the time of his conviction, a sentence of 25 years would in effect be equivalent to a sentence to prison for the rest of his life since "life expectancy in sub-Sahara Africa for males is 45 years".[582] This does not demonstrate how the Trial Chamber abused its discretion in determining the sentence. This sub-ground of appeal is therefore dismissed.

288. Finally, the Appellant claims that the Trial Chamber erred in sentencing him to 25 years' imprisonment, when the charges against him were not proven beyond reasonable doubt.[583] In response, the Prosecution submits that the Trial Chamber committed no error as to justify a reduction in sentence.[584] The Appeals Chamber finds that, under this sub-ground of appeal, the Appellant merely reiterates arguments already presented elsewhere in support of his claim that the Trial Chamber erred in the factual and legal findings supporting his conviction for genocide and extermination as a crime against humanity. These arguments were already dismissed and since no distinct argument is advanced demonstrating that the Trial Chamber made a specific error in sentencing, these sub-grounds of appeal are dismissed.

[579] Prosecution Response, para. 235.
[580] *Ntakirutimana* Appeal Judgement, para. 569.
[581] At the appeal hearing, the Appellant submitted the following: "We also stated that to our mind the sentence was unfair because of the age of the witness *(sic)*, and also because of the medical files in the possession of the UNDF. It not possible for us to mention the health status of an individual for which information is available in the files of the Tribunal" (AT. 22 May 2007 p. 67).
[582] AT. 22 May 2007 pp. 22, 23. The Appeals Chamber notes that this argument is being raised for the first time on appeal as it was not raised during closing arguments nor in the Defence Closing Brief. *See* Defence Closing Brief Against the Amended Indictment of 10 May 2004; T. 7 and 8 July 2005.
[583] Simba Notice of Appeal, IV-5; Simba Appeal Brief, paras 421-423.
[584] Prosecution Response, para. 223.

III. THE APPEAL OF THE PROSECUTION

A. Alleged Errors in Finding that Aloys Simba was not Criminally Responsible for his Participation in the Cyanika Parish Massacre

289. The Prosecution contends that the Trial Chamber erred in fact and in law by failing to find the Appellant criminally responsible for his participation in the Cyanika Parish Massacre on 21 April 1994.[585] Under this ground of appeal, the Prosecution submits, first, that the Trial Chamber erred in fact by requiring proof that the Appellant was physically present at Cyanika Parish before holding him responsible for genocide and extermination as a crime against humanity for the acts that took place there;[586] and, secondly, that it erred in law by requiring a direct and substantial contribution by the Appellant to the massacre at Cyanika Parish as a pre-condition for holding him criminally responsible for that specific massacre.[587]

290. The Appeals Chamber will consider the Prosecution's arguments in turn.

1. Alleged Errors in Requiring Proof that the Appellant was Physically Present at Cyanika Parish

291. The Prosecution submits that the Trial Chamber erred in fact by requiring proof that the Appellant was physically present at Cyanika Parish before it would hold him responsible for the killings there, instead of considering his presence and all of his actions at Murambi Technical School and Kaduha Parish, both on 21 April 1994, as proof of his active role in furthering the common purpose of the JCE that encompassed all three massacre sites.[588] It contends that while physical presence at a massacre site might be an indicator of a co-perpetrator's contribution,[589] it is not necessary in order to incur liability under a JCE theory.[590]

292. The Prosecution submits that although the Trial Chamber correctly set out the applicable law with respect to JCE, it failed to apply it accurately to the factual findings with respect to the nature and extent of the Appellant's criminal responsibility for the Cyanika Parish massacre.[591] On the basis of the Trial Chamber's findings, the Prosecution asserts that the only reasonable conclusion is that a single JCE existed with the common purpose of killing Tutsi at Murambi

[585] Prosecution Notice of Appeal, Ground 1, paras 1-5; Prosecution Appeal Brief, para. 26; AT. 22 May 2007 pp. 46-53.
[586] Prosecution Appeal Brief, para. 27; AT. 22 May 2007 p. 46.
[587] Prosecution Appeal Brief, para. 27. In its Appeal Brief, the Prosecution also contends that the Trial Chamber erred in applying the *mens rea* for the first category of JCE (Prosecution Appeal Brief, paras 67-74). The Appeals Chamber will not consider this alleged error since it was not included in the Prosecution Notice of Appeal, and because it has previously decided to disregard paragraphs 65-74 of the Prosecution Appeal Brief (*see* Decision on 'Prosecutor's Motion for Variation of Notice of Appeal Pursuant to Rule 108' of 17 August 2006).
[588] Prosecution Notice of Appeal, Ground 1, para. 2; Prosecution Appeal Brief, paras 27, 40-45.
[589] Prosecution Appeal Brief, para. 44.
[590] Prosecution Appeal Brief, para. 40.

Technical School, Cyanika Parish and Kaduha Parish. The Trial Chamber erred in "breaking up" this single enterprise and in finding that the Appellant was not criminally responsible for the killing of Tutsi at the Cyanika Parish.[592]

293. The Appellant submits that the Prosecution's request that the Appellant be found responsible for the Cyanika Parish massacre without any factual basis is unjustified, as the theory of "on-site or spontaneous joint criminal enterprise" in itself has no basis in law.[593] He argues that his participation in the Cyanika Parish massacre was not established beyond reasonable doubt at trial,[594] and that the Trial Chamber erred in linking the Cyanika Parish massacre to those of Murambi and Kaduha.[595]

294. The Appeals Chamber notes that the Prosecution originally alleged in its Notice of Appeal that the Trial Chamber erred in fact. Subsequently, in its Appeal Brief, it expanded this to encompass an error of law. It is not entirely clear on what basis the error of fact is alleged. As the alleged error appears to more closely resemble an error of law, the Appeals Chamber will address it as such.

295. The Appeals Chamber agrees that the Trial Chamber concluded that there was a single JCE encompassing all three massacre sites, stating that, "[i]n the Chamber's view, the only reasonable inference from the evidence is that a common criminal purpose existed to kill Tutsi at these three sites."[596] However, the Appeals Chamber notes that, in respect of the Appellant's personal responsibility, this finding is clearly qualified by subsequent Trial Chamber findings. While not expressly stated, it is clear that the Trial Chamber found that there was in effect a separate JCE limited to Murambi Technical School and Kaduha Parish, in which the Appellant was a participant.[597]

296. The Appeals Chamber agrees with the Prosecution that physical presence at the time a crime is committed by the physical perpetrator is not required for liability to be incurred by a participant

[591] Prosecution Appeal Brief, para. 34.
[592] AT. 22 May 2007 p. 49.
[593] Simba Response, para. 42.
[594] Simba Response, para. 41.
[595] Simba Response, para. 43.
[596] Trial Judgement, para. 402.
[597] Trial Judgement, para. 419: "The Trial Chamber finds beyond reasonable doubt that Simba is criminally responsible under Article 6(1) of the Statute based on his participation in a joint criminal enterprise to kill Tutsi civilians at Murambi Technical School and Kaduha Parish." *See also* para. 415: "The Trial Chamber has found that Simba participated in a joint criminal enterprise to kill Tutsi civilians at Murambi Technical School and Kaduha Parish by providing weapons and lending encouragement and approval to the physical perpetrators."; and paragraph 425: "Simba participated in this large-scale killing as a participant in the joint criminal enterprise to kill Tutsi at these two sites by distributing weapons and lending approval and encouragement to the physical perpetrators."; and paragraph 426: "Simba is criminally responsible under Article 6(1) of the Statute based on his participation in a joint criminal enterprise to kill Tutsi civilians at Murambi Technical School and Kaduha Parish."

in a JCE.[598] However, as conceded by the Prosecution,[599] it may be taken as an indicator of a co-perpetrator's contribution. Here, the Trial Chamber considered that there was "no direct evidence of the presence of Simba" at Cyanika Parish.[600] This appears to have been relevant primarily as a basis for the Trial Chamber's finding that there was no evidence to support the idea that he shared the intent to participate in the common purpose of killing Tutsi there.[601] After finding generally that a common purpose existed to kill Tutsi at the three sites, it found that the Appellant shared the common purpose of killing Tutsi at Murambi Technical School and Kaduha Parish, but expressed its doubt that he equally shared the common purpose of killing Tutsi at Cyanika Parish.[602] As explained by the Trial Chamber, this doubt arose from the fact that there was "no direct evidence linking the Appellant to Cyanika Parish or indicating that he knew and accepted that it would also form part of the operation".[603] It is apparent from this language that the Trial Chamber's consideration of this issue focused on his intent to participate in the common purpose to kill the Tutsi at this site.[604] Therefore the Trial Chamber's inquiry was broader than mere physical presence. The Appeals Chamber sees no error in this approach.

297. Accordingly, this sub-ground of appeal is dismissed.

2. Alleged Error in Requiring a Direct and Substantial Contribution by the Appellant to the Massacre at Cyanika Parish as a Pre-Condition to Holding him Criminally Responsible

298. The Prosecution further claims that the Trial Chamber erred in law in requiring a direct and substantial contribution by the Appellant to the Cyanika Parish massacre as a precondition for holding him criminally responsible for that massacre as a participant in a JCE encompassing all three massacre sites.[605] It submits that a participant in a JCE need only perform actions that "in some way" are directed to the furtherance of the common purpose.[606] The Prosecution adds that, although the Trial Chamber correctly noted that there is no requirement to make a substantial contribution, it erroneously required such contribution.[607]

299. The Prosecution notes that the Trial Chamber found that the three massacres on 21 April 1994 could only be described as a highly coordinated operation involving local militiamen backed

[598] Prosecution Appeal Brief, para. 40; *Kvočka* Appeal Judgement, paras 112-113, 276.
[599] Prosecution Appeal Brief, para. 44.
[600] Trial Judgement, para. 399. *See also* para. 134.
[601] Trial Judgement, para. 407.
[602] Trial Judgement, paras 406-407.
[603] Trial Judgement, para. 407. The Trial Chamber noted that the "only evidence directly connecting him to the massacre comes from Witness KSU", but noted that this evidence had been excluded (Trial Judgement, para. 134).
[604] Trial Judgement, paras 134-136.
[605] Prosecution Notice of Appeal, Ground 1, para. 3; Prosecution Appeal Brief, paras 27, 30, 46, 63; AT. 22 May 2007 p. 47.
[606] Prosecution Appeal Brief, paras 47, 52.

by gendarmes, armed with guns and grenades, and with the organisational and logistical support offered by local authorities and prominent personalities such as the Appellant.[608] The Prosecution submits that the massacre at Cyanika Parish was clearly an essential part of the highly coordinated operation, due to geographic proximity and the participation of the same attackers in the massacres at both Murambi Technical School and Cyanika Parish.[609]

300. The Prosecution submits that the Appellant participated in this JCE by distributing weapons and lending approval and encouragement to the physical perpetrators of the crimes committed at Murambi Technical School and Kaduha Parish.[610] It notes the Trial Chamber's findings regarding the effect that the Appellant had on the enthusiasm of the attackers at Murambi, and the decisive role played in these assaults by the guns and grenades distributed by the Appellant at Kaduha Parish. The Prosecution notes that the Trial Chamber considered that, in light of the fact that the Appellant was a respected national figure in Rwandan society and well known in his native region, the assailants at those places considered the Appellant's presence during the attacks as approval of their conduct, particularly after the Appellant's invocation of the government. Moreover, given the Appellant's stature in Rwandan society as a prominent former political and military figure, the Trial Chamber found that his participation would have had a similar effect on other prominent participants in the JCE such as Prefect Bucyibaruta, Captain Sebuhura, and Bourgmestre Semakwavu.[611]

301. The Appellant responds that the Prosecution was unable to prove beyond reasonable doubt that he had taken part in or in any way contributed to the Cyanika Parish massacre[612] and that the Trial Chamber's findings linking the Cyanika massacre to those of Kaduha and Murambi by assuming a "hypothetical and un-proven plan" are erroneous.[613] Accordingly, he submits that the Prosecution's request that he be found responsible for the killings at Cyanika Parish has no basis.[614]

302. The Appellant also makes a number of submissions regarding whether JCE was established at trial[615] or properly pleaded,[616] the vagueness of the Indictment,[617] the category of JCE applied by

[607] Prosecution Appeal Brief, paras 48-49, referring to the Trial Judgement, paras 403, 415, 425 and footnote 407.
[608] Prosecution Appeal Brief, para. 55.
[609] Prosecution Appeal Brief, paras 58-59.
[610] Prosecution Appeal Brief, paras 56, 54, 51 (the latter referring to Trial Judgement, paras 403, 415, 419, 425, 426.).
[611] Prosecution Appeal Brief, para. 56.
[612] Simba Response, para. 41.
[613] Simba Response, para. 43.
[614] Simba Response, para. 42.
[615] Simba Response, paras 19-21.
[616] Simba Response, para. 12.
[617] Simba Response, para. 11.

the Trial Chamber,[618] his involvement in planning the three massacres,[619] and motive.[620] These are dealt with in other sections of the Trial Judgement and will not be addressed here.

303. The Appeals Chamber is unable to agree that the Trial Chamber required the Appellant's participation in a JCE at Cyanika Parish to be substantial. The basis for this Prosecution argument appears to be the Trial Chamber's findings that the Appellant provided substantial assistance at the massacres at Murambi Technical School and Kaduha Parish.[621] The Appeals Chamber notes that the Trial Chamber expressly acknowledged that a showing of substantial contribution is not required as a matter of law.[622] The Trial Chamber correctly interpreted the law on this matter. The Appeals Chamber recalls that although an accused's contribution to a JCE need not be necessary or substantial, it should at least be a significant contribution to the crimes for which the accused is found to be responsible.[623]

304. The fact that the Appellant's actions at Murambi Technical School and Kaduha Parish were found to have provided substantial assistance at those sites does not necessarily imply that this was therefore required for a finding of responsibility for the crimes at Cyanika Parish. The Appellant's actions with respect to Cyanika Parish were clearly addressed by the Trial Chamber, which found that there was "no direct evidence linking him to Cyanika Parish or indicating that he knew and accepted that it would also form part of the operation."[624] In so doing, it considered the Appellant's contribution to the Cyanika Parish massacre only insofar as it could have provided any evidence that would allow for a finding that he possessed the requisite *mens rea* with respect to the JCE at that site. The Prosecution has therefore demonstrated no legal error on the part of the Trial Chamber. As the Prosecution has not properly challenged on appeal the Trial Chamber's findings on the *mens rea* elements for a JCE encompassing the killing of Tutsi at Cyanika Parish,[625] the Appeals Chamber need not consider whether the Trial Chamber erred in its finding in this respect. Accordingly, this ground of appeal is dismissed in its entirety.

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[618] Simba Response, paras 14-15, 29, referring to Trial Judgement, paras 398-408, 412-426.
[619] Simba Response, paras 16, 24.
[620] Simba Response, para. 28.
[621] *See e.g.* Trial Judgement, para. 403: "Simba participated in the joint criminal enterprise through his acts of assistance and encouragement to the physical perpetrators of the crimes at Murambi Technical School and Kaduha Parish. In the Chamber's view, Simba's actions at those two sites had a *substantial effect* on the killings which followed" (footnote omitted) (emphasis added); Trial Judgement, para. 425: "Simba participated in this large-scale killing as a participant in the joint criminal enterprise to kill Tutsi at these two sites by distributing weapons and lending approval and encouragement to the physical perpetrators. In its findings on criminal responsibility, the Chamber described this assistance as having a *substantial effect* on the killings that followed" (footnotes omitted) (emphasis added); Trial Judgement, para. 433: "The Chamber determined that Simba's acts of assistance and encouragement provided *substantial assistance*." (emphasis added).
[622] Trial Judgement, fn. 407.
[623] *Brdanin* Appeal Judgement, para. 430.
[624] Trial Judgement, para. 407.
[625] *See* Decision on Motion for Variation of Notice of Appeal of 17 August 2006.

B. Alleged Errors Relating to the Sentence

305. The Prosecution makes several submissions to the effect that the Trial Chamber erred in law by imposing a sentence of 25 years' imprisonment instead of imprisonment for the remainder of the Appellant's life.[626] The Prosecution affirms that the Trial Chamber abused its sentencing discretion and committed three discernible errors of law invalidating its decision: (1) in failing to consider or give proper weight to relevant aggravating factors while erroneously according weight to irrelevant factors in mitigation; (2) in imposing a sentence that is manifestly disproportionate to the gravity of the crimes and the Appellant's role; and (3) in imposing a sentence that is in disparity with the Tribunal's sentencing practice.[627]

306. The Appeals Chamber recalls that the Trial Chamber has considerable discretion in determining an appropriate sentence, which includes the weight given to mitigating and aggravating circumstances.[628] As a general rule, the Appeals Chamber will not revise a sentence unless "it believes that the Trial Chamber has committed an error in exercising its discretion, or has failed to follow applicable law."[629] The Appeals Chamber will only intervene if a Trial Chamber ventures outside its "discretionary framework" in imposing a sentence and commits a "discernable" error.[630] It therefore falls, in the present appeal, on the Prosecution to demonstrate how the Trial Chamber ventured outside its discretionary framework in making the decisions challenged.

1. Alleged Failure to Consider or Give Proper Weight to Relevant Aggravating Factors and Erroneously According Weight to Irrelevant Factors in Mitigation.

307. The Prosecution contends that the Trial Chamber erroneously failed to consider or give adequate weight to aggravating factors, while taking extraneous and irrelevant considerations into account as mitigating circumstances.[631] The Prosecution submits that the Trial Chamber erred by (a) failing to accord full weight to the Appellant's stature in Rwandan society and his authority;[632] (b) giving undue weight in mitigation to the absence of zeal and sadism demonstrated by the Appellant

[626] Prosecution Notice of Appeal, Ground 2, paras 6-11; AT. 22 May 2007 pp. 53-61.
[627] Prosecution Notice of Appeal, Ground 2, paras 6-11; Prosecution Appeal Brief, para. 76. The Appeals Chamber will not consider the additional arguments presented in paragraphs 108 to 114 of the Prosecution Appeal Brief, since it has already decided to disregard them (*see* Decision on Motion for Variation of Notice of Appeal of 17 August 2006, in which the Appeals Chamber denied a Prosecution request for an amendment of its Notice of Appeal which invited the Appeals Chamber to consider the sentencing practice of Rwanda).
[628] *Brdanin* Appeal Judgement, para. 500.
[629] *Delalić et al.* Appeal Judgement, para. 725.
[630] *Delalić et al.* Appeal Judgement, para. 725.
[631] Prosecution Notice of Appeal, Ground 2, paras 8-10; Prosecution Appeal Brief, paras 76, 79, 101-107; AT. 22 May 2007 p. 53.
[632] Prosecution Notice of Appeal, Ground 2, para. 8; Prosecution Appeal Brief, paras 80-91.

while committing the crimes;[633] and (c) according undue weight to extraneous and irrelevant considerations in mitigation.[634] The Appeals Chamber will consider these arguments in turn.

(a) Alleged Failure to Accord Full Weight to Aloys Simba's Stature and Authority in Rwanda

308. The Prosecution alleges that although the Trial Chamber noted the Appellant's stature in Rwandan society as a prominent former political and military figure, and stated that the influence derived from this status would have made it likely that others would follow his example, it erred by not according full weight to this aggravating factor. It further contends that the Trial Chamber should have accorded full weight to this factor regardless of whether the Appellant's authority and influence were formal or *de facto*.[635] The Prosecution submits that the Appellant wielded the same authority, albeit *de facto*, when he committed the crimes as when he occupied formal positions within the government, military and political structure. He was able to use that authority to instigate others to commit crimes[636] or to stop them from doing certain acts.[637] It further submits that the Appellant's use of his stature to commit crimes constituted an abuse of public trust.[638]

309. The Appellant opposes the Prosecution's submissions on his stature. He submits that he had been deprived of rank and promotion for a long time and that his relations with the Tutsi earned him criticism within Rwandan society and in the press. He also submits that as the Prosecution abandoned at trial, due to lack of evidence, its allegations that the Appellant had *de facto* authority over Hutu civilians, local administrative authorities, and soldiers and gendarmes, it cannot on appeal make arguments based on an alleged abuse of formal or *de facto* authority or adduce new factual evidence to this effect on appeal without violating his rights.[639]

310. The Trial Chamber found that the influence the Appellant derived from his stature made it likely that others would follow his example, and that this was an aggravating factor.[640] The Appeals Chamber recalls that the Trial Chamber implicitly found that the Appellant abused this influence.[641] This interpretation is supported by the Trial Chamber's findings that the Appellant participated in the attack against Murambi Technical School and Kaduha Parish by lending encouragement and

[633] Prosecution Notice of Appeal, Ground 2, para. 9. In its Appeal Brief, the Prosecution further affirms that the Trial Chamber should have found that the Appellant acted with sadism and zeal and that this constituted an aggravating factor (Prosecution Appeal Brief, paras 92-100).
[634] Prosecution Notice of Appeal, Ground 2, para. 10.
[635] Prosecution Appeal Brief, para. 80, referring to Trial Judgement paras 434-435, 439; Prosecution Appeal Brief, paras 84-85, referring to *Semanza* Appeal Judgement, para. 336.
[636] Prosecution Appeal Brief, para. 81.
[637] Prosecution Appeal Brief, para. 82.
[638] Prosecution Appeal Brief, paras 82-83.
[639] Simba Response, paras 50-53.
[640] Trial Judgement, para. 439, referring to its previous factual findings on the Appellant's stature in Rwandan society (*see* Trial Judgement, paras 54-60).
[641] *See* above Chapter II, Section K, para. 285.

approval to the attackers and that, since the Appellant was a respected national figure in Rwandan society and well-known in his native region (Gikongoro), the assailants at those places would have viewed his presence during the attacks as approval of their conduct, particularly after his invocation of government support.[642] In so doing, the Trial Chamber did not distinguish between his formal or *de facto* authority and influence, but limited itself to established facts. The Trial Chamber therefore did fully take into account as aggravating factors the Appellant's stature in Rwanda society, as well as the abuse of the influence he derived from it.

311. This sub-ground of appeal is accordingly dismissed.

(b) Alleged Failure to Give Proper Weight to the Sadism and Zeal of the Appellant

312. The Prosecution submits that the Trial Chamber erred in law by "treating its finding that the [Appellant] did not commit the crimes with sadism and zeal, in effect, as a mitigating factor".[643] The Prosecution further argues that the Trial Chamber took into account erroneous factors to reach this finding[644] and that, contrary to the Trial Chamber's conclusion, the criminal conduct of the Appellant evidences zeal and sadism.[645]

313. The Prosecution submits that the Appellant's own conduct and his targeting of refugees at sites traditionally regarded as safe havens, such as churches and schools, overwhelmingly evidenced zeal and sadism.[646] The Prosecution argues that attacks against such places have traditionally been characterised as evidencing zeal, and as constituting an aggravating factor in sentencing.[647] Further, the Prosecution submits that the Appellant's zeal and sadism is demonstrated by his use of language, describing the victims as "filth" and urging others to "wipe them away".[648] It adds that, in any case, sadism is inherent in mass crimes such as those he committed.[649]

314. The Prosecution also asserts that the impact of the Appellant's criminal conduct was profound, despite the brevity of his visit to the massacre sites.[650] The Prosecution affirms that the fact that the Appellant did not physically participate in killings and that he made only brief visits to the massacre sites is irrelevant in the present case since the Appellant has been found responsible

[642] Trial Judgement, paras 400, 403. The Trial Chamber thus did not regard as an aggravating circumstance the fact that the Appellant encouraged and approved of the attacks, as these were elements of the crime, but rather took into account the fact that he abused his influence by doing so.
[643] Prosecution Notice of Appeal, Ground 2, para. 9.
[644] AT. 22 May 2007 p. 57.
[645] Prosecution Appeal Brief, para. 92, referring to Trial Judgement, para. 435.
[646] Prosecution Appeal Brief, paras 94, 97; AT. 22 May 2007 p. 61.
[647] Prosecution Appeal Brief, para. 97, referring to *Kayishema and Ruzindana* Trial Judgement, para. 16, and *Kayishema and Ruzindana* Appeal Judgement, paras 360-361.
[648] Prosecution Appeal Brief, para. 96.
[649] Prosecution Appeal Brief, paras 94, 100.
[650] Prosecution Appeal Brief, para. 92, referring to Trial Judgement para. 435.

for "committing" the crimes as a member of a JCE, distributing weapons and giving words of encouragement "set[ting] in motion a process that culminated in the massacres of thousands of victims".[651]

315. The Appellant does not specifically respond to this Prosecution argument.

316. The Trial Chamber held at paragraph 435:

> At the time of the events, Simba had no formal position within the government, military, or political structures of the government. He assumed the post of civil defence adviser on 18 May 1994. However, he is not charged with any criminal conduct based on this position. In addition, the Chamber is not convinced beyond reasonable doubt that Simba was the architect of the massacres at Murambi Technical School and Kaduha Parish or that he played a role in their planning. In addition, the manner in which Simba participated in the joint criminal enterprise did not evidence any particular zeal or sadism on his part. In particular, he did not physically participate in killings and did not remain at the sites of the massacres for more than a brief period.[652]

317. The Appeals Chamber is unable to agree that the finding of a lack of zeal or sadism was considered in mitigation of the Appellant's sentence. The Appeals Chamber observes that paragraph 435 of the Trial Judgement is not included in the section entitled "Individual, Aggravating, and Mitigating Circumstances" but in the section of the sentencing deliberations entitled "Gravity of the Offence". The finding thus appears to have been considered in the context of determining the gravity of the Appellant's crimes, as evidenced by the subsequent paragraph.

318. The Appeals Chamber further notes that the Trial Chamber listed, in the section on "Individual, Aggravating, and Mitigating Circumstances", a number of mitigating factors that it considered in the determination of the Appellant's sentence. The fact that he did not exhibit any particular zeal or sadism was not included in this section. The Appeals Chamber finds, therefore, that the finding regarding a lack of zeal or sadism did not influence the Trial Chamber's decision with respect to factors mitigating the Appellant's sentence.

319. With respect to the Prosecution's arguments to the effect that the Trial Chamber erred in not taking into account the Appellant's sadism and zeal as an aggravating factor, the Appeals Chamber notes that these are raised for the first time in the Appeal Brief.[653] The Prosecution Notice of Appeal does not explicitly allege that the Trial Chamber erred by not finding that the Appellant acted with zeal and sadism and by failing to take these factors into account in aggravation. Hence, the Prosecution clearly failed to "indicate the substance of the alleged errors" as required by Rule

[651] Prosecution Appeal Brief, para. 93.
[652] Trial Judgement, para. 435 (footnote omitted).
[653] Prosecution Appeal Brief, para. 97.

108 of the Rules. Accordingly, the Appeals Chamber declines to consider the Prosecution's arguments at issue.

320. However, the Appeals Chamber holds, *proprio motu*, Judge Liu dissenting, that the Trial Chamber erred when it assessed the gravity of the offence in light of its finding that "the manner in which Simba participated in the joint criminal enterprise did not evidence any particular zeal or sadism."[654] The Appeals Chamber notes that the aforementioned factors are neither elements of the crime of genocide or extermination nor factors indicating the gravity of the crimes as such. The Appeals Chamber raises this issue *proprio motu* in order to clarify that zeal and sadism are factors to be considered, where appropriate, as aggravating factors rather than in the assessment of the gravity of an offence. Nonetheless, given the fact that the Appeals Chamber has already rejected the Prosecution's claim that the Trial Chamber erred in not taking into account the Appellant's sadism and zeal in aggravation on procedural grounds in the preceding paragraph, this error can not have any impact upon the Appellant's sentence.

321. Accordingly, this sub-ground of appeal is dismissed.

(c) Alleged Errors in According Weight to Extraneous and Irrelevant Considerations in Mitigation, or Undue Weight to Mitigating Factors.

322. The Prosecution submits that the Trial Chamber committed a discernible error by according weight to extraneous and irrelevant considerations in mitigating the Appellant's sentence.[655] In particular, the Prosecution contends that the Trial Chamber erred (i) in according weight in mitigation to the selective assistance that the Appellant provided to some people, and (ii) considering in mitigation that the Appellant "might have acted out of patriotism and government allegiance rather than extremism or ethnic hatred".[656]

323. The Appellant does not specifically respond to this argument, submitting that he will not discuss the Trial Chamber's exercise of its discretionary sentencing power for "crimes in respect of which the physical possibility that [he] committed them remains unproven".[657]

324. The Appeals Chamber will consider these arguments in turn.

(i) The Trial Chamber Accorded Weight in Mitigation to the Selective Assistance Provided by the Appellant to Members of his Family

[654] Trial Judgement, para. 435.
[655] Prosecution Notice of Appeal, Ground 2, para. 10; Prosecution Appeal Brief, para. 101.
[656] Prosecution Appeal Brief, paras 102, 104; Trial Judgement, paras 441-442.
[657] Simba Response, para. 49.

325. The Prosecution contends that the Trial Chamber erred, at paragraph 442 of the Trial Judgement, in according weight in mitigation to the selective assistance provided by the Appellant to some people. It argues that the Appellant extended assistance only to members of his family and close friends, some of whom happened to be Tutsi, and thus did not provide assistance because they were members of the Tutsi ethnic group. Consequently, his assistance should not have been given any weight in mitigation.[658]

326. The Appeals Chamber notes that this argument was not included in the Prosecution's Notice of Appeal. Consequently the Prosecution is precluded from adducing it on appeal.

(ii) The Trial Chamber Accorded Weight in Mitigation to the Possibility that the Appellant Acted Out of Patriotism and Government Allegiance rather than Extremism or Ethnic Hatred

327. The Prosecution contends that the Trial Chamber erroneously considered in mitigation that the Appellant "might have acted out of patriotism and government allegiance rather than extremism or ethnic hatred." It submits that possible motivation could not amount to a mitigating factor in the circumstances of this case.[659] The Prosecution adds that it "is incorrect […] to use as a mitigating factor, only something that may have existed or could possibly have existed".[660]

328. The Appeals Chamber recalls that neither the Statute nor the Rules exhaustively define the factors which may be considered as mitigating factors.[661] Consequently, under the jurisprudence of this Tribunal, "what constitutes a mitigating circumstance is a matter for the Trial Chamber to determine in the exercise of its discretion."[662] The burden of proof which must be met by an accused with regard to mitigating circumstances is not, as with aggravating circumstances, proof beyond reasonable doubt,[663] but proof on the balance of probabilities – the circumstance in question must exist or have existed "more probably than not".[664] Once a Trial Chamber determines that certain evidence constitutes a mitigating circumstance, the decision as to the weight to be accorded to that mitigating circumstance also lies within the wide discretion afforded to the Trial Chamber at sentencing.[665]

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[658] Prosecution Appeal Brief, para. 104.
[659] Prosecution Notice of Appeal, Ground 2, para. 10; Prosecution Appeal Brief, paras 102-103.
[660] AT. 22 May 2007 p. 55.
[661] *Kajelijeli* Appeal Judgement, para. 294.
[662] *Musema* Appeal Judgement, para. 395.
[663] *Delalić et al.* Appeal Judgement, para. 763.
[664] *Delalić et al.* Appeal Judgement, para. 590.
[665] *Niyitegeka* Appeal Judgement, para. 266, referring to *Musema* Appeal Judgement, para. 396 and *Kayishema and Ruzindana* Appeal Judgement, para. 366; *Kajelijel*i Appeal Judgement, para. 294.

329. In the instant case, the Trial Chamber found that

> [the Appellant] spent much of his life and career before 1994 engaged in professions devoted to the public service of his country. His political views before April 1994 appear to have been relatively moderate. Such evidence can in no way exonerate or excuse [him] for his participation in the killings. However, it provides a somewhat nuanced picture and may imply that his participation in the massacres resulted from misguided notions of patriotism and government allegiance rather than extremism or ethnic hatred. The Chamber also notes that [the Appellant] does not deny the existence of genocide in Rwanda and condemned the massive slaughter that occurred.[666]

330. The Appeals Chamber finds that the Prosecution allegation at issue is based on a misreading of the Trial Judgement. It is clear from paragraph 441 that the Trial Chamber took into account only two mitigating factors, the Appellant's prior moderate political views and his service to his country. In the view of the Trial Chamber, these two mitigating factors demonstrated that the Appellant might have acted with another motive. However, this was merely speculation on the part of the Trial Chamber and did not reflect a finding that this motive was itself a separate mitigating factor. This being the case, the Prosecution has not demonstrated that the Trial Chamber erroneously considered in mitigation that the Appellant "might have acted out of patriotism and government allegiance rather than extremism or ethnic hatred."

2. Alleged Error in Imposing on the Appellant a Sentence that Was Manifestly Disproportionate to the Gravity of his Crimes and his Role in Them

331. The Prosecution submits that the Trial Chamber erred by failing to take sufficient account of either the inherent gravity of the crimes of which the Appellant was convicted or his individual circumstances.[667] The Prosecution submits that the jurisprudence of the international tribunals shows that the gravity of the crimes is the most important consideration in arriving at an appropriate sentence.[668] In the instant case, the Appellant was convicted of genocide and extermination as a crime against humanity, both inherently grave crimes, with the former the "gravest crime known to the international criminal justice system."[669] As a result, the Prosecution argues that the Trial Chamber did not impose the sentence the crimes deserved.[670]

332. The Prosecution contends that the Appellant's participation and the impact of such participation were "pre-eminent", and that "the short duration of the [Appellant's] stay at the

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[666] Trial Judgement, para. 441 (internal footnotes omitted).
[667] Prosecution Notice of Appeal, Ground 2, para. 8; Prosecution Appeal Brief, para. 115.
[668] Prosecution Appeal Brief, para. 116, referring to *Akayesu* Appeal Judgement para. 413, *Kayishema and Ruzindana* Appeal Judgement para. 593, *Delalić et al.* Appeal Judgement, para. 731; *Kupreškić* Appeal Judgement, para. 442; *Aleksovski* Appeal Judgement, para. 182.
[669] Prosecution Appeal Brief, para. 117, quoting *Semanza* Appeal Judgement, Separate Opinion of Judge Shahabuddeen and Judge Güney, para. 2.
[670] Prosecution Appeal Brief, para. 117.

massacre site is irrelevant since the *impact* of his actions was profound."[671] The Trial Chamber held that the use of guns and grenades, which the Appellant distributed at Kaduha Parish, was a "decisive" factor in the success of these assaults.[672]

333. The Prosecution adds that the Trial Chamber erred in focusing solely on the fact that the Appellant did not physically perpetrate the crimes himself as opposed to looking at the impact of his actions.[673] The Prosecution submits that the Trial Chamber erred by removing the Appellant from the category of "principle perpetrators", limiting those to persons who planned and ordered atrocities.[674]

334. The Prosecution finally submits that even assuming that there were some mitigating factors, this does not automatically entitle the Appellant to "credit" in the determination of the sentence.[675] It argues that given the gravity of crimes of which the Appellant was convicted, the shocking number of lives lost, the Appellant's pre-eminent role and the totality of the circumstances of this case, the Appellant deserved no credit and the Trial Chamber should not have "moved him away from the category of convicts deserving of a life sentence".[676]

335. The Appellant does not specifically respond to these Prosecution arguments.

336. The Appeals Chamber observes that the Trial Chamber correctly noted that it has "considerable, though not unlimited, discretion on account of its obligation to individualize penalties to fit the individual circumstances of an accused and to reflect the gravity of the crimes for which the accused has been convicted".[677] The Appeals Chamber also endorses the view taken by the Trial Chamber that there are a "multitude of variables, ranging from the number and types of crimes committed to the personal circumstances of the individual"[678] which need to be taken into account in order to individualise sentences. In the instant case, the Trial Chamber expressly recognised the gravity of the crimes for which the Appellant was responsible[679] while at the same time taking into consideration his role in the commission of these crimes.[680] The Prosecution advances a different view of the gravity of the crimes and the Appellant's role therein, apparently arguing against any discretion in sentencing where an accused is a "principal perpetrator" who has committed grave crimes. For the reasons stated above, the Appeals Chamber, Judge Schomburg

[671] Prosecution Appeal Brief, para. 118.
[672] Prosecution Appeal Brief, para. 118.
[673] Prosecution Appeal Brief, para. 119.
[674] Prosecution Appeal Brief, para. 120.
[675] Prosecution Appeal Brief, para. 123, referring to *Niyitegeka* Appeal Judgement, para. 267.
[676] Prosecution Appeal Brief, para. 124.
[677] Trial Judgement, para. 431.
[678] Trial Judgement, para. 432, referring to *Kvočka et al* Appeal Judgement, para. 681.
[679] Trial Judgement, para. 436.

dissenting, is unable to agree that the Trial Chamber was so restricted in the exercise of its discretion and reaffirms the requirement to individualise sentences. In the instant case, the Prosecution has not demonstrated how the Trial Chamber may have committed an error in exercising its discretion or departed from the Tribunals' case law by imposing a sentence of 25 years' imprisonment. The Appeals Chamber, Judge Schomburg dissenting, accordingly dismisses this sub-ground of appeal.

3. The Sentence is Allegedly Inconsistent with the Tribunal's Sentencing Practice

337. The Prosecution submits that the Trial Chamber erred by imposing a sentence that is manifestly inconsistent with the Tribunal's sentencing practice in similar cases.[681]

338. This argument goes beyond the scope of the Prosecution Notice of Appeal. It is also noted that a previous attempt by the Prosecution to amend its Notice of Appeal in order to incorporate a similar ground of appeal was rejected by the Appeals Chamber.[682] Accordingly, this sub-ground is dismissed without further consideration.

[680] Trial Judgement, para. 435.
[681] Prosecution Appeal Brief, para. 125.
[682] Simba Prosecutor's Motion for Variation of the Notice of Appeal Pursuant to Rule 108 of 27 March 2006, para. 9.

IV. DISPOSITION

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 22 May 2007;

SITTING in open session;

DISMISSES in all respects the grounds of appeal raised by Aloys Simba, and the Prosecution in their respective appeals;

AFFIRMS the Appellant's convictions for genocide and extermination as a crime against humanity under Counts 1 and 3;

AFFIRMS, Judge Schomburg dissenting, the Appellant's sentence of twenty-five (25) years' imprisonment entered for these convictions, subject to credit being given under Rule 101(D) and Rule 107 of the Rules for the period already spent in detention since 27 November 2001;

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

ORDERS in accordance with Rules 103(B) and 107 of the Rules, that Aloys Simba 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.

_____	_____	_____
Fausto Pocar	Mehmet Güney	Liu Daqun
Presiding Judge	Judge	Judge

_____	_____
Theodor Meron	Wolfgang Schomburg
Judge	Judge

Judge Schomburg appends a partially dissenting opinion.

Judge Liu appends a partially dissenting opinion.

Signed on the 21st day of November 2007 at The Hague, The Netherlands, and delivered on this 27th day of November 2007 at Arusha, Tanzania.

[Seal of the Tribunal]

V. PARTIALLY DISSENTING OPINION OF JUDGE LIU DAQUN

1. I support the Appeals Chamber's findings in this case. However, with due respect, I am in disagreement with the Majority that "the Trial Chamber erred when it assessed the gravity of the offence in light of its finding that 'the manner in which Simba participated in the joint criminal enterprise did not evidence any particular zeal or sadism'".[1] I further disagree with the Majority's view that because neither zeal nor sadism are "elements of the crime of genocide or extermination nor factors indicating the gravity of crimes as such […] zeal and sadism are factors to be considered, where appropriate, as aggravating factors rather than in the assessment of the gravity of an offence."[2]

2. I agree that zeal and sadism are not elements of genocide and extermination, however, they may still be correctly taken into account as "particular circumstances" relevant to the gravity of the offence. It is established in the jurisprudence of the Appeals Chamber of this Tribunal and the ICTY that "[w]hen assessing the gravity of the offence, a Trial Chamber must take into account the inherent gravity of the crime and the criminal conduct of the accused, *the determination of which requires a consideration of the particular circumstances of the case* and the crimes for which the accused was convicted, as well as the form and degree of the participation of the accused in the crime."[3] Thus, by taking zeal and sadism into account in the context of assessing "the manner in which Simba participated"[4] in the JCE, the Trial Chamber acted in conformity with the case law.

3. In the jurisprudence of this Tribunal and that of the ICTY, the consideration of zeal and sadism in sentencing has not been restricted to the determination of "aggravating factors", although they are factors which when relevant have been considered in the framework of enhancing a sentence. In the *Ntakirutimana* case, the Trial Chamber considered zeal and sadism in the context of the principle of gradation of sentences, not as an aggravating circumstance.[5] Although this was

[1] Appeal Judgement, para. 320.
[2] *Ibid*. While I disagree with the Majority that the Trial Chamber erred, I do not support the crediting by the Trial Chamber of the Appellant for something he did not do in its assessment of the gravity of the offence, that is, in considering that his manner of participation in the JCE "*did not evidence* any particular zeal or sadism" (emphasis added). In this regard, I note the Appeals Chamber's holding in the *Momir Nikolić* Appeals Judgement, para. 56, that "Trial Chambers, when assessing the gravity of the offence, have no obligation to take into account what the accused did *not* do." (emphasis in original). Since this aspect of the verdict is not in issue in the present Judgement, I will not address it further.
[3] (Emphasis added). *Akayesu* Appeal Judgement, para. 413; *Blaškić* Appeal Judgement, para. 683; *Vasiljević* Appeal Judgement, para. 182; *Furundžija* Appeal Judgement, para. 249; *Aleksovski* Appeal Judgement, para. 182.
[4] Trial Judgement, para. 435.
[5] *Ntakirutimana* Trial Judgement, para. 884.

noted by the Appeals Chamber on appeal,[6] the Appeals Chamber did not find an error on the part of the Trial Chamber for not taking it into account as an aggravating circumstance. Similarly, the *Ndindabahizi* Trial Chamber and *Niyitegeka* Trial Chamber did not consider zeal and sadism in the context of aggravating circumstances but in the context of gradation of sentences.[7] Although both the *Ndindabahizi* Appeals Chamber and the *Niyitegeka* Appeals Chamber considered errors in sentencing, neither Appeals Chamber made a *proprio motu* finding of an error on the part of the Trial Chamber, for not taking it into account as an aggravating circumstance.

4. In a very recent ICTY Appeals Chamber Judgement, the Appeals Chamber in *Limaj*, dismissed a ground of appeal by the Prosecution, opining that the absence of a sadistic motive was not considered by the Trial Chamber as a mitigating circumstance but "taken into account as particular circumstances when assessing the gravity of the crimes".[8] This approach is directly on point and consistent with that taken by the Trial Chamber in the present case. However, the Appeals Chamber in *Limaj* did not *proprio motu* find that the Trial Chamber had erred. Similarly, in the *Dragan Nikolić* case, the Trial Chamber held that the manner in which crimes were committed is an important consideration in assessing the gravity of the offence and considered in this context, that he sadistically beat detainees.[9] This was assessed by the Appeals Chamber which found no error *proprio motu* on the part of the Trial Chamber for not taking it into account as an aggravating circumstance.[10]

5. Furthermore, the Appeals Chamber has emphasised in previous Judgements that sentencing is a discretionary decision and that it is inappropriate to set down a definitive list of sentencing guidelines, given the discretionary nature of sentencing.[11] Up until this point, the practice of the Appeals Chamber has been consistent with this principle, generally allowing a Trial Chamber to decide the categorisation of elements as relevant to factors such as gravity on one hand and aggravating on the other. s a result, certain factors have in the jurisprudence been considered both as aggravating factors and under the gravity of the offence (although not in the same case). In my respectful view, the above-mentioned finding of the Majority marks an unfortunate departure from this principle.

6. In sum, the Majority's decision to *proprio motu* find that the Trial Chamber erred in considering zeal and sadism in its assessment of the gravity of the offence is unsupported by the jurisprudence which has broadly defined elements that may be considered under "gravity". It is not

[6] *Ntakirutimana* Appeal Judgement, para. 550.
[7] *Ndindabahizi* Trial Judgement, para. 500; *Niyitegeka* Trial Judgement, para. 486.
[8] *Limaj* Appeal Judgement, para. 133.
[9] *Dragan Nikolić* Trial Judgement, paras 186, 189.
[10] *Dragan Nikolić* Appeal Judgement, para. 30.

clear why the Majority decided to act *proprio motu* in this case, particularly as the Prosecution ground relating to this issue was summarily dismissed for lack of notice. In my view, this finding marks an encroachment into the discretionary framework of the Trial Chambers, who are best placed to determine the relevant factors in sentencing. It is for the foregoing reasons that I cannot support the Majority's finding of an error by the Trial Chamber in the exercise of its sentencing discretion.

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

Signed on the 21st day of November 2007 at The Hague, The Netherlands,
Issued on the 27th day of November 2007 in Arusha, Tanzania.

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Liu Daqun
Judge

[Seal of the Tribunal]

[11] *Blaškić* Appeal Judgement, para. 680.

VI. PARTIALLY DISSENTING OPINION OF JUDGE SCHOMBURG

1. With all due respect, I cannot find any reason to depart from the International Tribunal's established jurisprudence on sentencing and uphold the sentence of 25 years' imprisonment for Aloys Simba. The Trial Chamber simply took this sentence from the wrong shelf.[1] The only adequate sentence in this case is life imprisonment. I cannot identify any factors which would permit a distinction to be made between this judgement and previous cases, in particular *Gacumbitsi v. The Prosecutor*.

2. Furthermore, pursuant to Article 23(1) of the International Tribunal's Statute, we shall have recourse to the general practice regarding prison sentences in the courts of Rwanda. This International Tribunal was established to avoid impunity. It would be contrary to this mandate to mete out punishment which is more lenient than sentences handed down in Rwanda, in particular vis-à-vis subordinates, as opposed to those standing trial as their superiors before the International Tribunal.

3. Finally, I need to point out that in this case, unlike in most of the other cases before the International Tribunal in which those convicted for the crime of genocide have received less than life sentence, there were no significantly distinguishing circumstances.[2] In fact, Aloys Simba was a principal perpetrator with stature in Rwandan society as a prominent former political and military figure who abused his position and influence to encourage the death of thousands, proven not only for one occasion. Like Sylvestre Gacumbitsi, he was a "primary player."[3]

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[1] *See Galić* Appeal Judgement, para. 455; *Gacumbitsi* Appeal Judgement, para. 205.
[2] Simba's case is not comparable to those cases in which an individual convicted of genocide or extermination has been sentenced to less than life imprisonment. In the *Serushago* Sentencing Judgement (upheld on appeal) and the *Ruggiu* Sentencing Judgement, a fixed term of imprisonment was imposed in cases where the convicted person had pleaded guilty. In the *Semanza* Appeal Judgement (para. 389 and Disposition) and the *Kajelijeli* Appeal Judgement (paras 324-325), the sentences reflected the fact that the pre-trial rights of the convicted persons had been infringed. In the *Kayishema and Ruzindana* Trial Judgement (Sentence, para. 28), upheld on appeal in the *Kayishema and Ruzindana* Appeal Judgement (para. 372), and *Ntakirutimana* Appeal Judgement (para. 564 and Disposition), the fixed sentences reflected other mitigating factors such as age and level of culpability of the accused.
[3] *Gacumbitsi* Appeal Judgement, para. 204.

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

Signed on the 21st day of November 2007 at The Hague, The Netherlands,
Issued on the 27th day of November 2007 in Arusha, Tanzania.

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Wolfgang Schomburg
Judge

[Seal of the Tribunal]

ANNEX A: PROCEDURAL BACKGROUD

A. Notices of Appeal and Briefs

1. The Trial Judgement was delivered in English on 13 December 2005. The Prosecution and the Appellant both submitted Notices of Appeal against the Trial Judgement.

1. Prosecution's Appeal

2. The Prosecution filed its Notice of Appeal on 12 January 2006 and its Appeal Brief on 27 March 2006.[1] On 17 August 2006, the Appeals Chamber dismissed a Prosecution motion for variation of the Notice of Appeal.[2] In its decision, the Appeals Chamber informed the parties that paragraphs 65-74 and 108-114 of the Prosecution Appeal Brief, which were related to the amendment the Prosecution sought to introduce in its Notice of Appeal, would be disregarded.

3. On 18 October 2006, the Appellant filed his response to the Prosecution Appeal Brief.[3] The Prosecution filed its Brief in Reply on 31 October 2006.[4]

2. Appellant's Appeal

4. On 16 December 2005, the Appeals Chamber granted the Appellant's Motion for Extension of Time for Filing his Notice of Appeal.[5] The Appellant was ordered to file his Notice of Appeal no later than thirty days from the date of the filing of the French translation of the Trial Judgement.[6] The French translation of the Trial Judgement was filed on 15 May 2006,[7] and the Appellant filed his Notice of Appeal on 22 June 2006.[8]

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[1] Prosecutor's Notice of Appeal, 12 January 2006; Prosecutor's Appellant's Brief, 27 March 2006, as amended by the Corrigendum to Prosecutor's Appellant's Brief, 28 March 2006.
[2] Decision on Motion for Variation of Notice of Appeal of 17 August 2006.
[3] *The Prosecutor v. Aloys Simba*, Case No. ICTR-2001-76-A, Respondent Brief, filed on 17 October 2006. On 13 April 2006, the Pre-Appeal Judge had granted an extension of time to the Appellant to file his response to the Prosecution Appeal Brief for the reason that a French translation of the documents was not available (Decision on Respondent's Motion for Extension of Time, 13 April 2006).
[4] Prosecutor's Brief in Reply, filed on 31 October 2006.
[5] *Requête en extrême urgence de la Défense en vue d'obtenir un report de délai pour le dépôt de son Acte d'appel contre le jugement de la première Chambre du TPIR rendu le 13/12/05 (Article 166B) du RPP)*, 14 December 2005.
[6] Decision on Motion for Extension of Time for Filing of Notice of Appeal, 16 December 2005.
[7] *See also* Decision on Registrar's Request for Extension of Time for Filing an Official Translation of the Trial Judgement, 25 January 2005; *Observations du Greffier relatives à la seconde ordonnance de la décision relative à la requête visant à obtenir un report de délai pour le dépôt de l'acte d'appel rendue par la Chambre d'Appel le 16 décembre 2005*, 21 December 2005.
[8] *Acte d'appel de la Défense (Article 24 du Statut du TPIR),* 22 June 2006. The Appeals Chamber notes that the French translation of the Trial Judgement was only served to the Appellant on 23 May 2006 (*see* Decision on Defence Motion for Extension of Time to Respond to the Prosecutor's Appellant's Brief, 20 June 2006, fn. 6).

5. The Appellant filed confidentially his Appeal Brief on 6 September 2006.[9] The Prosecution filed two motions, on 8 September and 27 September 2006 respectively, objecting to the Appellant's Appeal Brief.[10] On 29 September 2006, the Pre-Appeal Judge rejected the filings of both the electronic version and the hard copy of the Appellant's Appeal Brief, and ordered the Appellant to re-file, by 6 October 2006, his Appeal Brief in strict compliance with the Practice Direction on the Length of Briefs and Motions on Appeal and directed the Registrar to withhold the payment of fees, if claimed, associated with the rejected filings.[11]

6. The Appellant filed his Appeal Brief on 16 October 2006.[12] The Prosecution filed its Response Brief on 1 December 2006.[13] On 2 March 2007, the Appellant filed his Brief in Reply.[14]

B. Assignment of Judges

7. On 16 December 2005, the following Judges were assigned to hear the appeal: Judge Fausto Pocar, Presiding; Judge Mehmet Güney; Judge Liu Daqun; Judge Theodor Meron; and Judge Wolfgang Schomburg.[15] On 24 January 2006, Judge Liu Daqun was designated as Pre-appeal Judge.[16]

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[9] *Mémoire d'appel de la Défense,* 6 September 2006. An electronic copy had been transmitted on 5 September 2006. The annexes were filed on 18 September 2006. The original hard copy of the Appellant's Appeal Brief was filed on 21 September 2006. *See* Order Concerning Aloys Simba's Appellant's Brief, 29 September 2006, p. 2.

[10] Prosecutor's Urgent Motion Objecting to "Mémoire d'appel de la Défense", 8 September 2006; Prosecutor's Urgent Motion Objecting to "Mémoire d'appel de la Défense" and Annexes as Filed on 21 September 2006 and 18 September 2006, Respectively", 27 September 2006.

[11] Order Concerning Aloys Simba's Appellant's Brief, 29 September 2006. *See* also *Requête en extrême urgence de la Défense en vue de solliciter le réexamen de l' « Ordonnance relative au Mémoire d'appel de Simba »,* 2 October 2006; Prosecutor's Response to « Requête en extrême urgence de la Défense en vue de solliciter le réexamen de l' « Ordonnance relative au Mémoire d'appel de Simba (Article 73 du RPP) »», 2 October 2006; Decision on the Appellant's Request for Reconsideration of the Order Concerning Aloys Simba's Appellant's Brief, 8 November 2006.

[12] *Mémoire d'appel d'Aloys Simba*, 16 October 2006. On 4 October 2006, in response to the Appellant's motion requesting an extension of the word limit and authorisation to transmit his Appeal Brief via express mail (*Requête en extrême urgence de la Défense en vue de solliciter exceptionnellement l'interprétation du paragraphe C1a) de la Directive Relative à la Longueur des mémoires et des requêtes en appel et l'autorisation de dépasser le nombre des mots limité et de transmettre le mémoire d'appel uniquement par courrier express (article 73 du RPP),* 3 October 2006) the Pre-Appeal Judge ordered the Appellant, *inter alia*, to file an Appeal Brief not exceeding 30,000 words, allowed the Appellant to submit his Appeal Brief by express mail, and requested him to take the necessary measures to ensure that the brief reached the Registry of the Tribunal in Arusha, no later than 13 October 2006 (Decision on Aloys Simba's Motion to File his Appellant's Brief, 4 October 2006).

[13] Prosecutor's Respondent's Brief, 1 December 2006. The Prosecution filed a first respondent's brief on 24 November 2006. On 30 November 2006, the Pre-Appeal Judge ordered the Prosecution to re-file its respondent's brief no later than 7 December 2006 in strict compliance with the Practice Direction on the Length of Briefs and Motions on Appeal (Order Concerning the Prosecution's Respondent's Brief, 30 November 2006).

[14] *Mémoire en réplique de l'Appelant,* 2 March 2007.

[15] Order of the Presiding Judge Assigning Judges to an Appeal before the Appeals Chamber, 16 December 2005.

[16] Order Appointing a Pre-Appeal Judge, 24 January 2006.

C. Review Motions

8. On 22 July 2006, the Appellant filed a motion before the Trial Chamber requesting a review of the Trial Judgement pursuant to Rule 120 of the Rules.[17] On the same date, the Appellant filed a request before the Appeals Chamber for the suspension of the time limits in the appeal proceedings and the return of the case to the Trial Chamber for the purposes of conducting a review.[18] On 15 August 2006, the Pre-Appeal Judge confirmed the continuation of the pre-appeal proceedings in this case.[19] On 30 August 2006, the Prosecution asked the Trial Chamber to dismiss the request for review and direct the Appellant to file it before the Appeals Chamber.[20] On 11 September 2006, the Appellant filed a motion requesting the Appeals Chamber to send the request for review to the Trial Chamber for the consideration of its merits, or in the alternative to admit the request for review and to find that it has merit.[21] On 9 January 2007, the Appeals Chamber dismissed the Request for Review and the Request for Suspension of Appeal Proceedings.[22] On 17 August 2007, the Trial Chamber rejected the Defence requests for review and the Motion for Clarification and Additional Relief as moot.[23]

D. Motions Related to the Admission of Additional Evidence

9. On 3 April 2007, the Appellant filed a motion for the admission of additional evidence.[24] On 24 April 2007, and following an Order of the Pre-Appeal Judge,[25] the Appellant submitted several

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[17] *Requête en extrême urgence de la Défense en vue de la Révision du Jugement en date du 13 Décembre 2005 pour cause de faits nouveaux*, 22 July 2006.

[18] *Requête de la Défense en vue de la suspension de tous les délais de la procédure en appel en cours,* 22 July 2006 ("Request for Suspension of Appeal Proceedings"); Prosecutor's Response to "Requête de la Défense en vue de la suspension de tous les délais de la procédure en appel en cours", 1 August 2006; *Réplique de la Défense à la Réponse du Procureur suite à la requête de la Défense en vue de la suspension de tous les délais de la procédure en appel en cours*, 7 August 2006.

[19] Scheduling Order, 15 August 2006.

[20] Motion for Clarification and Additional Relief, 30 August 2006.

[21] *Requête en extrême urgence de la Défense en vue de la Révision du Jugement en date du 13 Décembre 2005 pour cause des faits nouveaux et/ou de renvoi de la cause devant la 1ère Chambre du TPIR pour en connaître au fond*, 11 September 2006 ("Request for Review"); Prosecutor's Response to « Requête en extrême urgence de la Défense en vue de la Révision du Jugement en date du 13 Décembre 2005 pour cause des faits nouveaux et/ou de renvoi de la cause devant la 1ère Chambre du TPIR pour en connaître au fond », 21 September 2006; *Réplique à la Réponse du Procureur suite à la «Requête en extrême urgence de la Défense en vue de la Révision du Jugement en date du 13 Décembre 2005 pour cause des faits nouveaux et/ou de renvoi de la cause devant la 1ère Chambre du TPIR pour en connaître au fond »,* 25 October 2006.

[22] Decision on Aloys Simba's Requests for Suspension of Appeal Proceedings and Review, 9 January 2007.

[23] Ruling on Defence Requests for Review of Trial Judgement and on Prosecution Motion, 17 August 2007.

[24] *Requête en extrême urgence de la Défense en vue d'obtenir l'autorisation de présenter des moyens de preuve supplémentaires (Articles 73 et 115 du RPP)*, 3 April 2007; Prosecutor's Response to "*Requête en extrême urgence de la Défense en vue d'obtenir l'autorisation de présenter des moyens de preuve supplémentaires (Article 73 et 115 du RPP)*", 27 April 2007. Corrigendum, filed on 30 April 2007; *Réplique de la Défense suite à la Réponse du Procureur à la "Requête en extrême urgence de la Défense en vue d'obtenir l'autorisation de présenter des moyens de preuve supplémentaires (Article 73 et 115 du RPP)"*, 11 May 2007. The Appellant filed the annexes to the motion on 12 April 2007.

[25] Order Concerning Aloys Simba's « Requête en extrême urgence de la Défense en vue d'obtenir l'autorisation de présenter des moyens de preuve supplémentaires », 18 April 2007.

documents in support of his Rule 115 application.[26] On 21 May 2007, the Appeals Chamber dismissed the Appellant's motion in its entirety.[27]

E. Hearing of the Appeals

10. Pursuant to a Scheduling Order of 3 April 2007, the Appeals Chamber heard the parties' oral arguments on 22 May 2007 in Arusha, Tanzania.[28]

F. Post-Hearing Proceedings

1. Order for Translation

11. On 3 July 2007, the Appeals Chamber issued an order for the translation of Exhibits D3, D4, D5-A and D5-B, which were admitted at trial in Kinyarwanda only.[29] The Appeals Chamber instructed the parties to file those unofficial translations of the exhibits which were in their possession and requested the Registry to provide certified translations of the exhibits into English and French. The Appellant and Prosecution filed confidentially their submissions on 9 and 11 July 2007 respectively.[30] On 16 July 2007, the Registry filed confidentially the official translations.[31]

2. Order to Registrar Regarding BJK1

12. On 13 July 2007, the Appeals Chamber issued an order in which it requested the Registrar to submit a detailed written submission on the steps taken by the Registry in order to secure the attendance at trial of BJK1.[32] On 13 August 2007, the Registrar filed a confidential submission re BJK1.[33]

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[26] *Transmission des pièces suite à l'ordonnance du juge de la mise en état en date du 18 avril 2007*, 24 April 2007.
[27] Decision on Appellant Aloys Simba's Request to Present Additional Evidence, 21 May 2007 (confidential filing).
[28] Scheduling Order, 3 April 2007.
[29] Order for Translation, 3 July 2007.
[30] *Transmission par la Défense des traductions non-officielles en Français des pièces D3, D4, D5A, et D5B,* 9 July 2007; Prosecutor's Response to the Appeals Chamber's "Order for Translation" Dated 3 July 2007, 11 July 2007.
[31] Registrar's Submissions Under Rule 33(B) of the Rules on Order for Translation, 16 July 2007. On 3 August 2007, the Registry submitted additional information on the origin of Exhibit D4 (Registrar's Submissions Under Rule 33(B) of the Rules on Order for Translation, 3 August 2007).
[32] Simba Order to Registrar Regarding BJK1 of 13 July 2007.
[33] The Registrar's Submission filed pursuant to Rule 33(B) of the Rules of Procedure and Evidence Regarding Securing the Attendance At Trial of Witness BJK1, 13 August 2007 (confidential filing).

ANNEX B: CITED MATERIALS/DEFINED TERMS

A. List of Court Decisions

1. ICTR

AKAYESU

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

BAGILISHEMA

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

BAGOSORA ET AL.

Prosecutor v. Théoneste Bagosora et al., Case Nos. ICTR-98-41-AR93 & ICTR-98-41-AR93.2, Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, 19 December 2003 ("*Bagosora* Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence of 19 December 2003")

BIZIMUNGU ET AL.

The Prosecutor v. Bizimungu, Case No. ICTR-99-50-T, Decision on Prosecution's Interlocutory Appeals Against Decisions of the Trial Chamber on Exclusion of Evidence, 25 June 2004

"BUTARE CASE"

The Prosecutor v. Pauline Nyiramasuhuko et al., Joint Case No. ICTR-98-42-A15*bis* Decision In the Matter of Proceedings under Rule 15 *bis*(D), 24 September 2003 ("*Butare Case* Decision In the Matter of Proceedings under Rule 15 *bis*(D) of 24 September 2003")

GACUMBITSI

The Prosecutor v. Sylvestre Gacumbitsi, Case No. ICTR-01-64, Trial Judgment, 17 June 2004 ("*Gacumbitsi* Trial Judgement")

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

KAJELIJELI

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

KAMBANDA

Jean Kambanda v. The Prosecutor, Case No. ICTR-97-23-A, Judgement, 19 October 2000 ("*Kambanda* Appeal Judgement")

KAMUHANDA

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

KAREMERA ET AL.

The Prosecutor v. Édouard Karemera et al., Case No. ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007 ("*Karemera* Decision on Interlocutory Appeal Regarding Witness Proofing of 11 May 2007")

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 ")

MUHIMANA

Mikaeli Muhimana v. The Prosecutor, Case No. ICTR-95-1B-A, Judgement, 25 May 2007 ("*Muhimana* Appeal Judgement")

MUSEMA

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

MUVUNYI

Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-T, Judgement and Sentence, 12 September 2006 ("*Muvunyi* Trial Judgement")

NDINDABAHIZI

The Prosecutor v. Emmanuel Ndindabahizi, Case No. ICTR-01-71-I, Judgement and Sentence, 15 July 2004 ("*Ndindabahizi* Trial Judgement")

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

NIYITEGEKA

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

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

NTAGERURA ET AL.

The Prosecutor v. André Ntagerura et al., Case No. ICTR-99-46-T, Judgement and Sentence, 25 February 2004 ("*Ntagerura et al.* Trial Judgement")

The Prosecutor v. André Ntagerura et al., Case No. ICTR-99-46-A, Arrêt, 7 July 2005 ("*Ntagerura et al.* 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 Ntakirutimana and Gérard Ntakirutimana, Case Nos. ICTR-96-10-A & ICTR-96-17-A, Judgement, 13 December 2004 ("*Ntakirutimana* Appeal Judgement")

RUTAGANDA

The Prosecutor v. Georges Anderson Nderumwe Rutaganda, Case No. ICTR 96-3-A, Decision on Appeals Against the Decisions by Trial Chamber I Rejecting the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witnesses "E" and "CC", 8 June 1998

("*Rutaganda* Decision Rejecting the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witnesses "E" and "CC" of 8 June 1998")

Georges Anderson Nderubumwe Rutaganda v. The Prosecutor, Case No. ICTR-96-3-T, Judgement, 6 December 1999 ("*Rutaganda* Trial Judgement")

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

SEMANZA

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

SEROMBA

The Prosecutor v. Athanase Seromba, Case No. ICTR-01-66-I, Judgement, 13 December 2006 ("*Seromba* Trial Judgement")

SERUGENDO

The Prosecutor v. Joseph Serugendo, Case No. ICTR-05-84-I, Judgement and Sentence, 12 June 2006 ("*Serugendo* Trial Judgement")

SIMBA

The Prosecutor v. Aloys Simba, Case No. ICTR-01-76-I, Decision on Motion to Amend Indictment, 26 January 2004 ("Indictment Decision of 26 January 2004")

The Prosecutor v. Aloys Simba, Case No. ICTR-01-76-I, Decision on Preliminary Defence Motion Regarding Defects in the Form of the Indictment, 6 May 2004 ("Decision on the Defects in the Form of the Indictment of 6 May 2004")

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The Prosecutor v. Aloys Simba, Case No. ICTR-2001-76-T, Decision on the Defence Request to Preclude the Testimony of Prosecution Witness KDD under Oath, 28 October 2004 ("Decision of 28 October 2004")

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The Prosecutor v. Aloys Simba, Case No. ICTR-2001-76-T, Decision on the Defence Request for Site Visits in Rwanda, 31 January 2005 ("Decision on Site Visits of 31 January 2005")

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2. ICTY

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BLAŠKIĆ

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FURUNDŽIJA

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KVOČKA ET AL.

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SIMIĆ ET AL.

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STAKIĆ

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TADIĆ

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VASILJEVIĆ

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B. Defined Terms and Abbreviations

The Appellant	Aloys Simba
cf.	[Latin: *confer*] (Compare)
CIPEP	*Centre intercommunal de perfectionnement du personnel*
Defence	The Appellant, and/or the Appellant's counsel
Exh(s).	Exhibit(s)
fn.	footnote
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. Aloys Simba*, Case No. ICTR-01-76-I, Amended Indictment (Pursuant to 6 May 2004 Decision), dated 10 May 2004
Amended Indictment	*The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-I, Amended Indictment, dated 20 November 2003 and filed on 27 January 2004 (Pursuant to 26 January 2004 Decision)

Initial Indictment	*The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-I, Indictment, dated 4 January 2002
JCE	Joint criminal enterprise
MRND	*Mouvement révolutionnaire national pour la démocratie et le développement*
Prosecution	Office of the Prosecutor
para. (paras)	paragraph (paragraphs)
Prosecution Appeal Brief	The Prosecutor v. Aloys Simba, Case No. ICTR-01-76-A, Prosecutor's Appellant's Brief, filed on 27 March 2006
Prosecution Corrigendum to Appeal Brief	The Prosecutor v. Aloys Simba, Case No. ICTR-01-76-A, Corrigendum to Prosecutor's Appellant's Brief, filed on 28 March 2006
Prosecution Final Trial Brief	*The Prosecutor v. Aloys Simba*, Case No. ICTR-2001-76-T, The Prosecutor's Closing Brief, filed on 22 June 2005
Prosecution Pre-Trial Brief	*The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-I, The Prosecutor's Pre-Trial Brief Pursuant to Article 73 bis (B)(i) of the Rules of Procedure and Evidence, filed on 16 February 2004
Prosecution Notice of Appeal	Prosecutor's Notice of Appeal, filed on 12 January 2006
Prosecution Response	*The Prosecutor v. Aloys Simba*, Case No. ICTR-2001-76-A, Prosecutor's Respondent's Brief, filed on 1 December 2006
Prosecution Reply	*The Prosecutor v. Aloys Simba*, Case No. ICTR-2001-76-A, Prosecutor's Brief in Reply, filed on 31 October 2006
R.P.	Registry Page (reference to page number in case file maintained by the Registry)
Rules	Rules of Procedure and Evidence of the ICTR
Simba Appeal Brief	*The Prosecutor v. Aloys Simba*, Case No. ICTR-2001-76-A, Appellant's Brief, filed in French on 16 October 2006 (Mémoire d'Appel d'Aloys Simba).
Simba Final Trial Brief	*The Prosecutor v. Aloys Simba*, Case No. ICTR-2001-76-T, "Conclusions de la Défense contre l'Acte d'Accusation modifié en date du 10 Mai 2004", filed on 22 June 2005. Note : English *draft* translation available
Simba Notice of Appeal	*The Prosecutor v. Aloys Simba*, Case No. ICTR-2001-76-A, Defence Notice of Appeal, filed in French (Acte d'Appel de la Défense) on 22 June 2006

Simba Reply	*The Prosecutor v. Aloys Simba*, Case No. ICTR-2001-76-A, Appellant's Brief in Reply, filed in French (Mémoire en Réplique de l'Appelant) on 2 March 2006
Simba Response	*The Prosecutor v. Aloys Simba*, Case No. ICTR-2001-76-A, Respondent Brief, filed on 17 October 2006
Statute	Statute of the International Tribunal for Rwanda established by Security Council Resolution 955 (1994)
T.	Transcript page from hearings in *Prosecutor v. Aloys Simba*, Case No. ICTR-01-76. All references are to the official English transcript, unless otherwise indicated.
AT.	Transcript page from hearings in *Aloys Simba v. The Prosecutor,* Case No. ICTR-01-76-A. All references are to the official English transcript, unless otherwise indicated.
CRA	French Transcript (Compte rendu d'audience) page from hearings in *Prosecutor v. Aloys Simba*, Case No. ICTR-01-76
Tribunal or ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994
UN	United Nations
UNDF	United Nations Detention Facilities for persons awaiting trial or appeal before the ICTR
WVSS	Witness and Victims Support Section

C. Other Documents cited

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The Prosecutor v. Aloys Simba, Case No. ICTR-01-76-I, Requête de la défense en vue d'enjoindre au procureur d'avoir à fournir la *preuve* que des poursuites judiciaires ont été *engagées* contre les témoins "KXX" et "YH" lesquels se sont accusés du crime de *génocide*, 25 October 2004 ("Motion of 25 October 2004")

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