UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

APPEALS CHAMBER

Case No. ICTR-99-46-A

ENGLISH
Original: FRENCH

Before: Judge Fausto Pocar, presiding
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Adama Dieng

Date: 7 July 2006

THE PROSECUTOR
(Appellant and Respondent)

v.

ANDRÉ NTAGERURA
(Respondent)
EMMANUEL BAGAMBIKI
(Respondent)
SAMUEL IMANISHIMWE
(Appellant and Respondent)

JUDGEMENT

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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 Samuel Imanishimwe ("Imanishimwe") and by the Prosecution, against the Judgement rendered by Trial Chamber III in the case of *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe* on 25 February 2004 (the "Trial Judgement").

A. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe

2. André Ntagerura ("Ntagerura") was born on 2 January 1950 in Cyangugu prefecture, Rwanda. From March 1981 through July 1994 Ntagerura served as a minister in the Rwandan Government, his last appointment being Minister of Transport and Communications in the Interim Government.[1]

3. Emmanuel Bagambiki ("Bagambiki") was born on 8 March 1948 in Cyangugu prefecture, Rwanda. From 4 July 1992 to 17 July 1994, Bagambiki served as the prefect of Cyangugu.[2]

4. Samuel Imanishimwe ("Imanishimwe") was born on 25 October 1961 in Gisenyi prefecture, Rwanda. Imanishimwe, a lieutenant in the Rwandan Armed Forces, served as the acting commander of the Cyangugu military camp, which is also referred to as the Karambo military camp, from October 1993 until he left Rwanda in July 1994.[3]

B. The Trial Judgement

5. The trial was based on two separate indictments. The first indictment, filed on 9 August 1996 and amended on 29 January 1998, charged Ntagerura with genocide, conspiracy to commit genocide, extermination as a crime against humanity, serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II and two counts of complicity in genocide, both as an individual pursuant to Article 6(1) and as a superior under Article 6(3) of the Statute of the Tribunal (the "Statute"). Another indictment, filed on 9 October 1997 and amended on 10 August 1999, charged Bagambiki and Imanishimwe with genocide, complicity in genocide, conspiracy to commit genocide, murder, extermination and imprisonment as crimes against humanity and serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II. Imanishimwe was, in addition, charged with torture as a crime against humanity.

6. The trial of Ntagerura, Bagambiki and Imanishimwe was based on the following facts:

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[1] Trial Judgement, para. 5.
[2] *Ibid*., para. 12.
[3] *Ibid*., para. 13.

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- On the evening of 6 April 1994, after receiving notification of President Habyarimana's death, Imanishiwme addressed the soldiers of the Karambo military camp and immediately placed his camp on alert.[4]

- On 7 April, refugees began to arrive at the parishes of Shangi and Mibilizi.[5]

- On 8 April, predominantly Tutsi refugees fleeing the violence in their neighbourhoods began gathering at Cyangugu Cathedral and eventually numbered 5,000. The prefectural authorities provided at least two to four gendarmes to protect the refugees at the cathedral.[6] On the same day, Bagambiki sent gendarmes to guard Shangi Parish at the request of parish authorities.[7] Still on the same day, Hutu assailants began attacking Tutsi homes in Gisuma commune and, after several days of clashes, a number of refugees gathered at the Gashirabwoba football field.[8]

- Between 9 and 11 April 1994, four gendarmes were posted at Mibilizi Parish.[9]

- On 10 April, daily attacks began at Shangi Parish. The sub-prefect went to the the parish to examine the situation.[10]

- On 11 April, a group of *Interahamwe* came to the cathedral shooting into the air, creating disorder and panic among the refugees. Bagambiki came to the cathedral after this attack to speak briefly to the refugees.[11] On the same day, soldiers arrested seven refugees in the vicinity of the cathedral and took them to the Karambo military camp, where they were maltreated in Imanishimwe's presence.[12] Some other refugees who had been arrested were returned to the cathedral after Witness LY asked Bagambiki to intervene.[13] Still on the same day, the gendarmes posted at the cathedral deterred two attacks on the refugees gathered there.[14]

- By 11 April 1994, about 500 refugees had gathered at the Gashirabwoba football field. On the morning of this day, they repulsed an attack. During the afternoon, Bagambiki and Imanishimwe arrived at the football field and took away Côme Simugomwa, the local head of the PL party. After the genocide, Côme Simugomwa's body was found by a river in Karengera commune. In the evening, soldiers arrived at the football field.[15]

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[4] *Ibid*., para. 389.
[5] *Ibid*., para. 478 (Shangi) and 529 (Mibilizi).
[6] *Ibid*., para. 309.
[7] *Ibid*., para. 478.
[8] *Ibid*., para. 435.
[9] *Ibid*., para. 529.
[10] *Ibid*. paras. 480-481.
[11] *Ibid*., para. 309.
[12] *Ibid*., para. 310.
[13] *Ibid*., para. 311.
[14] *Ibid*., para. 313.
[15] *Ibid*. para. 435.

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- On 11 and 12 April, local *Interahamwe* attacked Mibilizi Parish, but the refugees warded off the attacks.[16]

- On 11 April, a delegation including a sub-prefect visited Nyamasheke Parish, where a number of Tutsi had sought refuge.[17] On the same day, soldiers killed a number of civilians detained at the Karambo military camp.[18]

- On 12 April, Sub-Prefect Munyangabe delivered medicine to Shangi Parish.[19] On the same day, the refugee population at the Gashirabwoba football field had swelled to nearly 3,000. That morning, thousands of assailants began attacking the refugees at the football field. Bagambiki and Nsabimana, the director of the Shagasha tea factory, came to the football field and Bagambiki promised to send soldiers to protect the refugees. An hour later, armed factory guards and soldiers arrived at the football field and started firing and throwing grenades at the refugees. *Interahamwe* then killed the survivors and looted their personal possessions.[20]

- On the same day, *Interahamwe* attacked Nyamasheke Parish. No one was killed during that attack. The next day, the assailants returned and engaged in a similar attack. During the attack, a gendarme fired and killed three *Interahamwe*, ending the attack. After Bagambiki had been informed about the attack, he went to Nyamasheke Parish to intervene.[21]

- On 13 April 1994, the prefecture made available gendarmes and a vehicle to take a shipment of food to Shangi Parish. Either on the same day or on the next day, there was a massive assault on the parish, which by one estimate resulted in the death of 800 refugees.[22]

- Either on the same day or the next day, Bagambiki prevented an attack against the refugees at Cyangugu Cathedral when he personally stopped an armed crowd of assailants heading to the cathedral. On 14 April, the church authorities convened a meeting with Bagambiki and Imanishimwe because the church authorities felt that they could no longer ensure the refugees' safety. Bagambiki determined that the refugees should be transferred to Kamarampaka Stadium.[23] On the same day, a number of refugees tried to seek refuge at Kamarampaka Stadium, but were stopped by soldiers. Some of the soldiers then fetched Bagambiki, who briefly addressed the refugees. After he left the refugees, *Interahamwe* emerged from the bush and killed some of them.[24]

[16] *Ibid*., para. 530.
[17] *Ibid*., paras. 577, 579.
[18] *Ibid*., para. 408.
[19] *Ibid*., para. 479.
[20] *Ibid*., para.437.
[21] *Ibid*., paras. 580-581.
[22] *Ibid*., paras. 479-480.
[23] *Ibid*., paras. 313-314.
[24] *Ibid*., para. 594.

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- On 14 April, Bagambiki and others went to Mibilizi Parish to discuss the situation with delegations of local *Interahamwe* and refugees.[25]

- On 15 April 1994, refugees from Cyangugu cathedral were transferred to the Kamarampaka Stadium. Bagambiki and the bishop accompanied the procession of refugees that was protected by gendarmes.[26] The refugees joined between 50 and 100 refugees who had been at the stadium since 9 April 1994. A number of other refugees from various locations throughout the prefecture arrived later.[27] The refugees at the stadium were guarded by gendarmes.[28]

- On the same day, there was another clash between the refugees and the local attackers at Mibilizi Parish.[29] Also at Nyamasheke Parish, assailants launched a massive assault against the parish, killing most of the refugees there.[30]

- On 16 April, Bagambiki and Imanishimwe received a list of names of people with suspected ties to RPF from assailants who were threatening to attack Kamarampaka Stadium.[31] Bagambiki and Imanishimwe then searched for and took away 17 refugees from the Cyangugu Cathedral and Kamarampaka Stadium. Bagambiki addressed the refugees at the stadium, stating that the authorities were going to remove and question the 17 refugees in order to ensure the safety of the other refugees. Out of the 17 refugees, 16 were killed that evening or during the following night.[32]

- On the same day, Nyamasheke Parish was attacked again. Most of the refugees who had survived the attack of 15 April were killed. After the attack, Bagambiki suspended *Bourgmestre* Kamana because of his involvement in the attack.[33]

- On 18 April, Miblizi Parish suffered several attacks. Sub-Prefect Munyangabe was sent there and tried to negotiate with the assailants. He did not succeed in preventing a massive assault in which the assailants killed many refugees.[34] On 20 April, the assailants returned to the parish, removed between 60 and 100 refugees and killed them.[35]

- On 26 April, Bagambiki was informed about an imminent massive attack against the refugees at Shangi Parish. At Bagambiki's insistence, Munyangabe went to the parish to try to prevent the attack. Munyangabe negotiated with the attackers and agreed that he would remove about 40 refugees from the parish

[25] *Ibid*., para. 530.
[26] *Ibid*., para. 316.
[27] *Ibid*., paras. 316-317, 335.
[28] *Ibid*., para. 329.
[29] *Ibid*., para. 530.
[30] *Ibid*., para. 584.
[31] *Ibid*., para. 614.
[32] *Ibid*., paras. 318, 320.
[33] *Ibid*., paras. 585-586.
[34] *Ibid*., para. 534.
[35] *Ibid*., para. 536.

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if the assailants agreed not to attack the remaining refugees there. The selected refugees were taken to the Kamarampaka Stadium. On the way, they were attacked and mistreated, and one of them was killed. The others finally arrived at the stadium.[36]

- Around 27 April, a number of refugees were selected and removed from the Kamarampaka Stadium. One of them was killed, while the fate of the others was unknown.[37]

- On 28 or 29 April, a massive attack was launched on Shangi Parish, killing most of the refugees there.[38]

- On 30 April, gendarmes tried in vain to prevent an attack on Mibilizi Parish. Between 60 and 80 refugees were killed.[39]

- In May, the prefectural authorities transferred the refugees from Kamarampaka Stadium to a new camp at Nyarushishi, where the conditions were better. The camp was guarded by gendarmes, who pushed back at least one attempted attack between 11 May 1994 and the arrival of the French *Opération Turquoise* forces on 23 June 1994.[40] The surviving refugees from Shangi and Mibilizi Parishes were also transferred to this camp.[41]

- On 6 June 1994 in Kamembe city, soldiers arrested approximately 300 people in the presence of Bagambiki and Imanishimwe. Some of the arrested persons were killed on Imanshimwe's orders. Subsequently, a number of detainees were held at the Karambo military camp, where they were questioned and mistreated in Imanishimwe's presence.[42]

7. The Trial Chamber acquitted Ntagerura and Bagambiki on all the counts in the Indictment.[43] Pursuant to Article 98 *bis* of the Rules of Procedure and Evidence of the Tribunal (the "Rules"), the Trial Chamber had already acquitted Imanishimwe of conspiracy to commit genocide during the trial.[44] In the Trial Judgement, Imanishimwe was by majority found guilty of genocide (Count 7), extermination as a crime against humanity (Count 10) and serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 13) under Article 6(3) of the Statute.[45] The Trial Chamber unanimously found him not guilty of complicity in genocide, but guilty of murder (Count 9), imprisonment (Count 11), and torture (Count 12) as crimes against humanity and serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 13) under Article 6(1) of the Statute. Having convicted Imanishimwe on Counts 7 and 10, the Chamber

[36] *Ibid*., para. 481.
[37] *Ibid*., para. 325,
[38] *Ibid*., para. 482.
[39] *Ibid*., para. 538.
[40] *Ibid*., paras. 609-611.
[41] *Ibid*., para. 482 (Shangi) and para. 539 (Mibilizi).
[42] *Ibid*., paras. 394-395.
[43] *Ibid*., para. 829.
[44] *Ibid*., para. 807; T.6 March 2002 p. 54.
[45] *Ibid*., para. 806.

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sentenced him to two terms of 15 years' imprisonment, to be served concurrently.[46] For the convictions under Counts 9, 11, 12 and 13 the Trial Chamber imposed sentences of 10, 3, 10 and 12 years' imprisonment respectively, to be served concurrently.[47] The Trial Chamber found that the concurrent sentences for Counts 9, 11, 12, and 13 should be served consecutively to the concurrent sentences for Counts 7 and 10. Accordingly, Imanishimwe's total sentence was 27 years' imprisonment.[48]

C. The Appeals

8. The Prosecution raises 11 grounds of appeal, two of which relate exclusively to Imanishimwe. In the other nine grounds of appeal, the Prosecution objects to the Trial Chamber's conclusions on the form of the Indictments. In addition, the Prosecution avers that the Trial Chamber's assessment of the evidence was erroneous and that Bagambiki should have been held criminally responsible for several crimes that the Trial Chamber found established. The Prosecution further submits that Imanishimwe should have been held criminally responsible under Article 6(1) for the crimes committed at the Gashirabwoba football field, and that the sentence imposed by the Trial Chamber was too lenient.

9. Imanishimwe has lodged six grounds of appeal. They relate to defects in the form of the Indictment, his conviction under Article 6(3) of the Statute for the Gashirabwoba events, multiple convictions, the application of Article 4 of the Statute, evidentiary matters and sentencing.

10. The Appeals Chamber recalls that it unanimously dismissed the grounds of appeal raised by the Prosecutor in respect of André Ntagerura and Emmanuel Bagambiki and affirmed their acquittal in the disposition of the Judgement concerning the Prosecutor's appeal against the acquittal of André Ntagerura and Emmanuel Bagambiki, delivered at the close of the hearings on 8 February 2006. The present Judgement now sets on the reasons for the decision and rubs on the grounds of appeal raised by the Prosecutor in relation to Imanishimwe and Imanishimwe's appeal.

D. Standards for Appellate Review

11. The Appeals Chamber recalls the standards for appellate review pursuant to Article 24 of the Statute, as summarised in the *Kamuhanda* Appeal Judgement.[49] 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.[50]

12. 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

[46] *Ibid*., paras. 822-823.
[47] *Ibid*., paras. 825-826.
[48] *Ibid*., para. 827.
[49] *Kamuhanda* Appeal Judgement, paras. 6-7.
[50] See *Semanza* Appeal Judgement, para. 7; *Kamuhanda* Appeal Judgement, para. 6.

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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.[51]

13. Arguments of a party which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[52] The appealing party must provide precise references to relevant transcript pages or paragraphs in the Judgement to which the challenge is being made.[53] Further, "the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies".[54]

14. Finally, it should be recalled that the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing.[55] The Appeals Chamber will dismiss arguments which are evidently unfounded without providing detailed reasoning.[56]

II. GROUNDS OF APPEAL RELATED TO THE INDICTMENT

A. Introduction

15. The Prosecution submits under its third ground of appeal that the Trial Chamber erred in law in finding that joint criminal enterprise was not pleaded in the Ntagerura Indictment and the Bagambiki/Imanishimwe Indictment (the "Indictments") and, as a result, in refusing to allow the Prosecution to rely on this mode of liability as the basis for the individual criminal responsibility of the Accused.[57] Under its fourth ground of appeal, the Prosecution submits that the Trial Chamber erred in (1) refusing to consider whether the Pre-Trial Brief and other disclosures cured any defects in the Indictments;[58] (2) making a post-trial finding

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[51] *Niyitegeka* Appeal Judgement, para. 8; *Semanza* Appeal Judgement, para. 8; *Kamuhanda* Appeal Judgement, para. 7; see also *Tadić* Appeal Judgement, para. 64; *Aleksovski* Appeal Judgement, para. 63; *Čelebići* Appeal Judgement, para. 434; *Krnojelac* Appeal Judgement, paras. 11-13; *Vasiljević* Appeal Judgement, para. 8; *Kristić* Appeal Judgement, para. 40.
[52] *Kajelijeli* Appeal Judgement, para. 6. See also, e.g., *Rutaganda* Appeal Judgement, para. 18; *Blaškić* Appeal Judgement, para. 13; *Ntakirutimana* Appeal Judgement, para. 13.
[53] Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005, para. 4(b)(ii). See also *Kajelijeli* Appeal Judgement, para. 7; *Blaškić* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 10; *Ntakirutimana* Appeal Judgement, para. 14; *Vasiljević* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 19; *Kayishema and Ruzindana* Appeal Judgement, para. 137.
[54] *Vasiljević* Appeal Judgement, para. 12. See also, e.g., *Kajelijeli* Appeal Judgement, para. 7; *Blaškić* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 10; *Kunarac et al.* Appeal Judgement, paras. 43, 48.
[55] *Kajelijeli* Appeal Judgement, para. 8. See also, e.g., *Niyitegeka* Appeal Judgement, para. 11; *Ntakirutimana* Appeal Judgement, para. 15; *Rutaganda* Appeal Judgement, para. 19; *Semanza* Appeal Judgement, para. 11; *Kunarac et al.* Appeal Judgement, para. 47.
[56] *Kajelijeli* Appeal Judgement, para. 8. See also, e.g., *Niyitegeka* Appeal Judgement, para. 11; *Ntakirutimana* Appeal Judgement, para. 15; *Semanza* Appeal Judgement, para. 11; *Kunarac et al.* Appeal Judgement, para. 48.
[57] Prosecution Notice of Appeal, paras. 15-16.
[58] *Ibid*., paras. 20, 22 and 24, with reference to Trial Judgement, paras. 64-70.

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that the Indictments were defective, despite its earlier finding that they were not defective;[59] (3) failing to read the Indictments as a consolidated whole, despite their joinder;[60] and (4) reading the paragraphs of the Indictment in isolation to one another, rather than considering them in the context of the counts of the Indictment.[61]

16. Imanishimwe submits under his first ground of appeal that the Trial Chamber erred in convicting him for the events at Gashirabwoba football field, which events, he argues, were not pleaded in the Indictment against him.[62]

17. Before examining in detail the grounds of appeal related to the Indictment, the Appeals Chamber wishes to briefly recall the main procedural developments during the pre-trial phase. At the pre-trial stage, the Trial Chamber ruled on a preliminary motion by Imanishimwe, ordering the Prosecution to clarify paragraph 3.14 of the Bagambiki/Imanishimwe Initial Indictment.[63] The amended paragraph 3.14, together with the Bagambiki/Imanishimwe Initial Indictment, contained the final version of the charges against Imanishimwe and Bagambiki ("Bagambiki/Imanishimwe Indictment").[64]

18. Upon a preliminary motion by Ntagerura, the Trial Chamber ordered the Prosecution to specify several parts of the Ntagerura Initial Indictment.[65] The amended Indictment contained the final version of the charges against Ntagerura ("Ntagerura Indictment").[66]

19. On 11 October 1999, the Trial Chamber, pursuant to Rule 48, granted the Prosecution's motion for joinder of Ntagerura with Bagambiki and Imanishimwe.[67]

20. The Appeals Chamber will now outline the law governing the form of an indictment.

B. The Law Applicable to Indictments

21. The jurisprudence of this Tribunal and the International Criminal Tribunal for the Former Yugoslavia ("ICTY") on the law applicable to indictments is well established and consistent. Both Tribunals have held that Articles 17(4), 20(2), 20(4)(a) and 20(4)(b) of the Statute and Rule 47(C) of the Rules place a clear obligation on the Prosecution to state the

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[59] *Ibid*., para. 26.
[60] *Ibid*., para. 29, with reference to Trial Judgement, paras. 41-48, 51-70, 82 and 202.
[61] *Ibid*., paras. 36 and 38, with reference to Trial Judgement, paras. 41-48, 50-56 and 62-70.
[62] Imanishimwe Notice of Appeal, paras. 8-14.
[63] *The Prosecutor v. Emmanuel Bagambiki, Samuel Imanishimwe and Yussuf Munyakazi*, Case No. ICTR-97-36-I, Decision on the Defence Motion on Defects in the Form of the Indictment, 25 September 1998 ("Decision on Bagambiki/Imanishimwe Initial Indictment"), Disposition.
[64] Trial Judgement, para. 15.
[65] *The Prosecutor v. André Ntagerura*, Case No. ICTR-96-10-I, Decision on the Preliminary Motion filed by the Defence Based on Defects in the Form of the Indictment, 28 November 1997 ("Decision on Ntagerura Initial Indictment").
[66] Trial Judgement, para. 10.
[67] *The Prosecutor v. Ntagerura*, Case No. ICTR-96-10-I, *Prosecutor v. Emmanuel Bagambiki, Samuel Imanishimwe and Yussuf Munyakazi*, Case No. ICTR-97-36-I, Decision on the Prosecutor's Motion for Joinder, 11 October 1999 ("Decision on Joinder"). An Appeal against this decision was rejected as filed out of time: *Prosecutor v. Emmanuel Bagambiki*, Case No. ICTR-96-10-A and ICTR-97-36-A, Decision (Appeal Against Trial Chambers III's Decision of 11 October 1999), 13 April 2000; *Prosecutor v. Emmanuel Bagambiki*, Case No. ICTR-97-36-AR72, Decision (Motion to Re-Open Deliberations), 7 September 2000. Yussuf Munyakazi, the other accused, remained at large at the time of trial: Trial Judgement, footnote No. 13.

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material facts underpinning the charges in the indictment, but not the evidence by which such facts are to be proven.[68]

22. If an accused is not properly notified of the material facts of his alleged criminal activity until the Prosecution files its Pre-Trial Brief or until the trial itself, it will be difficult for his Defence to conduct a meaningful investigation prior to the commencement of the trial.[69] The question of whether an indictment is pleaded with sufficient particularity is therefore dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform an accused clearly of the charges against him so that he may prepare his defence.[70] An indictment which fails to plead material facts in sufficient detail is defective.[71]

23. Whether particular facts are "material" depends on the nature of the Prosecution case. The Prosecution's characterization of the alleged criminal conduct and the proximity of the accused to the underlying crime are decisive factors in determining the degree of specificity with which the Prosecution must plead the material facts of its case in the indictment in order to provide the accused with adequate notice.[72] For example, where the Prosecution alleges that an accused personally committed the criminal acts in question, it must plead the identity of the victim, the place and approximate date of the alleged criminal acts, and the means by which they were committed "with the greatest precision".[73] However, less detail may be acceptable if the "sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes".[74]

24. Where the Prosecution relies on a theory of joint criminal enterprise, the Prosecution must specifically plead this mode of responsibility in the indictment; failure to do so will result in a defective indictment.[75] Although joint criminal enterprise is a means of "committing", it is insufficient for an indictment to merely make broad reference to Article 6(1) of the Statute.[76] The Prosecution must also plead the purpose of the enterprise, the identity of the participants, the nature of the accused's participation in the enterprise and

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[68] *Ntakirutimana* Appeal Judgement, para. 470. See also *Semanza* Appeal Judgement, para. 85; *Kvočka et al.* Appeal Judgement, para. 27; *Kupre{ki} et al.* Appeal Judgement, para. 88; *Naletili}* and *Martinovi}* Appeal Judgement, para. 23.

[69] *Niyitegeka* Appeal Judgement, para. 194.

[70] *Kupre{ki} et al.* Appeal Judgement, para. 88; *Ntakirutimana* Appeal Judgment, para. 470.

[71] *Kupre{ki} et al.* Appeal Judgement, para. 114; *Niyitegeka* Appeal Judgement, para. 195; *Kvo~ka et al.* Appeal Judgement, para. 28.

[72] *Kvo~ka et al.* Appeal Judgement, para. 28.

[73] *Kupre{ki} et al.* Appeal Judgement, para. 89; *Bla{ki}* Appeal Judgement, para. 213.

[74] *Kupre{ki} et al*. Appeal Judgement, para. 89. The Appeals Chamber recalls that "the inability to identify victims is reconcilable with the right of the accused to know the material facts of the charges against him because, in such circumstances, the accused's ability to prepare an effective defence to the charges does not depend on knowing the identity of every single alleged victim. The Appeals Chamber recalls that the situation is different, however, when the Prosecution seeks to prove that the accused personally killed or harmed a particular individual. […] [T]he Prosecution cannot simultaneously argue that the accused killed a named individual yet claim that the 'sheer scale' of the crime made it impossible to identify that individual in the Indictment. Quite the contrary: the Prosecution's obligation to provide particulars in the indictment is at its highest when it seeks to prove that the accused killed or harmed a specific individual": *Ntakirutimana* Appeal Judgement, paras. 73-74.

[75] *Kvo~ka et al*. Appeal Judgement, para. 42.

[76] *Idem*.

the period of the enterprise.[77] In order for an accused charged with joint criminal enterprise to fully understand which acts he is allegedly responsible for, the indictment should clearly indicate which form of joint criminal enterprise is being alleged.[78]

25. Where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, the Prosecution is required to identify the "particular acts" or "the particular course of conduct" on the part of the accused which forms the basis for the charges in question.[79]

26. In relation to an allegation of superior responsibility under Article 6(3) of the Statute, the material facts which must be pleaded in the indictment are: (1) that the accused is the superior of certain persons sufficiently identified, over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible;[80] (2) the criminal acts of such persons, for which he is alleged to be responsible;[81] (3) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates;[82] and (4) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[83]

27. An indictment may also be defective when the material facts are pleaded without sufficient specificity, for example, when the times mentioned refer to broad date ranges, the places are only vaguely indicated, and the victims are only generally identified.[84] It is of course possible that material facts are not pleaded with the requisite degree of specificity in an indictment because the necessary information was not in the Prosecution's possession. In this respect, the Appeals Chamber emphasises that the Prosecution is expected to know its case before proceeding to trial and may not rely on the weaknesses of its own investigation in order to mould the case against the accused in the course of the trial depending on how the

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[77] *Ibid.*, para. 28, citing *Prosecutor v. Stani{i},* Case No. IT-03-69-PT, Decision on Defence Preliminary Motions, 14 November 2003, p. 5; *Prosecutor v. Mejaki} et al.,* Case No. IT-02-65-PT, Decision on Dusko Kneževic's Preliminary Motion on the Form of the Indictment, 4 April 2003, p. 6; *Prosecutor v. Mom~ilo Kraji{nik & Biljana Plav{i}*, Case No. IT-00-39&40-PT, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, 4 March 2002, para. 13.

[78] *Kvo~ka et al*. Appeal Judgement, para. 28.

[79] *Bla{ki}* Appeal Judgement, para. 213. *See also Prosecutor v. Milorad* Krnojelac, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 13; *Prosecutor v. Milorad Krnojelac,* Case No. IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 18; *Prosecutor v. Radoslav Br|anin and Momir Tali},* Case No. IT-99-36-PT, Decision on Objections by Momir Tali} to the Form of the Amended Indictment, 20 February 2001 ("*Br|anin and Tali}* 23 February 2001 Decision"), para. 20.

[80] *Bla{ki}* Appeal Judgement, para. 218(a).

[81] *Naletili} and Martinovi}* Appeal Judgement, para. 67.

[82] *Bla{ki}* Appeal Judgement, para. 218(b). The Appeals Chamber notes that "the facts relevant to the acts of those others for whose acts the accused is alleged to be responsible as a superior, although the Prosecution remains obliged to give all the particulars which it is able to give, will usually be stated with less precision because the detail of those acts are often unknown, and because the acts themselves are often not very much in issue": *Bla{ki}* Appeal Judgement, para. 218 and accompanying references. See also *Naletili} and Martinovi}* Appeal Judgement, para. 67.

[83] *Bla{ki}* Appeal Judgement, para. 218(c). See also *Naletili} and Martinovi}* Appeal Judgement, para. 67.

[84] *Kvo~ka et al.* Appeal Judgement, para. 31.

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evidence unfolds.[85] Other defects in an indictment may arise at a later stage of the proceedings because the evidence turns out differently than expected. In such circumstances, the Trial Chamber must consider whether a fair trial requires an amendment of the indictment, an adjournment, or the exclusion of evidence outside the scope of the indictment.[86]

28. In reaching its judgement, a Trial Chamber can only convict the accused of crimes which are charged in the indictment.[87] If the indictment is found to be defective because of vagueness or ambiguity, then the Trial Chamber must consider whether the accused was nevertheless accorded a fair trial, or, in other words, whether the defect caused any prejudice to the Defence.[88] In some instances, a defective indictment may be deemed "cured" and a conviction entered if the Prosecution provides the accused with timely, clear and consistent information from the Prosecution detailing the factual basis underpinning the charges against him or her.[89] Where the failure to give sufficient notice of the legal and factual reasons for the charges against the accused has violated the right to a fair trial, no conviction may result.[90]

29. When challenges to an indictment are raised on appeal, amendment of the indictment is no longer possible and so the question is whether the error of trying the accused on a defective indictment "invalidat[ed] the decision" and warrants the Appeals Chamber's intervention.[91] In making this determination, the Appeals Chamber does not exclude the possibility that, in some instances, the prejudicial effect of a defective indictment can be "remedied" if the Prosecution has provided the accused with clear, timely and consistent information detailing the factual basis underpinning the charges against him or her,[92] which compensates for the failure of the indictment to give proper notice of the charges.[93]

30. The questions whether the Prosecution has cured a defect in the indictment and whether the defect has caused any prejudice to the accused are both aimed at assessing whether the trial was rendered unfair.[94] In this regard, the Appeals Chamber reiterates that a vague or an ambiguous indictment, not cured by timely, clear and sufficient notice, constitutes a prejudice to the accused.[95] The defect may only be deemed harmless through demonstrating that the accused's ability to prepare his defence was not materially impaired.[96]

31. When an appellant raises a defect in the indictment for the first time on appeal, then the appellant bears the burden of showing that his ability to prepare his defence was

[85] *Niyitegeka* Appeal Judgement, para. 194; *Kvo~ka et al.* Appeal Judgement, para. 30; see also *Kupre{ki} et al.* Appeal Judgement, para. 92.
[86] *Kupre{ki} et al.* Appeal Judgement, para. 92; *Niyitegeka* Appeal Judgement, para. 194; *Kvo}ka et al.* Appeal Judgement, para. 31.
[87] *Kvo~ka et al.* Appeal Judgement, para. 33; *Naletili}* and *Martinovi}* Appeal Judgement, para. 33.
[88] *Ntakirutimana* Appeal Judgement, para. 27; see also *Kvo~ka et al.* Appeal Judgement, para. 33.
[89] *Kupre{ki} et al.* Appeal Judgement, para. 114; *Kvo~ka et al.* Appeal Judgement, para. 33.
[90] *Kvo~ka et al.* Appeal Judgement, para. 33; *Naletili}* and *Martinovi}* Appeal Judgement, para. 26.
[91] Article 24(1)(a) of the Statute; *Niyitegeka* Appeal Judgement, para. 196.
[92] *Niyitegeka* Appeal Judgement, para. 195; *Ntakirutimana* Appeal Judgement, para. 27. See also *Kupre{ki} et al*. Appeal Judgement, para. 114.
[93] *Kvo~ka* Appeal Judgement, para. 34.
[94] *Ntakirutimana* Appeal Judgement, para. 27; *Kordi} and Cerkez* Appeal Judgement, para. 143; see *Kupre{ki} et al.* Appeal Judgement, para. 122.
[95] *Ntakirutimana* Appeal Judgement, para. 58.
[96] *Idem*; *Kupre{ki} et al.* Appeal Judgement, para. 122.

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materially impaired.[97] Where, however, an accused had already raised the issue of lack of notice before the Trial Chamber, the burden rests on the Prosecution to demonstrate on appeal that the accused's ability to prepare a defence was not materially impaired.[98] All of this is subject to the inherent jurisdiction of the Appeals Chamber to do justice in the case.[99]

32. The Appeals Chamber emphasizes that the possibility to cure defects in the indictment is not unlimited. A clear distinction has to be drawn between vagueness in the indictment and an indictment omitting certain charges altogether. While it is possible to remedy the vagueness of an indictment by providing the defendant with timely, clear and consistent information detailing the factual basis underminning the charges, omitted charges can be incorporated into the indictment only by a formal amendment pursuant to Rule 50 of the Rules.

C. Alleged Refusal of the Trial Chamber to Consider Joint Criminal Enterprise (Prosecution's 3rd Ground of Appeal)

33. At paragraph 34 of the Trial Judgement, the Trial Chamber held:

> If the Prosecutor intends to rely on the theory of joint criminal enterprise to hold the accused criminally responsible as a principal perpetrator of the underlying crimes rather than as an accomplice, the indictment should plead this in an unambiguous manner and specify upon which form of joint criminal enterprise the Prosecutor will rely. In addition to alleging that the accused participated in a joint criminal enterprise, the Prosecutor must also plead the purpose of the enterprise, the identity of the co-participants, and the nature of the accused's participation in the enterprise. For these reasons, the Chamber will not consider the Prosecutor's arguments, which were advanced for the first time during the presentation of closing arguments, to hold the accused criminally responsible based on this theory [footnotes omitted].

34. The Prosecution submits that the Trial Chamber erred in law in refusing to allow the Prosecution to rely on joint criminal enterprise as a basis for establishing the individual criminal responsibility of the Accused.[100] More specifically, the Prosecution alleges in its Notice of Appeal and Appeal Brief that the Trial Chamber erred in law in finding that the Prosecution had failed to plead joint criminal enterprise in the Indictments.[101] Relying on the jurisprudence of the Tribunal and the ICTY,[102] the Prosecution argues that it was not obliged to expressly plead joint criminal enterprise in the Indictments.[103] However, during the Appeal hearings, the Prosecution clarified that it had abandoned this argument in view of the recent

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[97] *Niyitigeka* Appeal Judgement, para. 200; *Kvo~ka et al.* Appeal Judgement, para. 35.
[98] *Idem*.
[99] *Niyitigeka* Appeal Judgement, para. 200.
[100] Prosecution Notice of Appeal, para. 15; Prosecution Appeal Brief, paras. 40, 41 and 51. While admitting that it did not explicitly plead joint criminal enterprise in the Indictments, the Prosecution argued that it provided adequate notice of its intention to rely on the theory of joint criminal enterprise, and that such information was conveyed to each of the Accused in the charges and facts alleged in the Indictments, in the evidence as set forth in the Prosecution's Pre-Trial Brief, in the Prosecution's Opening Statements, in the arguments presented in the Prosecution's Closing Brief, in the evidence presented at trial and also in the Trial Chamber's Decision to join the Indictments.
[101] Prosectorat Notice of Appeal, para. 15; Prosecution Appeal Brief, para. 40.
[102] Prosecution Appeal Brief, paras. 45, 46 and 48.
[103] Prosecution Appeal Brief, paras. 61, 64-65.

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decision issued by the ICTY Appeals Chamber in *Kvočka et al*.[104] The Prosecution acknowledges that the Indictments did not plead Joint Criminal Enterprise with sufficient specificity, but maintains nonetheless that the Indictments had been cured of this defect. The Prosecution argues, indeed, that the Accused were provided with clear and coherent information of the Prosecution's intention to invoke joint criminal enterprise as a theory of liability.[105]

35. Since the Prosecution has acknowledged that it did not specifically plead joint criminal enterprise in the Indictments, the Appeals Chamber will straightaway focus on the question whether the Accused were nevertheless provided with timely, clear and consistent notice by the Prosecution that this mode of responsibility was being alleged. The Appeals Chamber will limit its examination to the parts of the trial record relied upon by the Prosecution for its argument, namely the Decision on Joinder, the Prosecution Pre-Trial Brief, its Opening Statement and its Final Trial Brief.

36. In the first place, the Prosecution submits that the Trial Chamber in its Decision on Joinder recognised that the Prosecution had given adequate notice of its intention to rely on the theory of joint criminal enterprise.[106] In this respect, the Prosecution also refers to its oral pleadings on joinder in August 1999 in which it argued that "there was one genocide in Rwanda, *one criminal enterprise*, and all of [the Accused] were part of that enterprise and on that basis should be charged and tried in one single proceeding".[107]

37. Ntagerura and Bagambiki submit that the Decision on Joinder made no reference to the Prosecution's intention to rely on the theory of joint criminal enterprise.[108] Bagambiki argues that the Prosecutor's motion for joinder was not likely to inform the Accused of the Prosecution's intention since a motion for joint trials does not pursue the same objective as an indictment.[109]

38. The Decision on Joinder concerned the issue of whether the Accused were charged with crimes "committed in the course of the same transaction", which is a condition under Rule 48 of the Rules for granting a joint trial. The term "transaction" is defined in Rule 2 of the Rules as "[a] number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan". The Trial Chamber's statements in the decision were squarely confined to the legal test set out in Rule 48.[110] As such, it would be incorrect to suggest that the Trial Chamber intended through these statements to recognise the Prosecution's intention to argue joint

[104] AT. 6 February 2006, p. 32, referring to *Kvočka* Appeal Judgement, para. 42.
[105] *Ibid*., p. 33.
[106] Prosecution Notice of Appeal, para. 15(a); Prosecution Appeal Brief, paras. 70, 72, citing Decision on Joinder, para. 6 where the Trial Chamber summarised the Prosecution's arguments as being that: "the accused allegedly committed crimes separately and jointly as part of the same series of events and as part of a common scheme, strategy or plan" and para. 43 where the Trial Chamber held that: "to establish the existence of a conspiracy […] [i]t is sufficient to establish that the accused had a common purpose or design, that they planned to carry out that purpose or design and that they executed that plan".
[107] Prosecution Appeal Brief, para. 72, citing T.11 August 1999, p. 99 (emphasis in the original).
[108] *Ntagerura* Response Brief, paras. 51-55, citing the Decision on Joinder, paras. 31, 53 and 60; *Bagambiki* Response Brief, paras. 107-109.
[109] Bagambiki Response Brief, para. 107, citing Rule 82 of the Rule and Article 20(4) of the Statute.
[110] Decision on Joinder, para. 46.

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criminal enterprise as a mode of liability. Similarly, the Decision on Joinder did not serve to put the Accused on notice that that mode of liability was being alleged.

39. Furthermore, it is apparent from the Prosecution's oral arguments on the joinder motion that the said arguments were made in relation to the "same transaction" test, and not to clarify the modes of liability argued in the Indictments. In any event, the broad reference to "one genocide in Rwanda", coupled with the failure to specify the nature of the Accused's participation in such "criminal enterprise", did not provide the Accused with clear and consistent information which might have compensated for the ambiguity in the Indictments relating to joint criminal enterprise.

40. In the second place, the Prosecution submits that its Pre-Trial Brief put the Accused on notice that it would rely on joint criminal enterprise.[111] The Appeals Chamber agrees with the Prosecutor[112] that the Prosecution Pre-Trial Brief contained factual allegations that the Accused participated in the recruiting, arming and training of the *Interahamwe* and that they planned the genocide in Cyangugu prefecture.[113] The Accused were also alleged to have participated in meetings, to have been present together during massacres and to have played a part in relation to massacres.[114] However, it is the Appeals Chamber's opinion that the Prosecution Pre-Trial Brief, particularly in the parts relating to the individual criminal responsibility of the Accused,[115] makes no specific mention of a joint criminal enterprise, a common criminal plan or any other synonym of that mode of criminal liability. It was therefore not obvious that the aforementioned factual allegations were meant to underpin a charge of joint criminal enterprise.

41. The Prosecution further argues that "throughout the trial, [it] consistently pursued its theory of joint criminal enterprise against all three of the [Accused]".[116] In support of this, the Prosecution refers to its Opening Statement, which states that the Accused "acted in concert for the realisation of a single and the same criminal enterprise",[117] and to its Final Trial Brief which mentions the common purpose doctrine – in other words, the joint criminal enterprise doctrine –in relation to Article 6(1) of the Statute.[118] It further submits that, given that the Accused called 82 witnesses to controvert the Prosecution case, it is inappropriate for them to claim that the preparation of their defence was impaired.[119]

42. The Appeals Chamber notes that, contrary to the Trial Chamber's view,[120] the Prosecution did not mention joint criminal enterprise for the first time in its closing

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[111] Prosecution Appeal Brief, paras. 77, 79 and 80, citing the Prosectorat Pre-Trial Brief, paras. 2.16, 2.45, 2.47, 2.60, 2.64, 2.87, 2.88, 2.98, 2.99, 2.105-2.108, 2.110-2.112, 2.114 and 2.116.
[112] Prosecution Appeal Brief, paras. 76-77, citing Prosecution Pre-Trial Brief, para. 2.4. The Prosecution alleged in support that the Respondents were present together at occasions involving weapons distribution and training: *ibid*., para. 77, citing Prosecution Pre-Trial Brief, paras. 2.8, 2.12-2.13.
[113] Prosecution Pre-Trial Brief, paras. 2.8, 2.12, 2.13 and 2.16.
[114] *Ibid*., para. 78, citing Prosecution Pre-Trial Brief, paras. 2.17-2.28, 2.33, 2.34, 2.36-2.38, 2.45, 2.64, 2.102, 2.105-2.110, 2.112 and 2.114.
[115] Prosecution Pre-Trial Brief, paras. 3.1-3.37.
[116] *Ibid*., para. 82.
[117] *Ibid*., para. 83, citing T.18 September 2000, pp. 41-42.
[118] Prosecution Appeal Brief, para. 83, citing Prosecution Final Trial Brief, para. 57.
[119] *Ibid*., para. 68.
[120] Trial Judgement, para. 34. See also Prosecution Appeal Brief, para. 40.

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arguments. The Prosecution alluded to this mode of liability in its Opening Statement in the following terms:

> Whether they acted severally or jointly depending on the circumstances, André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe acted in concert for the realisation of a single and the same criminal enterprise; namely, the elimination of the Tutsi ethnic group from the population map of Rwanda and particularly from the Préfecture of Cyangugu, and all of this in flagrant and deliberate violation of all the duties imposed on them by the laws of Rwanda. It thus appears that to achieve this goal, each of the Accused persons made his active, effective and crucial contribution, the contribution in terms of their intelligence, experience, professional skills, their authority or influence, each and every one of them in their specific roles, and all of them together in exemplary coordination and complementarity (sic). By the same token, the Prosecutor will be presenting to you each of the Accused and their respective roles in the execution of the massacres in Cyangugu.[121]

43. Then, in its Final Trial Brief the Prosecution clarified its intention to rely upon the theory of joint criminal enterprise under the section on individual criminal responsibility pursuant to Article 6(1).[122]

44. The Appeals Chamber however recalls that if the material facts of an accused's alleged criminal activity are not disclosed to the Defence until the trial itself, it will be difficult for the Defence to conduct a meaningful investigation prior to the commencement of the trial.[123] In the present case, the Prosecution waited until the first day of trial, when it gave its Opening Statement, to allude to its intention of relying upon joint criminal enterprise. It then waited until it delivered its Final Trial Brief to develop its arguments on this mode of liability as it directly related to the Accused's individual criminal responsibility. In neither its Opening Statement nor its Final Trial Brief did the Prosecution specify which form of joint criminal enterprise it had relied upon. The Prosecution's argument that the Accused called 82 witnesses during trial[124] is not indicative of the Accused's ability to prepare their defence against the specific allegation of participation in a joint criminal enterprise. As a result, the Appeals Chamber finds that the Accused were not provided with timely, clear and consistent notice that their individual criminal responsibility would be invoked under the theory of joint criminal enterprise.

45. The Trial Chamber thus correctly declined to consider the criminal responsibility of the Accused under the theory of joint criminal enterprise. As a result, it is unnecessary for the Appeals Chamber to deal with the Prosecution's submission that the Accused "acted pursuant to a joint criminal enterprise and therefore should have been held individually criminally responsible under Article 6(1) of the Statute".[125]

46. The Prosecution's third ground of appeal is therefore dismissed.

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[121] T.18 September 2000, pp. 41-42.
[122] Prosecution Final Trial Brief, paras. 52-57.
[123] *Niyitegeka* Appeal Judgement, para. 194. In the *Kvočka* case, which was cited by the Prosecution during the appeals hearing (AT., 6 February 2006, p. 37), the accused had been informed well before the opening of the trial; *Kvočka* Appeal Judgement, paras. 44-45.
[124] Prosecution Appeal Brief, para. 68.
[125] *Ibid.*, paras. 84-95.

D. The Trial Chamber Findings on the Indictments (Prosecution's 4th Ground of Appeal)

47. Under its fourth ground of appeal, the Prosecution submits that the Trial Chamber committed four errors of law, as follows: (1) refusing to consider whether the Prosecution's post-indictment submissions cured any defects in the Indictments; [126] (2) finding the Indictments defective after the conclusion of the trial, given that it had previously found that they were not defective;[127] (3) failing to read the Indictments as a whole, despite their having been joined;[128] and (4) reading the paragraphs of the Indictments in isolation from one another and without due regard for the counts charged.[129] The Prosecution contends that this ground of appeal impacts on all the verdicts returned in relation to the Accused.[130]

48. The Appeals Chamber recalls that the Trial Chamber had, in its Judgement, found that some paragraphs of the two Indictments, namely paragraphs 9.1, 9.2, 9.3, 11, 12.1, 13, 14.1, 14.3 and 16 to 19 of the Ntagerura Indictment,[131] and paragraphs 3.12 to 3.28, 3.30 and 3.31 of the Bagambiki/Imanishimwe Indictment[132] were defective. The Appeals Chamber notes that the Trial Chamber nevertheless considered that it would make factual findings with respect to paragraphs 9.1, 9.2, 9.3, 14.1, 17, 18 and 19 of the Ntagerura Indictment and paragraphs 3.16 to 3.28, 3.30 and 3.31 of the Bagambiki/Imanishimwe Indictment.[133]

49. The Appeals Chamber considers that the issue of whether the Trial Chamber erred in finding the Indictments defective after the conclusion of the trial, despite its earlier conclusion that they were not, is a preliminary question.

1. Finding the Indictments defective after the conclusion of the trial

50. The Prosecution submits that the Trial Chamber erred in law in finding the Indictments defective after the close of the trial after having found in "an earlier decision" that the Indictments were not defective.[134] The Prosecution refers in this regard to the Separate and Concurring Opinion of Judge Williams to the Rule 98 *bis* Decision to emphasize that the Indictments were found to be adequate at both the confirmation and the preliminary objection stages.[135]

51. In its Decision on the form of the Bagambiki/Imanishimwe Initial Indictment, the Trial Chamber found that a link was established in paragraph 3.22 of the Bagambiki/Imanishimwe Initial Indictment between the events alleged therein and

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[126] Prosecution Notice of Appeal, paras. 20, 22, 24, citing Trial Judgement, paras. 64-70.
[127] Prosecution Notice of Appeal, para. 26.
[128] *Ibid*., para. 29, citing Trial Judgement, paras. 41-48, 51-70, 82, 202; Decision on the Prosecution's Motion for Joinder, 11 October 1999.
[129] *Ibid*., paras. 36, 38, citing Trial Judgement, paras. 41-48, 50-56, 62-70.
[130] Prosecution Notice of Appeal, paras. 19, 25, 27 and 28.
[131] Trial Judgement, paras. 40-48.
[132] *Ibid*., paras. 49-63.
[133] *Ibid*., para. 69.
[134] Prosecution Appeal Brief, para. 169.
[135] Prosecution Appeal Brief, para. 169, citing *The Prosecution v. Ntagerura et al.*, Case No. ICTR-99-46-T, Separate and Concurring Decision of Judge Williams on Imanishimwe's Defence Motion for Judgement of Acquittal on Count of Conspiracy to Commit Genocide Pursuant to Rule 98*bis*, 13 March 2002 ("Separate Concurring Opinion of Judge Williams to the Rule 98*bis* Decision").

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Imanishimwe, through his authority over the gendarmes.[136] Paragraph 3.22 remained unaltered in the Bagambiki/Imanishimwe Indictment. However, in the Trial Judgement, the Trial Chamber found that it failed to allege a connection between the principal perpetrators of the crimes and Bagambiki and Imanishimwe.[137]

52. The Trial Chamber also considered paragraph 3.14, which underpinned the charge of conspiracy (Count 19) and found that Imanishimwe participated in meetings. The Trial Chamber considered that paragraph 3.14 was vague and ordered the Prosecution to:

> clarify […] the meetings referred to in that paragraph, [specifically] the approximate dates, locations and the purpose of these meetings, so far as possible, and also clarify whether the accused persons and others named in the indictment were the only persons present at these meetings or if others, not named in the indictment, were present also.[138]

The Prosecution filed the amended paragraph 3.14 on 10 August 1999 which, together with the Bagambiki/Imanishimwe Initial Indictment, contained the final version of the charges against Bagambiki and Imanishimwe.[139] In the Trial Judgement, the Trial Chamber found that the amended paragraph 3.14 failed to:

> allege facts that would constitute material elements of the crime of conspiracy [and] also d[id] not particularise the nature of Bagambiki's and Imanishimwe's participation in the meetings.[140]

The question therefore is: Why did the Trial Chamber not direct the Prosecution to further clarify paragraph 3.14, particularly with respect to the material elements of the crime that paragraph 3.14 was to underpin?

53. In a preliminary motion, Ntagerura submitted that the Ntagerura Initial Indictment was too vague in certain respects.[141] Ruling on this preliminary motion in its Decision on the form of the Ntagerura Initial Indictment, the Trial Chamber ordered the Prosecution to specify certain allegations in the Indictment, for example, with respect to the time-frames in paragraphs 9 to 16 and dismissed Ntagerura's preliminary motion on all other points.[142] It subsequently confirmed that the amendments filed by the Prosecution complied with the said order.[143]

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[136] Decision on the Form of the Bagambiki/Imanishimwe Initial Indictment, para. 10.
[137] Trial Judgement, para. 56 (emphasis added).
[138] Decision on the Form of the Bagambiki/Imanishimwe Initial Indictment, para. 11; see also the Disposition.
[139] Trial Judgement, para. 15.
[140] Trial Judgement, para. 51.
[141] *The Prosecutor v. André Ntagerura*, Case No. ICTR-96-10A-I, Preliminary Motions (Defects in the Indictment), 21 April 1997 ("Objection to the Ntagerura Initial Indictment"), paras. 54-98.
[142] *The Prosecutor v. André Ntagerura*, Case No. ICTR-96-10-I, Decision on the Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment, 1 December 1997 ("Decision on the Form of the Ntagerura Initial Indictment"), Disposition.
[143] *The Prosecutor v. André Ntagerura*, Case No. ICTR-96-10 A-I, Decision on the Defence Motion for a Ruling that the Amended Indictment Filed on 29 January 1998 Does Not Comply With the Trial Chamber's Decision of 28 November 1997, 17 June 1999, p. 3.

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54. In the Trial Judgement, however, imprecise date ranges were enumerated as one of the defects in the Ntagerura Indictment.[144] Moreover, having dismissed Ntagerura's preliminary motion with regard to the lack of specificity concerning the locations and the description of the alleged events, his personal participation in the events, as well as the identity of his subordinates and his *mens rea* under Article 6(3) of the Statute, the Trial Chamber nevertheless found in the Trial Judgement that the Ntagerura Indictment was defective in these respects.[145]

55. It is apparent from the foregoing that the Trial Chamber reconsidered in the Trial Judgement some of the findings it had made in certain pre-trial decisions on the form of the Indictments. This does not in itself constitute an error, as it is within the discretion of a Trial Chamber to reconsider a decision it has previously made[146] if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.[147] However, the Appeals Chamber emphasises that "where such a decision is changed, there will be a need in every case for the Trial Chamber to consider with great care and to deal with the consequences of the change upon the proceedings which have in the meantime been conducted in accordance with the original decision".[148] In the present case, the Appeals Chamber considers that, once the Trial Chamber decided to reconsider its pre-trial decisions relating to the specificity of the Indictments at the stage of deliberations, it should have interrupted the deliberation process and reopened the hearings. At such an advanced stage of the proceedings, after all the evidence had been heard and the parties had made their final submissions, the Prosecution could not move to amend the Indictment. On the other hand, reopening the hearings would have allowed the Prosecution to try to convince the Trial Chamber of the correctness of its initial pre-trial decisions on the form of the Indictment, or to argue that any defects had since been remedied. The Appeals Chamber finds that the Trial Chamber erred in remaining silent on its decision to find the abovementioned parts of the Indictments defective until the rendering of the Trial Judgement.

56. The question of whether this error invalidated the decision will be examined below, in the light of the Appeals Chamber's conclusions as to the other errors alleged by the Prosecution under this ground of appeal. The Appeals Chamber will first address the question of whether the two Indictments should have been read together.

2. Alleged failure to read the Indictments together as a whole

57. The Prosecution submits that the Trial Chamber erred in not reading the two Indictments together because, as per the Decision on Joinder, the Indictments "became, in law, a single Indictment".[149] It further submits that the Trial Chamber in that Decision "expressly accepted arguments in support of reading the two Indictments as one

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[144] Trial Judgement, paras. 41, 43, 45 and 46.
[145] Trial Judgement, paras. 41, 43, 45 (location of the events); ibid., paras. 41, 42, 45, 47 (description of the events); ibid., paras. 41, 43, 44, 46 (Ntagerura's personal participation); ibid., paras. 42, 47 (Ntagerura's responsibility under Article 6 (3) of the Statute, in particular in relation to Count 6).
[146] *Prosecutor v. Stanislav Gali}*, Case No. IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001, at para. 13.
[147] Kajelijeli Appeal Judgement, paras. 203 and 204.
[148] *Prosecutor v. Stanislav Gali}*, Case No. IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001, at para. 13.
[149] Prosecution Appeal Brief, paras. 173-174.

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document".[150] The Prosecution generally contends that each Indictment supported the other in relation to the charges of conspiracy to commit genocide, but restricts its detailed arguments to the Trial Chamber's findings on the Ntagerura Indictment.[151]

58. Imanishimwe responds that the fact that the trials of the Accused were joined did not also cause the charges against them to be joined.[152] Bagambiki for his part responds that the Trial Chamber did not recognise in its Decision on Joinder that the charges in any one of the Indictments could be brought against any one of the Accused, nor did it modify any of the references to the factual allegations underpinning the charges in the Indictments.[153] He argues that it would run contrary to the right of the accused to be informed of the charges brought against him for a Trial Chamber to consider factual allegations in an indictment other than his own.[154] Ntagerura responds that the Trial Chamber and the accused should not have to turn to a second indictment to understand the allegations made in the first indictment.[155]

59. The Prosecution replies that its object is not to "confuse the charges against accused A with those against accused B", but to point to the error committed by the Trial Chamber in disregarding the particulars relating to the charges against Accused A when they appear in the indictment against Accused B.[156]

60. The Appeals Chamber notes that in the Indictments, the Prosecution informed the Accused of the factual allegations which underpinned the charges by listing the relevant paragraphs in the Indictments which corresponded to each Count. However, the Prosecution did not, in this way, cross-reference between the Indictments. Therefore, the factual allegations made in each of the Indictments remained inherently linked to the charges in the respective Indictments. The mere fact that the Accused were joined "for the purposes of a joint trial"[157] (as opposed to having their charges joined) did not serve to notify the Accused that the factual allegations underpinning the charges in one Indictment would also underpin the charges in the other Indictment. Therefore, although Ntagerura was mentioned in the Bagambiki/Imanishimwe Indictment, the Appeals Chamber cannot conclude that he was put

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[150] *Ibid.*, para. 173, citing Decision on Joinder para. 30, where the Trial Chamber cited the Separate and Concurring Opinion of Judge Tieya and Judge Nieto-Navia in the *Kanyabashi* case: "permission for joint charging under [Rule 48] does not necessarily require the bringing of a new, substitute indictment in lieu of the existing ones because by adding names to one of the existing indictments which concern the same facts or transactions, the case may become a joint trial of several accused on different charges found in one single indictment, subject to, of course, any request for amendment": *The Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-A, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdictions of Trial Chamber I, 3 June 1999, Separate and Concurring Opinion of Judge Wang Tieya and Judge Nieto-Navia, para. 6.

[151] It argues in this regard that the following paragraphs should have been read together: (i) paragraph 13 of the Ntagerura Indictment with paragraph 3.16 of the Bagambiki/Imanishimwe Indictment; (ii) paragraph 16 of the Ntagerura Indictment with paragraph 3.29 of the Bagambiki/Imanishimwe Indictment; and (iii) paragraphs 17, 18 and 19 of the Ntagerura Indictment with paragraphs 3.16 and 3.23 of the Bagambiki/Imanishimwe Indictment: Prosecution Appeal Brief, paras. 176-178.

[152] Imanishimwe Response Brief, paras. 70, 74-75.

[153] Bagambiki Response Brief, paras. 159, 161.

[154] *Ibid*. Response Brief, para. 160.

[155] Ntagerura Response Brief, para. 115.

[156] Prosecution Brief in Reply, paras. 24, 31.

[157] Decision on Joinder, para. 60 (emphasis added). The Trial Chamber's reference to the Separate and Concurring Opinion of Judge Tieya and Judge Nieto-Navia in the *Kanyabashi* case, referred to by the Prosecution, was made in support of the Trial Chamber's conclusion that "accused persons can be jointly tried, even if they were not jointly charged": Decision on Joinder, para. 30.

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on notice that the allegations in that Indictment would underpin the charges in the Indictment against him.

61. The Prosecution further argues that reading the Indictments separately with regard to the factual allegations "negates the rationale for creating the joinder in the first place".[158] This argument cannot prosper. It is not self-evident that distinct indictments should be read together as a whole, in case of a joinder. In joint trials, each accused shall be accorded the same rights as if he were being tried separately.[159] The Prosecution thus remains under an obligation to plead, in each indictment brought, the material facts underpinning the charges against each accused.[160] The Prosecution's argument that the Indictment "became, in law, a single indictment" is dismissed. It was up to the Prosecutor to submit a new, joint and single Indictment against the three Accused.

62. For these reasons, the Appeals Chamber finds that the Prosecution's argument that the Indictments should have been read together as a whole is without merit. Insofar as the Appeals Chamber concludes that the Trial Chamber did not err by refusing to read the Indictments together, it is not necessary to examine the effect that a combined reading of the two Indictments might have had.

63. Turning to the Prosecution's other grounds of appeal, the Appeals Chamber concedes that tt would be logical to now consider whether the Trial Chamber erred in determining that the Indictments were defective. To avoid a double analysis of each contested paragraph – to see whether it was defective and, if it was defective, whether the defect was cured – the Appeals Chamber will first examine whether the Trial Chamber erred in not considering whether the defects identified in the Indictments were cured.[161] Only after this analysis will the Appeals Chamber proceed to examine each Indictment paragraph by paragraph.

3. Curing of defects in the Indictments

(a) Did the Trial Chamber err in not considering whether the defects had been cured?

64. The Trial Chamber concluded that "the operative paragraphs underpinning the charges against Ntagerura, Bagambiki and Imanishimwe, as well as the charges themselves, [were] unacceptably vague". Moreover, the Chamber finds no justifiable reason for the Prosecutor to have pleaded the allegations or charges in such a generic manner.[162] The Trial Chamber took note of the ICTY Appeal Judgement in *Kupre{ki} et al.* and the possibility that, in a limited number of cases, a defective indictment may be cured of its defects.[163] The Trial Chamber went on to note that:

> the supporting materials to the Ntagerura and to the Bagambiki/Imanishimwe Indictments, other pre-trial disclosure, and the Pre-Trial Brief provide additional

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[158] Prosecution Brief in Reply, para. 24.
[159] Rule 82(A) of the Rules.
[160] *Cf. Ntakirutimana* Appeal Judgement, para. 470; *Kupre{ki} et al.* Appeal Judgement, para. 88.
[161] Prosecution Notice of Appeal, para. 20; Prosecution Appeal Brief, paras. 107-111.
[162] Trial Judgement, para. 64. The Trial Chamber noted that paragraphs 9.1, 9.2, 9.3, 11, 12.1, 13, 14.1, 14.3, 16, 17, 18 and 19 of the Ntagerura Indictment and paragraphs 3.12-3.28, 3.30 and 3.31 of the Bagambiki/Imanishimwe Indictment were defective in one way or the other.
[163] Trial Judgement, para. 65.

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> information concerning the possible evidence to be introduced at trial and the theory of the Prosecution's case. However, pre-trial submissions and disclosure are not adequate substitutes for a properly pleaded indictment, which is the only accusatory instrument mentioned in the Statute and the Rules. The indictment must plead all material facts. The Trial Chamber and the accused should not be required to sift through voluminous disclosures, witness statements, and written or oral submissions in order to determine what facts may form the basis of the accused's alleged crimes, in particular, because some of this material is not made available until the eve of trial.[164]

65. The Appeals Chamber recalls that it is well established in the jurisprudence of both this Tribunal and the ICTY that, in a limited number of cases, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.[165] In the present case, it is apparent from the Trial Judgement that the Trial Chamber did not consider whether the defects in the Indictments were cured. The Appeals Chamber recalls that, if an indictment is found to be defective because of vagueness or ambiguity, then the Trial Chamber must determine whether the accused has nevertheless been accorded a fair trial.[166] In view of the Trial Chamber's statement that some of Prosecution's post-indictment submissions "provide[d] additional information concerning the possible evidence to be introduced at trial and the theory of the Prosecution's case",[167] the Appeals Chamber considers that the Trial Chamber, in fulfilling its obligation to consider whether or not the trial was fair, should have evaluated whether the defects were cured. The Trial Chamber erred in failing to do so. As a result, where applicable, the Appeals Chamber will consider the Prosecution's argument that the defects in the Indictments were cured.

(b) The "Strong Evidence Passage" in the *Kupre{ki} et al.* Appeal Judgement

66. After having concluded that the Indictments were defective and declining to consider whether the defects were cured, the Trial Chamber held that:

> in *Kupre{ki}* the Appeals Chamber intimated that it "might understandably be reluctant to allow a defect in the form of the indictment to determine finally the outcome of a case in which there is strong evidence pointing towards the guilt of the accused." The Chamber will thus consider the Prosecutor's evidence against Ntagerura, Bagambiki, and Imanishimwe to see if such strong evidence exists.[168]

67. The Appeals Chamber considers that the statement made by the ICTY Appeals Chamber in *Kupre{ki} et al.* that "it might understandably be reluctant to allow a defect in the form of the indictment to determine finally the outcome of a case in which there is strong evidence pointing towards the guilt of the accused" does not permit a Trial Chamber to consider material facts of which the accused was not adequately put on notice. The "strong evidence passage" arose in relation to whether, having upheld the appellants' objections that the indictment was too vague, the appropriate remedy on appeal was to remand the matter for

[164] Ibid., para. 66 (footnotes omitted).
[165] See *supra*, para. 28.
[166] *Kvo~ka et al.*, Appeal Judgement, para. 33.
[167] Trial Judgement, para. 66.
[168] *Ibid*., para. 68.

retrial.[169] This question does not arise at trial. The Appeals Chamber emphasises that if the indictment is found to be defective at trial, then the Trial Chamber must consider whether the accused was nevertheless accorded a fair trial. No conviction may be pronounced where the accused's right to a fair trial has been violated because of a failure to provide him with sufficient notice of the legal and factual grounds underpinning the charges against him.[170]

4. Reading the paragraphs of the Indictments in isolation from one another and conclusions of the Trial Chamber on the defects affecting certain paragraphs of the Indictments

68. The Appeals Chamber notes that the Prosecution's argument that the Trial Chamber erred in reading the paragraphs of each Indictment in isolation from one another mainly relates to the Trial Chamber's finding that several paragraphs of the Indictments failed to describe the criminal conduct of the Accused that was being alleged.[171] With respect to the Trial Chamber's finding that the dates, venues and circumstances of the alleged events were insufficiently pleaded in the Indictments, the Prosecution argues that its post-indictment submissions cured any defects in the Indictments.[172] In order to simplify the analysis, the Appeal Chamber will examine these two arguments together.

69. The Appeals Chamber notes that despite having found defects in some paragraphs of the Indictments, the Trial Chamber continued to make factual findings on the basis of such paragraphs.[173] Accordingly, the Trial Chamber's conclusions on the validity of the Indictments did not have any impact on its final judgement as regards a certain number of allegations. Rather than having been rejected for reasons relating to the form of the Indictments, these allegations were rejected because the Trial Chamber considered them to be unfounded. Although the Prosecution submits that it is not satisfied with the findings the Trial Chamber made in relation to these paragraphs, it does not develop this point. Given that the arguments raised by the Prosecution under its fourth ground of appeal relating to those paragraphs on which the Trial Chamber made factual findings cannot succeed, the Appeals Chamber will limit its discussion to the consideration of Prosecution arguments relating to the paragraphs on which the Trial Chamber did not make any factual findings. These are paragraphs 11, 12.1, 13 and 16 of the Ntagerura Indictment and paragraphs 3.12 through 3.15 of the Bagambiki/Imanishimwe Indictment. The Appeals Chamber will also examine paragraph 3.28 of the Bagambiki/Imanishimwe Indictment which was only partly discussed.

(a) Ntagerura Indictment

70. The Appeals Chamber recalls that the Trial Chamber made factual findings in relation to paragraphs 9.1, 9.2, 9.3, 14.1, 14.3, 17, 18 and 19 of the Ntagerura Indictment, and will, accordingly, examine only the alleged errors with regard to paragraphs 11, 12.1, 13 and 16.

(i) Paragraph 11

[169] *Kupre{ki} et al.* Appeal Judgement, para. 125.
[170] *Kvo~ka et al.,* Appeal Judgement, para. 33. See also para. 30.
[171] Prosecution Appeal Brief, paras. 179-181.
[172] Prosecution Notice of Appeal, para. 20; Prosecution Appeal Brief, paras. 107-111; Prosecution Notice of Appeal, para. 22; Prosecution Appeal Brief, para. 126.
[173] To wit, paragraphs 9.1, 9.2, 9.3, 14.1, 14.3, 17, 18 and 19 of the Ntagerura Indictment and paragraphs 3.16 to 3.31 of the Bagambiki/Imanishimwe Indictment. See Trial Judgement, para. 69.

71. Paragraph 11 of the Ntagerura Indictment reads:

> From 1 January to 31 July 1994 and particularly in February, March and April 1994, **ANDRE NTAGERURA** allowed and/or authorized the use of government vehicles, specifically buses for the transport of militiamen, armed *Interahamwe* militiamen and civilians, including Tutsis, as well as for the transport of weapons and ammunition to and throughout Cyangugu *préfecture*, particularly through Karengera, Bugarama, Nyakabuye and other *communes* as well as in Butare, Ruhengeri and Kibuye *préfectures* and elsewhere.

72. The Trial Chamber found that this paragraph failed to allege any instance when Ntagerura allowed or authorised the use of government vehicles or any circumstance in which they were used. It further held that, because the paragraph did not set out the intended purpose of the transports or Ntagerura's knowledge of such a purpose, it failed to allege the elements of a criminal act. The Prosecution particularly sought to use this paragraph in support of Ntagerura's Article 6(3) superior responsibility as alleged in Count 6.[174] The Trial Chamber found in that respect that paragraph 11, like the Ntagerura Indictment as a whole, failed to identify Ntagerura's subordinates who actually approved the use of the buses and the other material facts necessary to make out an allegation of superior responsibility.[175]

73. The Prosecution submits that the summary of Witness MF's statement included details of Ntagerura's authorisation, on several occasions, for the use of government vehicles for purposes such as the transport of arms, ammunition and *Interahamwe*, as well as details of the vehicles used, such as the ONATRACOM buses, and the persons to whom the authorisation was given.[176]

74. The summary of Witness MF's statement specified one incident when Ntagerura allegedly ordered the use of a government vehicle, namely vehicle A-7058, which he ordered to be given to the sub-prefect of Busengo in March 1994. However, the summary provides no information regarding the criminal purpose for which this vehicle would subsequently be used or Ntagerura's knowledge of such purpose. Accordingly, this summary did not put Ntagerura on notice of the material facts of his alleged responsibility under Article 6(3) of the Statute.[177]

(ii) Paragraphs 12.1, 13 and 16

75. The Prosecution submits that the Trial Chamber erred in its findings on paragraphs 12.1, 13, 14.1, 14.3 and 16 of the Ntagerura Indictment.[178] Although the Trial Chamber made factual findings on paragraphs 14.1 and 14.3, the Appeals Chamber will

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[174] Ntagerura Indictment, Count 6.
[175] Trial Judgement, para. 42.
[176] Prosecution Appeal Brief, para. 133, citing Appendix 4 to Prosecution Pre-Trial Brief, Appendix 4: Summary of Prosecution witness statements, filed on 3 July 2000 ("Appendix 4"), p. 5, No. 17 (Witness MF).
[177] Appendix 4, p. 5, No. 17 (Witness MF): Witness will state that he knew Ntagerura and alleges that Ntagerura used to avail government vehicles to *Interahamwe*, for example, vehicle A-7058 which Ntagerura ordered the witness to give the Sous-Prefect of Busengo in March 1994; that Ntagerura did this on several occasions; the witness also saw Onatracom buses transporting arms, ammunition and *Interahamwe*; that the witness reported these incidents to his chief and Ntagerura but never received any reaction on these reports.
[178] Prosecution Appeal Brief, para. 184.

consider the arguments related to these paragraphs in order to allow for an analysis of paragraphs 12.1, 14.1 and 14.3 in their context.

76. Paragraphs 12.1, 13, 14.1, 14.3 and 16 of the Ntagerura Indictment read as follows:

> 12.1 From 1 January to 31 July 1994 as early as 1991, **ANDRÉ NTAGERURA** encouraged and participated in the training of *Interahamwe* militiamen in Karengera *commune* and in other *communes* in Cyangugu *préfecture*.
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> 13. From 1 January to 31 July 1994 and as early as January 1993, weapons, ammunition and uniforms were frequently distributed in Cyangugu *prefecture*. These weapons were sometimes stored in Yussuf MUNYAKAZI's house in Bugarama *commune* and elsewhere. They were later distributed to the *Interahamwe* in Cyangugu *préfecture*.
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> 14.1 From 1 January to 31 July 1994, **ANDRÉ NTAGERURA** was often seen in the company of, and publicly expressed his support for, Yussuf MUNYAKAZI and the *Interahamwe* in Cyangugu *préfecture*, specifically in Bugarama *commune*.
>
> 14.3 From 1 January to 31 July 1994, **ANDRÉ NTAGERURA** travelled throughout Cyangugu *préfecture*, often accompanied by *Préfet* Emmanuel BAGAMBIKI and Yussuf MUNYAKAZI, to monitor the activities of the *Interahamwe* and verify that the orders to kill the Tutsis and all political opponents had been carried out.
>
> 16. From 1 January to 31 July 1994, Yussuf MUNYAKAZI was an influential member and one of the leaders of the *Interahamwe* in Cyangugu *préfecture*. He was one of the people in charge of implementing MRND orders. Many of the orders came from **ANDRÉ NTAGERURA**.

77. The Trial Chamber found that paragraphs 12.1, 13 and 16, in addition to being vague, failed to plead any identifiable criminal conduct on the part of Ntagerura.[179] It further found that paragraphs 14.1 and 14.3 did not sufficiently describe the nature of Ntagerura's criminal participation.[180]

78. The Prosecution submits that the Trial Chamber erred in these findings and argues that "the facts stated in those paragraphs are connected to each other in ways that support the allegations in each. The thread that runs through these paragraphs is the association of [Ntagerura] with the *Interahamwe* and the role of the *Interahamwe* in the genocide".[181] It argues that: (i) paragraph 12.1 connects Ntagerura to the training of the *Interahamwe*; (ii) paragraph 13 connects him to the supply of arms and uniforms to the *Interahamwe* through Munyakazi; and (iii) paragraphs 14.1 and 14.3 and paragraph 16 connect him to the activities of both Munyakazi and Bagambiki in relation to the *Interahamwe*, as well as to the *Interahamwe* directly, and to the activities of the *Interahamwe* involving the killings of Tutsis and political opponents.[182]

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[179] Trial Judgement, para. 69.
[180] *Ibid*., para. 45.
[181] Prosecution Appeal Brief, para. 184.
[182] *Ibid*., para. 185.

79. The Appeals Chamber notes that paragraphs 12.1, 13, 14.1, 14.3 and 16 allege a certain connection between Ntagerura, Munyakazi and the *Interahamwe* and indicated that the latter perpetrated criminal acts. However, such a general allegation did not suffice to put Ntagerura on notice of the material facts of his criminal conduct. The Appeals Chamber notes that it is not obvious that those members of the *Interahamwe* who in paragraph 14.3 were alleged to have carried out acts of killing were the same members who in paragraph 12.1 were alleged to have been trained. In fact, it is not even indicated that the training was undertaken in furtherance of such acts. Moreover, there is no indication in paragraph 14.3 of who allegedly gave and/or executed "[the orders to kill all the Tutsis and political opponents]". Further, the allegations that Ntagerura "was often seen in the company of, and publicly expressed his support for Munyakazi and the *Interahamwe*", as alleged in paragraph 14.1; that he "monitor[ed] the activities" of the *Interahamwe* as pleaded in paragraph 14.3; or that he issued MRND orders as stated in paragraph 16, did not sufficiently describe his role, if any, in the distribution of weapons alleged in paragraph 13.

80. Similarly, it was not clear whether the MRND orders that Ntagerura allegedly issued concerned the activities described in paragraphs 12.1, 13, 14.1 or 14.3. In addition, the Appeals Chamber notes that Ntagerura is not mentioned in paragraph 13 at all. An objective reader cannot understand in what respect the storing and distribution of arms in the prefecture of Cyangugu was related to Ntagerura. For the same reasons, Ntagerura's alleged participation in the events alleged in paragraphs 14.1 and 14.3 was not clarified by paragraphs 12.1, 13 or 16. Therefore, the Trial Chamber did not err in finding that paragraphs 12.1, 13, 14.1, 14.3 and 16 failed to sufficiently plead Ntagerura's criminal conduct.

81. The Appeals Chamber notes that the summaries of the statements of Witnesses LAB, MF, LAI, LAP and LAR, which the Prosecution refers to in support of its argument that the defects in paragraphs 12.1, 13, 14.1, 14.3 and 16 were cured,[183] do not cure the vagueness with which Ntagerura's criminal conduct was pleaded in those paragraphs.

82. The summary of Witness LAB's statement alleges that Ntagerura addressed a crowd in the Nyamuhunga Sector in April 1994, but makes no link between his statements on that occasion and any underlying crime with which he is charged.[184] Although the summary of Witness LAB's statement alleges that on 18 May 1994 Ntagerura delivered arms to the Shagasha factory, it did not indicate whether those weapons were used in any crime or in the training that took place at the factory. Moreover, that training was alleged to have taken place between January and April 1994, that is, before 18 May 1994.[185] The allegation in the summary of Witness LAP's statement that Ntagerura arrived on 28 January 1994 in Bigogwe with boots and uniforms which were distributed to the *Interahamwe* also fails to mention any crime in which those supplies were used.[186] The same holds true for the allegation in the summary of Witness LAR's statement that on 28 January 1994 Ntagerura announced to a crowd assembled in Bugarama that he had delivered boots and uniforms.[187] The summary of Witness MF's statement alleges that Ntagerura ordered that government vehicle A-7058 be

[183] *Ibid.*, para. 136, footnote 181.
[184] Appendix 4, p. 11, No. 32 (Witness LAB).
[185] Appendix 4, p. 11, No. 32 (Witness LAB). Furthermore, the Appeals Chamber has already found that the summary of Witness LAB did not indicate whether Ntagerura participated in the training at the Shagasha factory.
[186] Appendix 4, p. 7, No. 22 (Witness LAP).
[187] Appendix 4, p. 9, No. 26 (Witness LAR).

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given to the sub-prefect of Busengo in March 1994, but failed to link the use of that vehicle to a criminal purpose or to specify whether Ntagerura had any knowledge of such a purpose.[188] Finally, although the summary of Witness LAI's statement indicates that Ntagerura faxed an order to Munyakazi to eliminate Tutsi intellectuals "after 7 April 1994", it is not clear whether that order was executed, or when between 7 April 1994 and 31 July 1994[189] he allegedly issued it.[190] Given that Ntagerura is alleged to have been responsible for ordering in this instance, this is not a sufficiently precise time span.

83. Considering that paragraphs 12.1, 13, 14.1, 14.3 and 16 were not cured of defects in respect of the alleged criminal conduct, it is unnecessary for the Appeals Chamber to determine whether these paragraphs were cured of other defects.

(iii) Modes of Responsibility

84. At paragraph 48 of the Trial Judgement, the Trial Chamber held that:

> the formulation of the counts in the Ntagerura Indictment is incomprehensible. The phrase "as a result of the acts committed ... in relation to the events described in paragraphs 9-19", which is contained in each count, refers to the "results" and to "the events" and not to the criminal conduct of Ntagerura. Moreover, the counts do not clearly specify whether Ntagerura is being charged as a principal or as an accomplice, or what particular form of complicity is alleged.

85. The Prosecution submits that this finding "is erroneous in view of the details supplied in the pre-trial disclosures showing, as described, the nature of Ntagerura's involvement in the crimes with which he is charged as well as his relationship to any other perpetrators".[191]

86. The Appeals Chamber notes that the Prosecution does not explain how the pre-trial disclosures served to inform Ntagerura of the mode of responsibility with which he was charged. The Appeals Chamber has already found that certain pre-trial disclosures relied on by the Prosecution did not help to clarify in the least defects in the Indictment relating to Ntagerura's alleged superior responsibility.[192] The Prosecution relies on the pre-trial disclosure of the statements given by Witnesses LAB, LAI, LAR and LAP to show that defects in the Indictment were cured.[193] Having examined these statements, the Appeals Chamber finds that they did not provide Ntagerura with clear and consistent information regarding the mode of responsibility with which he was charged.

(iv) Conclusion on the Ntagerura Indictment

87. In light of the foregoing, the Appeals Chamber finds that the Prosecution has not demonstrated that the Trial Chamber erred in finding that paragraphs 11, 12.1, 13 and 16 of

[188] Appendix 4, p. 5, No. 17 (Witness MF).
[189] Paragraphs 14.1 and 14.2, as well as 16, of the Ntagerura Indictment pertained to the period between 1 January to 31 July 1994.
[190] Appendix 4, p. 6, No. 21 (Witness LAI).
[191] Prosecution Appeal Brief, para. 149.
[192] See *supra* Section (ii), paras. 81 and 82.
[193] Prosecution Appeal Brief, paras. 128 and 140.

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the Ntagerura Indictment were defective or that those defects were not cured. The Prosecution's argument is therefore dismissed in these respects.

(b) Bagambiki/Imanishimwe Indictment

88. The Prosecution submits that the Trial Chamber erred in reading the following paragraphs of the Bagambiki/Imanishimwe Indictment in isolation from each other: (i) 3.12, 3.13 and 3.14; (ii) 3.15, 3.16, 3.17 and 3.18; and (iii) 3.19, 3.20, 3.24 and 3.25.[194] It adds that the defects in these paragraphs as well as in paragraphs 3.21, 3.22, 3.23, 3.26, 3.27, 3.28, 3.30 and 3.31 were cured.[195] The Appeals Chamber recalls that the Trial Chamber made factual findings on paragraphs 3.16 to 3.31, and that as a result, there is no need examining them further. But for the alleged error in paragraph 3.28, no other error alleged by the Prosecution could have an impact on the outcome of the appeal. Accordingly, the Appeals Chamber will examine only paragraphs 3.12 and 3.15 on which no factual findings were made at trial and paragraph 3.28 which was only partly examined.

(i) Paragraphs 3.12, 3.13 and 3.14

89. Paragraphs 3.12, 3.13 and 3.14 of the Bagambiki/Imanishimwe Indictment read as follows:

> 3.12 During the events referred to in this indictment, *Préfet* **Emmanuel BAGAMBIKI** chaired many of the meetings of the 'restricted security committee' of the *préfecture* of Cyangugu, the body responsible for the safety of the civilian population of the *préfecture*, meetings in which **Samuel IMANISHIMWE** participated, in his capacity as the Commander of the Cyangugu Barracks, as well as the Commander of the *Gendarmerie*, the *souspréfets* and others. One of these meetings was held on or about 9 April 1994.
>
> 3.13 Furthermore, on at least two occasions, on or about 11 April 1994 and on or about 18 April 1994, *Préfet* **Emmanuel BAGAMBIKI** chaired meetings of the 'prefectural committee' of Cyangugu p*réfecture*, where problems relating to the safety of the civilian population of the *préfecture* were discussed. Members of the 'restricted security committee', particularly *Préfet* **Emmanuel BAGAMBIKI** and Lieutenant **Samuel IMANISHIMWE**, as well as all the *bourgmestres,* representatives of political parties and different churches, attended these meetings.
>
> 3.14 Before and during the events referred to in this indictment, **Emmanuel BAGAMBIKI,** *Préfet* of Cyangugu;
>
> **André NTAGERURA**, Minister of Transportation and Communications;
>
> **Yussuf MUNYAKAZI**, *Interahamwe* leader;
>
> Christophe NYANDWI, an official in the Ministry of Planning;
>
> Michel BUSUNYU, MRND Chairman for Karengera *commune*; and Édouard BANDESTE, *Interahamwe* leader;

[194] *Ibid.*, paras. 188-191.
[195] *Ibid*., paras. 150-166.

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> all of whom were prominent figures within the MRND in Cyangugu, held a large number of meetings among themselves, or with others, to incite, prepare, organise and commit genocide.
>
> These meetings took place in diverse locations throughout Cyangugu *préfecture*, in the *sous-préfectures* and in the *communes*, including public gathering places such as Kamarampaka stadium, and also in restricted locations, such as bars and private residences, notably:
>
> (a) towards late 1993, in Kirambo *commune*, with members of the MRND;
>
> (b) towards late 1993 and early 1994, in Augustin MIRUHO's drinking place in Karangiro, with the participation of Félicien BALIGIRA, a former parliamentarian, Simeon NTEZIRYAYO, the Manager of SONARWA, KAYIJAMAHE, the Manager of STIR, and others;
>
> (c) February 1994, in **André NTAGERURA**'s house, Karengera *commune*, with the participation of **Yussuf MUNYAKAZI**, an *Interahamwe* leader, Christophe NYANDWI, a civil servant in the Ministry of Planning, Edouard BANDETSE, an *Interahamwe* leader, and other members of the MRND;
>
> (d) on 7 February 1994, at Bushenge market, with he [*sic*] participation of **André NTAGERURA**, Daniel MBANGURA, Michel BUSUNYU, Callixte NSABIMANA, Félicien BALIGIRA and other members of the MRND and CDR;
>
> (e) during June 1994 at the MRND headquarters, in Cyangugu, organised by President Théodore SINDIKUBWABO with the participation of **André NTAGERURA,** Daniel MBANGURA, a Minister, together with civilians and religious figures;
>
> (f) from 1993 to early 1994, in Gatare *commune*, with the participation of **André NTAGERURA**, **Yussuf MUNYAKAZI**, and **Emmanuel BAGAMBIKI**;
>
> (g) on or about 28 January 1994, in Bugarama, with the participation of **André NTAGERURA** and **Yussuf MUNYAKAZI**; and
>
> (h) in late June 1994, in Gisuma, with the participation of **Emmanuel BAGAMBIKI** and **Samuel IMANISHIMWE.**

90. The Trial Chamber found that paragraphs 3.12, 3.13 and 3.14 "fail[ed] to allege facts that would constitute material elements of the crime of conspiracy, which, according to the Prosecutor, [was] the only charge that these paragraphs support[ed]".[196] In particular, the Trial Chamber found that the *actus reus* of the crime of conspiracy, "namely that two or more persons agreed to commit the crime of genocide", was not pleaded.[197] With regard to paragraphs 3.12 and 3.13, the Trial Chamber found that they failed to identify the criminal purpose of the alleged meetings or any connection that the meetings might have had with an underlying crime, and thus failed to identify any sort of criminal participation of Bagambiki or Imanishimwe. It also found that the time frames in paragraphs 3.12 and 3.13, save for the

[196] Trial Judgement, paras. 50-51.
[197] *Ibid*., para. 70.

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enumerated dates of 9, 11 and 18 April 1994, were vague.[198] Finally, the Trial Chamber held that paragraph 3.14 did not particularise the nature of Bagambiki's and Imanishimwe's participation in the meetings.[199]

91. The Prosecution argues that the Trial Chamber erred in reading these paragraphs in isolation from one another and without taking into account the context of the underlying charge of conspiracy.[200] The Prosecution further contends that the Trial Chamber's findings that the material elements of conspiracy were not pleaded in paragraphs 3.12, 3.13 and 3.14, were "unwarranted since [paragraphs 3.12, 3.13 and 3.14] demonstrate that [Bagambiki and Imanishimwe] undertook coordinated actions and were acting within a unified framework as evidenced by the numerous meetings that they attended together[;] these meetings provided the framework in which the conspiracy involving [Bagambiki and Imanishimwe] took place".[201] The Prosecution relies in this regard on the finding of the Trial Chamber in *Nahimana et al.* that "conspiracy to commit genocide can be inferred from coordinated actions by individuals who have a common purpose and are acting within a unified framework".[202]

92. At the outset, the Appeals Chamber considers that, at a minimum, conspiracy to commit genocide consists of an agreement between two or more persons to commit the crime of genocide.[203] The existence of such an agreement between Bagambiki, Imanishimwe, and potentially other persons, should thus have been pleaded in the Bagambiki/Imanishimwe Indictment as a material fact. The fact that paragraphs 3.12, 3.13 and 3.14, as argued by the Prosecution, were intended to describe the "framework in which the conspiracy involving Bagambiki and Imanishimwe took place" or that those paragraphs were referred to in support of the charge of conspiracy, did not exonerate the Prosecution from the obligation to plead this material fact.[204] The Prosecution remained, indeed, obliged to plead the material facts underpinning the charges against Bagambiki and Imanishimwe so as to enable them to prepare their defence.

93. In the absence of any alleged criminal purpose or criminal participation by Bagambiki or Imanishimwe, the mere allegations as formulated in paragraphs 3.12 and 3.13 that they participated in meetings did not set out the material fact of the crime, namely, that they agreed to commit genocide.[205]

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[198] *Ibid*., para. 50.
[199] *Ibid*., para. 51.
[200] Prosecution Appeal Brief, para. 188.
[201] *Ibid*., para. 189.
[202] *Idem*, citing *Nahimana et al.* Trial Judgement, para. 1047.
[203] *Musema* Trial Judgement, para. 191; *Ntakirutimana* Trial Judgement, paras. 798-799. The Appeals Chamber further recalls that, with regard to the concept of conspiracy in general, the ICTY Appeals Chamber has held that "conspiracy requires a showing that several individuals have agreed to commit a certain crime or set of crimes": *Ojdani}* Jurisdiction Decision, para. 23.
[204] See Prosecution Appeal Brief, para. 221, where the Prosecution itself notes that "the material facts translate the abstract elements of the crime into a specific reality, by establishing who did what to whom, where, when, how, and with what intent".
[205] In fact, the only mentioned purpose of these meetings was "problems relating to the safety of the civilian population of the *préfecture*", which, as noted by the Trial Chamber, appears to run counter to the charge of conspiracy to commit genocide: Bagambiki/Imanishimwe Indictment, para. 3.13; Trial Judgement, para. 50.

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94. The Appeals Chamber admits that, even if paragraph 3.14 does not explicitly mention the words that the accused agreed "to commit genocide", the allegation that Bagambiki, Ntagerura and Imanishimwe (and other important members of the MRND in Cyangugu) held a large number of meetings among themselves or with others "to instigate, prepare, and organize the genocide"[206] could be understood to suggest the required purpose for a conspiracy to commit genocide. However, the Appeals Chamber notes that the Trial Chamber refused to consider the allegations in paragraph 3.14 because of the vagueness, finding that the paragraph did "not particularise the nature of Bagambiki's and Imanishimwe's participation in the meetings".[207] The Prosecution appears to accept this characterization of the paragraph but argues that during the pre-trial stage, it provided the Accused with the relevant evidence concerning the meetings and their participation therein.[208]

95. The Appeals Chamber agrees with the Trial Chamber's opinion that paragraph 3.14 is unacceptably vague because it provides no details as to the participation of the two accused in the meetings. According to paragraph 3.14, Bagambiki participated in no more than two meetings, while Imanishimwe would have participated only in one. There was no meeting in which all three Accused would have participated together. As to the purpose of these meetings, the Prosecution limited itself to the generic formula that they served "to incite, prepare, organise and commit" genocide, without indicating the precise nature of the role the Accused might have played in the meetings.

96. According to the Prosecution, the ambiguity in paragraph 3.14 was cured by the pre-trial disclosure of the summaries of witness statements given by Witnesses LAI, LAP, LAG, LAR and LAN.[209] The summaries of the statements given by Witnesses LAI, LAP and LAG allege that Bagambiki and/or Imanishimwe participated in meetings in 1993 and the summary of Witness LAR's statement indicates that they met Ntagerura in Bugarama on 28 January 1994, neither of which offers any specification relating to their participation in these meetings.[210] The summary of Witness LAN's statement alleges that Ntagerura, Bagambiki, Munyakazi and other party dignitaries "presided over" an MRND meeting at Bushenge centre on 7 February 1993 at which the *Interahamwe* "sang songs inciting ethnic cleansing which were applauded by Ntagerura, Bagambiki and others", but did not mention any agreement reached on that occasion to commit genocide.[211] Furthermore, this meeting was not mentioned in paragraph 3.14, which, with regard to meetings which took place in 1993, merely refers to meetings "towards late 1993" and "from 1993 to early 1994 in Gatare *commune*".[212] The Appeals Chamber also notes that Bushenge is not located in Gatare *commune*. The Appeals Chamber therefore concludes that the pre-trial disclosure of the summaries of statements given by Witnesses LAI, LAP, LAG, LAR and LAN did not provide clear and consistent information regarding the nature of Bagambiki's or

[206] The Appeals Chamber notes that the English version of the amended paragraph 3.14 reads "to incite, prepare, organise and commit genocide". The Prosecution filed the English and French versions of the amended paragraph 3.14 on the same day and in the same document, without indicating which language was authoritative. The Appeals Chamber emphasizes that the Bagambiki/Imanishimwe Initial Indictment had been originally filed in French, which was accordingly the authoritative language.
[207] Trial Judgement, para. 51. See also ibid., para. 69.
[208] Prosecution Appeal Brief, par. 151.
[209] Ibid., para. 151, footnote 193.
[210] Appendix 4, p. 6, No. 21 (Witness LAI); ibid., p. 7, No. 22 (Witness LAP); ibid., p. 8, No. 25 (Witness LAG); ibid., p. 9, No. 26 (Witness LAR).
[211] Appendix 4, p. 8, No. 24.
[212] Bagambiki/Imanishimwe Indictment, para. 3.14(a), (b), (f).

Imanishimwe's participation in the meetings, or regarding any agreement to commit genocide reached by them.

(ii) Paragraph 3.15

97. For a proper analysis, the Appeals Chamber deems it necessary to place paragraph 3.15 in its context, and then examine it in the light of paragraphs 3.16, 3.17 and 3.18. Paragraphs 3.15, 3.16, 3.17 and 3.18 read as follows:

> 3.15 Also, during this same period, André NTAGERURA, Yussuf MUNYANKAZI, and **Emmanuel BAGAMBIKI** publicly expressed anti-Tutsi sentiments.
>
> 3.16 Before and during the events referred to in this indictment, Minister André NTAGERURA, *Préfet* **Emmanuel BAGAMBIKI**, Yussuf MUNYANKAZI, Christophe NYANDWI, all of whom were influential figures in the MRND in Cyangugu, participated, directly or indirectly, in the training and instructing of, and distributing of weapons to, the MRND militiamen, the *Interahamwe*, who later committed massacres of the civilian Tutsi population.
>
> 3.17 During the events referred to in this indictment, **Lieutenant Samuel IMANISHIMWE**, in his capacity as Commander of the Cyangugu Barracks, participated, with *Préfet* **Emmanuel BAGAMBIKI** and other persons, in preparing lists of people to eliminate, mostly Tutsis and some Hutus in the opposition.
>
> 3.18 These lists were given to the soldiers and militiamen with orders to arrest and kill the persons whose names were listed. The soldiers and the *Interahamwe* then carried out the orders.

98. The Trial Chamber found that none of these paragraphs pleaded the dates or venues of the alleged activities with sufficient particularity.[213] It further held that paragraph 3.15 failed to specify the nature and approximate content of the alleged statements or their connection to the commission of an underlying crime,[214] and that paragraph 3.16 did not plead Bagambiki's role in the training and weapons distribution nor did it indicate any massacre in which those persons who were trained might have participated.[215] Finally, the Trial Chamber found that paragraphs 3.17 and 3.18 failed to identify any individuals named on the lists as well as Bagambiki's or Imanishimwe's role or knowledge in the issuing or execution of the orders that were alleged to have been given.[216]

99. In the first place, the Prosecution argues that the Trial Chamber's assessment of paragraphs 3.15 to 3.18 and its finding on the lack of particularity are unreasonable due to the underlying charge of conspiracy to commit genocide. In addition, it argues that any defects in paragraphs 3.15 to 3.18 were cured.[217]

100. The Appeals Chamber has found that paragraphs 3.12 and 3.13 failed to plead the material fact that Bagambiki, Imanishimwe and others agreed to commit genocide, and that

[213] Trial Judgement, paras. 52-54.
[214] *Ibid*., para. 52.
[215] *Ibid*., para. 53.
[216] *Ibid*., para. 54.
[217] Prosecution Appeal Brief, paras. 152-155.

paragraph 3.14 was too vague, because it did not indicate the nature of Bagambiki's and Imanishimwe's participation in the meetings. For the purposes of the crime of conspiracy, it is therefore inconsequential that paragraphs 3.15, 3.16, 3.17 and 3.18 provide information on the background and continuing nature of the acts that culminated in the commission of genocide. The Trial Chamber correctly found that the allegations supporting the charge of conspiracy to commit genocide (Count 19) "could not constitute the material elements of the crime of conspiracy".[218]

101. The Prosecution further submits that the summaries of the statements of Witnesses LAI, LAP, LAG, LAR and LAN provided details of Bagambiki's and Imanishimwe's expressions of anti-Tutsi sentiments alleged in paragraph 3.15.[219]

102. The Appeals Chamber notes that the summary of Witness LAI's statement alleged that "Bagambiki also incited the population to kill [T]utsi", but without specifying date, place or how this statement was connected to an underlying crime.[220] The summary of Witness LAP's statement indicated that Bagambiki attended a meeting at Kamarampaka Stadium in 1993 where the population was "incited against the Tutsi", but does not mention whether Bagambiki expressed any sentiments to that effect.[221] The same holds true for the meeting alleged in the summary of Witness LAG's statement.[222] The summary of Witness LAR's statement contained no information that Bagambiki publicly expressed anti-Tutsi sentiments.[223] The summary of Witness LAN's statement alleged that Ntagerura, Bagambiki and others "presided over" a meeting at Bushenge centre on 7 February 1993, during which "the *Interahamwe* sang songs inciting ethnic cleansing which were applauded by Ntagerura, Bagambiki and others".[224] However, no mention was made of any agreement made at this meeting to commit genocide, the material fact found to be lacking in paragraph 3.15.

(iii) Paragraph 3.28

103. Paragraph 3.28 reads:

> 3.28 During the events referred to in this Indictment, *Préfet* **Emmanuel BAGAMBIKI** had the duty of ensuring the protection and safety of the civilian population within his *préfecture*. On several occasions in April 1994, *Préfet* **BAGAMBIKI** failed or refused to assist those whose lives were in danger who asked for his help, particularly in Gatare *commune*, where those Tutsis were massacred.

104. The Trial Chamber found that paragraph 3.28 did not indicate any occasion by date and specific location or any instance where Bagambiki failed or refused to assist those whose lives were in danger.[225]

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[218] Trial Judgement, para. 70.
[219] Prosecution Appeal Brief, para. 152.
[220] Appendix 4, p. 6, No. 21 (Witness LAI).
[221] Appendix 4, p. 7, No. 22 (Witness LAP).
[222] Appendix 4, p. 8, No. 25 (Witness LAG).
[223] See Appendix 4, p. 9, No. 26 (Witness LAR).
[224] Appendix 4, p. 8, No. 24 (Witness LAN).
[225] Trial Judgement, para. 61.

105. The Prosecution submits that the summary of Witness LQ's statement stated that Bagambiki, despite repeated warnings given to him of the impending attack on the refugees at Hanika Parish in April 1994 and his repeated promises to intervene, did nothing, and about 2 000 refugees were killed in the attack. It also argues that the summary of Witness MP's statement indicated that Bagambiki failed to stop the assault by the *Interahamwe* on thousands of refugees at Mbilizi Parish between 12 and 30 April 1994.[226]

106. Although the Trial Chamber made a number of factual findings with respect to the attacks at Gatare Parish alleged in paragraph 3.28,[227] it, however, declined to mention in its Judgement the attack at Hanika Parish testified to by Witness LQ.

107. The summary of Witness LQ's statement states in relevant part that:

> at 0900AM on 11th April, 1994 [I]nterahamwe attackers surrounded the [Hanika] parish; that the witness telephoned Bagambiki seeking his intervention to stave off the attack and that Bagambiki promised to send the burgomaster of Gatare with gendarmes; that the attacks first started with machetes, then with grenades; that around noon the witness called BAGAMBIKI again, who told him to be patient; that meanwhile the assault continued; that the burgomaster arrived at around 4:30PM with only one gendarme and two communal policemen; […] that about 2000 refugees were killed on that day.[228]

108. The summary does not indicate that Bagambiki, whose assistance was sought by Witness LQ, refused to stave off the attack. Rather, it states that Bagambiki told Witness LQ "to be patient" and that the protection promised by Bagambiki, however sparse, did arrive in the afternoon. Therefore, the Appeals Chamber finds that the summary of Witness LQ's statement did not clearly allege that Bagambiki failed or refused to assist the people under attack at the Hanika Parish on 11 April 1994 and that, as such, it remains unclear whether this summary does in fact support the allegations made in paragraph 3.28 at all.

(iv) The Counts in the Bagambiki/Imanishimwe Indictment

109. The Trial Chamber found that the formulation of the counts in the Bagambiki/Imanishimwe Indictment were "problematic" because they did not clearly identify whether Bagambiki and Imanishimwe were being charged as principals or as accomplices nor did they specify what particular form of complicity was charged.[229] The Prosecution contends that its arguments relating to how the defects in the Bagambiki/Imanishimwe Indictment were cured show the "nature of Bagambiki's and Imanishimwe's involvement in the crimes with which they were charged as well as their relationship to any other perpetrators".[230]

110. The Prosecution does not show how the remark made by the Trial Chamber to the effect that the formulation of the counts in the Bagambiki/Imanishimwe Indictment was "problematic" impacted on the Trial Judgement. In the preceding section, the Appeals Chamber has already found that the Prosecution's challenges to the Trial Chamber's

[226] Prosecution Appeal Brief, para. 165.
[227] Trial Judgement, paras. 528-540.
[228] Appendix 4, p. 3, No. 10 (Witness LQ).
[229] Trial Judgement, para. 63.
[230] Prosecution Appeal Brief, para. 167.

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conclusions, in so far as they are said to impact on the Judgement, are unfounded. The Appeals Chamber therefore declines to further consider the Prosecution's argument on this point.

(v) Conclusion on the Bagambiki/Imanishimwe Indictment

111. The Appeals Chamber finds that the Prosecution has failed to show that the Trial Chamber erred in finding that paragraphs 3.12, 3.13, 3.14, 3.15 and 3.28 of the Bagambiki/Imanishimwe Indictment were defective. Similarly, it failed to show that the defects identified therein had been remedied. Consequently, the Prosecution's arguments as to the Bagambiki/Imanishimwe Indictment are also dismissed.

5. Conclusion

112. The Appeals Chamber finds that the Prosecution's arguments concerning the paragraphs of the Indictments on which the Trial Chamber made no factual findings (or its findings on a portion of paragraph 3.28 of the Bagambiki/Imanishimwe Indictment) are unfounded. The Prosecution, indeed, failed to demonstrate that the paragraphs were not defective or that they had been cured of their defects.

113. The Appeals Chamber had earlier found that the Trial Chamber erred in reconsidering its pre-trial decisions on the form of the Indictments after the close of the trial, without giving the parties the opportunity to be heard.[231] The Appeals Chamber also finds that the Trial Chamber erred in failing to consider whether the defects in the Indictments were cured.[232] In view of its findings on the other grounds of appeal, the Appeals Chamber, however, considers that these two errors do not invalidate the Trial Chamber's decisions. Accordingly, the Prosecution's 4th ground of appeal is dismissed in its entirety.

114. The Appeals Chamber wishes to express its concern regarding the Prosecution's approach in the present case. The Appeals Chamber recalls that the indictment is the primary accusatory instrument and must plead the Prosecution case with sufficient detail. Although the Appeals Chamber allows that defects in an indictment may be "remedied" under certain circumstances, it emphasizes that this should be limited to exceptional cases.[233] In the present case, the Appeals Chamber is disturbed by the extent to which the Prosecution seeks to rely on this exception. Even if the Prosecution had succeeded in arguing that the defects in the Indictments were remedied in each individual instance, the Appeals Chamber would still have to consider whether the overall effect of the numerous defects would not have rendered the trial unfair in itself.

[231] See *supra*, paras. 55-56.
[232] See *supra*, para. 65.
[233] *Kupre{ki} et al.* Appeal Judgement, para. 114; see also *Ntakirutimana* Appeal Judgement, para. 125; *Kvo~ka et al.* Appeal Judgement, para. 33.

E. Conviction for Acts not Pleaded in the Indictment (Imanishimwe's 1st Ground of Appeal)

115. In his first ground of appeal, Imanishimwe contends that the Trial Chamber convicted him for acts not pleaded in the Indictment, and thereby exceeded its jurisdiction.[234] He submits that the Trial Chamber committed an error by convicting him on Counts 7, 10 and 13 for crimes perpetrated at the Gashirabwoba football field, whereas these crimes were not pleaded in the Bagambiki/Imanishimwe Indictment.[235]

1. Was the Indictment defective?

116. In support of his contention, Imanishimwe recalls that in several motions he denounced the vagueness of the Indictment.[236] He alleges that paragraphs 3.25 and 3.30 of the Bagambiki/Imanishimwe Indictment did not in any way inform him of the nature of the charges against him as a result of the acts committed at the Gashirabwoba football field, since these paragraphs do not specify the actual perpetrators, the date and place of the alleged massacre, or the nature of his alleged participation therein or that of his subordinates.[237] While conceding that in some situations, the Prosecution does not have to specify the date and place where some events occur, he submits that the particular gravity of the Gashirabwoba massacre required that such information be provided pursuant to Articles 17(4), 19(3) and 20(4)(a) of the Statute and Rule 47(B) and (C) of the Rules.[238]

117. The Prosecution concedes that the charges in paragraphs 3.25 and 3.30 of the Bagambiki/Imanishimwe Indictment are in outline form only and that the crimes perpetrated at Gashirabwoba were not pleaded in the Indictment.[239] It acknowledges that "[I]f the case went to trial with nothing more than this, the accused might have no basis on which to prepare a proper defence".[240]

118. The Trial Chamber found Imanishimwe guilty of the counts of genocide (Count 7), extermination as a crime against humanity (Count 10) and serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 and of Additional Protocol II (Count 13) for his responsibility in the massacre of civilian refugees at the Gashirabwoba football field on 12 April 1994, on the basis of paragraphs 3.25 and 3.30 of the Bagambiki/Imanishimwe Indictment.[241] It found beyond reasonable doubt that, although it was not established that Imanishimwe ordered the attack or that he was present, he was criminally responsible under Article 6(3) of the Statute for failing to prevent his subordinates from attacking the refugees.[242]

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[234] *Imanishimwe* Notice of Appeal, paras. 7-12.
[235] *Imanishimwe* Appeal Brief, paras. 8-12.
[236] *Imanishimwe* Appeal Brief, paras. 15-20. Imanishimwe is referring to Preliminary Motions of 28 January 1998; Motion for Redefinition of Facts, Article 17(4) of the Statute and Rules 47(A) and (B) of the Rules, of 10 February 1998 (and not 24 September 1998 as indicated by Imanishimwe).
[237] *Imanishimwe* Appeal Brief, paras. 24-25.
[238] *Imanishimwe* Appeal Brief, paras. 23, 30-33, also referring to the *Kupre{kić et al.* Trial Judgement, para. 725.
[239] Prosecution Response Brief, paras. 37 and 52.
[240] *Ibid*., para. 37.
[241] *Cf.* Trial Judgement, paras. 688, 689, 744 and 791.
[242] Trial Judgement, paras. 694, 749, 750 and 802. The Appeals Chamber notes that in paragraphs 691, 744 and 794 of the Trial Judgement, the Trial Chamber also mentions the fact that "Imanishimwe did not punish any soldier for this attack". The Appeals Chamber considers this clarification to be incidental, given that the Trial

119. Paragraphs 3.25 and 3.30 read as follows:

> 3.25 Between April and July 1994, Tutsis and moderate Hutus were arrested and taken to the Cyangugu Barracks to be tortured and executed. Also, during this period, soldiers, participated on several occasions with MRND militiamen and the *Interahamwe* in massacres of the civilian Tutsi population.
>
> 3.30 During the events referred to in this indictment, the militiamen, *i.e*. the *Interahamwe*, with the help of the soldiers, participated in the massacres of the civilian Tutsi population and of Hutu political opponents in Cyangugu *préfecture*.

120. In its Judgement, the Trial Chamber thoroughly examined the preliminary matters pertaining to the Indictments. It thus carefully examined paragraphs 3.25 and 3.30, and noted that:

> The paragraph 3.25 also fails to identify any incident with particularity where soldiers participated in massacres with militiamen and *Interahamwe* against the Tutsi civilian population or any other material fact that would demonstrate Imanishimwe's responsibility for the crimes. [243]
>
> (...) paragraphs 3.30 and 3.31 fail to particularise with any specificity the underlying criminal events or the specific role that the accused allegedly played in the massacres.[244]

before concluding that:

> For the foregoing reasons, the Chamber finds that the operative paragraphs underpinning the charges against Ntagerura, Bagambiki and Imanishimwe, as well as the charges themselves, are unacceptably vague. Moreover, the Chamber finds no justifiable reason for the Prosecution to have pleaded the allegations or charges in such a generic manner.[245]

121. The Appeals Chamber reaffirms that the Prosecution must not only inform the accused of the nature and cause of the charges against him in the indictment, but must also provide a concise description of the facts underpinning those charges. The Appeals Chamber has already had occasion above to recall the material facts to be pleaded in relation to the accused's responsibility under Article 6(3) of the Statute.[246]

122. The Appeals Chamber cannot but note that paragraphs 3.25 and 3.30 of the Bagambiki/Imanishimwe Indictment are manifestly vague. By framing the charges in such a vague manner, the Bagambiki/Imanishimwe Indictment fails to fulfil the fundamental purpose of providing the accused with a description of the charges against him with sufficient particularity to enable him to prepare his defence. The Appeals Chamber considers the

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Chamber decided in its legal findings not to find Imanishimwe responsible for failure to prevent his soldiers from committing crimes.

[243] Trial Judgement, para. 58.

[244] *Ibid*., para. 62.

[245] Judgement, para. 64 (footnote omitted).

[246] See *supra*, para. 26.

Bagambiki/Imanishimwe Indictment defective with regard to the allegations concerning the Gashirabwoba football field.

2. Could the defects in the Indictment be cured?

123. Imanishimwe contends that since the indictment is the only accusatory instrument of the Tribunal, it cannot be supplemented, completed or corrected through the Prosecution's opening address or Pre-Trial Brief, or by witness statements or other documents disclosed to the accused before or during the trial.[247] Invoking a number of decisions of the Tribunal and of ICTY,[248] as well as Judge Dolenc's Dissenting Opinion, Imanishimwe asserts that by convicting an accused of charges not pleaded in the indictment the Trial Chamber exceeds the confines of the matter referred to it, which confines are fixed by the indictment.[249] He thus takes issue with the legal standard enunciated in paragraphs 67 and 68 of the Trial Judgement. He argues that even if it were legally possible to cure the defects in an indictment, the charges relating to Gashirabwoba in the Bagambiki/Imanishimwe Indictment are so vague and unacceptable that there is no remedy for the Prosecution's omission.[250]

124. The Prosecution concedes that only charges contained in the indictment may be part of the case against the accused. It contends, however, that in the case at hand, the charges pertaining to the Gashirabwoba events are set forth "in outline form" in paragraphs 3.25 and 3.30 of the Bagambiki/Imanishimwe Indictment. The Prosecution submits that Imanishimwe adopts an excessively rigid interpretation of the law relating to pleading[251] and affirms that Judge Dolenc's view that a defective indictment cannot be cured under any circumstances is, by his own admission, not based on applicable law.[252]

125. In his Brief in Reply, Imanishimwe contends that under the principle of legality, whose corollary is the principle of strict interpretation of criminal law, the Trial Chamber could not overlook the provisions governing the indictment – namely Articles 17, 18, 19 and 20 of the Statute and Rules 47 and 50 of the Rules of the Tribunal – pursuant to which a Trial Chamber cannot expand the scope of the case brought before it.[253] As regards the *Niyitegeka*, *Ntakirutimana* and *Kvo~ka et al.* cases which the Prosecution invokes, Imanishimwe submits that they may not be considered as a source of law since such case-law postdates the Judgement.[254]

126. The Appeals Chamber reiterates that no new charges may be introduced outside the indictment, which is the only accusatory instrument of the Tribunal. Indeed, this is the view held by the Trial Chamber at paragraphs 29, 30 and 66 of the Trial Judgement. Nonetheless, the Appeals Chamber does not consider that an indictment may not be "supplemented,

[247] *Imanishimwe* Appeal Brief, paras. 35-36.
[248] Notably, *Kupre{kić et al.* Appeal Judgement, para. 92; *Semanza* Trial Judgement, para. 61; *Krnojelac* Trial Judgement, para. 86; *The Prosecution v. Radoslav Brđanin,* Case No. IT-99-36-T, Decision on Motion for Acquittal Pursuant to Rule 98 *bis*, 28 November 2003, para. 88; *Stakić* Trial Judgement, para. 772.
[249] *Imanishimwe* Appeal Brief, paras. 41-44.
[250] *Ibid*., paras. 48-57.
[251] Prosecution Response Brief, paras. 27 and 32.
[252] *Ibid*., paras. 33-36 and paras. 38-41, referring to *Niyitegeka* Appeal Judgement, para. 197; *Ntakirutimana* Appeal Judgement, para. 27; *Kvo~ka et al.* Appeal Judgement, paras. 27-35. See also Prosecution Response Brief, para. 43, directing the reader to paragraphs 115 onwards of the *Kupre{kić et al.* Appeal Judgement.
[253] *Imanishimwe* Brief in Reply, paras. 10-29.
[254] *Ibid*., paras. 29-31, 35-37, 65-66.

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completed or corrected" under any circumstances. There is consistent jurisprudence that a defective indictment due to ambiguity or vagueness can be cured, in some instances, if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.[255]

127. Contrary to Imanishimwe's assertion, the Appeals Chamber does not consider that the principle that an overly ambiguous or vague indictment cannot be cured departs from the provisions of the Statute and the Rules governing indictments. It is by interpreting the said provisions that the Appeals Chamber of ICTY articulated the principle for the first time in those terms. The Appeals Chamber recalls that the principle of legality, or the *nullum crimen sine lege* doctrine, does not prevent a court from determining an issue through a process of interpretation and clarification of the applicable law; nor does it prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular provisions.[256] The Appeals Chamber wishes to clarify that when it interprets certain provisions of the Statute or the Rules, it is merely identifying what the proper interpretation of that provision has always been, even though it was not previously expressed that way. Imanishimwe's argument that the principle of legality precludes consideration of case-law developed subsequent to the Trial Judgement cannot succeed.

128. Having articulated the legal standard to be applied to a defective indictment, the Appeals Chamber should now acknowledge the error that the Trial Chamber committed in the articulation of its own legal standards. Although the Trial Chamber was correct in stating that "in certain circumstances it has discretion to consider evidence supporting a paragraph even if the paragraph is defective",[257] its reasoning stems from an incorrect reading of the *Kupre{kić et al.* jurisprudence when it concludes, at paragraph 68, that it would consider Prosecution evidence to see if there is strong evidence pointing towards the guilt of the accused.[258] The Appeals Chamber refers to its analysis on this point in relation to the Prosecution's fourth ground of appeal.[259] The Appeals Chamber agrees with Imanishimwe's assertion that the Trial Chamber overlooked the provisions governing indictments by recording such findings.

129. However, the Appeals Chamber takes issue with Imanishimwe's assertion that, in view of the circumstances of the instant case, the vagueness of the Indictment cannot be cured. Imanishimwe's arguments derive from confusion regarding the evidence to be pleaded in an indictment, namely the charges *per se* and the material facts underlying them. The Trial Chamber did not conclude that paragraphs 3.25 and 3.30 of the Bagambiki/Imanishimwe Indictment did not plead charges *per se*, but that the charges pleaded in those paragraphs were "unacceptably vague".[260] It is worth noting that the principal charge, namely the "massacres of the civilian Tutsi population", is pleaded in the two paragraphs in question. Imanishimwe fails to demonstrate how the Trial Chamber erred by recording such findings. The events at Gashirabwoba are clearly within the contours of this charge, even though the charge exists in outline form only. The Appeals Chamber further notes that the Prosecution clearly stated in the Indictment that it was relying on paragraphs 3.25 and 3.30 for Counts 7,

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[255] *Cf. Aleksovski* Appeal Judgement, paras. 126-127.
[256] *Ibid*., paras. 126, 127.
[257] Trial Judgement, para. 67, referring to *Kupre{kić et al.* Appeal Judgement*,* para. 114.
[258] See *supra*, paras. 66-67.
[259] See *supra*, para. 67.
[260] See Trial Judgement, para. 64 read with para. 69.

10 and 13.[261] The Appeals Chamber reaffirms the Trial Chamber's finding that Imanishimwe was not in the dark about the charges against him, but that he was inadequately informed thereof in the Bagambiki/Imanishimwe Indictment.

130. Accordingly, there was no legal basis for the Trial Chamber not to consider the evidence relating to the imprecise charge, as long as the Prosecution provided Imanishimwe with timely, clear and consistent information detailing the factual basis underpinning the charges, and thereby permitted Imanishimwe to prepare his defence. The Appeals Chamber has already indicated that this information could, *inter alia* and depending on the circumstances, be supplied in the Prosecution's Pre-Trial Brief or opening statement.[262] The Appeals Chamber considers that the degree of vagueness of the charge is of no import where the proceedings were not rendered unfair. This constitutes an overarching condition, which must be met in entering a finding of guilt. The Appeals Chamber will now examine if Imanishimwe received timely, clear and consistent information detailing the factual basis underpinning the charges against him.

3. Were the defects in the Indictment cured?

131. Imanishimwe affirms that the Trial Chamber glaringly exceeded the scope of the matter referred to it by finding him guilty of the crimes perpetrated at the Gashirabwoba football field.[263] Although the Trial Chamber stated that it is possible in certain circumstances to consider evidence supporting a defective paragraph in the indictment, Imanishimwe alleges that the Trial Chamber did not indicate those circumstances in the Trial Judgement[264] and that the failure to give reasons for its decision shows the Trial Chamber's bias and that it was guided by one concern only, namely to convict Imanishimwe "at all cost".[265] He argues that when placed in their context, the paragraphs of the *Kupre{kić et al.* Appeal Judgement cited by the Trial Chamber[266] highlight the error the Trial Chamber committed by finding him guilty on the basis of allegations that were not pleaded in the Indictment but were improperly introduced in Witness LAC's evidence, given three weeks after commencement of trial, that is more than three years after the filing of the initial Bagambiki/Imanishimwe Indictment.[267] Imanishimwe further contends that neither the Indictment nor the Prosecution Pre-Trial Brief informed him of the Prosecution's intention to prosecute him under Article 6(3) of the Statute. He affirms that the Prosecution limited the prosecutorial framework and, hence, the framework within which the case was brought before the Chamber under Article 6(1) of the Statute.[268] After recalling some of the arguments advanced by Judge Dolenc in his separate and dissenting opinion,[269] Imanishimwe concludes that the Trial Chamber's error caused him serious prejudice which can be remedied only by reversal of the Trial Judgement.[270]

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[261] Bagambiki/Imanishimwe Indictment, para. 4, p. 9.
[262] See, *inter alia*, *Kupre{ki} et al.* Appeal Judgement, para. 117; *Ntakirutimana* Appeal Judgement, para. 36; *Niyitegeka* Appeal Judgement, para. 219; *Kordi} and ^erkez* Appeal Judgement, para. 169.
[263] *Imanishimwe* Appeal Brief, para. 47.
[264] *Ibid*., paras. 53-54.
[265] *Ibid*., para. 56.
[266] *Kupre{ki} et al*. Appeal Judgement, paras. 122-125.
[267] *Imanishimwe* Appeal Brief, para. 57-61.
[268] *Ibid*., paras. 162-163, referring to paragraphs 2.33 and 2.35 of the Prosecution Response Brief. See also *Imanishimwe* Appeal Brief, para. 102.
[269] See Judge Dolenc Opinion, paras. 5, 6 and 10.
[270] *Imanishimwe* Appeal Brief, paras. 61-68.

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132. The Prosecution argues that failure to mention the events at Gashirabwoba in the Indictment was cured by disclosure of timely, clear, and consistent information.[271] The Prosecution submits that Imanishimwe was supplied with information pertaining to Gashirabwoba on 26 November 1999 through disclosure of the redacted statements of Witnesses LAC, LAB and LAH.[272] It further submits that it clearly stated its intention to show that Imanishimwe was involved in the massacre at the Gashirabwoba football field in paragraphs 2.29 to 2.40 and in Annexes 3 and 5[273] of its Pre-Trial Brief, which was filed two and a half months prior to the start of trial.[274] It emphasizes that the said paragraphs clearly informed Imanishimwe in detail of the allegations against him in relation to the Gashirabwoba massacre,[275] including: (1) the perpetrators of the crimes,[276] (2) the role played by Imanishimwe,[277] (3) the dates and times of the events,[278] (4) the place of the events,[279] (5) the identity of the soldiers,[280] (6) the acts performed,[281] (7) Imanishimwe's knowledge of the events,[282] and (8) Imanishimwe's failure to prevent or punish the crimes committed by the soldiers and the *Interahamwe*.[283] The Prosecution concludes that the way Imanishimwe approached and conducted his defence shows that he was provided with timely notice of the charges relating to the Gashirabwoba football field, and, as such, that he suffered no prejudice to his ability to prepare his defence.[284]

133. Imanishimwe submits that the defects in the Indictment were not cured by the Prosecution Pre-Trial Brief or the disclosure of the statements of Witnesses LAB, LAC and LAH. He affirms that nothing in the Prosecution Pre-Trial Brief indicated that the Prosecution intended to prosecute him as a superior for acts allegedly committed by his subordinates at Gashirabwoba. He argues that paragraphs 1.36 to 1.40, to which the Prosecution refers, allege that he personally participated in the massacre, with nothing whatsoever indicating that he incurred responsibility as a superior for acts allegedly committed by his subordinates. The statements of Witnesses LAB, LAC and LAH are,

[271] Prosecution Response Brief, para. 52.
[272] *Ibid*., para. 47. The Prosecution indicates that the unredacted witness statements were disclosed to Imanishimwe on 31 August 2000.
[273] The Prosecution is referring in particular to the summaries of the witness statements of Witnesses LAC, LAB and LAH as contained in Annex 5 to the Prosecution Pre-Trial Brief, pp. 1412-1413.
[274] Prosecution Response Brief, paras. 43-44.
[275] *Ibid*., para. 50. The Prosecution adds, in paragraph 51, that Annex 5 to the Pre-Trial Brief, containing the summary of the anticipated evidence of Witnesses LAC, LAB and LAH also indicated the allegations in question.
[276] "Soldiers and *Interahamwe*", Prosecution Response Brief, para. 50(a). During the appeal hearing, Counsel for the Prosecution explained that paragraph 2.39 of the Prosecution Pre-Trial Brief indicated "that the soldiers were acting under Imanishimwe's direction"; AT. 7 February 2006, p. 21.
[277] The fact that he "instigated killings of civilians, mainly Tutsi", that he "verbally encouraged the *Interahamwe* to attack and exterminate Tutsi", that he took a man away and that the man "was never seen again", that he arrived at Gashirabwoba with "a group that included armed soldiers", that he "ordered separation of Hutu from Tutsi", that he "ordered soldiers and *Interahamwe* to encircle the football field", that he gave "a direct command to soldiers to fire at the crowd", Prosecution Response Brief, para. 50(b).
[278] Monday, 11 April and morning of Tuesday, 12 April 1994, Prosecution Response Brief, para. 50(c).
[279] Gashirabwoba football field, Gisuma *Commune*, Prosecution Response Brief, para. 50(d).
[280] Those under his "direct command", Prosecution Response Brief, para. 50(e).
[281] Prosecution Response Brief, para. 50(f).
[282] *Ibid*., para. 50(g), arguing that Imanishimwe admitted that he was aware of the Gashirabwoba massacre (Samuel Imanishimwe, T.22 January 2003, p. 41).
[283] Prosecution Response Brief, para. 50(h).
[284] *Ibid*., paras. 53, 60-62.

according to him, equally silent on this point.[285] Imanishimwe argues that he thus sought to defend himself only in relation to his alleged personal involvement in the massacre within the meaning of Article 6(1) of the Statute.[286] In response to the Prosecution's assertion that he failed to raise objections, he points out that he denounced the defects in the Indictment at the appropriate moments, that is "*in limine litis*" by means of two motions dated 28 January and 17 February 1998[287] and "at the end of the trial" in his final trial brief and closing arguments.[288] Lastly, Imanishimwe submits that the unredacted statements of Witnesses LAB, LAC and LAH were disclosed to him on 31 August 2000, only two weeks prior to the start of trial.[289] He thus reaffirms that he was not able "to prepare his defence in relation to the acts allegedly carried out by the soldiers under his responsibility on 12 April 1994".[290]

134. In its Judgement, under Preliminary Matters Relating to the Indictments, the Trial Chamber sets forth the principles it deems applicable to indictments.[291] The Appeals Chamber has already determined that the Trial Chamber committed some errors in its legal findings. The Appeals Chamber notes, by implication, that the Trial Chamber also erred in the way it applied the law to the facts. Indeed, although the Trial Chamber noted the vagueness of the Indictment with regard to the Gashirabwoba events, it proceeded to make factual findings on the evidence before it, without first determining whether Imanishimwe received timely, clear and consistent information detailing the factual basis underpinning the allegations in question. At no time did the Trial Chamber show that it considered whether the Accused was adequately informed of the material facts permitting him to defend himself against the charges relating to the acts committed at Gashirabwoba, even though it undertook to examine "to what extent the lack of notice and the ambiguity influenced the evidence".[292] After its analysis, the Trial Chamber made factual and legal findings in respect of these events, without meeting its obligation to consider whether the trial was rendered unfair by the "unacceptably" vague and ambiguous Indictment.[293] The Appeals Chamber considers this to be an error of law stemming directly from the application of the wrong legal standard. Now that the error has been identified, the Appeals Chamber does not deem it necessary to examine Imanishimwe's allegation that there was no reasoned opinion.

135. With regard to the allegation of bias on the part of the Trial Chamber, the Appeals Chamber recalls that it cannot entertain sweeping or abstract allegations that are neither substantiated nor detailed to rebut the presumption of impartiality enjoyed by the Judges of the Tribunal.[294] In the case at bar, the Appeals Chamber notes that Imanishimwe simply stated his allegation without substantiating it in any way. Hence, Imanishimwe's allegation that there was no reasoned opinion cannot be tantamount to a demonstration of bias on the part of the Trial Judges.

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[285] Imanishimwe Brief in Reply paras. 51-59, 65-66.
[286] *Ibid*., para. 60.
[287] Imanishimwe is referring to Preliminary Motions filed on 28 January 1998; Motion for Redefinition of Facts, Article 17(4) of the Statute and Rules 47(A) and (B) of the Rules, filed on 10 February 1998 (and not 24 September 1998, as indicated by Imanishimwe).
[288] Imanishimwe Brief in Reply, para. 61.
[289] *Ibid*., para. 64.
[290] *Ibid*., para. 67.
[291] See Trial Judgement, paras. 29-39, 65-68.
[292] Trial Judgement, para. 68.
[293] See *supra*, para. 65.
[294] See *Rutaganda* Appeal Judgement, para. 43, referring to *Akayesu* Appeal Judgement, paras. 92 and 100.

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136. In order to determine whether the Trial Chamber's error invalidates its decision to convict Imanishimwe for crimes committed at the Gashirabwoba football field, the Appeals Chamber will have to examine if the defects in the Bagambiki/Imanishimwe Indictment were cured. In other words, after correcting the legal error by articulating the applicable criteria, the Appeals Chamber will now apply the legal standards to the circumstances of the case at hand and determine if the proceedings were not rendered unfair.

137. The Appeals Chamber can affirm the convictions against Imanishimwe for the Gashirabwoba massacre on the basis of paragraphs 3.25 and 3.30 of the Bagambiki/Imanishimwe Indictment only if it is satisfied that the Prosecution provided Imanishimwe with timely, clear and consistent information detailing the factual basis underpinning the Indictment, and thereby permitted Imanishimwe to prepare his defence.

(a) Burden of proof

138. First and foremost, the Appeals Chamber has to determine on which party lies the burden of proof. The Appeals Chamber recalls that, where the indictment turns out to be defective, an accused person who fails to object on this point at trial has the burden of proving on appeal that his ability to prepare his case was materially impaired. Where, however, the accused person objected at trial, the burden is on the Prosecution to prove on appeal that the accused's ability to prepare his defence was not materially impaired.[295] In the instant case, the Appeals Chamber notes that, in the pre-trial phase, Imanishimwe filed two separate preliminary motions on defects of the Initial Bagambiki/Imanishimwe Indictment, pursuant to Rule 72(A)(ii) of the Rules. In his 29 January 1998 Motion, Imanishimwe denounced the lack of sufficient evidence to support the charges and the absence of a "concise statement of the charges against the Accused".[296] In the 24 March 1998 Motion, Imanishimwe requested that the Indictment be withdrawn on the grounds that it did not inform him of the exact nature and cause of the charges against him.[297] Imanishimwe reiterated his complaints about the vagueness of the Indictment in his Final Trial Brief and Closing Arguments, thereby denouncing the introduction of new charges related to Gashirabwoba.[298] In light of the foregoing, the Appeals Chamber finds that Imanishimwe did not invoke the defects in the Indictment for the first time on appeal. It is therefore for the Prosecution to prove that Imanishimwe's ability to prepare his defence against the allegations pertaining to Gashirabwoba was not seriously impaired by the failure to provide him with information. In other words, the Prosecution has the burden of proving that the proceedings were not rendered unfair.

(b) Disclosure of Material Facts: Place, Date, Identity of the Perpetrators of the Massacre

139. The Prosecution affirms in its written submissions that it provided Imanishimwe with the material facts concerning the charges formulated in paragraphs 3.25 and 3.30 as from

[295] See *supra*, para. 31.

[296] *The Prosecution v. Emmanuel Bagambiki, Samuel Imaniwhimwe and Yussuf Munyakazi,* Case No. ICTR-97-36.I, Preliminary Motions, 29 January 1998, p. 4.

[297] *The Prosecution v. Emmanuel Bagambiki, Samuel Imanishimwe and Yussuf Munyakazi*, Case No. ICTR-97-36-I, Motion for Redefinition of Facts, 17 February 1998.

[298] Imanishimwe Final Trial Brief, pp. 66-69 for paragraphs 3.25 and 3.30 of the Bagambiki/Imanishimwe Indictment. See also, Imanishimwe's Closing Arguments, T.15 August 2003, pp. 10-11 and 47-48, regarding Gashirabwoba specifically.

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26 November 1999. On that date, the Prosecution filed the redacted statements of Witnesses LAC, LAB and LAH. According to the Prosecution, these statements are the "sources of the particulars pertinent to the Gashirabwoba events". The Appeals Chamber is not satisfied that the mere service of copies of the statements of the witnesses the Prosecution intended to call to testify at trial, required by Rule 66(A)(ii) of the Rules, was sufficient to provide Imanishimwe with the information necessary to cure the defects of the Indictment.[299]

140. The Appeals Chamber recognises, however, that the Prosecution did state its intention to charge Imanishimwe for the acts perpetrated at the Gashirabwoba football field in his Preliminary Pre-Trial Brief, filed on 24 May 2000.[300] The intention was confirmed in the Prosecution Pre-Trial Brief, which was filed a few months thereafter. In the latter filing, the Prosecution clearly stated its intention to invoke Imanishimwe's participation in the massacres perpetrated at the Gashirabwoba football field on or around Tuesday, 12 April 1994.[301] The Prosecution supports the charge formulated in paragraphs 3.25 and 3.30 by specifying the exact date and place of one of the massacres of Tutsi civilians. The information pertaining to the acts of violence and to its direct perpetrators is contained in paragraphs 2.33 to 2.40 of the Pre-Trial Brief. It is also stated in paragraph 2.39 of the Pre-Trial Brief that soldiers under Imanishimwe's command participated in the acts of violence.

141. It emerges from these factors that the Prosecution did provide Imanishimwe with clear and consistent information regarding the place and dates of the massacre of Tutsi refugees, as well as the identity of the actual direct perpetrators. The Appeals Chamber however reserves its conclusions as to whether disclosure was made in a timely manner until later in the analysis.

(c) Criminal conduct attributed to the Accused

142. With regard to Imanishimwe's role in the commission of the crimes, the Appeals Chamber observes that paragraphs 2.31 to 2.40 of the Prosecution Pre-Trial Brief clearly describe Imanishimwe's direct and personal involvement in the massacres perpetrated at the Gashirabwoba football field on 12 April 1994.[302] The Prosecution alleges that Imanishimwe

[299] *Ntakirutimana* Appeal Judgement, para. 27, referring to *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 62.

[300] The Prosecutor's Preliminary Pre-Trial Brief, filed on 24 May 2000, paras. 1.29-1.40.

[301] Prosecution Pre-Trial Brief, para. 2.29.

[302] The relevant sections of the Prosecution Pre-Trial Brief read as follows:

> 2.31. […] Imanishimwe encouraged with words the interahamwe to attack and exterminate the Tutsi causing them and others to flee to the football field. […]
>
> 2.33. It is alleged that immediately prior to the attack, Emmanuel Bagambiki and Samuel Imanishimwe brought grenades by vehicle to Gisuma commune, which were passed to Ananie Kanyamuhanda for distribution to the interahamwe.
>
> 2.36. On or around 12 April 1994, early in the morning, the interahamwe attacked the refugees who again successfully resisted. Later that same morning, Emmanuel Bagambiki and Samuel Imanishimwe came to the football field with others, including a group of armed soldiers.
>
> 2.38. Samuel Imanishimwe then ordered the Hutus on the field to separate from the Tutsis and that the Hutus should leave the field, which many did; he then ordered the soldiers and the interahamwe to encircle the field.
>
> 2.39 Soldiers under the direct command of Samuel IMANISHIMWE began firing at the crowd. It is alleged that an automatic firing weapon, positioned on the football field, was able to spray the crowd

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committed both concrete acts of inciting, encouraging and aiding and abetting, and of giving criminal orders.

143. Imanishimwe contends, however, that he was not convicted of direct individual criminal responsibility under Article 6(1) of the Statute, but as a superior, under Article 6(3) of the Statute, for failure to prevent his subordinates from attacking the refugees. Indeed, the Appeals Chamber notes that the Trial Chamber found that it was not established that Imanishimwe ordered the attack or that he was present.[303]

(i) Form of Responsibility Charged Against Samuel Imanishimwe

144. Without necessarily examining further whether the information provided by the Prosecution outside the Indictment did remedy the Prosecution's shortcomings, the Appeals Chamber is of the opinion that Imanishimwe's ground of appeal can be admitted at this stage. Having read the contradictory information contained in the Prosecution's Pre-Trial Brief and in its Final Trial Brief, the Appeals Chamber considers that the Prosecution failed to pursue its allegation that Imanishimwe incurred responsibility for the crimes described in paragraphs 3.25 and 3.30 of the Bagambiki/Imanishimwe Indictment under Article 6(3) of the Statute, *i. e.* the form of responsibility under which he was convicted.

145. While the Prosecution states its intention to charge Imanishimwe in Counts 7, 10 and 13 of the Bagambiki/Imanishimwe Indictment under Article 6(3) of the Statute,[304] a careful reading of the Prosecution's earlier filings reveals a number of contradictions and inconsistencies with regard to Imanishimwe's responsibility for the said crimes as a superior.

146. The first such inconsistencies are found in the Prosecution Pre-Trial Brief: whereas in the headings of paragraphs 3.33 and 3.35 relating to Counts 7 and 10 against Imanishimwe, the Prosecution reiterates its intention to invoke Articles 6(1) and 6(3) of the Statute, which corresponds to the charges as formulated in the Indictment, the Prosecution states without any ambiguity in the body of these paragraphs that it intends to charge the Accused by virtue of his responsibility pursuant to Article 6(1) only:

> **3.33 Genocide 6(1) and 6(3)**
>
> The accused is charged in count seven of the indictment with genocide pursuant to Article 2(3)(a) of the Statute of the Tribunal by virtue of his responsibility pursuant to Article 6(1) of the Statute, for killing, causing of serious bodily or mental harm and deliberate infliction of conditions calculated to bring about the destruction of Tutsis in whole or in part, that occurred in the area of Cyangugu prefecture, Rwanda in April, May and June 1994, and outlined in the indictment. […] [305]

> with bullets. It is alleged that the soldiers and interahamwe threw grenades into the crowd at the same time.
>
> 2.40 After the shooting stopped, many people lay dead or fatally wounded. The Interahamwe finished off any survivors by stabbing with knives, hacking with machetes or bludgeoning to death with clubs. The interahamwe and soldiers looted the belongings of the dead.

[303] See Trial Judgement, paras. 653 and 691.
[304] Bagambiki/Imanishimwe Indictment, para. 4, p. 7, and Counts 7 and 10.
[305] Prosecution Pre-Trial Brief, para. 3.33 (emphasis added). See also Prosecution Preliminary Pre-Trial Brief, 24 May 2000, para. 2.33.

> **3.35 Crimes against Humanity (Murder, Extermination, Imprisonment and Torture), 6(1) and 6(3)**
>
> At counts nine, ten, eleven and twelve of the indictment, Samuel Imanishimwe is charged with crimes against humanity, of murdering, extermination and imprisoning of civilians, by virtue of his responsibility pursuant to Article 6(1) of the Statute in and around Cyangugu prefecture in April, May and June 1994 as outlined in the indictment.
>
> In support of the said charge the Prosecution will prove beyond reasonable doubt that:
>
> > a. The accused instigated, ordered committed, aided and abetted in the extermination of thousands of Tutsi civilians in Cyangugu prefecture in April, May and June 1994 as outlined in the indictment.[…][306]

The Prosecution does not specify in its Pre-Trial Brief the form of responsibility alleged under Count 13 (serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereof).[307]

147. With regard to the allegations pertaining to Gashirabwoba in particular, the Appeals Chamber notes that the only indication given by the Prosecution of its intention to charge Imanishimwe as a superior is the allegations of participation of "soldiers under the direct command of Samuel Imanishimwe".[308] This information is nevertheless given as part of the factual evidence of Imanishimwe's direct participation in the massacre.[309] Moreover, the Appeals Chamber considers that the information that soldiers under Imanishimwe's command allegedly participated in the massacre is not in itself inconsistent with the charge of direct participation, which, in this instance, seems to be the Prosecution case.[310]

148. Similar inconsistencies are found in the Prosecution Final Trial Brief.[311] Whereas it states several times that Samuel Imanishimwe is charged for Counts 7, 10 and 13 pursuant to Articles 6(1) and 6(3) of the Statute[312], the Prosecution systematically refers to Imanishimwe's direct participation in the commission of the crimes relating to the material facts underpinning these three counts.[313] The facts that may form the basis for a 6(3) conviction are systematically omitted.

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[306] Prosecution Pre-Trial Brief, para. 3.35 (emphasis added). See also Prosecution Preliminary Pre-Trial Brief, 24 May 2000, para. 2.35.

[307] Prosecution Pre-Trial Brief, para. 3.36.

[308] *Ibid*., para. 2.39.

[309] *Ibid*., paras. 2.31-2.40.

[310] The Appeals Chamber recalls in this regard that an accused's responsibility for "ordering" crimes requires the implied existence of a superior-subordinate relationship between the direct perpetrators and the accused. See *Semanza* Appeal Judgement, para. 361.

[311] The Appeals Chamber notes that the Prosecution does not mention in his oral closing arguments the form of responsibility with which Imanishimwe is charged for Gashirabwoba.

[312] Prosecution Final Trial Brief, paras. 39, 1132, 1302, 1596, 1741.

[313] The Prosecutor's Closing Brief Filed under Rule 86(B) and (C) of the Rules of Procedure and Evidence, 26 Juny 2003, paras. 1146-1151. The most relevant sections read as follows (emphasis added):

> **1146. Genocide (Counts 1 and 7)**
>
> 1147. Evidentiary basis establishing the Crime of Genocide:

149. In light of the above, the Appeals Chamber considers that the Prosecution failed to pursue the charges relating to Gashirabwoba under Article 6(3) of the Statute, but focused solely on criminal responsibility under Article 6(1) of the Statute, a form of responsibility that the Trial Chamber did not retain for the events in question.

150. The Appeals Chamber considers that for the foregoing reasons, the Trial Chamber could not have entered a finding of guilt under Article 6(3) of the Statute for Counts 7, 10 and 13. On this basis only, the Appeals Chamber deems it possible to allow the ground of appeal and set aside the guilty verdict against Imanishimwe for the Gashirabwoba events based on Article 6(3) of the Statute.

151. In any event, the Appeals Chamber finds, having examined the question as to whether Imanishimwe was adequately informed of the material facts underpinning the charges based on Article 6(3) relating to the Gashirabwoba massacre, that he was not so informed, as will be shown in the following analysis.

(ii) Disclosure of material facts underpinning a charge based on Article 6(3)

152. The Prosecution charges Samuel Imanishimwe with responsibility pursuant to Article 6(3) in the Indictment, but omits to plead the material facts relating to this form of responsibility, especially with regard to Gashirabwoba, which is simply omitted. The Appeals Chamber recalls that where an accused is charged with responsibility pursuant to Article 6(3) of the Statute, the material facts which must be pleaded in the indictment are: (1) that the accused is the superior of subordinates sufficiently identified over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible; (2) the criminal conduct of those others for whom he is alleged to be responsible; (3) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinate; and (4) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[314]

153. First, as to whether Imanishimwe had effective control over subordinates, Imanishimwe could not have been unaware of the Prosecution's intention to establish that he exercised *de facto* and *de jure* authority over the soldiers at the Cyangugu military camp as

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> 1148. […] Specifically, the following supporting evidence establishes that [Bagambiki and Imanishimwe] committed genocide by directly participating in massacres and attacks with the specific intent to destroy, in whole or in part, ethnic Tutsi.
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> 1149. Direct Participation in Massacres and Attacks:
> […]
>
> 1151. […] The Accused Emmanuel Bagambiki and Samuel Imanishimwe participated directly in these mass killings, gave orders to others to kill Tutsis, provided ammunition to people to be used to kill Tutsis, and otherwise encouraged and facilitated the massacres and attacks against Tutsis in Cyangugu *préfecture*.[313]

See also paras. 1313 and 1316. Regarding the Gashirabwoba massacre in particular, see Prosecution Final Trial Brief, para. 1172. Regarding Count 10, see Prosecution Final Trial Brief, para. 1604. Regarding Count 13, see Prosecution Final Trial Brief, paras. 1758, 1769-1770, 1772.

[314] See *supra*, para. 26.

the commander of the camp.[315] Specifically with regard to the Gashirabwoba massacre, the mention "soldier under the direct command of Samuel Imanishimwe" in paragraph 2.39 of the Prosecution Pre-Trial Brief shows that Imanishimwe was informed of this material fact. The same applies to his knowledge of the alleged criminal conduct of his subordinates.[316]

154. Secondly, regarding the Accused's conduct, from which it may be deduced that he knew or had reason to know that his subordinates were about to commit crimes,[317] the Appeals Chamber notes that in its Pre-Trial Brief, the Prosecution omits to mention this material fact. This omission is easily explained by the fact that the Prosecution alleges that the Accused was physically present and made a direct and substantial contribution on the day of the massacre: the Accused's knowledge is inferred by implication, but as the only inference possible from the criminal conduct with which he is charged. At no moment is Samuel Imanishimwe's absence from the scene of the massacre envisaged. The summary of the statements of Witnesses LAH, LAB and LAC annexed to the Prosecution's Pre-Trial Brief are no more informative in this regard: the summary of Witness LAB's statement indicates that Imanishimwe was present during the attack, with no further details,[318] whereas the summary of Witness LAC's statement says nothing about Imanishimwe's supposed knowledge of the attack.[319] It is mentioned in the summary of Witness LAH's statement that the witness "made daily updates on the progress of the killings to Bagambiki and Imanishimwe".[320] Such indication, which is not specifically related to the Gashirabwoba attack, with regard to which LAH mentions Imanishimwe's presence, is of little weight

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[315] See Bagambiki/Imanishimwe Indictment, para. 3.10. See also Prosecution Pre-Trial Brief, para. 2.3.

[316] See Prosecution Pre-Trial Brief, para. 2.39.

[317] The Appeals Chamber has decided not to consider whether Imanishimwe was properly informed that the Prosecution intended to prove that he knew or had reason to know that his subordinates were about to commit crimes, given that Imanishimwe was found guilty for failing to prevent the crimes, a finding which requires prior knowledge of the commission of the crimes.

[318] Prosecution Pre-Trial Brief, Annex 4: Summary of Anticipated Evidence, prepared by the Prosecution, p. 1412 (Registry pagination):

> [Witness LAB will state that] in January 1994, Imanishimwe and Bagambiki came to Shagasha tea factory and recruited about 30 youths for military training which was conducted till April 1994 […]; that Imanishimwe trained them for a week in the forest on target practice using live ammunition while Bagambiki used to inspect training and brief trainees that they were being trained to fight the tutsi invaders and their accomplices; that on 7 April, Imanishimwe and Bagambiki brought about 150 clubs and 300 machetes which were distributed to the *Interahamwe*; that a few days later there was an attack on the refugees at Gashirobwa by the *Interahamwe*, which was repulsed by the refugees using stones and bricks; that later that day Imanishimwe and Bagambiki arrived with a reinforcement of soldiers and went for the final attack on Gashirabwoba […]

[319] Prosecution Pre-Trial Brief, Annex 4: Summary of Anticipated Evidence, prepared by the Prosecution, p. 1412 (Registry pagination):

> [Witness LAC will state that] he fled to Gashirobwa football field where he arrived simultaneously with other Tutsi refugees around 1300 hours; that about an hour later, Imanishimwe and Bagambiki arrived with a list and Bagambiki called out two names […]; that on 12 April the refugees were attacked by *Interahamwe* around 0800 hours but repulsed the attack and also repulsed another attack about two hours later; that Bagambiki came about 30 minutes after the second attack and said he would send soldiers to guard them; that after about another 30min soldiers came with *Interahamwe* and started firing at the crowd with guns and lobbing hand grenades; that when the shooting stopped, after many were dead and wounded, the *Interahamwe* moved in and started hacking the wounded with machetes and stripping the dead of valuables […].

[320] Prosecution Preliminary Pre-Trial Brief, Annex 4: Summary of Anticipated Evidence, prepared by the Prosecution, p. 1413 (Registry pagination):

> [Witness LAH will state that on 7 April 1994] Bagambiki and Imanishimwe distributed grenades that were used against the Tutsi in the attack at Gashirabwoba; that Imanishimwe came to Gashirobwa with a reinforcement of about 30 soldiers and guns which he distributed to the *Interahamwe* before commencing the attack; that [the] witness also made daily attacks against Tutsi and made daily updates on the progress of the killings to Bagambiki and Imanishimwe.

compared to the abundant information provided by the Prosecution about its intention to prove that Imanishimwe was present, and even ordered the massacre.

155. The Appeals Chamber cannot conclude that the Prosecution provided Imanishimwe with clear and consistent information of this allegation. In fact, it is interesting to note that the Prosecution in its Response Brief simply alleges that Imanishimwe was aware of the facts by relying on the Accused's own admission before the Trial Chamber on 22 January 2003.[321] Nothing in the relevant part of the trial transcript indicates that Imanishimwe was informed of the conduct by which the Prosecution intended to establish that he knew or had reasons to know that his subordinates were about to attack the refugees at Gashirabwoba.[322] Imanishimwe simply affirms that he knew that massacres had occurred at the Gashirabwoba football field. The Appeals Chamber notes that the Accused admits that he knew that a massacre had been perpetrated, and not that a massacre was about to be perpetrated, and his subordinates' participation is not mentioned.

156. Lastly, with regard to the Accused's conduct, from which it may be deduced that he failed to take the necessary and reasonable measures to prevent the crimes from being committed,[323] the Appeals Chamber notes that the Prosecution Pre-Trial Brief says nothing about it. The Prosecution does not bring any particular information to the attention of the Chamber – by way of a passage in its Pre-Trial Brief, its Opening Statement or summaries of witness statements – to demonstrate it provided Imanishimwe with clear and consistent information regarding this material fact. In paragraph 50(h) of its Response Brief, the Prosecution simply lists the violent acts committed by "the soldiers and the *interahamwe*,"[324] as enumerated in the Pre-Trial Brief, without demonstrating to what extent such facts informed Imanishimwe of the reasons for which he was charged for failing to prevent the crimes committed at the Gashirabwoba football field on 12 April 1994. The Appeals Chamber recalls that the Prosecution has the burden of proving that the Indictment was cured

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[321] Prosecution Response Brief, para. 50(g), referring to T.22 January 2003, p. 34, lines 26-31.

[322] Samuel Imanishimwe, T.22 January 2003, p. 34:

> MR. PRESIDENT:
> Mr. Imanishimwe, just before I forget, because sometimes I make a note of these things but later on I forget, maybe you can assist me with something, and I am not sure whether I have the pronunciation right, so if I don't have it right, you can excuse me. Gashirabobwa park, or pitch, or football pitch, were you aware that any killings took place at that place?
>
> THE WITNESS:
> Yes, I heard that there were massacres there.
>
> MR. PRESIDENT:
> Very well, thank you.

[323] The Appeals Chamber does not deem it necessary to consider whether Imanishimwe was informed of the conduct by which the Prosecution was to make the case that he failed to take necessary and reasonable measures to punish the perpetrators of the crimes, given that he was found guilty of failure to prevent the crimes, and punishing the perpetrators thereof, which requires prior knowledge of the commission of the crimes.

[324] Prosecution Response Brief, para. 50(h):

> **"The Appellant's failure to act** - besides the active role played by the Appellant, set out in subparagraphs b and f herein, the Appellant was aware of and omitted to prevent or punish soldiers and *Interahamwe* for committing these acts: they burned houses and killed individuals on the hills around Gashirabwoba (Pre-Trial Brief, paragraph 2.30); soldiers and *Interahamwe* threw grenades into the crowd at Gashirabwoba on 12 April 1994 (Pre-Trial Brief, paragraph 2.39); *Interahamwe* finished off the survivors by stabbing with knives, hacking with machetes and bludgeoning to death with clubs (Pre-Trial Brief, paragraph 2.40); *Interahamwe* and soldiers looted the belongings of the dead (Pre-Trial Brief, paragraph 2.40)."

of its defects, because Imanishimwe was provided with the necessary details concerning the charges against him.[325]

157. The Appeals Chamber notes that a certain amount of clear and consistent information on the charges relating to the Gashirabwoba massacre was provided by the Prosecution to the Accused in its Pre-Trial Brief, which was filed two months before the start of trial. The Appeals Chamber considers, however, that it does not need to rule on whether the information was provided timely – that is, in time for Imanishimwe to prepare his defence – since it is of the view that not all the necessary information was disclosed.[326] Imanishimwe's criminal conduct, described in sufficient detail by the Prosecution in his Pre-Trial Brief, is limited to his direct participation in the massacre. General reference to Article 6(3) and to the fact that people "under his direct command" participated in the crimes is not sufficient to find that Imanishimwe was given clear and consistent information regarding the case he had to meet under Article 6(3) of the Statute in respect of the acts committed by his subordinates in Gashirabwoba.

158. The Appeals Chamber recognises that, prior to the presentation of all of the evidence, the Prosecution cannot determine with certainty which of the charges brought against an accused will be proven. Cumulative charging is therefore allowed.[327] However, this does not relieve the Prosecution of its obligation to state all material facts underpinning each of the charges if it intends to plead several forms of responsibility, cumulatively or alternately. In the instant case, the Prosecution simply invokes Article 6(3) of the Statute without providing the Accused with all the material facts underpinning the charges under that Article. The Prosecution seems to consider mere mention of Article 6(3) to be the key to a conviction under this Article. The Appeals Chamber cannot but denounce this approach. It reaffirms that if the Prosecution intends to charge a superior with individual criminal responsibility pursuant to Article 6(3) of the Statute, it must plead the material facts underpinning the charges in the indictment, and that failure to do so may be remedied only if the missing material facts are provided in a clear, consistent and timely manner.

(d) Unfairnes of the proceedings

159. The Prosecution contends, nonetheless, that the proceedings were not rendered unfair because it can be inferred from the whole trial record that Imanishimwe "understood and was ready at trial for the Prosecution case, based on the charges relating to Gashirabwoba".[328]

160. In support of its assertion, the Prosecution argues that Imanishimwe failed to raise a specific objection to any evidence being led on the Gashirabwoba massacre[329] and did not

[325] See *supra*, para. 138.
[326] In the light of the conclusions regarding Imanishimwe's 10th ground of appeal, the Appeals Chamber does not consider it necessary to discuss whether the material facts which had to be pleaded to allow Imanishimwe's conviction for the events at Gashirabwoba under Article 6(1) of the Statute were communicated to him in a timely manner. See below, Ch. III, G, paras. 353-377.
[327] *Čelebići* Appeal Judgement, para 400.
[328] Prosecution Response Brief, paras. 53-62. During the appeal hearing, Counsel for the Prosecution elaborated on this point, referring to paragraph 53 of the *Kvočka* Appeal Judgement: "proper notice may be inferred from an accused's understanding of the nature of the Prosecution case"; AT.7 February 2006, p. 24. See Imanishimwe Brief in Reply, paras. 57-62 and 67.
[329] Prosecution Response Brief, paras. 55-59. See Imanishimwe Brief in Reply, para. 61.

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require further time for cross-examination, or to conduct further investigation.[330] In the view of the Appeals Chamber, this does not demonstrate that Imanishimwe was informed of the fact that the Prosecution intended to charge him with responsibility for those acts as a superior. The Appeals Chamber concluded earlier that Imanishimwe was informed of some of the material facts relating to the Gashirabwoba charges. It was therefore normal for him to defend against those facts at trial. The Appeals Chamber notes that none of the evidence adduced by the Prosecution in respect of the events at Gashirabwoba was limited to Imanishimwe's responsibility as a superior, thereby necessitating an objection on his part or the request for additional time for the preparation of his defence.

161. The Prosecution contends that Imanishimwe's attitude at trial shows that he was prepared to meet the charges relating to Gashirabwoba. First, it invokes the fact that Counsel for Imanishimwe cross-examined Witnesses LAC, LAB and LAH in detail on the Gashirabwoba events.[331] Having read the passages of the trial records cited by the Prosecution, the Appeals Chamber cannot consider that the way Counsel for Imanishimwe conducted the cross-examination of Witnesses LAC and LAH[332] supports the Prosecution's position: the cross-examination did not touch on the evidence relating to the form of responsibility for which Imanishimwe was found guilty.

162. The Prosecution also asserts that Imanishimwe adduced further evidence on the Gashirabwoba events.[333] The only example of the additional evidence the Prosecution cites is Exhibit D-IS 2 presented on 10 October 2002. In the opinion of the Appeals Chamber, the introduction of this exhibit – a rudimentary sketch of the Gashirabwoba football field and its immediate surroundings – does not in any way demonstrate that Imanishimwe knew that he was to defend himself against charges based on Article 6(3) of the Statute. The Prosecution further asserts that Defence Witnesss PBA and PKA testified in an attempt to provide an alibi for Imanishimwe for 12 April 1994.[334] The calling of these two witnesses and the strategy adopted by Counsel for Imanishimwe at trial strengthen the Appeals Chamber's conviction that Imanishimwe thought that he was to defend himself against the charge relating to his responsibility for direct participation in the crimes, and not against his responsibility as a superior. Lastly, the Prosecution avers that Imanishimwe himself testified about the Gashirabwoba massacres, "stating that he knew about it, simply denying being involved".[335] Here again, the Appeals Chamber considers that this evidence, which is insufficient to conclude that Imanishimwe was informed of all the material facts underpinning the charges based on Article 6(3) of the Statute, seems to demonstrate that Imanishimwe was responding to a charge of direct participation in the Gashirabwoba massacre.

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[330] AT. 7 February 2006, p. 24.
[331] Prosecution Response Brief, para. 60. The Prosecution refers to the following passages of the trial record: Witness LAC, T.10 October 2000, pp. 39-47 (closed session); Witness LAH, T.11 October 2000, pp. 75-98; Witness LAB, T.29 January 2001, pp. 25-76. See also AT.7 February 2006, p. 24. See Imanishimwe Brief in Reply, paras. 57-60 and 62.
[332] The Appeals Chamber considers that the excerpts of Witness LAH's cross-examination quoted by the Prosecution are not relevant in this instance, because the cross-examination in question was led by Counsel for Emmanuel Bagambiki.
[333] Prosecution Response Brief, para. 60. The Prosecution refers to Exhibit D-IS 02, presented on 10 October 2002.
[334] Prosecution Response Brief, para. 60. The Prosecution refers to the following passages: Witness PBA, T.5 November 2002, pp. 83-84, and T.6 November 2002, pp. 7-8; Witness PKA, T.15 October 2002, pp. 7-8.
[335] Prosecution Response Brief, para. 60.

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163. Lastly, the Prosecution argues that (1) in his Opening Statement, Imanishimwe made specific reference to the events at Gashirabwoba, not in the context of the Appellant's lack of knowledge of these events, but simply in order to state that he had not participated in them;[336] and (2) that the testimony of Witnesses LAC, LAH and LAB was examined closely in Imanishimwe's Final Trial Brief.[337] The Appeals Chamber considers that these arguments do not advance the Prosecution case. Contrary to the purpose for which they are advanced, they end up convincing the Appeals Chamber that Imanishimwe was not informed that he had to defend himself against charges for responsibility as a superior for failure to prevent the massacre. It is, indeed, a matter of concern to note that Imanishimwe's whole strategy in relation to Gashirabwoba is essentially confined to proving that he was not present at the scene on 12 April 1994.

4. Conclusion

164. The Appeals Chamber considers that Imanishimwe's ability to prepare his defence in relation to the Gashirabwoba events was materially impaired. Aside from the fact that Imanishimwe was not provided with timely, clear and coherent information about the material facts underpinning the charges that the Prosecution intended to bring against him under Article 6(3) of the Statute, the Appeals Chamber finds that Imanishimwe was entitled to infer from the post-indictment filings that the Prosecution had decided not to pursue the Gashirabwoba charges based on Article 6(3) of the Statute. In the opinion of the Appeals Chamber, Imanishimwe was not informed that he had to defend himself against a charge alleging responsibility as a superior for the Gashirabwoba massacre. This set of circumstances rendered the proceedings unfair. Accordingly, the Appeals Chamber finds that the Trial Chamber could not enter a finding of guilt on the basis of Article 6(3) of the Statute for the acts committed at the Gashirabwoba football field.

165. The Appeals Chamber allows this ground of appeal and sets aside the guilty verdict against Imanishimwe entered under Article 6(3) of the Statute for the acts committed at the Gashirabwoba football field, that is, for genocide (Count 7 of the Bagambiki/Imanishimwe Indictment), for extermination as a crime against humanity (Count 10 of the Bagambiki/Imanishimwe Indictment) and for serious violations of the Common Article 3 to the Geneva Conventions and of Additional Protocol II (Count 13 of the Bagambiki/Imanishimwe Indictment). The impact, if any, of this decision on the sentence will be addressed later in this Judgement.

III. THE PROSECUTION'S APPEAL

A. Standard of Proof (5th Ground of Appeal)

1. The Application of the standard of proof

166. Under the fifth ground of appeal, the Prosecution submits that the Trial Chamber committed an error of law with respect to the application of the criminal standard of proof

[336] Prosecution Response Brief, para. 61, referring to Imanishimwe Opening Statement, T.2 October 2002, pp. 71-87.
[337] Prosecution Response Brief, para. 62, referring to Imanishimwe Final Trial Brief, pp. 769-865. See Imanishimwe Brief in Reply, para. 61.

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beyond a reasonable doubt. It contends that "instead of reserving the application of the criminal standard of proof for the determination of the ultimate issues of guilt or innocence in the case, the Trial Chamber applied it to the assessment of individual items of evidence presented at the trial, treated in isolation from one another".[338] The Prosecution submits that it was not required to prove each and every individual circumstance alleged against the Accused beyond a reasonable doubt, but that the Trial Chamber should have considered the whole of the evidence in relation to each of the counts.[339] Referring to the jurisprudence of the ICTY, the Prosecution concedes that in order to establish the guilt of the accused it must prove the material facts beyond a reasonable doubt, but it argues that this does not apply to background facts. In the present case, the Prosecution reproaches the Trial Chamber with considering itself bound to establish also these background facts beyond a reasonable doubt.[340] In the view of the Prosecution, "the criminal standard of proof [beyond reasonable doubt] should only apply at the verdict stage, and not at the earlier fact-finding stage".[341] According to the Prosecution, this ground of appeal affects all the verdicts rendered against Ntagerura, Bagambiki and Imanishimwe.[342]

167. Bagambiki and Ntagerura maintain that the material elements of the crimes have to be proved beyond a reasonable doubt.[343] Imanishimwe argues that an indictment should not contain "general facts", which implies that each fact contained in an indictment has to be considered as an element of the crime, and therefore has to be proved by the Prosecution.[344] In fact, Imanishimwe submits, each contested element of the charges should be proved.[345]

168. In the understanding of the Appeals Chamber, the Prosecution raises two closely interlinked arguments to support this ground of appeal: first, the standard of proof beyond reasonable doubt should not, as the Trial Chamber did, be applied at the fact-finding stage of the trial, but rather to the "ultimate issues of guilt or innocence in the case";[346] and second, the Trial Chamber erroneously failed to consider the evidence as a whole, but applied the standard of proof beyond reasonable doubt to each individual piece of evidence.[347]

(a) Application of the Standard of Proof at the Fact-Finding Stage

169. As to the first argument, the Prosecution relies on a decision of the Supreme Court of Canada, *R. v. Morin*, to support its position that the standard of proof has to be applied at the verdict stage only, but not to the individual facts of the case.[348] However, this decision does not support the contention that the individual facts of the case do not have to be proven beyond a reasonable doubt:

[338] Prosecution Appeal Brief, para. 193.
[339] *Ibid*., para. 194.
[340] *Ibid*., paras. 221-222.
[341] *Ibid*., para. 198.
[342] Prosecution Nottice of Appeal, para. 40.
[343] Bagambiki Response Brief, para. 188; Ntagerura Response Brief, para. 126; *cf.* Imanishimwe Response Brief, para. 80.
[344] Imanishimwe Response Brief, para. 83.
[345] *Ibid*., para. 80.
[346] Prosecution Appeal Brief, para. 193.
[347] *Ibid*., para. 218.
[348] *Ibid*., paras. 227-228.

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> During the process of deliberation, the jury must consider the evidence as a whole and determine whether guilt is established by the prosecution beyond a reasonable doubt. *This of necessity requires that each element of the offence or issue be proved beyond a reasonable doubt.*[349]

In fact, Judge Sopinka, speaking for the majority, endorsed the conclusion in another case of the Supreme Court of Canada, *Nadeau v. The Queen*:

> The jurors cannot accept his [a 'Crown witness'] version, or any part of it, unless they are satisfied beyond all reasonable doubt, having regard to all the evidence, that the events took place in this manner; otherwise, the accused is entitled, *unless a fact has been established beyond a reasonable doubt*, to the finding of fact the most favourable to him, provided of course that it is based on evidence in the record and not mere speculation.[350]

In addition, the Appeals Chamber notes that some of the language used in *R. v. Morin*, which could be construed to support the Prosecution's position at first view, is due to the fact that the issue in *R. v. Morin* was the instruction given to the jury by the trial judge. When considering this case in the context of the Tribunal, it has to be borne in mind that here the trier of fact is not a jury, but a panel of professional judges. In the case of the jury, the one question which has to be answered is the question of guilty or not guilty, and the factual findings supporting this conclusion are neither spelled out nor can they be challenged by one of the parties. The instruction given to the jury concentrates on this "ultimate issue" of the case. In this Tribunal, on the other hand, Trial Chambers cannot restrict themselves to the ultimate issue of guilty or not guilty; they have an obligation pursuant to Article 22(2) of the Statute, translated into Rule 88(C) of the Rules, to give a reasoned opinion.[351]

170. The Appeals Chamber recalls that Article 20(3) of the Statute provides that an accused shall be presumed innocent until proven guilty. This Article embodies a general principle of law, that the Prosecution bears the onus of establishing the guilt of the accused beyond reasonable doubt.[352] With respect to the Trial Chamber's Judgement, Rule 87(A) of the Rules clearly states that a finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt. Although the Rules are silent as to whether the same standard applies at the fact-finding stage, and, if so, with respect to which facts, the ICTY Appeals Chamber has left no doubt that the standard of proof "beyond reasonable doubt" is not limited to the ultimate question of guilt:

> [T]he Prosecution argues that […] the evidence of Witness H '…forms nothing more than a constituent in the entire composition of evidence against the Appellant for count 1 [persecution].' The Appeals Chamber disagrees. The Prosecution's argument reflects the same misconception that the attack on Witness H's house was only evidence of persecution, not a material fact integral to the crime of persecution as identified in the preceding discussion on the defects in the Amended Indictment. The persecution conviction of Zoran and Mirjan Kupreškić hinged upon their participation in the attack on Witness H's house. The Prosecution's argument that the Trial Chamber was at liberty to employ anything other than the standard of proof beyond

[349] *R. v. Morin*, [1988] 2 S. C. R. 345 (emphasis added).
[350] *Nadeau v. The Queen*, [1984] 2 S.C.R. 570, at p. 571, *per* Judge Lamer (emphasis added).
[351] *Kordić and Čerkez* Appeal Judgement, para. 383.
[352] *Kayishema and Ruzindana* Appeal Judgement, para. 107.

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> reasonable doubt in assessing Witness H's evidence implicating Zoran and Mirjan Kupreškić in that attack cannot be sustained.[353]

(b) Piecemeal approach to the evidence

171. To support its argument that the Trial Chamber erroneously adopted a piecemeal approach to the evidence, the Prosecution refers to the *Musema* Appeal Judgement. There, the Appeals Chamber endorsed the view of the ICTY Appeals Chamber in the *Tadi}* Judgement on Allegations of Contempt:

> [A] tribunal of fact must never look at the evidence of each witness separately, as if it existed in a hermetically sealed compartment; it is the accumulation of *all* the evidence in the case which must be considered. The evidence of one witness, when considered by itself, may appear at first to be of poor quality, but it may gain strength from other evidence in the case. The converse also holds true.[354]

172. In the Appeals chamber's view, the case law referred to by the Prosecution does not address the issue of the standard of proof applicable to any particular fact. The duty of the Trial Chamber to consider all the evidence does not relieve it from the duty to apply the required standard of proof to any particular fact.

173. The Prosecution quotes as one of the examples for the alleged error of law by applying the standard of proof to individual items of evidence the Trial Chamber's conclusions in paragraph 118 of the Trial Judgement.[355] The Appeals Chamber notes that the Trial Chamber did not look at the testimony of the different witnesses in isolation, but considered it in the light of other evidence. It took into account the testimony of a Defence witness (Witness BLB), which created doubts as to the credibility of Witness LAH in general, and also that of Prosecution Witness NL, but found that it did not corroborate the testimony of Witness LAH. The Trial Chamber's approach clearly follows the principle enunciated in the *Tadi}* Judgement on Allegations of Contempt. Only at the end of this analysis does the Trial Chamber apply the standard of proof and determine whether the fact in question was proved beyond a reasonable doubt.

174. It appears to the Appeals Chamber that the Prosecution's argument does not clearly distinguish between the different stages of the fact-finding process which a Trial Chamber undertakes before it can enter a conviction:

- At the first stage, the Trial Chamber has to assess the credibility of the relevant evidence presented. This cannot be undertaken by a piecemeal approach. Individual items of the evidence, such as the testimony of different witnesses, or documents admitted into evidence, have to be

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[353] *Kupreškić et al.* Appeal Judgement, para. 226 (footnotes omitted).
[354] *Tadi}* Judgement on Allegations of Contempt, para. 92, quoted by *Musema* Appeal Judgement, 134.
[355] Prosecution Appeal Brief, para. 193, fn. 257. Prosecution Witness LAH had testified that he had taken part in a meeting at the Bushenge market, where, according to the witness, Ntagerura had said that in a short time President Habyarimana would no longer be there, "and at that time, the fate of the Tutsi will be sealed". (See Trial Judgement, para. 114, referring to T.10 October 2000, pp. 63, 104, 109-110; T.11 October 2000, pp. 25, 26. The Trial Chamber found that the testimony of another Prosecution witness, Witness NL, did not corroborate Witness LAH's testimony. The Trial Chamber therefore concluded that it was not satisfied beyond a reasonable doubt that Ntagerura took part in the meeting (Judgement, para. 118).

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analysed in the light of the entire body of evidence adduced. Thus, even if there are some doubts as to the reliability of the testimony of a certain witness, that testimony may be corroborated by other pieces of evidence leading the Trial Chamber to conclude that the witness is credible. Or, on the other hand, a seemingly convincing testimony may be called into question by other evidence which shows that evidence to lack credibility.

- Only after the analysis of all the relevant evidence, can the Trial Chamber determine whether the evidence upon which the Prosecution relies should be accepted as establishing the existence of the facts alleged, notwithstanding the evidence upon which the Defence relies. At this fact-finding stage, the standard of proof beyond a reasonable doubt is applied to establish the facts forming the elements of the crime or the form of responsibility alleged against the accused, as well as with respect to the facts which are indispensable for entering a conviction.

- At the final stage, the Trial Chamber has to decide whether all of the constitutive elements of the crime and the form of responsibility alleged against the accused have been proven. Even if some of the material facts pleaded in the indictment are not established beyond reasonable doubt,[356] a Chamber might enter a conviction provided that having applied the law to those material facts it accepted beyond reasonable doubt, all the elements of the crime charged and of the mode of responsibility are established by those facts.

In light of the above analysis, the Appeals Chamber agrees with the Prosecution that "applying the criminal standard of proof piecemeal to individual items of evidence" would amount to an error.[357]

(c) Conclusion

175. The Appeals Chamber recalls that the presumption of innocence requires that each fact on which an accused's conviction is based must be proved beyond a reasonable doubt. The Appeals Chamber agrees with the Prosecution's argument that "if facts which are essential to a finding of guilt are still doubtful, notwithstanding the support of other facts, this will produce a doubt in the mind of the Trial Chamber that guilt has been proven beyond a reasonable doubt".[358] Thus, if one of the links is not proved beyond a reasonable doubt, the chain will not support a conviction.

[356] The Appeals Chamber considers that the "material facts" which have to be pleaded in the indictment to provide the accused with the information necessary to prepare his defence have to be distinguished from the facts which have to be proved beyond reasonable doubt.
[357] Prosecution Appeal Brief, para. 258.
[358] AT. 6 February 2006, p. 52.

2. Individual Instances of the alleged misapplication of the standard of proof

176. To support its position, the Prosecution identifies a number of instances where the Trial Chamber, in the Prosecution's view, incorrectly applied the standard of proof. The Appeals Chamber will examine each of these instances relied upon by the Prosecution to determine whether the treatment of the evidence reveals a factual error on the part of the Trial Chamber. In addition, the Prosecution refers to an annex to its Brief, containing tables to "illustrate [the Prosecution's] argument visually".[359] The Appeals Chamber accepts them as an illustration and, accordingly, declines to discuss in detail the individual facts contained in the tables.

(a) Bagambiki's Involvement in the Gashirabwoba massacre and the killing of refugees removed from Cyangugu Cathedral and Kamarampaka Stadium

177. The Prosecution submits that one example of the Trial Chamber's erroneous approach is its treatment of Bagambiki's role in the events related to the Gashirabwoba massacre and the murder of refugees removed from Cyangugu Cathedral and Kamarampaka Stadium.[360] The Prosecution argues that the majority of the Trial Chamber looked at these incidents in isolation, rather than viewing them in conjunction with one another, and with other evidence. Viewed this way, the Prosecution argues, they reveal a pattern, implicating Bagambiki unequivocally in the crimes.[361]

178. In response, Bagambiki argues that the Trial Chamber did recognize a pattern in the events, namely, that he tried to help and to protect the refugees.[362]

179. The Trial Chamber found that on 16 April 1997 Bagambiki, Imanishimwe and others selected 12 Tutsi from the refugees assembled at Kamarampaka Stadium, who were subsequently killed together with 4 other Tutsi refugees, who had been selected from Cyangugu Cathedral by the same authorities some time earlier.[363] The majority of the Trial Chamber found that it lacked sufficient evidence to conclude that Bagambiki participated in the killing of the 16 refugees.[364] In paragraph 437 of the Trial Judgement, the Trial Chamber found that on 12 April 1994 a large number of refugees had assembled at the Gashirabwoba football field. After they had been attacked in the morning, Bagambiki arrived and tried to reassure them and promised to send soldiers to protect them. An hour later, armed guards and soldiers surrounded the refugees and opened fire on them. The Trial Chamber found that it was not satisfied that Bagambiki participated in the attack.[365]

180. In both instances, the Trial Chamber relied on the evidence of a number of witnesses to support its findings. In the instance of the 16 refugees, there is no direct evidence that Bagambiki participated in their killing. The Prosecution argues that the Trial Chamber

[359] Prosecution Appeal Brief, para. 200.
[360] *Ibid*., para. 202.
[361] *Idem*.
[362] Bagambiki Response Brief, paras. 189-191.
[363] Trial Judgement, para. 337.
[364] *Idem*.
[365] *Ibid*., paras. 438-440.

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erroneously failed to draw the only reasonable inference from the circumstantial evidence.[366] This, however, is not a question of the alleged piecemeal approach to the evidence. Regarding the findings relating to the Gashirabwoba football field massacre, the Trial Chamber relied mainly on the evidence of one witness (Witness LAC), but rejected the testimony of Witnesses LAH and LAB. Although Witnesses LAH and LAB, the Trial Chamber reasoned, provided some measure of corroboration for their assertions that Bagambiki and Imanishimwe participated in the attack, their accounts contained inconsistencies and were incompatible with Witness LAC's testimony.[367] The reasoning of the Trial Chamber does not reveal an erroneous approach; on the contrary, the Trial Chamber analysed the entire body evidence without isolating any individual item.

181. Also, when viewing the two incidents in conjunction, a reasonable Trial Chamber could still arrive at the conclusion that Bagambiki's participation was not proved. The Trial Chamber's reasoning with respect to the killing of the 16 refugees and the Gashirabwoba football field massacre does not reveal an erroneous application of the standard of proof.

(b) <u>Paragraphs 3.12 through 3.22 of the Bagambiki/Imanishimwe Indictment</u>

182. The Prosecution submits that the Trial Chamber did not consider a number of paragraphs of the Bagambiki/Imanishimwe Indictment, because they were too vague or did not plead identifiable criminal conduct on the part of the Accused. In the Prosecution's view, the entire Indictment and all of the evidence should have been considered as a whole.[368]

183. The Appeals Chamber notes that most of the Prosecution's argument does not relate to the application of the standard of proof, but to the Trial Chamber's consideration of the Indictments, which has already been discussed in Section II(D) of this Judgement.[369]

184. With regard to paragraph 3.22 of the Bagambiki/Imanishimwe Indictment, the Prosecution submits that the Trial Chamber found that gendarmes guarded the Kamarampaka Stadium, curtailing the movement of the refugees who were staying there. It argues that the Trial Chamber again adopted "a piecemeal approach to the consideration of the evidence",[370] by finding that it lacked "sufficient reliable evidence to determine whether the restriction on the refugees' movement was principally to keep them incarcerated or to ensure their protection".[371] The Prosecution argues that the Trial Chamber should have been considered all of the available evidence to "determine whether the presence of the *gendarmes* was benign or sinister".[372]

185. The Appeals Chamber notes that the Prosecution does not identify other evidence which would have allowed the Trial Chamber to draw more far-reaching conclusions on the culpability of the Accused. Bagambiki correctly points out that the Trial Chamber found, for instance, that gendarmes guarded the refugees who had assembled at the Cyangugu Cathedral

[366] Prosecution Appeal Brief, paras. 202 and 210. This argument is discussed below, in the context of the Prosecution's first ground of appeal; see below, paras. 302-328.
[367] Trial Judgement, para. 440.
[368] Prosecution Appeal Brief, para. 206.
[369] See *supra*, paras. 47-114.
[370] Prosecution Appeal Brief, para. 208.
[371] *Idem*, quoting Trial Judgement, para. 336.
[372] Prosecution Appeal Brief, para. 208.

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and deterred two attacks on them on 11 April 1994, only a few days before the refugees were transferred to the Kamarampaka Stadium.[373] The Trial Chamber subsequently found that the refugees were transferred from the Kamarampaka Stadium to a camp at Nyarushishi. Both during the transfer and the stay at the camp the refugees were guarded by gendarmes, who pushed back at least one attempted attack on the camp.[374] In the light of these findings, which are not contested by the Prosecution, the Appeals Chamber does not find any error in the Trial Chamber's application of the standard of proof.

(c) The execution of 16 Tutsi in Gataranda

186. The Prosecution challenges the Trial Chamber's conclusion in paragraph 337: "The Chamber lacks sufficient evidence to determine if the execution of the sixteen Tutsis occurred at Gataranda".[375] In this passage, the Prosecutor submits, "there is clear misunderstanding of the role and function of the application of the ultimate burden of proof that is to be applied to the evidence as a whole to determine the *guilt* of the accused, not applied to each individual piece of evidence".[376]

187. The Appeals Chamber disagrees. The killing of 16 refugees is not an individual piece of evidence, but a material fact which had to be established in order to constitute a basis for conviction. As a material fact, it had to be proved beyond a reasonable doubt.

(d) Ntagerura's Participation in meetings

(i) Alleged refusal to consider evidence outside the temporal scope of the Indictment

188. The Prosecution submits that the Trial Chamber refused to consider the evidence related to a number of facts, only because these facts did not fall within the temporal scope of paragraphs 14.1, 14.3, 17, 18 and 19 of the Ntagerura Indictment.[377] The Prosecution argues that this evidence should have been taken into consideration, because it was relevant to understanding the evidence that did fall into the temporal scope of these paragraphs.[378]

189. The Appeals Chamber finds that the Prosecution misread the Trial Judgement. In paragraph 149 of the Trial Judgement, the Trial Chamber indeed noted that the facts the Prosecution is referring to "fall outside the temporal scope of paragraphs 14.1, 14.3, 17, 18 and 19".[379] However, in a footnote to this observation, the Trial Chamber stated that it had considered these facts in other parts of the Trial Judgement, and gave references to the relevant parts of the Trial Judgement.[380]

[373] Bagambiki's Brief in Response, para. 198, referring to Trial Judgement, paras. 309 and 313.
[374] Trial Judgement, paras. 609 and 611.
[375] Prosecution Appeal Brief, para. 209, quoting Trial Judgement, para. 337.
[376] Prosecution Appeal Brief, para. 209.
[377] *Ibid*., para. 212.
[378] *Idem*.
[379] Trial Judgement, para. 149.
[380] *Idem*, fn. 220.

(ii) The Meeting at Bushenge Market, February 1993

190. The Prosecution goes on to challenge the Trial Chamber's considerations with respect to the very facts which it alleged only a few paragraphs earlier not to have been taken into consideration at all by the Trial Chamber. For example, the Prosecution takes issue with the Trial Chamber's conclusion regarding a meeting at Bushenge Market in February 1993.[381] The Trial Chamber had analysed the testimony of Witness LAN, who had testified that Ntagerura had addressed the gathering and had made statements about repulsing the "*Inkotanyi*" and "*Inyenzi*", terms which had been used, as the witness explained, to describe the entire Tutsi ethnic group.[382] The Trial Chamber found that it could not accept "the unsubstantiated interpretation proffered by Witness LAN, namely, that Ntagerura's words suggested a general and indiscriminate attack on Tutsi civilians".[383] The Prosecution submits that this evidence might have been better assessed in the light of evidence of subsequent events and Ntagerura's involvement in them.[384]

191. The Appeals Chamber observes that the Trial Chamber relied on the testimony of Witnesses LAD, LAN and NG-1, and considered also the hearsay evidence of a Defence witness, Hope. The Trial Chamber compared their testimonies and came to the conclusion that, despite some differences between their accounts, their evidence was largely consistent.[385] This reasoning does not lend support to the Prosecution's view that the Trial Chamber employed a fragmented and "piecemeal" approach towards the evidence. The Prosecution does not identify the "evidence of subsequent events"[386] the Trial Chamber should have taken into consideration. The Appeals Chamber understands that the Prosecution refers to the allegations that Ntagerura participated in meetings at the Hotel Izure, Gatare and the Cyangugu Prefecture Office.[387]

(iii) Meetings at the Hotel Izure, Gatare and the Cyangugu Prefecture Office

192. Regarding the alleged meetings at the Hotel Izure, Gatare and the Cyangugu Prefecture Office, the Prosecution argues that the Trial Chamber's treatment of these allegations is a clear demonstration of the effect of the Trial Chamber's method of considering the individual pieces of evidence in isolation.[388] The Trial Chamber, the Prosecution submits, even used its incorrect application of the "ultimate burden of proof" as a reason for its further incorrect application in another instance.[389]

193. Ntagerura responds that the relevance of these meetings to the Prosecution's case was unclear. Either, he argues, the Prosecution tried to prove that Ntagerura instigated genocide during these meetings, or it tried to prove that Ntagerura had the *mens rea* with regard to

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[381] Prosecution Appeal Brief, para. 213.
[382] Trial Judgement, paras. 103 and 97.
[383] Trial Judgement, para. 103.
[384] Prosecution Appeal Brief, para. 213.
[385] Trial Judgement, para. 102.
[386] Prosecution Appeal Brief, para. 213.
[387] *Ibid*., paras. 217 and 218.
[388] *Ibid*., para. 217.
[389] *Idem*.

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genocide. In either case, Ntagerura submits, the meetings were material facts, which had to be proved beyond a reasonable doubt.[390]

194. With regard to the alleged meeting at the Hotel Izure, the Trial Chamber analysed the testimony of Witness LAI, the only witness testifying about this meeting, and concluded that his testimony was not credible.[391] Witness LAI was also the only witness who testified about the meetings in Gatare and the Cyangugu Prefecture Office; also in this instance, the Trial Chamber declined to accept his testimony.[392]

195. The Appeals Chamber finds that the Trial Chamber's assessment of the evidence regarding the three meetings does not reveal an erroneous application of the standard of proof. The Prosecution has not identified any other evidence supporting Ntagerura's presence at anyone of these three meetings. The Trial Chamber did not analyse Witness LAI's testimony with regard to each of the meetings in isolation; it rather found that it could not rely on the uncorroborated evidence of a witness whom it had found unreliable in other instances. In particular, the Prosecutions takes issue with the Trial Chamber's argument that it was not convinced of Ntagerura's participation in the Gatare meeting, because this meeting had been planned at the Hotel Izure meeting, where Ntagerura's presence had not been proved beyond a reasonable doubt.[393] Thus, the Prosecution argues, the Trial Chamber used one erroneous conclusion as a reason for another erroneous conclusion.[394] The Appeals Chamber finds that, given the fact that Witness LAI was the only witness to testify about both events, this approach was not unreasonable. Moreover, the Trial Chamber did exactly what, in the Prosecution's view, it failed to do in other instances: it analysed the evidence relevant to one fact in the light of the evidence relevant to other facts. The Prosecution may not be satisfied with the result of this analysis; but this cannot form the basis of a successful appeal.

(iv) Considering the entire body of evidence related to the meetings

196. The Prosecution submits repeatedly that the Trial Chamber should have analysed the evidence in a cumulative way, that is, by taking into account the whole of the Prosecution's case.[395] However, the Appeals Chamber recalls its earlier observation that a factual allegation which is not supported by sufficient evidence cannot be used to support the finding of another fact, for which there is equally insufficient evidence. This applies in particular to Ntagerura's alleged participation in the meetings at Hotel Izure, Gatare and the Cyangugu Prefecture Office: a witness, who is found not to be credible with respect to one fact, does not become more reliable because he gives equally doubtful evidence about another related fact.

3. Conclusion

197. The Appeals Chamber rejects the Prosecution's argument that the Trial Chamber made an erroneous application of the standard of proof. Moreover, the Prosecution has not shown that the Trial Chamber employed a "piecemeal" approach to the evidence, analysing

[390] Ntagerura Response Brief, para. 128.
[391] Trial Judgement, para. 108.
[392] *Ibid*., para. 113. The Prosecution challenges also the Trial Chamber's conclusion as to Witness LAI's credibility; this issue will be addressed later. See below, paras. 198-209.
[393] Prosecution Appeal Brief, para. 217, referring to Trial Judgement, para. 113.
[394] Prosecution Appeal Brief, para. 217.
[395] See, e. g., Prosecution Appeal Brief, paras. 211, 218.

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individual items of evidence in isolation from each other. Accordingly, this ground of appeal is dismissed.

B. Assessment of Accomplice Evidence (6th Ground of Appeal)

198. Under the sixth ground of appeal, the Prosecution submits that the Trial Chamber erred in law in its approach to accomplice evidence. This error, the Prosecution argues, affected the Trial Chamber's assessment of the testimony of Witnesses LAP, LAI, LAJ, LAH, LAB, LAK and LAM. According to the Prosecution, this ground of appeal affects all the verdicts rendered against Ntagerura, Bagambiki and Imanishimwe.[396] The Prosecution advances four sub-grounds under this ground:

(1) The Trial Chamber applied an incorrect legal test to accomplice evidence;[397]

(2) The Trial Chamber failed to consider evidence in corroboration of the accomplice evidence;[398]

(3) The Trial Chamber did not apply the same caution to accomplice evidence presented by the Defence;[399] and

(4) The Trial Chamber did not allow the Prosecution to cross-examine Defence witnesses about their role as accomplices.[400]

1. The legal standard applied by the Trial Chamber

199. The Prosecution submits that the Trial Chamber erred in law in presuming that accomplice evidence necessarily had to be viewed with caution, without a closer analysis of the witness' credibility.[401] In fact, the Prosecution argues, the Trial Chamber did not accept the evidence of any of the seven alleged "accomplice witnesses", showing that the Trial Chamber's approach of "automatic suspicion" towards the accomplice witnesses led to a "wholesale dismissal of their evidence".[402]

200. In response, Bagambiki, Imanishimwe and Ntagerura assert that the Trial Chamber's approach was correct. Imanishimwe argues that the Trial Chamber analysed the evidence of the accomplice witnesses before arriving at the conclusion that the witnesses were not credible.[403] Bagambiki adds that the Trial Chamber did not reject the evidence only because it was accomplice evidence.[404] Bagambiki, Imanishimwe and Ntagerura point to the fact that the witnesses in question were detained in the Cyangugu prison and confessed that they

[396] Prosecution Notice of Appeal, para. 44.
[397] Prosecution Appeal Brief, paras. 265-287.
[398] *Ibid*., paras. 288-301.
[399] *Ibid*., paras. 302-313.
[400] Prosecution Notice of Appeal, para. 45; Prosecution Appeal Brief, paras. 314-320.
[401] Prosecution Appeal Brief, paras. 259-260.
[402] *Ibid*., para. 265.
[403] Imanishimwe Response Brief, para. 94.
[404] Bagambiki Response Brief, paras. 207 and 242; see also Ntagerura Response Brief, para. 150.

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participated in crimes in 1994.[405] Ntagerura points out that all of them were awaiting sentence from the Rwandan courts and had an evident interest in giving evidence implicating "[former Rwandan authorities]" in the crimes.[406]

201. The Prosecution replies that the Trial Chamber, by automatically applying "caution" to the testimony, chose a wrong starting point in its assessment, thus tainting its analysis.[407] The argument that the witnesses were motivated by self-serving interests is dismissed by the Prosecution as "unfounded conjecture",[408] adding that it was denied by the witnesses in question.[409]

202. The Appeals Chamber notes that the Prosecution mainly takes issue with the formula employed by the Trial Chamber when assessing the evidence of the seven witnesses in question: "[t]he Chamber notes that Witnesses […] are alleged accomplices of the accused and, as such, views their testimonies with caution."[410]

203. In the *Niyitegeka* Appeal Judgement, the Appeals Chamber stated that the ordinary meaning of the term "accomplice" is "an association in guilt, a partner in crime".[411] In its analysis of the applicable jurisprudence, the Prosecution points to the *Čelebići* and the *Kordić and Čerkez* cases of the ICTY. In both cases, the Prosecution submits, the Trial Chamber believed the evidence of witnesses notwithstanding the fact that they could be qualified as accomplices of the accused.[412] However, the Appeals Chambers notes that in both cases the Trial Chamber did not accept the testimony without caution. In *Čelebići,* the Trial Chamber noted that it had "critically analysed the evidence" of the witness in question,[413] and in *Kordić and Čerkez*, the Trial Chamber observed that "[i]n common law jurisdictions the evidence of Witness AT would be regarded as that of an accomplice and would be treated *with great caution*".[414] With regard to this witness, Dario Kordić argued on appeal that the Trial Chamber should have required corroboration of his testimony. The ICTY Appeals Chamber rejected this argument, holding that a Trial Chamber may convict an accused on the basis of the testimony of a single witness, "although such evidence must be assessed *with the appropriate caution*, and care must be taken to guard against the exercise of an underlying motive on the part of the witness".[415]

204. The Trial Chambers of this Tribunal employ the same cautionary approach when assessing the evidence given by accomplice witnesses. In *Niyitegeka*, the Trial Chamber noted with respect to the testimony of alleged accomplices "that it has exercised caution in its

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[405] Bagambiki Response Brief, para. 237; Imanishimwe Response Brief, para. 95; Ntagerura Response Brief, para. 151.
[406] Ntagerura Response Brief, para. 151; see also Imanishimwe Response Brief, para. 96.
[407] Prosecution Brief in Reply, para. 58.
[408] *Ibid*., para. 54.
[409] *Ibid*., para. 54.
[410] Trial Judgement, para. 92. This formula is repeated, almost *verbatim*, in paras. 95, 108, 131, 135, 141, 174, 176, 216, 321, 403, 438, 484, 540 and 587.
[411] *Niyitegeka* Appeal Judgement, para. 98.
[412] Prosecution Appeal Brief, paras. 270-273, quoting *Čelebići* Trial Judgement, para. 759 and 762, and *Kordić and Čerkez* Trial Judgement, paras. 628-629.
[413] *Čelebići* Trial Judgement, para. 761.
[414] *Kordić and Čerkez* Trial Judgement, para. 628 (emphasis added).
[415] *Ibid*., para. 274 (emphasis added).

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deliberations on such evidence",[416] and observed later that the evidence of accomplice witnesses "is subject to special caution".[417] On appeal, the Appeals Chamber held that accomplice evidence is not *per se* unreliable, especially where an accomplice may be thoroughly cross-examined. The Appeals Chamber stated, however, that considering that accomplice witnesses may have motives or incentives to implicate the accused person before the Tribunal, a Chamber, when weighing the probative value of such evidence, is bound to *carefully* consider the totality of the circumstances in which it was tendered.[418]

205. The Appeals Chamber finds that, contrary to the Prosecution's arguments, nothing in the jurisprudence of both this Tribunal and the ICTY suggest that the adoption of a cautious approach by a Trial Chamber when assessing accomplice evidence is erroneous. The Appeals Chamber further disagrees with the Prosecution's argument that such approach is inconsistent with the fact that national rules requiring corroboration of accomplice evidence have been abolished.[419] Even if national rules do not require corroboration of accomplice evidence, they certainly do not prevent the trial judge from exercising caution when analysing this type of evidence. Accordingly, the Appeals Chamber dismisses the argument that the Trial Chamber applied an incorrect legal test to accomplice evidence.

206. An analysis of the above-mentioned jurisprudence demonstrates that in assessing the reliability of accomplice evidence the Trial Chamber must consider whether the particular witness has a specific motive to testify as it did and to lie.[420] A reading of the Trial Judgement shows that the Trial Chamber merely stated that the witnesses in question were "alleged accomplices", without elaborating on the nature of this alleged complicity or analysing whether any of these witnesses had a personal motive to give false testimony. However, the fact that the Trial Chamber did not specifically refer to such motives does not mean that it failed to take them into consideration. The Appeals Chamber notes that a Trial Chamber is not obliged to justify every step in its reasoning. In particular, it is within the discretion of the Trial Chamber to evaluate the evidence and to consider whether the evidence as a whole is credible, without explaining its decision in every detail.[421]

207. During the Appeals hearing, Counsel for the Prosecution cited as an example of the alleged error the Trial Chamber's conclusions regarding an event that occurred on 20 January 1994, when Ntagerura allegedly went in a helicopter to Bugarama or Bigogwe to distribute weapons there. The Prosecution submits that the Trial Chamber dismissed the evidence about Ntagerura's presence only because it was given by accomplice witnesses.[422]

208. The Appeals Chamber notes that the Trial Chamber dedicated two entire paragraphs to a careful discussion of the evidence of the three witnesses in question, Witnesses LAI, LAJ and LAP. It noted the contradiction between their account and the testimony of Witness

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[416] *Niyitegeka* Trial Judgement, para. 48.
[417] *Ibid*., para. 73.
[418] *Niyitegeka* Appeal Judgement, para. 98 (emphasis added). See also *Kajelijeli* Appeal Judgement, para. 18, where the Appeals Chamber approved of the Trial Chamber's decision to treat the testimony of a witness who was allegedly biased against the accused with "caution".
[419] Prosecution Appeal Brief, para. 281.
[420] *Čelebići* Trial Judgement, paras. 759, 762; *Kordić and Čerkez* Trial Judgement, para. 630.
[421] *Kvočka et al.* Appeal Judgement, para. 23.
[422] AT. 6 February 2006, pp. 12 -13.

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Gratien Kabiligi,[423] and went on to discuss discrepancies between Witness LAJ's testimony and his earlier statement, which it found to be irreconcilable.[424] Only after this analysis did the Trial Chamber "recall" that Witnesses LAI, LAJ and LAP were "alleged accomplices" and that their testimony therefore had to be viewed with caution.[425] Hence, the Appeals Chamber does not agree with the Prosecution that this discussion of Witness LAI's, LAJ's and LAP's credibility "did not proceed along fair lines".[426]

209. In addition, the Appeals Chamber notes that the Prosecution misrepresented the Trial Chamber's reasoning. Instead of "finding" that Witness LAI, LAJ and LAP fabricated their evidence, as the Prosecution characterized the Trial Chamber's conclusion,[427] the Trial Chamber "acknowledged" the possibility "that the testimonies […] about this event *may* have been fabricated"[428] and concluded that "the Prosecution failed to prove Ntagerura's participation in these events beyond a reasonable doubt".[429] The Prosecution has not shown that this conclusion was not open to a reasonable trier of fact.

210. As a second example of the alleged error, the Prosecution cited the Trial Chamber's conclusion with regard to Witnesses BLB and JNQ and the letter purportedly written by Witness LAP.[430] This issue is discussed in detail below, when examining the Prosecution's eighth ground of appeal.[431]

2. Corroborated accomplice evidence

211. As its second sub-ground of appeal, the Prosecution submits that the Trial Chamber erred in failing to consider evidence corroborating the accomplice evidence.[432] The Prosecution submits that the Trial Chamber required every part of the accomplice evidence to be corroborated by other evidence, without considering whether it could rely also on the uncorroborated parts of the accomplice evidence.[433] The Prosecution argues that once a "suspect witness" is shown to be telling the truth on a number of issues, even if these issues do not implicate the accused, a tribunal of fact may have confidence also in the uncorroborated parts of this witness' testimony.[434]

212. Bagambiki responds that a Trial Chamber may reject the whole testimony of a witness once it found that his credibility was damaged, and that it is within the discretion of a Trial Chamber to accept accomplice evidence only when it is corroborated.[435] Ntagerura adds that

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[423] The Prosecution also takes issue with the Trial Chamber's approach to the evidence given by Kabiligi. This issue is discussed below, paras. 239-244.
[424] Trial Judgement, paras. 129-130.
[425] *Ibid*., para. 131.
[426] AT. 6 February 2006, p. 12.
[427] *Ibid*., p. 13.
[428] Trial Judgement, para. 131 (emphasis added).
[429] *Ibid*., para. 132.
[430] AT. 6 February 2006, p. 14.
[431] See below, paras. 265-268.
[432] Prosecution Appeal Brief, para. 288.
[433] *Ibid*., para. 292.
[434] *Ibid*., para. 289.
[435] Bagambiki Response Brief, paras. 246 and 247.

the Trial Chamber was not obliged to mention all the corroborative evidence it found unconvincing.[436]

213. The Appeals Chamber will analyse in turn the instances cited by the Prosecution as examples of the "problematic approach" adopted by the Trial Chamber.[437] But first, the Appeals Chamber deems it appropriate to recall that it will not lightly overturn findings of fact made by a Trial Chamber. The Appeals Chamber will give deference to the Trial Chamber that heard the evidence at trial as it is best placed to assess the evidence, including the demeanour of the witnesses. The Appeals Chamber will only interfere in those findings which no reasonable trier of fact could have reached or which are wholly erroneous. Moreover, if the finding of fact is erroneous, it will be quashed or revised only if the error occasioned a miscarriage of justice.[438]

214. In addition, the Appeals Chamber recalls that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony.[439] Even if some parts of a witness's testimony are corroborated by other evidence, a Trial Chamber is not bound to accept the whole of the testimony.

(a) Gashirabwoba Football Field

215. With respect to the attack at Gashirabwoba football field, the Prosecution submits that the Trial Chamber rejected the testimony of Witnesses LAB and LAH, despite the fact that their testimony was largely corroborated by the evidence given by Witness LAC, whose testimony was accepted by the Trial Chamber. The Prosecution claims that the only inconsistency between the different accounts was the date of the attack, but this should not have been a significant factor.[440]

216. The Appeals Chamber notes that one of the Trial Chamber's reasons for rejecting Witness LAB's evidence was the fact that it "materially conflicts with other evidence on record".[441] The main contradiction identified by the Trial Chamber concerns the issue whether Bagambiki was present during the attack on the refugees. According to Witness LAC, on the morning of 12 April 1994, a large number of people started attacking the refugees at the Gashirabwoba football field. During this attack, Bagambiki arrived, accompanied by another person, and asked the refugees to explain the situation. Bagambiki then promised to send soldiers to protect the refugees. One hour later, soldiers and armed guards arrived, but, instead of protecting the refugees, attacked them.[442] Witnesses LAH and LAB, on the other hand, testified that Bagambiki and Imanishimwe were present during the attack and organized it.[443]

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[436] Ntagerura Response Brief, para. 166.
[437] Prosecution Appeal Brief, paras. 293-299.
[438] *Semanza* Appeal Judgement, para. 8; see also *Niyitegeka* Appeal Judgement, para. 8; *Krstić* Appeal Judgement, para. 40; *Krnojelac* Appeal Judgement, paras. 11-13, 39; *Tadić* Appeal Judgement, para. 64; *Aleksovski* Appeal Judgement, para. 63; *Vasiljević* Appeal Judgement, para. 8.
[439] *Ntakirutimana* Appeal Judgement, para. 215; *Kamuhanda* Appeal Judgement, para. 248; *Kupreškić et al.* Appeal Judgement, para. 333.
[440] Prosecution Appeal Brief, para. 294.
[441] Trial Judgement, para. 439.
[442] *Ibid*., paras. 417-418.
[443] *Ibid*., paras. 423 (Witness LAH) and 426 (Witness LAB).

217. The Appeals Chamber finds that it was not unreasonable for the Trial Chamber to reject Witness LAH's and LAB's evidence about the Gashirabwoba massacre. Even if some details of their testimony were corroborated by Witness LAC's testimony, there was a clear contradiction as to whether Bagambiki and Imanishimwe were present. Witness LAC clearly stated that Bagambiki left after he had promised to send soldiers to protect the refugees, and did not mention the presence of Imanishimwe during the attack at all.[444] Witnesses LAH and LAB both testified that Bagambiki was present when the soldiers arrived and the massacre began.[445] The Trial Chamber had to decide between these two accounts; the Prosecution has not shown that it was unreasonable to accept that of Witness LAC.

(b) Shangi Parish

218. The Prosecution submits that the Trial Chamber erroneously disregarded Witness LAK's testimony about the events at Shangi Parish. The Prosecution argues that Witness LAK testified to the very same facts that were accepted by the Trial Chamber, but that the Trial Chamber did not even mention this circumstance. Rather, the Prosecution argues, the Trial Chamber concentrated on those parts of his testimony which were not corroborated, and rejected the whole of it.[446]

219. The Trial Chamber summarized Witness LAK's testimony comprehensively.[447] In its analysis of his testimony, the Trial Chamber stated that it viewed his testimony with suspicion, because he testified that he saw Ntagerura delivering weapons and addressing a crowd between 20 and 25 December 1993, whereas the Trial Chamber found that Ntagerura had been on a mission to Cameroon at that time.[448] The Trial Chamber noted that no other witness had mentioned Bagambiki or Imanishimwe distributing weapons at the Shangi roadblock, and that no other witness had corroborated Witness LAK's testimony about this roadblock.[449]

220. Witness LAK had testified that a roadblock had been set up on the orders of communal authorities near a small shop belonging to a certain Bonaventure Harerimana where Witness LAK worked three days a week. According to Witness LAK, any Tutsi who tried to pass this roadblock was killed.[450] Witness LAK further claimed that Bagambiki and Imanishimwe came to the roadblock and distributed weapons there on 9 April 1994.[451] Witnesses PCG and PCF, on the other hand, testified that there was no roadblock in front of Bonaventure Harerimana's shop. The first roadblock, according to them, was located about one kilometre away.[452] Witness PCG, who had been manning this roadblock, testified that the

[444] Witness LAC, T.9 October 2000, pp. 35-36. According to Witness LAC, Bagambiki was accompanied by Callixte Nsabimana, the manager of the Shagasha Tea Factory.
[445] Witness LAB, T.24 January 2001, pp. 10-12; T.29 January 2001, pp. 53-55, Witness LAH, T.10 October 2000, pp. 85-86, T.11 October 2000, pp. 87-90.
[446] Prosecution Appeal Brief, para. 297, T.6 February 2006, pp. 21-26.
[447] Trial Judgement, paras. 443-448.
[448] Trial Judgement, para. 484. The Trial Judgement reads "December 1994". From the references given by the Trial Chamber it becomes clear that this is a clerical error; *cf. CRA du 19 janvier 2001*, pp. 58-59.
[449] Trial Judgement, para. 485.
[450] Trial Judgement, para. 443; Witness LAK, T.18 November 2001, pp. 96-97 and 102.
[451] *Ibid*., para. 444; Witness LAK, T.18 November 2001, pp. 116-117.
[452] *Ibid*., paras. 475-476; Witness PCG, T.23 October 2002, pp. 2-3; Witness PCF, T.21 October 2002, p. 52.

roadblock was never visited by any official, and that no weapons were distributed there.[453] In addition, Witness PCF testified that he had been drinking beer at the relevant time on 9 April 1994 at Harerimana's shop and did not notice any distribution of weapons.[454]

221. The Appeals Chamber finds that there are clear contradictions between Witness LAK's testimony and the evidence given by Witnesses PCF and PCG as to the Shangi roadblock and Bagambiki's and Imanishimwe's alleged visit to it. As such, a reasonable trier of fact could conclude that Witness LAK's testimony was unreliable in this respect, even if his evidence about other events at Shangi Parish was corroborated by other witnesses.

(c) Mibilizi Parish

222. Another instance which is, in the Prosecution's view, "revealing" of the consequences of the Trial Chamber's approach, is its treatment of Witness LAJ's evidence in relation to the attack at Mibilizi Parish. Although, the Prosecution argues, Witness LAJ's evidence about the attack was amply corroborated by Witnesses MM, MP and Théodore Munyangabe, the Trial Chamber disregarded his evidence completely.[455]

223. The Appeals Chamber finds that the Prosecution's contention that Witness LAJ's testimony about the attack on Mibilizi Parish was corroborated by Witnesses MM, MP and Théodore Munyangabe is not supported by the record.[456] The Trial Chamber noted that Witness LAJ's account was "often internally inconsistent and conflict[ed] with other reliable and credible evidence on the record".[457] For example, the Trial Chamber explained, Witness LAJ testified that on 20 April 1994, he participated in a large-scale attack on the parish, and that later that day Munyakazi and his *Interahamwe* attacked. Later, the Trial Chamber noted, Witness LAJ denied that he had taken part in an attack on 20 April 1994, and the evidence on record indicated that Munyakazi attacked the parish on 30 April.[458] In addition, the Trial Chamber noted that Bagambiki and Imanishimwe had taken part in a prefectural security council meeting on 18 April 1994, thus undermining Witness LAJ's claim that he met them on the same day at the Hotel Ituze and received grenades and money from them.[459] The Appeals Chamber finds that the Prosecution has not shown that this conclusion was unreasonable.

(d) Nyamasheke Parish

224. Likewise, the Prosecution submits, the Trial Chamber disregarded the evidence of Witness LAM in relation to the events at Nyamasheke Parish, although it was corroborated in numerous instances by the evidence of Witnesses LBI and LAY.[460]

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[453] *Ibid*., para. 475; Witness PCG, T.23 October 2002, pp. 7-8.
[454] *Ibid*., para. 476; Witness PCF, T.21 October 2002, pp. 56-57.
[455] Prosecution Appeal Brief, para. 298.
[456] Witness LAJ, T.23 October 2000, pp. 90-112; Witness MM, T.12 October 2000, pp. 31-109; Witness MP, T.12 October 2000, pp. 127-164; Théodore Munyangabe, T.24 March 2003, pp. 22-34 and T.25 March 2003, pp. 3-11.
[457] Trial Judgement, para. 540.
[458] *Idem*. The evidence that Munyakazi attacked on the 30th was provided by Prosecution Witnesses MM (T.12 October 2000, p. 63) and MP (T.12 October 2000, p. 147).
[459] Trial Judgement, para. 540; *cf*. Witness LAJ, T.23 October 2000, pp. 93-98.
[460] Prosecution Appeal Brief, para. 299.

225. The Trial Chamber rejected Witness LAM's evidence about the events at Nyamasheke Parish "because it contradicts other evidence on the record and is not credible or reliable".[461] As an example of such contradictions, the Trial Chamber noted differences between Witness LAM's account of Bagambiki's arrival at the parish and that of Witnesses LAY and LBI: Witness LAM had testified that, after a gendarme had shot three *Interahamwe*, the attackers retreated and removed their dead; likewise, the gendarmes moved away. According to Witness LAM, Bagambiki arrived at a later time and met the witness at the communal office.[462] The Trial Chamber noted that Witnesses LAY and LBI, on the other hand, had testified that Bagambiki came to the parish and found on his arrival the attackers as well as the dead *Interahamwe* still there.[463] In addition, the Trial Chamber found it "highly doubtful" if Bagambiki and Imanishimwe could, as Witness LAM had testified, distribute weapons on the afternoon of 15 April 1994, because the Trial Chamber found that they were involved with church authorities in transferring the refugees from Cyangugu Cathedral to Kamarampaka Stadium.[464]

226. A close review of the trial record reveals that the Trial Chamber's reasoning with regard to Witness LAM's testimony is not correct: Witness LBI, in fact, also testified that the attackers left after three of them had been killed, and from Witness LBI's testimony it is not clear whether Bagambiki came first to the parish or to the communal office.[465] Witness LBI's testimony is not inconsistent with Witness LAM's in this respect. On the other hand, a reasonable tribunal of fact could conclude from Witness LAY's testimony that the attackers and the gendarmes were still present when Bagambiki arrived at the parish[466] and thus find that Witness LAM's testimony was contradicted.

227. The Prosecution has not challenged the Trial Chamber's finding about Bagambiki's and Imanishimwe's activities on the afternoon of 15 April 1994 nor has it offered any explanation as to the contradictions between the accounts of Bagambiki's arrival at Nyamasheke Parish. Given the improbability of Bagambiki's and Imanishimwe's presence in this area on the afternoon of 15 April 1994, and Witness LAM's rather confused account of their participation in the distribution of weapons and the subsequent attack,[467] the erroneous interpretation of Witness LBI's testimony does not amount to a miscarriage of justice. The Appeals Chamber finds that, even if some aspects of Witness LAM's evidence in relation to the events at Nyamasheke Parish were consistent with other evidence, a reasonable trier of fact could still arrive at the conclusion that his evidence as to Bagambiki's and Imanishimwe's participation in the attack was unreliable.

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[461] Trial Judgement, para. 587.
[462] Witness LAM, T.2 November 2000, pp. 20-21.
[463] Trial Judgement, para. 587; Witness LAY, T.26 October 2000, p. 117.
[464] *Ibid*., para. 588; *cf.* Witness LAM, T.20 November 2000, pp. 33-34.
[465] Witness LBI, T.25 October 2000, p. 61: "After the death of the three people the attack came to an end. The attackers left …" See also Witness LBI, T.25 October 2000, p. 62.
[466] Witness LAY, T.26 October 2000, p. 117: "After the arrival of the Prefect and his delegation, the assailants retreated."
[467] Witness LAM, T.2 November 2000, pp. 26-32.

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(e) Kamarampaka Stadium

228. During the Appeal hearing, the Prosecution cited as another example Witness LAP's evidence about the events at Kamarampaka Stadium. Witness LAP's evidence that Bagambiki ordered the refugees removed from the stadium on 16 April 1994 to be killed was rejected, the Prosecution submits, although it was largely corroborated by other witnesses.[468]

229. As the Prosecution acknowledges, the Trial Chamber "named many reasons for rejecting the testimony of [Witness] LAP".[469] In fact, the Trial Chamber devoted two entire paragraphs to an extensive discussion of the contradictions between Witness LAP's testimony and other evidence on the record, and to the inconsistencies between his testimony before the Trial Chamber and his earlier statements.[470] Most of these contradictions and inconsistencies related precisely to the uncorroborated part of Witness LAP's testimony about Bagambiki's direct participation in the killing of the refugees. The Appeals Chamber finds that, given these contradictions, it was only reasonable for the Trial Chamber to disregard the fact that this witness' testimony was corroborated in some – not all – other aspects by other evidence.

3. Alleged failure to apply caution to Defence accomplice testimony

230. The Prosecution submits that the Trial Chamber aggravated its erroneous treatment of the Prosecution's accomplice witnesses by not applying the same caution to accomplice witnesses testifying for the Defence. The Prosecution enumerates four Defence witnesses (Augustin Ndindiliyimana, Witness BLB, Gratien Kabiligi and Sub-Prefect Théodore Munyangabe) who, in its view, ought to have been characterized as accomplice witnesses. In fact, the Prosecution submits, none of these witnesses were even identified as possible accomplices in the Trial Judgement.[471]

(a) Augustin Ndindiliyimana

231. Augustin Ndindiliyimana, the Prosecution submits, admitted that he was facing charges of genocide and crimes against humanity before the Tribunal, and that he and Bagambiki had served under the same Government in Rwanda in 1994. In addition, the Prosecution submits, Augustin Ndindiliyimana expressed the clear wish that Bagambiki should be acquitted.[472] The Prosecution argues that Augustin Ndindiliyimana was charged with crimes committed by his troops in Cyangugu and was clearly exculpating himself and Bagambiki from any criminal responsibility.[473]

232. The Appeals Chamber notes that the Prosecution gives no details about the charges Augustin Ndindiliyimana is facing before the Tribunal, and that it does not contest Bagambiki's argument that these charges are based on different criminal acts than the charges against the Accused in the present case.[474] The Appeals Chamber will therefore first

[468] AT.6 February 2006, pp. 25-27.
[469] AT.6 February 2006, p. 25.
[470] Trial Judgement, paras. 321-322.
[471] Prosecution Appeal Brief, paras. 302-303.
[472] *Ibid*., para. 304.
[473] *Ibid*., para. 306.
[474] Bagambiki Response Brief, para. 257.

determine whether Ndindiliyimana can be qualified as an accomplice of Bagambiki in the ordinary meaning of this term.

233. In *Niyitegeka*, the Defence submitted that one of the witnesses, Witness KJ, was an accomplice and that the Trial Chamber should treat his evidence with suspicion.[475] The Trial Chamber, addressing this submission, noted that, although the witness was detained in a Rwandan military camp, he had not been charged with any crime. The Trial Chamber further stated: "Moreover, no evidence has been adduced of criminal involvement on his part in the events giving rise to the charges faced by the Accused".[476] Thus, the Trial Chamber concluded, the witness was not an accomplice whose uncorroborated testimony was subject to special caution.[477] On appeal, the Appeals Chamber endorsed the Trial Chamber's conclusion.[478] Reviewing the jurisprudence cited in the first section of this chapter,[479] the Appeals Chamber finds that it exclusively relates to accomplices in the "ordinary meaning" of the term. In *Čelebići*, the witness whom the Trial Chamber considered an accomplice was employed in the same prison camp as the accused and participated in the offences against the detainees.[480] In *Kordić and Čerkez*, the witness was convicted by the ICTY for his participation in one attack with which the accused was also charged.[481]

234. The Appeals Chamber recalls that the reason for applying "caution" to the testimony of accomplice evidence is that accomplice witnesses may have motives or incentives to implicate the accused person before the Tribunal.[482] Obviously, these motives or incentives are much stronger when the witness is charged with the same criminal acts as the accused. It may be necessary, depending on the circumstances of the case, also to employ a critical approach towards witnesses who are merely charged with crimes of a similar nature. But in most cases, they will not have the same tangible motives for giving false evidence like a witness who was allegedly involved in the same criminal acts as the accused. Therefore, as long as no special circumstances have been identified, it is reasonable not to employ the same cautious approach towards the testimony of witnesses charged with similar crimes as to the testimony of accomplices in the ordinary sense of the word.

235. As the Appeals Chamber has already noted, the Trial Chamber provided no details as to the involvement of the Prosecution "accomplice witnesses". However, the Prosecution does not challenge Bagambiki's contention that they are charged for their participation in the same acts with which the Accused were charged.[483] In fact, Witnesses LAB and LAH testified that they took part in the attack at the Gashirabwoba football field.[484] Witness LAK, despite stating that he did not commit any crimes, is detained in Cyangugu prison because of his involvement in the events at Shangi.[485] Witness LAJ testified that he led the attack at Mibilizi Parish;[486] Witness LAM testified that he participated in the attacks at Nyamasheke

[475] *Niyitegeka* Trial Judgement, para. 72.
[476] *Ibid*., para. 73.
[477] *Niyitegeka* Trial Judgement, para. 73.
[478] *Niyitegeka* Appeal Judgement, para. 105.
[479] See *supra*, paras. 203-204.
[480] *Čelebići* Trial Judgement, para. 759.
[481] *Kordić and Čerkez* Trial Judgement, para. 627.
[482] *Niyitegeka* Appeal Judgement, para. 98; see *supra*, para. 204.
[483] Bagambiki Response Brief, paras. 255-256.
[484] Witness LAH, T.10 October 2000, p. 94; Witness LAB, T.24 January 2001, pp. 10-11.
[485] Witness LAK, T.19 January 2001, pp. 21-23 (closed session).
[486] Witness LAJ, T.23 October 2000, p. 90.

Parish,[487] Witness LAP testified that he took part in the killing of Tutsi brought to the Gatandara roadblock by Bagambiki and Imanishimwe,[488] and Witness LAI testified that he took part in several attacks in the Cyangugu prefecture, including the attack at Mibilizi Parish.[489] Thus, the Prosecution's "accomplice witnesses" were in fact accomplices to the very crimes with which Bagambiki, Imanishimwe and Ntagerura are charged.

236. The Appeals Chamber considers that the broad assertion that Augustin Ndindiliyimana "is charged with crimes committed by his troops in Cyangugu"[490] does not justify his qualification as an accomplice in the ordinary sense of the word, that is, as "a partner in crime".[491] In fact, the indictment in his case contains only a very general reference to events in Cyangugu.[492] There is no specific relation between Augustin Ndindiliyimana and these events in Cyangugu, apart from the fact that he was at the relevant period chief of staff of the *Gendarmerie nationale*.[493] The Appeals Chamber finds therefore that the Trial Chamber did not err in not adopting the same cautionary approach to Augustin Ndindiliyimana's testimony as to the testimony of witnesses who were directly participating in the crimes with which the Accused are charged.

237. In addition, the Appeals Chamber notes that the Trial Chamber referred only two times to the evidence given by Augustin Ndindiliyimana. In both instances, he testified in general terms that the *préfet*, under Rwandan law, had the legal authority to requisition the *gendarmerie* (but not the army).[494] The Prosecution has not indicated to what extent this evidence may have been influenced by the fact that Augustin Ndindiliyimana was facing charges of a similar legal nature as the charges raized against the Accused in the present case.

(b) Witness BLB

238. With regard to Witness BLB, the Prosecution submits that he was facing charges in Rwanda for involvement in the same offences. The Prosecution argues that the witness "obviously could have benefited from a finding of not guilty respecting persons who had allegedly committed offences in the same *commune*".[495] In response, Bagambiki stresses that Witness BLB was acquitted at trial by the Cyangugu court of first instance.[496] The

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[487] Witness LAM, T.2 November 2000, pp. 20, 26,
[488] Witness LAP, T.10 September 2001, pp. 22-23.
[489] Witness LAI, T.17 September 2001, pp. 15-16.
[490] Prosecution Appeal Brief, para. 306.
[491] See *supra*, para. 203.
[492] *The Prosecutor v. Bizimungu et al.,* Case No. ICTR-2000-56-I, Indictment, amended in conformity with Trial Chamber II Decision dated 25 September 2002, para. 5.66:

> In Cyangugu, as in all the regions of the country throughout this period, members of the Tutsi population sought refuge in locations they thought would be safe, often locations that had been indicated to them by the authorities, such as Kamparampaka Stadium and Nyarushishi Camp. At these locations, despite the promises given by authorities that they would be protected, soldiers and *Interahamwe* abducted and killed refugees. Rape and other acts of sexual violence were notoriously committed by soldiers and *Interahamwe* against Tutsi women and young girls. Soldiers and *Interahamwe* abducted Tutsi women and young girls to isolated locations where they were raped and subjected to various other acts of sexual violence, including degrading and humiliating treatment, such as exposure of sexual organs, nudity and derogatory and sexually abusive language.

[493] *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-2000-56-I, Amended Indictment, para. 1.5.
[494] Trial Judgement, para. 194 and fn. 1609.
[495] Prosecution Appeal Brief, para. 308.
[496] Bagambiki Response Brief, para. 257.

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Prosecution mentions this acquittal also, but adds that the Rwandan Prosecution has appealed this decision.[497]

239. The Appeals Chamber notes that the Prosecution does not provide any details as to the charges raised against Witness BLB. The Appeals Chamber understands that the charges were related to the abduction of Côme Simugomwa and the events at the Gashirabwoba football field, thus to criminal acts with which Bagambiki and Imanishimwe were charged.[498] However, as the Prosecution acknowledges, the Trial Chamber was aware of the charges against Witness BLB.[499] The Appeals Chamber understands that the Prosecution blames the Trial Chamber for relying on Witness BLB's testimony. However, the Appeals Chamber observes that the Prosecution does not advance any arguments to show that the Trial Chamber's assessment of Witness BLB was "wholly erroneous".

240. The Appeals Chamber recalls that it is within the discretion of the Trial Chamber to evaluate the evidence and to consider whether the evidence as a whole is credible, without explaining its decision in every detail.[500] The Appeals Chamber notes that Witness BLB was acquitted of the charges raised against him, even if this decision was appealed. The Appeals Chamber considers that, contrary to the Prosecution's contention, it is not "obvious" to what extent the witness could have benefited from the acquittal of Bagambiki and Imanishimwe. After all, the witness was acquitted at first instance, before he gave evidence in the trial against Bagambiki and Imanishimwe, and, moreover, neither Bagambiki nor Imanishimwe are mentioned at all in the Rwandan judgement acquitting the witness.[501] Accordigly, the Appeals Chamber concludes that the Prosecution has failed to establish that the Trial Chamber erred when it evaluated the evidence of Witness BLB without explicitly stating that it was treating his evidence with caution.

(c) Gratien Kabiligi

241. The Prosecution submits that the Trial Chamber recognized during the cross-examination of Witness Gratien Kabiligi that he was an accused in another case before this Tribunal, and that it was clear that his offences were possibly linked to those of Bagambiki. Nevertheless, the Prosecution argues, the Trial Chamber did not apply any caution to his testimony that he was out of the country on 28 January 1994, but accepted it and used it to discredit the evidence of Witnesses LAI, LAJ and LAP, who had claimed to have seen him on this date. It even disregarded, the Prosecution adds, the fact that it could be demonstrated that Gratien Kabiligi had repeatedly made use of falsified travel documents to leave Rwanda.[502]

242. The Appeals Chamber notes that the Prosecution does not provide any details as to the charges raised against Gratien Kabiligi, and observes that the indictment in his case does not

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[497] Prosecution Appeal Brief, para. 308, fn. 358.
[498] Witness BLB., T.19 February 2003, pp. 23-24 (closed session).
[499] Trial Judgement, para. 432.
[500] *Kvočka et al.* Appeal Judgement, para. 23.
[501] Exhibit D-EBA-9 "*Jugement du 31/03/2000 No. RMP.79.901/S2/B.A RP.22/99 de la Chambre spécialisée du Tribunal de première instance de Cyangugu, y siégeant au 1er degré en matière pénale dans les affaires relatives au génocide et autres crimes contre l'humanité commis depuis le 1/10/1990*".
[502] Prosecution Appeal Brief, para. 309.

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mention any criminal acts committed in the Cyangugu prefecture.[503] The references given by the Prosecution to support the argument that Gratien Kabiligi's offences were possibly linked to those of Bagambiki are not helpful: they only show that the witness made use of a false passport at a certain time.[504] The Appeals Chamber concludes that Gratien Kabiligi is not an "accomplice" of Bagambiki and Ntagerura in the ordinary sense of the word, but merely facing charges with the same legal qualification.

243. The Trial Chamber noted that Witnesses LAP, LAI and LAJ testified that they had seen Ntagerura and Gratien Kabiligi visiting the Bigogwe military camp on 28 January 1994 and distributing weapons.[505] Noting also some inconsistencies in the evidence given by Witness LAJ,[506] the Trial Chamber accepted the corroborated evidence that Gratien Kabiligi had been on mission to Egypt from 27 January to 10 February 1994.[507] The Trial Chamber was aware of the fact that Gratien Kabiligi had admitted that, after he had left Rwanda as a refugee, he had obtained false documents to escape arrest by the Rwandan authorities.[508]

244. The Appeals Chamber finds that the Prosecution has not shown that the Trial Chamber's acceptance of Gratien Kabiligi's evidence was wholly erroneous. The fact that the witness, as a refugee, used false documents to travel and to escape arrest, does not necessarily mean that his testimony relating to his official position and activities before he left the country have to be viewed with suspicion.

(d) Théodore Munyangabe

245. The Prosecution challenges the Trial Chamber's treatment of the testimony of Witness Théodore Munyangabe. This witness, the Prosecution submits, had been charged, convicted at trial and subsequently acquitted on appeal by the Rwandan courts. The Cyangugu Court of Appeal, the Prosecution argues, accepted Théodore Munyangabe's defence that "[other named persons]", including Bagambiki and Imanishimwe, had been responsible for the crimes he was charged with, among them the abduction and murder of 17 Tutsi civilians from the Kamarampaka Stadium.[509] The Prosecution avers that it was clear that the witness changed his story before the Tribunal, but that the Trial Chamber neither mentioned this stark inconsistency nor that the witness may have been an accomplice of Bagambiki and Imanishimwe.[510]

246. Imanishimwe and Bagambiki respond that the judgement of the Cyangugu trial court on which the Prosecution relies to support its argument was subsequently overturned by the Cyangugu Court of Appeal.[511] Imanishimwe points to the appeal judgement, which explicitly

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[503] *The Prosecutor v. Kabiligi and Ntabakuze*, Case Nos. ICTR-97-30-I and ICTR-97-34-I, Amended Indictment, 13 August 1999. The Indictment contains specific allegations as to criminal acts committed in Kigali (paras. 6.34-6.39), Butare (paras. 6.40-6.41) and Gitarama (para. 6.42).
[504] Prosecution Appeal Brief, para. 309, referring to T.25 March 2002, pp. 121, 123-125.
[505] Trial Judgement, paras. 119-124.
[506] *Ibid*., para. 130.
[507] *Ibid*., para. 129. The Trial Chamber did not identify the corroborative evidence; the only piece of evidence corroborating Gratien Kabiligi's testimony seems to be a photocopy of his mission report with the pertaining cover letter to the Rwandan President, Exhibit DAN-5.
[508] Trial Judgement, para. 126.
[509] Prosecution Appeal Brief, para. 310.
[510] *Ibid*., para. 312.
[511] Bagambiki Response Brief, para. 257; Imanishimwe Response Brief, para. 108.

states that the transcripts of the trial had been changed and contained statements of witnesses which were never made.[512]

247. The Appeals Chamber notes that the Prosecution does not show to what extent the Trial Chamber actually made use of Théodore Munyangabe's testimony; apparently, the Prosecution uses the Trial Chamber's treatment of this evidence more as an illustration of the Trial Chamber's approach. A review of the Trial Judgement, however, reveals that the Trial Chamber's approach towards this evidence was rather cautious, even if the Trial Chamber did not identify the witness as an alleged accomplice.

248. In three instances the Trial Chamber relied on the testimony of Théodore Munyangabe:

- In paragraph 317 of the Trial Judgement, the Trial Chamber referred to the evidence given by Théodore Munyangabe and Bagambiki to establish that the refugees leaving the Cyangugu Cathedral joined at the Kamarampaka Stadium 50 to 100 refugees who had been there since 9 April 1994. For the other facts related to the events at the cathedral and the stadium, the Trial Chamber relied on a number of other witnesses, in particular on Witness LY.[513]

- For some details concerning the attacks at Mibilizi Parish, the Trial Chamber referred to the testimony of Théodore Munyangabe. For the principal findings related to these events, the Trial Chamber relied on the testimonies of Witnesses MM and MP.[514]

- Only in relation to the events at Shangi Parish is Théodore Munyangabe's testimony used in a more extensive manner. However, the Trial Chamber never relied on his testimony exclusively; he is only one in a number of several witnesses referred to in this context.[515]

Apart from the findings related to some details of the events at Mibilizi Parish, the Trial Chamber never relied on the uncorroborated testimony of Théodore Munyangabe alone. With regard to the events at Shangi Parish, the Trial Chamber noted that Munyangabe's testimony was "largely consistent" with the evidence given by Prosecution Witnesses NG-1 and LAD and Bagambiki Defence Witness GLB.[516] The Appeals Chamber notes in particular that the Trial Chamber never used Munyangabe's evidence to discredit Prosecution witnesses.

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[512] Imanishimwe Response Brief, para. 125.
[513] Trial Judgement, paras. 308-331.
[514] *Ibid*., paras. 528, 534.
[515] *Ibid*., paras. 479-487.
[516] *Ibid*., para. 479.

Q. And it is also true that you refer to *Préfet* Bagambiki and Samuel Imanishimwe as having removed people from the stadium and had them killed on a date you do not remember; isn't it?
A. Once more, the sentence here is not correct and that is why I appealed against this judgment, because I was not happy with it. If you would allow me, Counsel, I would like to tell you what I said with some nuance which has been omitted here.
Q. Witness, in this paragraph the judgment is referring to your evidence, isn't it?
A. No. The judgment misused my evidence and that's why I appealed against it because, in my opinion, it is incorrect.

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249. The Appeals Chamber further notes that Théodore Munyangabe was acquitted of his alleged participation in the crimes in the Cyangugu prefecture in 1994 when he testified before the Tribunal. His motive to give false testimony, if any, was therefore greatly reduced. With regard to the alleged "stark inconsistency" between Munyangabe's testimony before the Rwandan court and this Tribunal, the Appeals Chamber notes that Munyangabe, when confronted with the Rwandan trial judgement, maintained that his testimony was misstated in the judgement.[517] In addition, the Cyangugu Court of Appeal found that "the [trial] transcripts were altered by inventing testimony from witnesses and these witnesses never said those things before the court".[518] In the view of the Appeals Chamber, a reasonable trier of fact could disregard the alleged inconsistency, because it is unclear what Munyangabe had actually said before the Rwandan court.

4. Alleged failure to allow the Prosecution to cross-examine on issues relating to Defence witnesses' roles as accomplices

250. In a related argument, the Prosecution submits that the Trial Chamber erred on a question of law by refusing to allow the Prosecution to test the credibility of Defence witnesses by improperly limiting their cross-examination.[519] This happened, the Prosecution submits, during the testimony of Witnesses Augustin Ndindiliyimana, BLB, Gratien Kabiligi and PNA.[520] Thus, the Prosecution concludes, the Trial Chamber did not allow "the Prosecution to pursue issues that would relate to the Witness's own involvement in the matters before the Chamber".[521]

(a) Augustin Ndindiliyimana

251. With regard to Augustin Ndindiliyimana, the Prosecution argues that it attempted to test the credibility of the witness "through his participation in the offences", but was prevented from doing so, because the Trial Chamber declined to compel the witness to testify under Rule 90(E) of the Rules, which would have offered the witness the necessary protection.[522]

252. Rule 90(E) of the Rules reads:

> A witness may refuse to make any statement which might tend to incriminate him. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than perjury.

The Trial Chamber indeed declined to use this possibility; however, the Appeals Chamber observes that during the testimony of Augustin Ndindiliyimana the Prosecution did not explicitly request the Trial Chamber to compel the witness:

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[517] Witness Théodore Munyangabe, T.25 March 2003, p. 36.
[518] Witness Théodore Munyangabe, T.25 March 2003, p. 42, reading from the Kinyarwanda judgement (Exhibit D-EBA 15, "*Procès en appel de Munyangabe Théodore*"). [Théodore Munyangabe Appeal].
[519] Prosecution Appeal Brief, para. 314.
[520] *Ibid*., paras. 316-319.
[521] *Ibid*., para. 318.
[522] *Ibid*., para. 316.

> If the witness doesn't want to respond to the questions, that is his right. The Judges can compel the witness to answer these questions. In the event they don't, I can't push it any further. But it is, first and foremost, the right of the Prosecution to pose these questions.[523]

The question was finally allowed, but the witness declined to answer it.[524] The question related to the transport of *Interahamwe* by ONATRACOM buses in northern Rwanda;[525] subsequent questions concerned the distribution of arms in and around Kigali[526] and a report about the military situation in Rwanda received by the witness in September 1992.[527] Finally, the Presiding Judge found it necessary to give Prosecution Counsel a warning.[528]

253. The main issue before the Appeals Chamber is whether the Trial Chamber, as the Prosecution contends,[529] abused its discretion under Rule 90(E) by not compelling the witness to answer the first question. The second and third questions were apparently dropped by the Prosecution after interventions by the Defence and the Presiding Judge.[530] The Appeals Chamber bears in mind that it is the primary responsibility of the Trial Chamber to exercise control over the mode and order of witnesses, and that, in doing so, it has to make the interrogation effective for the ascertainment of the truth and avoid needless consumption of time.[531]

254. In the view of the Appeals Chamber, the question about the transport of *Interahamwe* in northern Rwanda had very little relevance to the facts of the present case, or to the subject-matter of Augustin Ndindiliyimana's testimony.[532] Counsel for the Prosecution argued that the question was necessary to test the witness' credibility.[533] Under Rule 90(G)(i) of the Rules, questions about matters affecting the credibility of a witness may be asked during cross-examination. However, the possibility to ask questions to test the credibility of a

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[523] T.18 February 2003, p. 50.
[524] Witness Augustin Ndindiliyimana, T.18 February 2003, p. 53.
[525] T.18 February 2003, pp. 49, 52-53.
[526] T.18 February 2003, pp. 57-58.
[527] T.18 February 2003, pp. 60, 63.
[528] T.19 February 2003, pp. 2-3:

> This is the very issue the Court has been raising with you all yesterday afternoon. You are using the indictment of this witness to impeach him. You are not permitted to do that. He's not charged before this Court. He's not the one on trial. It is Imanishimwe and Bagambiki who are on trial here, so all of this time you are spending, it has just been wasted; you are wasting the time of the Court. And I think the time has come when you have to desist from pursuing this line because I am not going to warn you again. We cannot proceed this way. So desist from this line of cross-examination, move on to some other line, or if you have no other line on which to cross-examine, take your seat because we must proceed.
>
> We are not going to go back over what we went over yesterday afternoon when I constantly had to be reminding you, whatever you may be alleging that this witness failed to do or whatever wrong you may be alleging that he may or may not have done is of no relevance to these proceedings. So that is my final warning to you, and now let us proceed to some other area rather than the areas you are trying to impeach him on his own indictment.

[529] Prosecution Appeal Brief, para. 316.
[530] T.18 February 2003, p. 60; T.19 February 2002, p. 4.
[531] Rule 90(F)(i) and (ii) of the Rules.
[532] See *supra*, para. 237.
[533] T.18 February 2003, p. 50.

witness is not unlimited.[534] The Appeals Chamber has already observed that Augustin Ndindiliyimana was not an accomplice in the ordinary meaning of the word, but is only charged with similar offences as Bagambiki and Imanishimwe.[535] The question the Prosecution wanted to put to the witness concerned a very specific matter, which was only in the most general way related to the criminal charges against the Accused. Taking into consideration the very limited scope of Augustin Ndindiliyimana's testimony,[536] the Appeals Chamber finds that the Prosecution has not demonstrated that this particular question was relevant to determining the reliability of Augustin Ndindiliyimana's testimony in the present case. The Appeals Chamber does not find that the Trial Chamber erred in law when it declined to compel the witness under Rule 90(E) of the Rules to answer the question.

(b) Gratien Kabiligi

255. The Prosecution raises a similar argument with regard to the cross-examination of Gratien Kabiligi. The Prosecution argues it "attempted to test the witness's credibility on an issue relating to the witness's whereabouts during the events".[537] When the witness refused to answer the question, the Prosecution submits, the Trial Chamber should have compelled the witness under Rule 90(E), but it declined to do so. "Thus, the Trial Chamber limited the cross-examination of the Prosecution, not allowing the Prosecution to pursue issues that would relate to the Witness's own involvement in the matters before the Chamber".[538]

256. The Appeals Chamber notes that the question was whether the witness was informed about the RPF attack on Ruhengeri on the 22 of January 1991.[539] The Prosecution has not established how this question related to facts relevant to the present case, or how an eventual answer of the witness would have affected his credibility. The Appeals Chamber finds that the Prosecution has not demonstrated that the Trial Chamber abused its discretion when it declined to compel the witness to answer.

(c) Witness BLB

257. The Prosecution submits that the Trial Chamber also intervened in an inadmissible manner during the cross-examination of Witness BLB. The Prosecution argues that it asked the Witness "whether the purpose of his testimony was 'to absolve both yourself and Bagambiki from responsibility [for] the killings in the commune'", and that the Trial Chamber did not allow the witness to answer this question.[540]

258. Upon reviewing the transcript, the Appeals Chamber finds that, although the Presiding Judge was initially concerned about the admissibility of the question,[541] he finally

[534] Archbold, *Criminal Pleading, Evidence and Practice* (London, 2004), para. 8-138, p. 1176: "[A] witness may be asked questions about his antecedents, associations or mode of life which although irrelevant to the issue would be likely to discredit his testimony. […] The judge has discretion to excuse an answer when the truth of the matter suggested would not in his opinion affect the credibility of the witness as to the subject matter of his testimony."
[535] See *supra*, para. 236.
[536] See *supra*, para. 237.
[537] Prosecution Appeal Brief, para. 318.
[538] *Idem*.
[539] T.25 March 2002, p. 102.
[540] Prosecution Appeal Brief, para. 317.
[541] T.20 February 2003, pp. 11-12.

admitted it, and it was duly answered by the witness.[542] This argument is therefore obviously without merit.

(d) Witness PNA

259. Likewise, the Prosecution argues, the Trial Chamber disallowed the Prosecution to ask Witness PNA questions concerning his identity, which related to his credibility.[543]

260. The Appeals Chamber observes that Witness PNA is not mentioned at all in the Trial Judgement. The Prosecution has failed to demonstrate the relevance of his testimony to the case against Bagambiki, Imanishimwe and Ntagerura. The Appeals Chamber therefore declines to discuss the merits of the Prosecution's argument in question.

5. Appearance of unfairness

261. The Prosecution submits that the Trial Chamber's exercise of its discretion in its different treatment of Prosecution and Defence accomplice witnesses, and the greater degree of scrutiny to which it subjected the testimony of Prosecution witnesses, resulted in an appearance of unfairness, which "in itself is a further error on a question of law".[544] The Prosecution stresses that it does not question the independence of the Tribunal or the impartiality of its Judges, but that in the present case the appearance of equality between the parties is in question.[545]

262. The Appeals Chamber notes that the Prosecution's contention that the Trial Chamber did not apply the same caution to the accomplices testifying as Defence witnesses, thus creating "a different standard for the Prosecution", is not supported by the Trial Judgement. When assessing the evidence given by five Imanishimwe Defence witnesses, the Trial Chamber took into consideration the fact "that the Imanishimwe Defence witnesses are biased and self-interested because they previously served as soldiers under Imanishimwe's command and because acknowledging that civilians were brought to the camp would implicate them or their colleagues in the mistreatment".[546] The Trial Chamber clearly took into account the possible involvement of these Defence witnesses in Imanishimwe's crimes, concluding that it rendered their testimony unreliable.

263. The Appeals Chamber has found that the Prosecution's arguments as to the alleged errors of the Trial Chamber relating to its treatment of Defence "accomplice" witnesses are unfounded. Therefore, there is no basis for the contention that the Trial Chamber imposed a "double standard" in relation to the treatment of accomplice evidence.

6. Conclusion

264. The Prosecution's sixth ground of appeal is accordingly dismissed.

[542] Witness BLB, 20 February 2003, p. 14 (closed session).
[543] Prosecution Appeal Brief, para. 319.
[544] Prosecution Appeal Brief, para. 321.
[545] Prosecution Appeal Brief, paras. 322-323.
[546] Trial Judgement, para. 399. The five witnesses are Witness PCD (Trial Judgement, para. 367), Witness PCE (Trial Judgement, para. 372), Witness PKB (Trial Judgement, para. 374), Witness PNC (Trial Judgement, para. 376) and Witness PNF (Trial Judgement, para. 382).

C. Rebuttal Evidence in Relation to Certain Letters (8th Ground of Appeal)

1. Witness PR3/LAP

265. Under the eighth ground of appeal, the Prosecution submits that the Trial Chamber erred in law in its Decision of 21 May 2003[547] that denied the Prosecution leave to call rebuttal evidence in relation to certain letters.[548] According to the Prosecutiom, this ground affects all the verdicts rendered against Ntagerura, Bagambiki and Imanishimwe.[549] The Prosecution contends that the Trial Chamber erroneously admitted into the trial record five letters, which were allegedly written by the Prosecution Witnesses LAP, LAB and LAJ.[550] These letters were introduced into evidence, Prosecution argues, through Defence Witness JNQ, who had no knowledge as to the authenticity of the letters. Moreover, the Prosecution adds, the letters were never put to the Prosecution witnesses in cross-examination.[551] The Prosecution further submits that the Trial Chamber denied its motion to present rebuttal evidence as to the authenticity of the letters.

266. Ntagerura and Bagambiki respond that the Trial Chamber did not rely on the letters in question, and that neither their admission nor the refusal to allow evidence in rebuttal had any impact on the final verdict of the Trial Chamber.[552]

267. The Appeals Chamber notes that, although originally five letters were introduced into evidence, the Prosecution's arguments are focused on the two letters purportedly written by Witness LAP. In fact, the letters purportedly written by Witnesses LAB and LAJ are not mentioned at all in the Trial Judgement.

268. With regard to Witness LAP and the two letters introduced by Witness JNQ, the Trial Chamber found:

> Moreover, in the Chamber's opinion, Witness LAP's request for money in exchange for providing evidence leaves the impression that his testimony is for sale, which is further supported by Bagambiki Defence Witnesses GLB and JNQ who testified about Witness LAP's reputation for making false accusations for personal gain. The Chamber further notes that Witness JNQ testified about a series of letters bearing the seal of the Cyangugu Prison in which Witness LAP admitted to falsifying evidence related to other cases. The Prosecution has asserted that these letters are not reliable because they are of questionable provenance. Given the numerous indicia that Witness LAP lacks credibility and is not reliable, the Chamber need not examine this issue further.[553]

[547] *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe,* Case No. ICTR-99-46-T, Decision on the Prosecutor's Motion for Leave to Call in Evidence in Rebuttal Pursuant to Rules 54, 73, and 85(A)(iii) of the Rules of Procedure and Evidence, 21 May 2003 ("Decision of 21 May 2003").
[548] Prosecution Appeal Brief, para. 341.
[549] Prosecution Notice of Appeal, para. 50.
[550] Prosecution Appeal Brief, paras. 341-342.
[551] *Ibid.*, para. 342.
[552] Ntagerura Response Brief, paras. 221-222; Bagambiki Response Brief, para. 267.
[553] Trial Judgement, para. 322 (footnote omitted).

In the view of the Appeals Chamber it is clear that the Trial Chamber did not rely on the letters in question, because other evidence before it was sufficient to establish that Witness LAP's testimony was unreliable. The Prosecution has not shown that this conclusion was unreasonable. The Appeals Chamber finds that the Prosecution has not demonstrated that the alleged error of law invalidated the decision, and accordingly declines to discuss the Prosecution's arguments further.

2. The Letter Purportedly Written by Witness LAH

269. The Prosecution contends that the Trial Chamber's approach to the admission of evidence impugning the credibility of Prosecution witnesses was not isolated, and refers to the admission of a letter purportedly written by Witness LAH, in which he recanted evidence he had allegedly given against Witness BLB before the Rwandan courts. The Prosecution argues that the letter was never put to Witness LAH in cross-examination and that its authenticity was never established.[554] The Prosecution submits that the Trial Chamber erred in law by admitting this letter into the record and subsequently relying on it to discredit Witness LAH.[555]

270. Ntagerura and Bagambiki respond that the Prosecution did not seek to examine the authenticity of the letter, or to adduce rebuttal evidence as to the authenticity of the letter.[556] Ntagerura points out that Witness BLB was acquitted by the Rwandan courts, adding that the letter was only of secondary importance to the Trial Chamber's conclusions.[557]

271. The Trial Chamber admitted the letter in question into evidence as Defence exhibit D-EBA 8, overruling an objection by the Prosecution.[558] There are several references in the Trial Judgement to this exhibit. In paragraphs 118, 141 and 438, the Trial Chamber repeated the same finding:

> The Trial Chamber has considered Witness LAH's testimony in light of the evidence provided by Defence Witness BLB, who testified that Witness LAH made and then recanted false accusations against him in relation to serious charges before the Rwandan courts.

To support this finding, the Trial Chamber referred to the testimony of Witness BLB as well as to Bagambiki Defence exhibits 8 and 9,[559] exhibit 9 being the Rwandan judgement acquitting Witness BLB.[560]

272. Before determining whether the Trial Chamber erred in law by admitting the letter into evidence, the Appeals Chamber recalls that

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[554] Prosecution Appeal Brief, para. 357.
[555] *Idem*.
[556] Ntagerura Response Brief, paras. 210 and 224; Bagambiki Response Brief, paras. 283-284.
[557] Ntagerura Response Brief, paras. 225, 229.
[558] T.19 February 2003, pp. 33-34 (closed session).
[559] Trial Judgement, para. 118, fn. 153; para. 141, fn. 214. In paragraph 438, footnote 1029, the Trial Chamber referred to its earlier findings in paragraphs 118 and 141.
[560] T.19 February 2003, p. 35 (closed session).

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> [t]he determination of whether the admission of a particular piece of evidence is precluded, under the circumstances, by the need to ensure a fair trial, is one which lies within the discretion of the Trial Chamber. The Appeals Chamber will revise such a determination only where the party challenging it has demonstrated that no reasonable trier of fact could have reached the conclusion.[561]

273. According to Rule 89(C) of the Rules, a Chamber may admit any relevant evidence which it deems to have probative value. Under this rule, the reliability of a piece of evidence is relevant to its admissibility. However, the threshold to be met before ruling that evidence is inadmissible is high. Only if the evidence is so lacking in terms of the indicia of reliability as to be devoid of any probative value, can admission be denied.[562] As long as there are sufficient indicia to allow a provisional proof of reliability, the evidence may be admitted.[563]

274. Witness BLB had testified that a copy of the letter written purportedly by, or on behalf of,[564] Witness LAH had been sent to Witness BLB's spouse by the Rwandan Office of the Public Prosecutor. Subsequently, the Witness continued, he had used the letter as exculpatory evidence in his own trial, which resulted in his acquittal.[565] The Appeals Chamber finds that a reasonable trier of fact could conclude from this testimony that there were sufficient indicia as to the authenticity of the letter. The admittance of the letter into evidence was, accordingly, not erroneous.

275. In addition, the Prosecution submits that the Trial Chamber committed an error on a question of fact by its use of the letter in assessing the credibility of Witness LAH.[566] The Prosecution argues that Witness BLB was not the author, addressee or recipient of the letter, and could not confirm that Witness LAH wrote it as alleged.[567]

276. In the assessment of Witness LAH's credibility, the Trial Chamber relied on Witness BLB's testimony that Witness LAH at first made, and then later recanted serious accusations against him. Although the letter is referred to in the footnotes, the Trial Chamber clearly attached more importance to the testimony of Witness BLB.[568] Considering that Witness BLB was acquitted by the Rwandan court, the Appeals Chamber finds that the Prosecution has not demonstrated that the Trial Chamber's assessment of Witness LAH's credibility did not reflect an assessment by a reasonable trier of fact.

3. Conclusion

277. Accordingly, the Prosecution's eighth ground of appeal is dismissed.

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[561] *Kordić and Čerkez* Appeal Judgement, para. 232.
[562] *Rutaganda* Appeal Judgement, para. 266; *Prosecutor v. Zlatko Aleksovski*, Case No. IT 95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15.
[563] *Rutaganda* Appeal Judgement, para. 266.
[564] Witness BLB, 19 February 2003, p. 43 (closed session).
[565] *Ibid.*, pp. 22, 30, 40-41 (closed session).
[566] Prosecution Notice of Appeal, para. 57.
[567] Prosecution Appeal Brief, para. 357.
[568] Trial Judgement, paras. 118, 141 and 438.

D. Alleged error of law relating to Ntagerura's supposed relations with RTLM (7th Ground of appeal)

278. The Prosecution submits that the Trial Chamber erred in law by preventing him from leading evidence on Ntagerura's relations with RTLM, in his capacity as founding member and shareholder.[569] By so doing, the Prosecution claims, the Trial Chamber failed to consider and assess the relevance and probative value of the evidence for establishing the requisite *mens rea* on the part of Ntagerura for the crimes charged.[570]

279. The Prosecution further submits that the Trial Chamber erred in law by preventing it from cross-examining Ntagerura on his involvement with RTLM[571] so as to test his credibility; yet, Ntagerura had been allowed to call evidence relating to other media and in disallowing cross-examination, the President Judge merely stated that Ntagerura's credibility was not in issue.[572]

280. Ntagerura contends in response that, even if the Prosecution intended to demonstrate his criminal intent by leading evidence of his involvement with RTLM, *mens rea* should be considered as a material fact of the crimes charged and, as such, should have been specifically pleaded in the Indictment.[573] Moreover, he contends that evidence of his alleged involvement with RTLM is irrelevant because "[n]one of the charges against [him] was in any way connected to the activities of RTLM".[574]

281. The Appeals Chamber notes that the error alleged under this ground of appeal centres on two issues. First, the Appeals Chamber is requested to determine whether the Trial Chamber erroneously deprived the Prosecution of the possibility of leading evidence of Ntagerura's criminal intent during the examination of Expert Witness Guichaoua. Secondly, the Appeals Chamber is requested to evaluate whether the Trial Chamber's overruling of the line of questioning adopted by the Prosecution during the cross-examination of Ntagerura unduly prevented the Prosecution from testing Ntagerura's credibility.

282. The Appeals Chamber notes that at the hearing of Expert Witness Guichaoua on 19 September 2001, the Trial Chamber, apparently concurring with the assertion by Counsel for Ntagerura that the expert's testimony should focus on allegations contained in the Indictment,[575] decided not to take into account the Prosecution's questions that made reference to RTLM, "[that is,] the association with the RTLM".[576] It clearly transpires from the trial record that it was solely in connection with the counts of conspiracy to commit genocide and complicity in genocide that the Prosecutor referred to Ntagerura's involvement with RTLM for the first time.[577] It was thus with regard to these two counts that the Trial Chamber refused to take into consideration Ntagerura's alleged involvement with RTLM.

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[569] Prosecution Appeal Brief, paras. 324 and 328.
[570] *Ibid.*, para. 325.
[571] *Ibid.*, para. 337.
[572] *Ibid.*, paras. 338 and 339.
[573] Ntagerura Response Brief, paras. 189, 193, 196 and 199-201.
[574] *Ibid.*, para. 195. See also paras. 202-203.
[575] Expert Witness Guichaoua, T.19 September 2001, pp. 86-92.
[576] *Ibid.*, p. 92.
[577] T.19 September 2001, pp. 88, 89:

283. During the hearing of 1 October 2002, the Prosecution referred to Ntagerura's supposed involvement with RTLM in order to test his credibility.[578] During that hearing the Trial Chamber seems to have admitted, on the basis of the line of argument used by Counsel for Ntagerura,[579] that the Prosecution was in fact using Ntagerura's cross-examination to reintroduce evidence relating to acts not pleaded in the Indictment. The Trial Chamber excluded from cross-examination the Prosecution's questions bearing on Ntagerura's supposed involvement with RTLM.[580] In the Prosecution Appeal Brief, it is in respect of the "various offences charged, including genocide"[581] that the Prosecution refers to Ntagerura's supposed involvement with RTLM.

284. However, it is with regard to the counts of conspiracy to commit genocide and complicity in genocide that the Appeals Chamber will direct its attention, as it was on these two counts that the Prosecution made reference to Ntagerura's involvement with RTLM and in which the Trial Chamber rejected the line of questioning on the grounds of relevance. The Appeals Chamber recalls that the Ntagerura Indictment charges in Count 2 the crime of conspiracy to commit genocide in view of the acts described in paragraphs 9, 13, 14.3, 16 and 19. Counts 3 and 6 of the Ntagerura Indictment correspond to the crime of complicity in genocide and are both based on the acts described in paragraphs 9 to 19.[582] For the purpose of ruling on this ground of appeal, the Appeals Chamber will examine below the way in which the Trial Chamber analysed these three counts.

285. The Appeals Chamber notes that the Trial Chamber advanced several findings to dismiss the count of conspiracy to commit genocide. The Trial Chamber first pointed out that paragraph 10 of the Ntagerura Indictment amounted to a "general allegation",[583] which could not, for this reason, sustain a count. With regard to paragraphs 12.2, 14.2, 15.1 and 15.2 of the Ntagerura Indictment, the Chamber considered that no evidence had been adduced to support the allegations contained in these paragraphs.[584] The Chamber further considered, after a careful study,[585] that paragraphs 11, 12.1, 13 and 16 of the Ntagerura Indictment, "in addition to being vague, […] fail to plead any identifiable criminal conduct on the part of the accused".[586] The Chamber thus considered only paragraphs 9.1, 9.2, 9.3, 14.1, 14.3, 17, 18 and 19 to make its factual findings.[587] The Trial Chamber consequently dismissed the count of conspiracy to commit genocide

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Notwithstanding, however, Your Honours, the evidence is nonetheless admissible in support of the count of conspiracy. Membership of RTLM, in itself, indeed may not be a chargeable offence or crime. It does, however, go to show the *mens rea* of the Accused with reard to the counts of conspirary and complicity, and on that basis, Your honours, it is admissible even though no specific reference is made in the factual allegations.

[578] André Ntagerura, T.1 October 2002, p. 71.
[579] *Ibid*., pp. 69-70.
[580] *Ibid*., p. 75.
[581] Prosecution Appeal Brief, para. 332.
[582] The Ntagerura Indictment states in Count 3, "particularly paragraphs 12.1 and 12.2" and in Count 6 "and particularly paragraph 11".
[583] Trial Judgement, para. 40.
[584] *Ibid*., paras. 40 and 69.
[585] *Ibid*., paras. 42-44 and 46.
[586] *Ibid*., para. 69.
[587] *Ibid*., paras. 41, 45 and 47.

> because the allegations supporting these counts, even if proven, could not constitute the material elements of the crime of conspiracy. In particular, the concise statements of the facts of these crimes fail to allege the *actus reus* of conspiracy, namely that two or more persons agreed to commit the genocide.[588]

286. The Appeals Chamber recalls that the Trial Chamber examined the evidence related to paragraphs 9.1, 9.2, 9.3, 14.1, 14.3, 17, 18 and 19 of the Ntagerura Indictment, and that it concluded that the facts alleged in these paragraphs had not been proven beyond reasonable doubt.[589] When the Appeals Chamber examined the Prosecution's fourth ground of appeal, it concluded that the Prosecution had not demonstrated that the Trial Chamber had erred in finding paragraphs 11, 12.1, 13 and 16 of the Ntagerura Indictment defective and that those defects had not been cured.[590]

287. Having determined that the Trial Chamber rightly found paragraphs 11, 12.1, 13 and 16 of the Ntagerura Indictment defective, and considering that the Prosecution admitted that there was no evidence to support the allegations in paragraphs 12.2, 14.2, 15.1 and 15.2 of the Ntagerura Indictment, the Appeals Chamber considers that the Trial Chamber acted correctly in dismissing the count of conspiracy to commit genocide, given that this count was based on the acts described in these paragraphs. The Appeals Chamber holds that, insofar as conspiracy to commit genocide was not properly pleaded, the issue of Ntagerura's intent for this crime is without substance.

288. With regard to the count of complicity in genocide, the Appeals Chamber notes that the Trial Chamber dismissed the third and sixth counts on several grounds. Recalling the findings it had made in respect of paragraphs 11, 12.1, 12.2, 13, 14.2, 15.1, 15.2 and 16 of the Ntagerura Indictment,[591] the Trial Chamber, in making its legal findings, considered only paragraphs 9.1, 9.2, 9.3, 14.1, 14.3, 17, 18 and 19.[592] The Chamber also found that the charges made in paragraphs 17 and 18 did not allege any criminal conduct on the part of Ntagerura.[593] Furthermore, the Chamber found that the acts alleged in paragraphs 9.1, 9.2, 9.3, 14.1, 14.3 and 19 had not been proven beyond a reasonable doubt.[594]

289. The Appeals Chamber notes that in his fifth ground of appeal, the Prosecution contested, in particular, the way in which the Trial Chamber assessed the evidence adduced to establish the facts as well as Ntagerura's guilt.[595] In this regard, although the Prosecution made reference to many findings,[596] it developed this line of argument only with regard to some specific examples.[597] It specifically contested the Trial Chamber's refusal to examine the allegations made in paragraphs 14.1, 14.3, 17, 18 and 19 of the Ntagerura Indictment in view of the evidence relating to the following allegations concerning paragraphs 9.1, 9.2 and 9.3 of the Ntagerura Indictment: the February 1993 meeting in Bushenge market, the June

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588 *Ibid.*, para. 70 (footnote omitted).
589 *Ibid.*, paras. 69, 667.
590 See *supra*, paras. 70-83.
591 *Ibid.*, para. 666.
592 *Ibid.*, para. 667.
593 *Ibid.*, para. 667.
594 *Ibid.*, para. 667.
595 Prosecution Appeal Brief, paras. 193-258.
596 Prosecution Appeal Brief, para. 193, referring in particular – but not exclusively – to Trial Judgement, paras. 92, 95, 103, 113, 118, 132, 141, 145, 149, 178 and 667.
597 Prosecution Appeal Brief, para. 212.

1993 meeting at Ituze Hotel, the October 1993 meeting in Gatare, the visit to Cimerwa (cement) factory in Bugarama in December 1993 and the visit to Bugarama in January 1994. The Appeals Chamber notes that the Prosecution did not challenge certain other findings relating to paragraphs 9.1, 9.2 and 9.3 of the Ntagerura Indictment.

290. The Appeals Chamber has earlier analysed the way in which the Trial Chamber assessed the evidence for each of the specific acts contested by the Prosecution in his fifth ground of appeal. The Appeals Chamber has not discovered any error in the way the Trial Chamber assessed the evidence relating to the facts relevant to paragraphs 9.1, 9.2, 9.3, 14.1, 14.3, 17, 18 and 19 of the Ntagerura Indictment.[598] In addition, the Appeals Chamber considers that it is not required to rule on the other findings relating to paragraphs 9.1, 9.2 and 9.3 of the Ntagerura Indictment, insofar as these have not been challenged by the Prosecution.

291. Accordingly, the Appeals Chamber considers that the Trial Chamber was correct in concluding that the acts alleged in paragraphs 9.1, 9.2, 9.3, 14.1, 14.3 and 19 have not been proven beyond reasonable doubt and they can thus not be relied on to find Ntagerura guilty under the Counts (Counts 3 and 6) of complicity in genocide.[599] The Appeals Chamber therefore considers that, since no evidence was called in respect of the material facts of the crime of complicity in genocide, the issue of Ntagerura's intent for this crime is without substance.

292. This finding does not conclude the examination of this ground of appeal. It still remains for the Appeals Chamber to determine whether the overruling of the Prosecution's line of questioning relating to the links between Ntagerura and RTLM during the cross-examination of Ntagerura unduly prevented the Prosecution from testing Ntagerura's credibility.

293. The Appeals Chamber notes that Ntagerura actually caused to be admitted into evidence a series of transcripts of broadcasts by Radio Rwanda and the BBC, establishing, in his view, specific government acts and statements. During the cross-examination of Ntagerura, the Prosecution questioned Ntagerura on his status as founding member and shareholder of RTLM,[600] to which Counsel for Ntagerura objected. When the Trial Chamber allowed this objection, it pointed out the following:

> What the witness did was, he said that government at certain meetings, I believe, had made certain statements and that was given over the press and to the press carried those statements. Now, you can't go off simply to deal with other radio stations or what other radio stations might have done.[601]

294. The Prosecution has not explained in what way the issue of Ntagerura's status as founding member and shareholder in RTLM made it possible to test Ntagerura's credibility regarding the government acts and statements reported by other radio stations. Although the Prosecution was at liberty to show that the acts and statements in question were reported

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[598] See *supra*, paras. 188-197.
[599] Trial Judgement, para. 667.
[600] André Ntagerura, T.1 October 2002, pp. 68-69.
[601] *Ibid.*, p. 75.

differently depending on each radio station,[602] it, however, did not convince the Trial Chamber that questioning on Ntagerura's status as founding member and shareholder in RTLM would allow it to do so. The Appeals Chamber considers that it was proper for the Trial Chamber to exclude from cross-examination issues linked to Ntagerura's involvement with RTLM.

295. In view of the foregoing, the Appeals Chamber finds that the Trial Chamber did not commit any error of law by excluding the question on Ntagerura's involvement with RTLM from the examination of expert Witness Guichaoua and from the cross-examination of Ntagerura. Accordingly, this ground of appeal fails.

E. Bagambiki's Participation in the Crimes (1st and 2nd Grounds of Appeal)

296. The Prosecution submits that the Trial Chamber erred in law and fact when it acquitted Bagambiki; in law, because it placed an impossible burden of proof on the Prosecution (2nd Ground of Appeal);[603] in fact, because it failed to draw the only reasonable inference from the facts it had found to be proven (1st Ground of Appeal).[604]

1. Misapplication of the burden of proof (2nd Ground of Appeal)

297. Under its second ground of appeal, the Prosecution submits that the Trial Chamber placed an impossible burden of proof upon the Prosecution. In the Prosecution's view, the majority of the Trial Chamber "appears" to have insisted upon direct evidence of Bagambiki's participation in the crimes. The Prosecution bases this view on certain observations in the Dissenting Opinion of Judge Williams, the Separate Opinion of Judge Ostrovsky and the language used in the Trial Judgement.[605] The Prosecution argues that circumstantial evidence is sufficient to support a conviction, and, if the Trial Chamber insisted upon direct evidence of Bagambiki's involvement in the crimes, this constituted a misapplication of the criminal standard of proof.[606]

298. Bagambiki notes that the Prosecution does not identify the circumstantial evidence upon which, in its view, the Trial Chamber should have based a conviction.[607] He argues that the Prosecution's arguments are founded on rash misinterpretations of the opinions of Judge Williams and Judge Ostrovsky as well as the Trial Chamber's conclusions.[608] Even if the Trial Chamber rejected certain elements of circumstantial evidence, Bagambiki argues, the language of the Trial Judgement does not show that the Trial Chamber insisted upon direct evidence.[609]

299. The Appeals Chamber notes that Judge Williams considered in his Dissenting Opinion that his conclusions about the Gashirabwoba football field massacre are the only

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[602] *Ibid.*, pp. 70-71.
[603] Prosecution Notice of Appeal, para. 9; Prosecution Appeal Brief, para. 32.
[604] *Ibid.*, para. 2; Prosecution Appeal Brief, para. 16.
[605] Prosecution Appeal Brief, paras. 32-33.
[606] *Ibid.*, para. 37.
[607] Bagambiki Response Brief, para. 60.
[608] *Ibid.*, para. 61.
[609] *Ibid.*, paras. 70-71.

"logical inference"[610] or "reasonable inference"[611] to be drawn from the evidence. In comparison, the separate opinion of Judge Ostrovsky shows that he considered the evidence about Bagambiki's conduct at the Gasirabwoba football field and the Kamarampaka Stadium to raise a "lingering suspicion" not amounting to proof beyond reasonable doubt.[612] The final conclusion of Judge Ostrovsky reads:

> This and other evidence reflect a concern on the part of Bagambiki for the welfare of the refugees and leave me with reasonable doubt that Bagambiki intended or that he was aware and consented to the deaths of refugees in Cyangugu prefecture. […] On the basis of the totality of the reliable and credible evidence presented in this case, I am not convinced that Bagambiki, with the resources available to him, could do more for the protection of refugees in Cyangugu prefecture.[613]

300. The majority reasoned that it "lacked sufficient reliable evidence to determine" whether Bagambiki played any role in the killing of the refugees selected and removed from Kamarampaka Stadium and Cyangugu Cathedral and in the death of Côme Simugomwa.[614] In the view of the Appeals Chamber, the Judgement shows that the Judges considered whether the evidence as a whole led to a conclusion beyond reasonable doubt as to the responsibility of Bagambiki for the crimes in question, but that the majority considered that this was not the case.[615]

301. Nothing in the Trial Judgement suggests that the majority, when it found that it "lacked sufficient reliable evidence to determine" whether Bagambiki was involved in the crimes, had in mind that there was not sufficient reliable *direct* evidence, as the Prosecution contends.[616] There is no instance in the Trial Judgement where the majority rejected evidence only because of its circumstantial nature. In fact, the Prosecution acknowledges that in the case of Imanishimwe the Trial Chamber "relied on evidence of an essentially circumstantial nature to establish his individual criminal responsibility".[617] Under these circumstances, there is simply no room for the "appearance" that the Trial Chamber, generally, erroneously insisted on direct evidence, as the Prosecution claims.[618] Whether the Trial Chamber erred in fact by not drawing the only reasonable inference from the circumstantial evidence will be discussed in the next section.

2. The Trial Chamber failed to draw the only reasonable inference (1st Ground of Appeal)

302. Under its first ground of appeal, the Prosecution submits that the Trial Chamber erred in fact when it failed to draw the conclusion that Bagambiki was criminally responsible for the massacre of Tutsi refugees at the Gashirabwoba football field and the murder of 16 Tutsi

[610] Judge Williams' Opinion, para. 7.
[611] *Ibid.*, para. 8.
[612] Judge Ostrovsky Opinion, para. 15.
[613] *Ibid.*, paras. 16-17.
[614] Trial Judgement, paras. 337, 442.
[615] See Trial Judgement, para. 337.
[616] Prosecution Appeal Brief, para. 36.
[617] Prosecution Brief in Reply, para. 10.
[618] The Prosecution expressly uses the terms "appear", Prosecution Appeal Brief, paras. 32 and 36. Even if the language of the Trial Judgement would lend support to this interpretation, the "appearance" of an error does not justify the intervention of the Appeals Chamber.

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refugees, who had been removed from Cyangugu Cathedral and the Kamarampaka Stadium. In the Prosecution's view, this was the only reasonable inference that could be drawn from the facts accepted by the Trial Chamber.[619] The Prosecution then provides an extensive paraphrase of the Trial Chamber's factual findings[620] and finally draws up a list of "culminating facts", which, it says, support "the irresistible conclusion of guilt".[621] The Prosecution adds that, in order to establish Bagambiki's responsibility for aiding and abetting genocide and other crimes, it was sufficient to show that Bagambiki had knowledge of the genocidal intent of the other participants and that he had made a substantial contribution to the commission of the crimes. The Prosecution submits that under the individual circumstances of the case – in particular, Bagambiki's position, his implication in the events and the proximity of his acts and the crimes – the only reasonable conclusion on the basis of the evidence was that he aided and abetted the commission of the crimes.[622]

303. The Prosecution points to the Dissenting Opinion of Judge Williams, according to which Bagambiki should have been convicted, and argues that no reasonable tribunal of fact could have assessed the evidence differently. The doubts of the majority, the Prosecution submits, were neither logically connected to the evidence, nor "based upon reason or common sense".[623]

(a) <u>The Standard of proof applicable to circumstantial evidence</u>

304. In the *Čelebići* Appeal Judgement, the ICTY Appeals Chamber set out the standard of proof applicable to circumstantial evidence as follows:

> A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him – here that he participated in the second beating of Gotovac. Such a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the *only* reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.[624]

The same standard was applied in the*Vasiljević*, *Krstić* and *Kvo~ka et al.* Appeal Judgements in relation to the establishment of the state of mind of the accused by inference[625] and, more recently, in the *Stakić* Appeal Judgement.[626]

305. As the ICTY Appeals Chamber made clear in the *Kordić and Čerkez* Appeal Judgement, the *Čelebići* standard on circumstantial evidence has to be distinguished from the

619 Prosecution Appeal Brief, para. 16.
620 *Ibid.*, para. 18.
621 Prosecution Brief in Reply, para. 3.
622 Prosecution Appeal Brief, paras. 26 and 27.
623 *Ibid.*, para. 21.
624 *Čelebići* Appeal Judgement, para. 458.
625 *Vasiljević* Appeal Judgement, para. 120; *Krstić* Appeal Judgement, para. 41; *Kvočka et al.* Appeal Judgement, para. 237.
626 *Stakić* Appeal Judgement, para. 219.

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standard of appellate review.[627] The Appeals Chamber notes that the Tribunal's law on appellate proceedings, namely wheter "no reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt", permits a conclusion to be upheld on appeal even where other inferences sustaining guilt could reasonably have been drawn at trial".[628]

306. It is settled jurisprudence that the conclusion of guilt can be inferred from circumstantial evidence only if it is the only reasonable conclusion available on the evidence. Whether a Trial Chamber infers the existence of a particular fact upon which the guilt of the accused depends from direct or circumstantial evidence, it must reach such a conclusion beyond reasonable doubt. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the non-existence of that fact, the conclusion of guilt beyond reasonable doubt cannot be drawn.

(b) Gashirabwoba Football Field

307. The Appeals Chamber is of the opinion that Bagambiki's position as prefect and his "active involvement in events on the ground"[629] do not unambiguously lend themselves to support a conclusion as to his guilt. The Appeals Chamber notes in particular several instances where the Trial Chamber found that Bagambiki actively intervened to protect refugees.[630] In addition, the Trial Chamber found that on several occasions the prefectural authorities tried to assist refugees by sending gendarmes or supplies.[631] The Appeals Chamber observes that, according to the Trial Chamber's findings, Bagambiki never physically participated in an attack on refugees, nor gave orders to assailants. If Bagambiki had ordered (or consented to) the attack at the Gashirabwoba football field, as the Prosecution contends,[632] this would be the single instance where he actively supported an attack.

308. The Prosecution points to Bagambiki's "close association" with Imanishimwe, who was found criminally responsible for the massacre at the Gashirabwoba football field. Bagambiki, on the other hand, denies this association and argues that no evidence existed supporting such a conclusion[633].

309. The Prosecution does not offer a further explanation as to the meaning of the "close association" between Bagambiki and Imanishimwe. In the view of the Appeals Chamber, the fact that Imanishimwe knew about the criminal activities of his soldiers does not necessarily mean that Bagambiki was fully aware of these crimes or Imanishimwe's involvement therein.

310. In addition, the Appeals Chamber notes that the Trial Chamber was not convinced that Bagambiki held *de jure* or *de facto* authority over the soldiers stationed at the Karambo military camp. The Trial Chamber accepted that there was no relationship of subordination

[627] *Kordić and Čerkez* Appeal Judgement, paras. 289-290.
[628] *Ibid.*, para. 288.
[629] Prosecution Appeal Brief, para. 20.
[630] Trial Judgement, paras. 311, 581, 313 and 316.
[631] *Ibid.*, paras. 309, 313, 480, 482, 534, 538, 580 and 611.
[632] Prosecution Appeal Brief, para. 24, quoting Judge Williams Opinion, paras. 7-8.
[633] Bagambiki Response Brief, paras. 28-29.

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between the prefecture and the Karambo camp, and found that there was no reliable evidence that Bagambiki ever issued orders to soldiers.[634]

311. Finally, the Prosecution relies on the "close proximity of [Bagambiki's] actions, in time and place, to the crimes" to support its position that the only reasonable conclusion open to the Trial Chamber was a finding of his guilt.[635] In particular, the Prosecution points to the coincidence that Bagambiki was accompanied during his visit to the Gashirabwoba football field by the director of the Shagasha tea factory, whose guards subsequently participated in the attack.[636]

312. However, the Trial Chamber did not find that there were large-scale and indiscriminate attacks by soldiers on refugees prior to the Gashirabwoba football field massacre. In fact, this was the only large-scale attack on refugees in which, according to the Trial Chamber's findings, soldiers participated.[637] On 11 April 1994, one day before the attack, there had been some instances of soldiers maltreating detainees at the Karambo military camp, killing two of them,[638] but there is no specific evidence suggesting that Bagambiki knew about these incidents.

313. Considering that in several cases the Trial Chamber found that Bagambiki took action to protect refugees or to prevent attacks on them,[639] the Appeals Chamber finds that it was not unreasonable for the majority of the Trial Chamber to decline to draw the conclusion that Bagambiki ordered the attack at the Gashirabwoba football field on 12 April 1994. Considering further that the Trial Chamber found that this was the only large-scale attack on refugees in the prefecture in which soldiers participated, the Appeals Chamber finds that it was equally open to a reasonable trier of fact not to draw the conclusion that Bagambiki acted with the knowledge and consent that the soldiers would attack the refugees.

(c) The killing of 16 Tutsi refugees

314. With regard to the murder of the 16 Tutsi refugees who had been removed from Cyangugu Cathedral and Kamarampaka Stadium, the Trial Chamber found that:

> on 16 April 1994, Bagambiki, Imanishimwe, and others selected twelve Tutsis and one Hutu from the stadium using a pre-established list. The Chamber finds that the twelve Tutsi refugees were executed along with four other Tutsis who had been selected and removed from Cyangugu Cathedral by the same authorities a short while earlier. The Chamber lacks sufficient reliable evidence to determine if the execution of the sixteen Tutsis occurred at Gatandara. A majority of the Chamber, Judge Williams dissenting, lacks sufficient reliable evidence to determine whether

[634] Trial Judgement, paras. 641-642. In the notice of appeal, the Prosecution contends that the Trial Chamber erred in law when it found that Bagambiki lacked effective control over the military (Prosecution Notice of Appeal, para. 59). However, the Prosecution Appeal Brief focuses on Bagambiki's position as to the *gendarmerie* and contains only some passing references to soldiers (Prosecution Appeal Brief, paras. 361, 372-381; the only explicit reference to soldiers is to be found in paragraph 371). The issue is discussed below. See below, para. 340.
[635] Prosecution Appeal Brief, para. 27.
[636] *Ibid.*, para. 20.
[637] Trial Judgement, para. 640.
[638] *Ibid.*, paras. 310, 311 and 408.
[639] See *supra*, para. 307.

> Bagambiki or Imanishimwe participated in the execution of these sixteen refugees by either personally killing them, ordering soldiers to kill them, or giving them to *Interahamwe* to be killed.[640]

315. Bagambiki testified that on the 16 and 17 of April 1994, a growing number of assailants made several attempts to attack the refugees at the Kamarampaka Stadium.[641] On the 17th, Bagambiki continued, he was informed by the commander of the gendarmerie guarding the stadium that the assailants had given him a list with a number of people, whom they believed to be in contact with RPF.[642] In addition, the commander of the gendarmerie told Bagambiki that he was not sure if he could prevent a massacre of the refugees, given the growing number of assailants and the limited number of gendarmes available.[643]

316. Bagambiki testified that he consulted the available members of the prefectural security council about the situation. The public prosecutor proposed to question the persons on the list under the protection of the *gendarmerie* to establish that they had no weapons or radios to contact RPF.[644] Bagambiki recalled that he decided that this was the only solution.[645] Bagambiki explained that it was not in his power to request the assistance of the military, as that was the responsibility of the commander of the gendarmerie. Finally, Bagambiki added, he was considering what had happened at Nyamasheke earlier, where the assailants had demanded the removal of one particular priest, and had abandoned their attack after this priest had left the Parish.[646]

317. Bagambiki testified that he was informed the next morning that the persons had been brought to the judicial brigade at Rusizi in order to be questioned the following day, but that the building, which was protected by a few gendarmes, was attacked by a crowd of assailants who killed the detainees.[647] The judicial brigade at Rusizi, Bagambiki explained, was where the *inspecteurs de la police judiciaire* had their office and their detention cells, and where persons to be questioned by the public prosecutor were detained.[648]

318. On appeal, Bagambiki submits that he did not have any choice: the assailants, who had already launched several attacks against the cathedral, threatened to attack the stadium, if the refugees on the list were not removed from the stadium. He adds that he knew that it was risky to take these persons away, but that it was, in his view, the only way to protect the refugees at the stadium as well as those whose names were on the list.[649]

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[640] Trial Judgement, para. 337.
[641] Bagambiki, T.1 April 2003, p. 24.
[642] *Ibid.*, p. 24.
[643] Bagambiki, T.1 April 2003, p. 25.
[644] *Idem*.
[645] *Ibid.*, p. 26: [a]fter the fact, the decision was risky, even if we were able to protect and stop the attack again, the thousands of refugees who were at the stadium who were still alive today. But when I thought about it, I wondered if I was able to take another solution – find another solution, but at the time we saw no other solution, no other decision; it was the only one which would guarantee the security of the persons on the list and the security of the persons at the stadium.
[646] Bagambiki, T.1 April 2003, p. 26.
[647] *Ibid.*, p. 28.
[648] *Idem*.
[649] Bagambiki Response Brief, para. 34.

319. There is no reliable direct evidence showing that Bagambiki was physically present at the killing of the 16 refugees or gave the order to kill them. Witness LAP was the only witness giving such evidence.[650] However, the Trial Chamber found that there were "numerous indicia that Witness LAP lacks credibility and is not reliable", among them several contradictions to evidence given by other witnesses, inconsistencies in the witness' own testimony, and a request for money in exchange for providing evidence.[651] Although the Prosecution takes issue with the Trial Chamber's decision not to admit certain rebuttal evidence related to Witness LAP's evidence,[652] it appears to accept the Trial Chamber's conclusion that there is no reliable evidence showing Bagambiki's direct participation in the killing. Rather, the Prosecution's argument is that he "substantially contributed" to the crime, having knowledge of the genocidal intent of its perpetrators, thus aiding and abetting the crime.[653]

320. In general, the Prosecution relies on the same set of facts to support its conclusion that Bagambiki "at the very least" aided and abetted the killing of the 16 refugees, in particular Bagambiki's position as a prefect and his "active involvement in events on the ground".[654]

321. The Appeals Chamber observes that Bagambiki had acknowledged that the decision to remove the refugees on the list was a "risky" one.[655] This, however, does not necessarily entail criminal responsibility. Bagambiki had testified that he believed at that time that this decision was the only one to ensure the security of both the persons on the list and the remaining refugees at the stadium.[656] The Appeals Chamber considers that to hold Bagambiki criminally responsible for the killing of the 16 refugees, a reasonable Trial Chamber would have to be satisfied beyond reasonable doubt that he knew that the refugees were to be killed and that he substantially contributed to their killing by his actions. This scenario is incompatible with the conclusion that, although aware of the risk, he was aiming at protecting the refugees by removing them from the stadium.

322. Witness LCJ, on whose testimony Judge Williams relied in his dissenting opinion, testified:

> [Bagambiki] said that the people whose names he was going to read out were people who were disrupting the security of the Hutu who were outside the stadium; in other words, the Hutu population. He added that, people were saying that those people had weapons as well as military uniforms and therefore they were going to be taken away to be questioned and if necessary their fate be decided.[657]

Given the fact that Bagambiki was apparently merely repeating the assailants' reasons why the refugees on the list should be removed from the stadium, the Appeals Chamber finds that

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[650] Trial Judgement, para. 257; Witness LAP, T.10 September 2001, pp. 41-46.
[651] Trial Judgement, paras. 321-322.
[652] See *supra*, paras. 265-268.
[653] Prosecution Appeal Brief, para. 27.
[654] *Ibid.*, para. 20.
[655] Bagambiki, T.1 April 2003, p. 26.
[656] *Idem*: given what had happened at Nyamasheke, if we withdraw just like we withdrew Father Ubald – because people said that they didn't want him at Nyamasheke and we transferred him to Cyangugu, the attackers withdrew and no longer attacked the refugees – we thought that in this case, in the same manner, if these persons were moved away, transferred, the other refugees, the assailants would not come back to attack.
[657] Witness LCJ, T.22 May 2001, pp. 10-11 (closed session).

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a reasonable trier of fact could conclude that this speech did not necessarily put the refugees in a greater risk than they were already in.

323. The fact that the only Hutu among the 17 selected refugees survived does not necessarily lead to the conclusion that Bagambiki knew or had reason to know about the impending fate of the other refugees. First, it is not clear whether Bagambiki knew that this one person was separated from the 16 Tutsi refugees. Second, Bagambiki testified that he was informed after the events that this refugee had been taken to the home of the commander of the *gendarmerie* because there were not enough cells at the Rusizi brigade and she was the only woman among the 17 selected persons.[658]

324. There are also some facts which support Bagambiki's defence. Not every observer thought that the selection of the refugees had a sinister meaning. Thus, when four of the refugees on the list were taken from Cyangugu Cathedral, the Church authorities believed that the request to question them was genuine and that they would not be harmed.[659]

325. Bagambiki stressed in his testimony that he was encouraged in his decision to allow the removal of the 17 refugees by the events in Nyamasheke.[660] The Trial Chamber indeed found that Bagambiki intervened at Nyamasheke Parish on 13 April 1994, negotiated with the assailants and removed the priest, Father Ubald, from the Parish. There were no further attacks on Nyamasheke Parish on 13 or 14 April. However, on 15 April, a massive assault was launched against the Parish, during which most of the refugees there were killed.[661] Bagambiki was informed about this attack on the same day, so that, when on 16 April the decision was taken to remove the 17 refugees from Cyangugu Cathedral and Kamarampaka Stadium, it might be argued that it was at least doubtful if this measure could actually prevent an attack at the stadium. However, Bagambiki's hope – if this was the motive for his decision – that the removal of the 17 refugees would prevent further attacks on the stadium apparently turned out to be justified: according to the Trial Chamber, there were no large-scale attacks at the refugees gathered at the Kamarampaka Stadium after 16 April 1994.[662]

326. The Appeals Chamber notes that the events at Shangi Parish show that the selection of some refugees to satisfy the demands of attackers did not necessarily mean that the selected refugees would be killed. According to the Trial Chamber's findings, Bagambiki sent Théodore Munyangabe on 26 April 1994 to Shangi Parish after he was informed about an impending attack. Munyangabe negotiated with the assailants and agreed to remove a number of refugees from the parish, if the assailants agreed not to attack the remaining refugees. The assailants gave Munyangabe a list with names of persons who, in their view, "caused insecurity".[663] Munyangabe then selected around 40 refugees, who were taken to the prefecture and a *gendarmerie* camp. On the way, one of them was killed during an attack by

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[658] Bagambiki, T.1 April 2001, p. 28.
[659] Trial Judgement, para. 318.
[660] Bagambiki, T.1 April 2003, p. 26.
[661] Trial Judgement, para. 584.
[662] Trial Judgement, para. 331. There were several instances of refugees being taken away from the stadium, and at least one refugee named George Nkusi was killed (Trial Judgement, para. 325). Witness LBH testified about the large-scale killing of refugees from Kamarampaka Stadium, but, noting contradicting evidence, the Trial Chamber rejected his evidence (Trial Judgement, para. 327).
[663] Trial Judgement, paras. 467, 481.

the local population, and several were mistreated in the *gendarmerie* camp, but the rest of them arrived safely at the Kamarampaka Stadium.[664]

327. In sum, the Appeals Chamber finds that the evidence is not as unequivocal as the Prosecution claims it to be. Many of the factual findings are open to different interpretations. Even if some of the facts would support the conclusion that Bagambiki knew that his participation in the selection of the refugees would lead to their death, this is far from being the only reasonable inference. The Appeals Chamber concludes that a reasonable trier of fact could find that Bagambiki's defence was not refuted by the evidence and conclude that he was not criminally responsible for the death of the 16 refugees.

3. Conclusion

328. For the foregoing reasons, the Prosecution's first and second grounds of appeal are dismissed in their entirety.

F. Emmanuel Bagambiki's Criminal Responsibility (9th Ground of Appeal)

329. Under its ninth ground of appeal, the Prosecution submits that the Trial Chamber erred in law when it absolved Bagambiki of individual criminal responsibility under Articles 6(1) and 6(3) of the Statute.[665] Although the Prosecution presents its submission under the heading "misapplication of Rwandan law", the Appeals Chamber understands that it raises in fact several broader issues:

- Contrary to the Trial Chamber's conclusions, Bagambiki was criminally responsible for "omissions or gross criminal negligence" and aiding and abetting crimes by acquiescence or tacit encouragement;[666]

- The Trial Chamber erroneously held that there was no superior-subordinate relationship between Bagambiki and the gendarmes;[667] and

- The Trial Chamber erred in its application of Article 6(3) of the Statute when it exonerated Bagambiki from responsibility for the massacre of Tutsi by the Kagano communal police.[668]

1. Criminal responsibility for omissions under Article 6(1) of the Statute

330. With regard to Bagambiki's responsibility under Article 6(1) of the Statute, the Prosecution submits in its Notice of Appeal that the Trial Chamber committed an error by finding that the Rwandan law only entailed civil, and not criminal sanctions for a prefect's failure to ensure the protection and safety of the civilian population.[669] In its Appeal Brief, the Prosecution expands this argument and submits that Bagambiki was not only responsible for criminal omissions, but that his inaction and silence, despite his knowledge of the massive

[664] Trial Judgement, para. 481.
[665] Prosecution Appeal Brief, para. 360.
[666] *Ibid*., para. 364.
[667] *Ibid*., paras. 372-381.
[668] *Ibid*., para. 362.
[669] Prosecution Notice of Appeal, para. 59(a).

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crimes, amount to conduct that was tantamount to acquiescence in the crimes or their tacit encouragement.[670]

(a) Culpable omission

331. With regard to Bagambiki's criminal liability for omissions or gross criminal negligence, the Prosecution argues that the Trial Chamber erred in relying exclusively on Rwandan law. According to the Tribunal's jurisprudence, the Prosecution argues, it is a well-established principle that an accused can be held liable under Article 6(1) for culpable omission; a principle, the Prosecution adds, which is also embraced by the Rwandan Penal Code.[671] Therefore, the Prosecution concludes, Bagambiki was criminally responsible, because he failed to "prevent or to punish the perpetrators" of the killings and acts of violence, despite his knowledge of the crimes.[672]

332. Bagambiki responds that the Trial Chamber drew a distinction between his general obligation to ensure the safety of the population of the prefecture, and his obligation to assist individual persons in danger who had explicitly asked for his assistance.[673] The Trial Chamber's reasoning regarding Rwandan law, Bagambiki submits, was relevant only to the first charge that Bagambiki failed to meet his obligations deriving from his position as a prefect.[674] In this respect, Bagambiki argues, the Trial Judgement was consistent with the jurisprudence and the Statute of the Tribunal.[675]

333. The Prosecution takes issue with the Trial Chamber's conclusions in paragraphs 658 through 660 of the Trial Judgement. At the outset, the Trial Chamber defined the requirements for criminal responsibility for an omission as a principal perpetrator:

> (a) the accused must have had a duty to act mandated by a rule of criminal law; (b) the accused must have had the ability to act; (c) the accused failed to act intending the criminally sanctioned consequences or with awareness and consent that the consequences would occur; and (d) the failure to act resulted in the commission of the crime.[676]

The Trial Chamber then found that Bagambiki, under Rwandan domestic law, had an obligation to ensure the protection of the population of his prefecture. The Trial Chamber went on to determine whether Bagambiki had the ability to act. It considered that, as the prefect, he could request the intervention of the Armed Forces, but that he had no authority to determine or control how the Armed Forces executed an operation. In addition, it found that "the evidence d[id] not indicate what other specific means were available to a prefect".[677] The Trial Chamber concluded that "this legal duty was not mandated by a rule of criminal law.

[670] Prosecution Appeal Brief, paras. 364, 370.
[671] *Ibid.*, para. 367.
[672] *Ibid.*, para. 369.
[673] Bagambiki Response Brief, para. 290.
[674] *Ibid.*, para. 293.
[675] *Ibid.*, para. 294.
[676] Trial Judgement, para. 659 (footnote omitted).
[677] *Ibid.*, para. 660.

Thus, any omission of this legal duty under Rwandan law, even if proven, does not result in criminal liability under Article 6(1) of the Statute".[678]

334. It is not disputed by the parties that an accused can be held criminally responsible for omissions under Article 6(1) of the Statute.[679] Neither do they dispute that any criminal responsibility for omissions requires an obligation to act. The issue is rather whether this obligation to act must stem from a rule of criminal law, or, as the Prosecution appears to contend, any legal obligation is sufficient. The Appeals Chamber notes that the *Blaskić* Appeal Judgement, on which the Prosecution relies in its Reply,[680] does not address this issue.[681]

335. In the context of the present case, it is not necessary to discuss this issue further. The Trial Chamber based its conclusion on two different arguments: The duty of the prefect was not mandated by a rule of criminal law, and it was not clear what means were available to Bagambiki to fulfil this duty. The Appeals Chamber also notes the Separate Opinion of Judge Ostrovsky:

> In my view, the Prosecutor simply failed to introduce sufficient evidence concerning what additional resources were available to the prefecture to stem the tide of violence and to provide greater protection to the refugees. On the basis of the totality of the reliable and credible evidence presented in this case, I am not convinced that Bagambiki, with the resources available to him, could do more for the protection of refugees in Cyangugu prefecture.[682]

The Prosecution has not indicated which possibilities were open to Bagambiki to fulfil his duties under the Rwandan domestic law. Thus, even if the failure to fulfil the duty of a Rwandan prefect to protect the population of his prefecture could entail responsibility under international criminal law, the Prosecution has not shown that the alleged error of the Trial Chamber invalidated its decision.

336. Moreover, the Appeals Chamber notes that the Prosecution does not identify any particular instances of Bagambiki's alleged failure to fulfil this obligation under this ground of appeal.

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[678] *Idem*.
[679] See e. g. *Blaskić* Appeal Judgement, para. 663 (regarding Article 7(1) of the ICTY Statute).
[680] Prosecution Brief in Reply, para. 75.
[681] *Blaskić* Appeal Judgement, fn. 1385 to para. 663, cites Article 86(1) of Additional Protocol I: "The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so", indicating that not every failure to act gives rise to *criminal* responsibility. In *Blaskić*, the duty to act was qualified as one imposed by the "laws and customs of war" (*Blaskić* Appeal Judgement, para. 668). *Cf.* also *Bagilishema* Appeal Judgement, para. 36: "The line between those forms of responsibility which may engage the criminal responsibility of the superior under international law and those which may not can be drawn in the abstract only with difficulty" and *A. Cassese*, International Criminal Law, p. 202: "It should be noted that *serious* violations of *many* of the above positive obligations […] amount to a war crime" (emphasis added).
[682] Judge Ostrovsky Opinion, para. 17.

(b) Aiding and abetting by tacit approval

337. The Prosecution submits that Bagambiki's "knowledge of such massive crimes and his inaction or silence amount to culpable omission or gross negligence or conduct that is tantamount to acquiescence in, tacit approval of, or aiding and abetting the crimes".[683] Citing the *Aleksovski* Trial Judgement, the Prosecution argues that when a superior was aware of crimes committed by his subordinates his silence could only be interpreted as a sign of approval, even when he was not present at the crime scene.[684]

338. In the view of the Appeals Chamber, criminal responsibility for an omission, which leads to a conviction as the principal perpetrator of the crime, has to be distinguished from aiding and abetting a crime by encouragement, tacit approval or omission, amounting to a substantial contribution to the crime. In the Notice of Appeal, the Prosecution's arguments are exclusively related to the issue of criminal responsibility for an omission. The issue of Bagambiki's responsibility for aiding and abetting the crimes by his tacit approval is raised only in the Appeal Brief, without the Prosecution having first sought leave to vary its grounds of appeal.[685] Accordingly, the Appeals Chamber declines to address this issue further.

2. Superior responsibility under Article 6(3) of the Statute

(a) Superior-subordinate relationship between Bagambiki and the gendarmes

339. The Prosecution challenges the Trial Chamber's finding that Bagambiki had neither *de jure* nor *de facto* authority over the gendarmes. The Prosecution submits that the Trial Chamber erred in its definition of a superior under Article 6(3) of the Statute. [686]

340. In its Notice of Appeal, the Prosecution submitted that the Trial Chamber erred in finding "that Bagambiki lacked effective control over the gendarmes *and the military*".[687] However, in the Appeal Brief, the Prosecution's arguments are focused on Bagambiki's effective control over the gendarmes, leading to the conclusion that Bagambiki had "the necessary *material ability* required to prevent or punish crimes by the *gendarmes* he requisitioned". [688] The Appeals Chamber will therefore concentrate on the issue of Bagambiki's responsibility for the crimes committed by the gendarmes.

341. The Prosecution asserts that the "Trial Chamber confined the definition of a superior to a military-style structure, where the superior can give orders or punish or prevent transgressions through issuing orders or taking disciplinary actions".[689] The paragraph of the Trial Judgement, to which the Prosecution refers, reads:

> After reviewing the relevant provisions of Rwandan law, the Chamber is not convinced that Bagambiki's ability to requisition gendarmes gave him *de jure* authority to give orders to them during the execution of an operation. […] The law

683 Prosecution Appeal Brief, para. 370.
684 *Idem*, quoting *Aleksovski* Trial Judgement, paras. 87-88.
685 *Cf.* Practice Directions on Formal Requirements for Appeals from Judgement, 4 July 2005, Article 2.
686 Prosecution Appeal Brief, paras. 372-373.
687 Prosecution Notice of Appeal, para. 59(b) (emphasis added).
688 Prosecution Appeal Brief, para. 379 (emphasis added).
689 *Ibid.*, para. 376.

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> contains no provision indicating that a prefect had the legal authority as a superior to prevent a gendarme from committing a crime by giving an order during the execution of an operation or to punish a gendarme who had committed a crime during the execution of an operation.[690]

In the next paragraph, the Trial Chamber went on to determine whether Bagambiki had *de facto* authority over the gendarmes, and found that

> [w]hile there is ample evidence that Bagambiki requisitioned gendarmes to provide security at a number of sites, there is insufficient evidence that he maintained any control over how these gendarmes carried out their mission upon deployment.[691]

Although the Trial Chamber in this paragraph did not explicitly refer to Bagambiki's ability to prevent the commission of the offence or to punish the offenders, its finding has to be read in the context of the Trial Chamber's general definition of superior responsibility:

> a superior-subordinate relationship is established by showing a formal or informal hierarchical relationship. The superior must have possessed the power or the authority, *de jure* or *de facto*, to prevent or punish an offence committed by his subordinates. The superior must have had effective control over the subordinates at the time the offence was committed. Effective control means the material ability to prevent the commission of the offence or to punish the principal offenders.[692]

This definition is consistent with the settled jurisprudence of both this Tribunal and the ICTY.[693] In particular, the Appeals Chamber recalls the conclusion of the ICTY Appeals Chamber in *Blaškić*:

> The indicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate.[694]

342. The Trial Chamber's definition and paragraph 637 of the Trial Judgement clearly show that the Trial Chamber was aware that "effective control" as the prerequisite for superior responsibility is tantamount to the material ability to prevent or punish criminal conduct.[695] Therefore, the Appeals Chamber finds that the Trial Chamber did not err in its definition of superior-subordinate relationship.

343. The Appeals Chamber does not agree with the Prosecution's argument that the Trial Chamber, in its analysis of Bagambiki's *de jure* position "subordinated substantive legislation to ministerial instructions relating to the *gendarmerie*".[696] The Trial Chamber's analysis encompassed not only the Rwandan Ministerial Instruction on the Maintenance and Re-

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[690] Trial Judgement, para. 636.
[691] *Ibid.*, para. 637.
[692] *Ibid.*, para. 628 (footnotes omitted).
[693] *Bagilishema* Appeal Judgement, paras. 50 and 55; *Kajelijeli* Appeal Judgement, para. 87; *Čelebići* Appeal Judgement, para. 196-198; *Blaškić* Appeal Judgement, paras. 67-69.
[694] *Blaškić* Appeal Judgement, para. 69 (footnotes omitted).
[695] *Kajelijeli* Appeal Judgement, para. 86.
[696] Prosecution Appeal Brief, para. 375.

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establishment of Order,[697] but also the Rwandan law on the *gendarmerie*.[698] The Prosecution submits that the Trial Chamber should have also considered the Law on the Organisation and Functioning of the Prefecture, which gave the prefect an "extensive obligation to ensure tranquillity, order and security of people and property".[699] The Prosecution does not indicate any particular provisions of this law to support its argument. The Appeals Chamber notes that Article 8(2) of the Law on Organisation and Functioning of the Prefecture indeed obliges the prefect to "ensure the tranquillity, the public order and the security of persons and property".[700] To fulfil this obligation, the law empowered the prefect to request the intervention of the Armed Forces "in accordance with the Law on the Establishment of the *gendarmerie*".[701] In other words, the Law on Organisation and Functioning of the Prefecture concretized the prefect's obligation by a reference to the Rwandan law on the *gendarmerie*, which the Trial Chamber duly took into account.

344. In addition, the Prosecution relies on paragraph 78 of the *Aleksovski* Trial Judgement, which held that

> [t]he possibility of transmitting reports to the appropriate authorities suffices once the civilian authority, through its position in the hierarchy, is expected to report whenever crimes are committed, and that, in the light of this position, the likelihood that those reports will trigger an investigation or initiate disciplinary or even criminal measures is extant.[702]

In his Response, Bagambiki points to the testimony of Prosecution expert witness, André Guichaoua, that in 1994 in Cyangugu the judiciary and the prosecution were not in a position to carry out their tasks satisfactorily: "These people were never known for having arrested or prevented any murder."[703] And, in addition, Bagambiki argues: "Should [Bagambiki] be blamed for not having submitted reports to the Interim Government whose members are currently under trial in this jurisdiction?"[704]

345. It fell to the Prosecution to identify the authorities to which, in its view, Bagambiki should have submitted reports in order to prevent the crimes or to punish their perpetrators. This it failed to do. In the view of the Appeals Chamber, the theoretical possibility of submitting reports of crimes committed against Tutsi refugees to the same authorities who, as the Prosecution argues in other cases, were actively organizing and ordering massacres of Tutsi throughout Rwanda is not sufficient to establish Bagambiki's criminal responsibility.

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[697] Exhibit D-EBA 3(ii) "*Instruction ministérielle n° 01/02 du 15 septembre 1978 – Maintien et rétablissement de l'ordre*", Trial Judgement, para. 635.
[698] Exhibit D-EBA 3(iii) "*Décret-loi du 23 Janvier 1974 – Création de la Gendarmerie*", Trial Judgement, para. 635.
[699] Prosecution Appeal Brief, para. 375.
[700] Exhibit D-EBA 3(i), "*Décret-loi n° 10/75 du 11 mars 1975 – Organisation et fonctionnement de la préfecture*": "*assurer la tranquillité, l'ordre public et la sécurité des personnes et des biens*".
[701] Exhibit D-EBA 3(i), "*Décret-loi n° 10/75 du 11 mars 1975 – Organisation et fonctionnement de la préfecture*", *Article 11: "Le préfet peut* […] *requérir l'intervention des forces armées pour le rétablissement de l'ordre public, et ce, conformément à la procédure prévue par les lois en vigueur et, notamment, par le Décret-Loi du 23 janvier 1974 portant création de la Gendarmerie*".
[702] Prosecution Appeal Brief, para. 378, quoting *Aleksovski* Trial Judgement, para. 78.
[703] Expert Witness André Guichaoua, T.24 September 2001, pp. 175-176.
[704] Bagambiki Response Brief, para. 329.

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346. The Prosecution itself argues that in April 1994 the monopoly of power lay with the prefects,[705] which is not easily reconcilable with the idea that Bagambiki should have submitted reports of criminal acts to the "appropriate authorities" in order to prevent and punish crimes. Regarding the argument that the prefects held the monopoly of power, the Appeals Chamber observes that general statements of the situation in Rwanda in April 1994 may be illustrative as to the background of the case, but they are not suited to prove the individual guilt of the Accused.

347. To demonstrate that Bagambiki exercised "effective control" over the gendarmes, the Prosecution had to prove that he had the material ability to prevent and punish crimes. This it failed to do. The Appeals Chamber concludes that the Prosecution has not demonstrated any error in the Trial Chamber's reasoning as to Bagambiki's *de jure* or *de facto* position of authority *vis-à-vis* gendarmes.

(b) Bagambiki's responsibility for the crimes of the Kagano communal police

348. The Prosecution submits that the Trial Chamber erred in finding Bagambiki not liable for the massacre of Tutsi refugees at the Nyamasheke Parish on 15 April 1994, in which members of the Kagano communal police participated.[706] The Prosecution argues that the Trial Chamber had found that Bagambiki was a superior with effective control over the Kagano communal police, but nevertheless acquitted him, because there was no evidence that he was informed of the attack.[707] This, the Prosecution contends, is "hardly to reconcile" with the Trial Chamber's finding that Bagambiki, due to his position, ought to have known about the various attacks.[708] In addition, the Prosecution argues that the Trial Chamber misconstrued the "ought to have known or had reason to know" test required under Article 6(3) of the Statute.[709]

349. The Appeals Chamber first of all notes that the argument that the Trial Chamber misconstrued the "knew or had reason to know" test set forth in Article 6(3) of the Statute is raised in the Appeal Brief for the first time, and, in addition, is unrelated to the claim that the Trial Chamber misapplied Rwandan law.[710] The Appeals Chamber further notes that the Prosecution did not seek leave to vary its grounds of appeal in order to include this new allegation.[711] Accordingly, the Appeals Chamber declines to address this issue further.

350. With regard to Bagambiki's knowledge about the participation of his subordinates in the Nyamasheke parish massacre, the Trial Chamber noted:

> The Chamber has no evidence that Bagambiki was informed while Bagambiki visiting Nyamasheke parish with Kamana and others on 13 April 1994 that Kagano commune police participated in the attack on that date. There is also no indication in

[705] Prosecution Appeal Brief, para. 380.
[706] *Ibid.*, paras. 382-384, referring to Trial Judgement, paras. 645-649.
[707] *Ibid.*, para. 382 (emphasis omitted).
[708] *Idem*.
[709] *Ibid.*, para. 383.
[710] Prosecution Notice of Appeal, paras. 58-60.
[711] *Cf.* Practice Directions on Formal Requirements for Appeals from Judgement, 4 July 2005, Article 2.

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> the evidence that Bagambiki was informed of the 15 April 1994 attack at Nyamasheke until after it was completed.[712]

The Trial Chamber went on to conclude that Bagambiki should have known that the *bourgmestre* of Kagano, Kamana, also participated in the attack. With regard to the Kagano communal police, it found:

> The Chamber lacks sufficient reliable evidence to determine whether Bagambiki should have known about the involvement of Kagano commune police in the 15 April 1994 attack, given the limited testimony about their involvement in the attacks against Nyamasheke parish, the limited number of attacks in which they participated, and the fact that they did not report directly to the prefect unless specially requisitioned by him.[713]

351. The Appeals Chamber finds that the Prosecution misreads the Trial Judgement when it argues that the Trial Chamber found that "there was no evidence that [Bagambiki] was *informed* of the attack".[714] In fact, the Trial Chamber found that Bagambiki was informed about the attack, and as a consequence, suspended *Bourgmestre* Kamana.[715] The Trial Chamber found Bagambiki not responsible for the attack because it lacked evidence showing that Bagambiki should have known about the *involvement* of the Kagano communal police in the attack. The Prosecution has not shown that this finding was unreasonable.

3. Conclusion

352. The Prosecution's ninth ground of appeal is dismissed in its entirety.

G. Nature of Samuel Imanishimwe's Criminal Responsibility for the Events of Gashirabwoba (10th Ground of Appeal)

353. The Trial Chamber found Imanishimwe guilty of genocide (Count 7 of the Bagambiki/Imanishimwe Indictment), extermination as a crime against humanity (Count 10) and serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II (Count 13) pursuant to Article 6(3) of the Statute for the acts committed by his subordinates at the Gashirabwoba football field on 12 April 1994.

354. The Prosecution submits that the finding that Imanishimwe incurs criminal responsibility pursuant only to Article 6(3) of the Statute "fails to capture the true nature of Imanishimwe's role and participation in the massacre at Gashirabwoba football field".[716] The Prosecution argues that the only finding that a reasonable trier of fact could have made from the established facts was that Imanishimwe was directly responsible for having ordered, or at the very least for having aided and abetted, the crimes committed on 12 April 1994 at

[712] Trial Judgement, para. 649.
[713] *Idem*.
[714] Prosecution Appeal Brief, para. 382.
[715] Trial Judgement, paras. 581 and 586. The Trial Chamber did not find explicitly that Bagambiki knew about the second attack on 15 April 1994, but it accepted Bagambiki's testimony that he was informed about the attack by *Bourgmestre* Kamana and suspended him because he was not convinced by his explanations, Trial Judgement, paras. 568 and 586.
[716] Prosecution Appeal Brief, para. 392.

Gashirabwoba.[717] The Prosecution also submits that Imanishimwe should have been found guilty for having "participated in a joint criminal enterprise as a co-perpetrator in a position to issue orders".[718] In short, the Prosecution alleges that the Trial Chamber erred in not finding Imanishimwe criminally responsible on the basis of Article 6(1) of the Statute.

355. In response to the Prosecution's arguments, Imanishimwe submits that he should not have been convicted of the events that occurred in Gashirabwoba. On the one hand, he contends that the acts allegedly committed by soldiers at Gashirabwoba on 12 April 1994 are not pleaded in the Indictment. On the other, he alleges that the Prosecution adduced no evidence to establish that the soldiers said to have massacred the refugees were his subordinates.[719] Imanishimwe is in fact repeating hence the arguments that he develops to buttress his first and second grounds of appeal. With regard to the finding that he incurred criminal responsibility on the basis of Article 6(1), Imanishimwe merely states that the arguments advanced by the Prosecution "are specious, as they contain no evidence whatsoever that Samuel Imanishimwe was present during the massacre at Gashirabwoba on 12 April 1994".[720]

1. Findings by the Trial Chamber

356. Upon examination of the evidence adduced by the parties on the events at Gashirabwoba, the Trial Chamber made the following factual findings:

> 435. […] A majority of the Chamber, Judge Ostrovsky dissenting, finds that on 11 April 1994 after the refugees had repulsed an attack, Bagambiki, Imanishimwe, and soldiers came to the field [of Gashirabwoba] between 2:30 and 3:00 p.m., and the refugees told Bagambiki that they were being attacked by assailants from Bumazi and Gashirabwoba sectors. [...] At about 7:00 p.m. that evening, soldiers returned to the field and asked the refugees if they were all Tutsis.
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> […]
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> 437. From Witness LAC's testimony, the Chamber further finds that, on 12 April 1994, the refugee population at the field had swelled to nearly 3,000. That morning, thousands of assailants from the surrounding area and the Shagasha tea factory began attacking the refugees at the football field. A majority of the Chamber, Judge Ostrovsky dissenting, finds that Bagambiki and Nsabimana, the director of the Shagasha tea factory, came to the field for about thirty minutes. From Witness LAC's evidence, the majority accepts that Bagambiki promised to send soldiers to protect the refugees. An hour later, armed factory guards and at least fifteen soldiers surrounded the refugees and, after the refugees had raised their hands and asked for peace, fired and threw grenades at them for thirty minutes. The Interahamwe then killed the survivors and looted their personal possessions.
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> […]

[717] Prosecution Notice of Appeal, para. 63; Prosecution Appeal Brief, para. 389.
[718] Prosecution Appeal Brief, sub-heading (ii), p. 145. In this case the Prosecution refers to its arguments under his 3rd ground of appeal.
[719] Imanishimwe Response Brief, paras. 170-194.
[720] *Ibid.*, para. 195; see also AT. 6 February 2006, pp. 94-95.

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> 439. [...] The Chamber notes that Witness LAC, whose testimony the Chamber accepted, did not see Bagambiki or Imanishimwe on the football field immediately prior to the soldiers' attack.

357. The Appeals Chamber notes that the Trial Chamber indicated at paragraph 624 of the Trial Judgement that it would consider Imanishimwe's individual criminal responsibility "as a superior under Article 6(3) or for 'ordering', under Article 6(1) [of the Statute]". A few paragraphs later, the Trial Chamber seems to widen the scope of the analysis by stating that it would like to assess the nature and form of criminal responsibility and participation for each of the accused "under Articles 2(3) and 6(1)".[721]

358. On the basis of its factual findings, the Trial Chamber made the following legal findings regarding Imanishimwe's criminal responsibility:

> 653. The Chamber has found that, on 12 April 1994, soldiers participated in the attack on the refugees at the Gashirabwoba football field. The Chamber lacks sufficient reliable evidence to find that Imanishimwe ordered his soldiers to participate in the attack within the meaning of Article 6(1) [emphasis added].
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> 654. The Chamber however finds that Imanishimwe knew or should have known about the participation of his soldiers in the attack at the Gashirabwoba football field. In reaching this conclusion, the Chamber recalls that Imanishimwe was present at the Gashirabwoba football field on 11 April 1994 and thus was fully aware of the presence of refugees and of their plight. His soldiers returned later that evening to determine whether the refugees were entirely Tutsi. On 12 April 1994, at least fifteen soldiers surrounded the refugees and killed them after the refugees asked for peace. Given the relatively small size of the camp, Imanishimwe's control over his soldiers, and the fact that he remained in regular contact with his soldiers stationed away from the camp, the Chamber cannot accept that fifteen or more soldiers would have participated in such a systematic, large-scale attack without the knowledge of their commander. The Chamber notes that there is no evidence that Imanishimwe took any steps to prevent the attack or to punish any soldier at Karambo camp for participating in the massacre. Thus, the Chamber finds that Imanishimwe can be held criminally responsible under Article 6(3) for the actions of his subordinates at the Gashirabwoba football field. Ŧemphasis addedğ[722]
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> […]
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> 695. As the majority has determined that Imanishimwe is criminally responsible for genocide as a superior under Article 6(3), the Chamber finds that Imanishimwe is not guilty on Count 8 of the indictment against him for complicity in genocide, which is based on the same facts as Count 7 and does not charge Imanishimwe with criminal responsibility under Article 6(3).[723]

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[721] Trial Judgement, para. 626.

[722] See also Trial Judgement, para. 691: "the Chamber finds that Imanishimwe is criminally responsible for the acts of his subordinates at the Gashirabwoba football field pursuant to Article 6(3) of the Statute because he failed to prevent the crime. The Chamber also recalls that Imanishimwe did not punish any soldier for this attack, which additionally shows that he acquiesced in the soldiers' participation in the massacre; para. 694: "The Chamber finds beyond a reasonable doubt that Imanishimwe is criminally responsible under Article 6(3) of the Statute for genocide because he failed to prevent the killing of members of the Tutsi ethnic group by his subordinates in relation to the events at the Gashirabwoba football field on 12 April 1994 […]".

[723] See also paras. 744, 749 and 794 for the other counts.

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359. The Appeals Chamber notes that with regard to Gashirabwoba, the Trial Chamber makes a direct pronouncement only on Imanishimwe's responsibility as superior and for having ordered the crimes. However, it is apparent from its findings on all the allegations made against Imanishimwe that the Trial Chamber did not restrict its examination only to these two forms of criminal responsibility. Note should be taken, for example, of the guilty verdict against Imanishimwe for aiding and abetting acts of torture and cruel treatment perpetrated in Karambo camp.[724] In the opinion of the Appeals Chamber, the Trial Chamber's silence over the other forms of criminal responsibility with regard to Gashirabwoba can be explained by the very nature of its factual findings: the Trial Chamber plainly considered that no form of criminal responsibility other than the ones envisaged in the body of the Trial Judgement was capable of describing the criminal conduct of the Accused.

360. It is now left for the Appeals Chamber to determine, in light of the factual findings made by the Trial Chamber, whether the Trial Chamber erred in finding Imanishimwe criminally responsible for the events at Gashirabwoba on the basis of Article 6(3) of the Statute only.

2. Responsibility for participation in a joint criminal enterprise

361. The Prosecution argues that Imanishimwe should have been found guilty as a "co-perpetrator in a position to issue orders"[725] for the crimes at Gashirabwoba on the strength of his participation in a joint criminal enterprise.

362. The Appeals Chamber recalls its finding above that the Trial Chamber did not err in deciding not to take into consideration responsibility for participation in a joint criminal enterprise, on the ground that the Prosecution had not pleaded this form of responsibility in the Indictment.[726] Consequently, the Appeals Chamber considers that the Prosecution has no basis for invoking to this form of responsibility here. The Appeals Chamber will therefore not consider the Prosecution's arguments in this respect any further.

3. Responsibility for ordering the commission of crimes

363. The Prosecution submits that Imanishimwe should have been held criminally responsible under Article 6(1) of the Statute for ordering the massacre perpetrated at the Gashirabwoba football field. The Prosecution argues that the Trial Chamber should have inferred from the corpus of evidence that Imanishimwe had not "simply *acquiesced in*" but rather "ordered"[727] the participation of his soldiers in the massacre. It recalls in support of its argument that "[t]he fact that an order was given can be proved through circumstantial evidence" and that "[p]roof of all forms of criminal responsibility can be given by direct or

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[724] Trial Judgement, paras. 763 and 802.
[725] Prosecution Appeal Brief, sub-heading (ii), p. 145.
[726] See *supra*, para. 45.
[727] Prosecution Appeal Brief, para. 403. The Prosecution cites the following passage from the *Galić* Trial Judgement, para. 170: "In situations where a person in authority under duty to suppress unlawful behaviour of subordinates of which he has notice does nothing to suppress that behaviour, the conclusion is allowed that that person, by positive acts or culpable omissions, directly participated in the commission of the crimes through one or more of the modes of participation described in Article 7(1)."

circumstantial evidence".[728] For the Prosecution, it is clear from the factual findings made by the Trial Chamber that the soldiers would not have participated in the Gashirabwoba massacre "without Imanishimwe's express order or at least, some form of assistance from him",[729] as the Chamber had established *inter alia* that Imanishimwe exercised effective control over the soldiers of Karambo camp; that he had issued unlawful orders to them resulting in his conviction on the basis of Article 6(1) for other crimes committed during the same period as the massacre, and that a massacre of that magnitude could not have taken place without his knowledge.[730]

364. On this issue, the Trial Chamber found that it lacked sufficient reliable evidence to find that Imanishimwe ordered his soldiers to participate in the attack within the meaning of Article 6(1) of the Statute.[731]

365. The Appeals Chamber has on many occasions recalled the constitutive elements of this mode of responsibility:

(1) the material element (or *actus reus*) is established when a person uses his position of authority to order [732] another person to commit a crime;

(2) the requisite mental element (or *mens rea*) is established when such person acted with direct intent to give the order.[733]

366. Applying these legal requirements to the Trial Chamber's factual findings, the Appeals Chamber does not consider that the Trial Chamber erred in its legal findings. The evidence presented before the Trial Chamber does not establish that Imanishimwe in one way or another, explicitly or implicitly, gave instructions to his subordinates to attack the Tutsi who had sought refuge at the Gashirabwoba football field. Accordingly, the Trial Chamber correctly found that Imanishimwe could not incur responsibility for "ordering" the crimes committed on 12 April 1994 at Gashirabwoba. This sub-ground of appeal is dismissed.

4. Responsibility for aiding and abetting the commission of crimes

367. Lastly, the Prosecution alleges that the Trial Chamber erred in not considering whether Imanishimwe was criminally responsible under Article 6(1) of the Statute for aiding and abetting the massacre perpetrated at Gashirabwoba on 12 April 1994.[734] A reasonable tribunal, according to it, "would, at the barest minimum, have found that Imanishimwe aided and abetted in the killing of Tutsi refugees at the Gashirabwoba football field on 12 April 2004 by having knowledge that his soldiers would participate in the attack and by allowing

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[728] Prosecution Appeal Brief, para. 402, citing *Galić* Trial Judgement, para. 171, and *Blaškić* Trial Judgement, para. 281.
[729] Prosecution Appeal Brief, para. 405. *See* also CRA(A) 6 February 2006, p. 55.
[730] Prosecution Appeal Brief, paras. 393-405.
[731] Trial Judgement, para. 653.
[732] *Semanza* Appeal Judgement, paras. 360-361, referring to *Kordić and Čerkez* Appeal Judgement, para. 28.
[733] *Kordić and Čerkez* Appeal Judgement, para. 29. The Appeals Chamber notes that, in the *Blaskić* Appeal Judgement, the ICTY Appeals Chamber reached the conclusion that another articulation of *mens rea* different from direct intent exists, namely the act of ordering "an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order". (*Blaskić* Appeal Judgement, para. 42).
[734] Prosecution Appeal Brief, para. 406.

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them to do so".[735] The Prosecution submits that the *actus reus* of aiding and abetting in this instance is established by Imanishimwe's omission to prevent his soldiers from going to Gashirabwoba, and that this omission had a decisive effect on their ability to participate in the attack.[736] It further contends that Imanishimwe possessed the requisite knowledge to be an aider and abettor in the Gashirabwoba massacre,[737] given that the Trial Chamber found that he knew or should have known about the participation of his soldiers in the attack.[738]

368. The Appeals Chamber notes that the Trial Chamber did not expressly rule on the issue as to whether Imanishimwe could have incurred criminal responsibility for aiding and abetting the crimes committed at the Gashirabwoba football field on 12 April 1994. This notwithstanding, the Appeals Chamber does not conclude that the Trial Chamber failed to consider this form of responsibility. It indeed transpires from the legal findings made by the Trial Chamber that this form of responsibility was considered and even accepted when the facts lent themselves to it. The Appeals Chamber understands the Trial Chamber's silence with respect to aiding and abetting as an indication that it was not established that the Accued's conduct could in this particular instance be characterized as aiding and abetting.[739]

369. Accordingly, the issue is for the Appeals Chamber to inquire into whether this finding is one which a reasonable trier of fact could have made.

370. To establish the material element (or *actus reus*) of aiding and abetting under Article 6(1) of the Statute, it must be proven that the aider and abettor committed acts specifically aimed at assisting, encouraging, lending moral support[740] for the perpetration of a specific crime, and that the said support had a substantial effect on the perpetration of the crime. The Appeals Chamber adds that the *actus reus* of aiding and abetting may, in certain circumstances, be perpetrated through an omission.[741] The requisite *mens rea* is the fact that the aider and abettor knows that his acts assist in the commission of the specific crime of the principal.[742]

371. In the instant case, the Trial Chamber considered that it was not established that the Accused had ordered or was present during the attack launched at Gashirabwoba on 12 April 1994.[743] On the other hand, it found that the soldiers responsible for the attack could not have

[735] *Ibid.*, para. 407.
[736] *Ibid.*, para. 408. In support of its line of reasoning, the Prosecution cites the *Blaškić* Trial Judgement, para. 284: "the *actus reus* of aiding and abetting may be perpetrated through an omission, provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite *mens rea*." (footnote omitted).
[737] Prosecution Appeal Brief, paras. 409-410, referring to *Tadić* Appeal Judgement, para. 229 and *Krstić* Appeal Judgement, para. 140.
[738] *Ibid.*, para. 410, citing Trial Judgement, para. 654.
[739] See *supra*, para. 359.
[740] The Appeals Chamber notes that the phrase "assist, encourage or lend no support" originally used by the Appeals Chamber in the *Tadić* (para. 229), *Aleksovski* (para. 163), *Vasiljević* (para. 102) and *Blaškić* (para. 45) Appeal Judgements has been translated as "*aider, encourager ou fournir un soutien moral*" in the French versions of the said Judgements. The Appeals Chamber considers that this translation may mislead the reader, given that "aided and abetted" is rendered in the French text of the Statute by "*aidé et encourage*".
[741] See *Blaskić* Appeal Judgement, para. 47.
[742] *Vasiljević* Appeal Judgement, para. 102; *Blaskić* Appeal Judgement, para. 45; *Kvočka et al.* Appeal Judgement, paras. 89-90, 188.
[743] Trial Judgement, paras. 439 and 653.

participated in the attack without their superior, Samuel Imanishimwe, being aware of it.[744] For the Trial Chamber, the fact that Imanishimwe did not punish any of the incriminated soldiers showed that he "acquiesced in the soldiers' participation in the massacre".[745]

372. Firstly, the Appeals Chamber notes that, contrary to Imanishimwe's assertion,[746] proof that he was present during the massacre is not necessary here. The ICTY Appeals Chamber has had occasion to point out that an aider and abettor may participate before, during or after the crime has been perpetrated and at a certain distance from the scene of the crime.[747] The Appeals Chamber adopts these findings and holds that Imanishimwe's argument is irrelevant.

373. The Appeals Chamber concludes that the facts as established by the Trial Chamber did not oblige a reasonable trier of fact to find Imanishimwe criminally responsible for aiding and abetting the commission of the crimes of genocide, extermination and murders perpetrated at Gashirabwoba.

374. Although the Trial Chamber finds that Imanishimwe "acquiesced in" the participation of his soldiers in the massacre, it does not establish that such acquiescence was a substantial contribution to the perpetration of the crime. A reasonable trier of fact could not have concluded from the evidence that the soldiers implicated in the massacre were aware of the acquiescence in question, nor have determined the extent to which it might have influenced the said soldiers. In these circumstances, the Trial Chamber cannot be taken to task for not finding Imanishimwe responsible for aiding and abetting the perpetrators of the massacre.

375. The Prosecution submits that the omission by Imanishimwe to prevent his soldiers from going to Gashirabwoba had a decisive effect on their ability to participate in the attack. The Appeals Chamber holds that the findings of the Trial Chamber do not permit it to be established that Imanishimwe's omission was specifically aimed at giving the soldiers the possibility of going to perpetrate the massacre, or that he was aware of the assistance he was lending them. Moreover, the Prosecution does not demonstrate that no reasonable trier of fact would have failed to make the same findings on the basis of the evidence admitted by the Trial Chamber.

376. The Appeals Chamber holds that the Prosecution failed to demonstrate that the Trial Chamber committed an error when it refused to conclude that Samuel Imanishimwe acted or omitted to act – for example, by not holding back his soldiers – in the knowledge that his act or omission would assist, encourage or lend moral support[748] to the perpetration of crimes against the persons who had taken refuge at the Gashirabwoba football field. The Appeals Chamber accordingly holds that the Prosecution has not demonstrated that the Trial Chamber erred in rejecting this form of responsibility when characterizing Imanishimwe's participation in the massacre of 12 April 1994.

[744] *Ibid.*, para. 654.
[745] *Ibid.*, para. 691. See also paras. 744 and 795.
[746] See *supra*, para. 355.
[747] *Blaskić* Appeal Judgement, para. 48.
[748] See *supra*, note 740.

5. Conclusion

377. For the foregoing reasons, the Appeals Chamber finds that the Prosecutor failed to demonstrate that the Trial Chamber committed an error when it refused, on the basis of its factual findings, to hold Samuel Imanishimwe individually responsible pursuant to Article 6(1) of the Statute for ordering or aiding and abetting the perpetration of the Gashirabwoba massacre. The Appeals Chamber declined to consider Imanishimwe's responsibility for participation in a joint criminal enterprise inasmuch as he was not informed that the Prosecution intended to plead this form of responsibility against him. The Appeals Chamber dismisses this ground of appeal in its entirety.

IV. SAMUEL IMANISHIMWE'S APPEAL

A. Superior Responsibility under Article 6(3) of the Statute (2nd Ground of Appeal)

378. In his second ground of appeal, Imanishimwe alleges that the Trial Chamber erred by finding him responsible as a superior pursuant to Article 6(3) of the Statute although it had not been established that the soldiers alleged to have massacred refugees at the Gashirabwoba football field were under his authority.[749]

379. As the Appeals Chamber has accepted Imanishimwe's first ground of appeal and consequently decided to set aside his convictions under Article 6(3) of the Statute for the events at the Gashirabwoba football field, this ground of appeal has become moot, and hence does not need to be considered by the Appeals Chamber.

B. Conviction on the basis of Article 4 of the Statute (4th Ground of Appeal)

380. The Trial Chamber found Imanishimwe guilty of serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II thereto (Count 13 of the Bagambiki/Imanishimwe Indictment) for acts perpetrated at Karambo camp and at the Gashirabwoba football field. In his fourth ground of appeal, Imanishimwe requests the Appeals Chamber to quash the conviction under Article 4(a) of the Statute for the acts committed at Gashirabwoba.[750] He submits that the approach of the Trial Chamber "clearly demonstrates its bias and complacency"[751] by basing his "guilt in respect of the Gashirabwoba events on a fragmented account of events".[752] He also submits that the Trial Chamber failed to establish a nexus between the alleged acts and the armed conflict.[753]

381. As the Appeals Chamber has accepted Imanishimwe's first ground of appeal and consequently decided to set aside his convictions under Article 6(3) of the Statute for the

[749] Imanishimwe Notice of Appeal, paras. 1[5]-1[6], Imanishimwe Appeal Brief, paras. 69-106.
[750] *Ibid.*, par. 21, as explained by Imanishimwe Appeal Brief, paras. 142-164.
[751] Imanishimwe Appeal Brief, para. 153.
[752] *Ibid.*, part 4.1, p. 43.
[753] *Ibid.*, para. 4.2, p. 44. The Appeals Chamber notes incidently that Imanishimwe puts forward no relevant argument in support of this ground appeal, contenting himself with repeating his arguments regarding the absence of any superior-subordinate relationship between him and the soldiers directly responsible for the Gashirabwoba massacre, the subject of his second ground of appeal.

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events at the Gashirabwoba football field, this ground of appeal has become moot, and hence does not need to be considered by the Appeals Chamber.

C. Assessment of Evidence in Respect of Karambo Military Camp (5th Ground 5 of appeal)

382. In his fifth ground of appeal, Imanishimwe raises two errors, of law and of fact, with regard to the evidence of the events that took place in Karambo camp. Imanishimwe submits that the Trial Chamber erred by being biased in its assessment of the credibility of the witnesses who appeared before it and by merely relying on speculations and inferences to find him responsible, thus denying him the benefit of presumption of innocence.

1. Credibility of witnesses

383. Imanishimwe complains that the Trial Chamber refused to give any credence to the military witnesses called by the Defence.[754] He denounces the Trial Chamber's insufficient justification for dismissing the testimony of these eyewitnesses whose statements were corroborated by four other witnesses, namely PNF, PBA, PNB and Essono, who were non military.[755] He submits that the Trial Chamber's argument that the military witnesses, as interested parties, were biased should, if valid, also have applied to Witnesses LI, MG, MA, LCJ and LAC who are portrayed by the Prosecution as victims of the acts for which Imanishimwe is held responsible.[756]

384. Imanishimwe concomitantly complains that the Trial Chamber gave undue credence to Witnesses LI and MG.[757] As regards Witness LI, Imanishimwe submits that the improbability of his statement casts doubt on his presence at Karambo camp at the time of the events that he claimed to describe, and blames the Trial Chamber for disregarding the statement by Prosecution Witness Essono, demonstrating, according to him, the "absurdity of Witness LI's account".[758] As regards Witness MG, Imanishimwe submits that several of his allegations were contradicted by Defence Witness PNB and that the Trial Chamber nevertheless wrongly ignored this testimony.[759]

385. In its Response Brief, the Prosecution argues that Imanishimwe's allegations are unfounded and that he has not demonstrated that no reasonable trier of fact could have reached similar conclusions.[760] It adds that Imanishimwe merely proposes alternative conclusions that may have been open to the Trial Chamber.[761] The Prosecution further argues that the Chamber did not reject the testimonies of the Defence witnesses wholesale or because of their status as accomplices but that it carried out a balanced examination of Defence and Prosecution testimonies in an equitable and rational manner.[762] The Prosecution

[754] Although they are not specifically identified in Imanishimwe's Appeal Brief, the Appeals Chamber considers that Imanishimwe refers particularly to Witnesses PNC, PNE, PKB, PCC, PCD, and PCE.
[755] Imanishimwe Appeal Brief, paras. 165-166, citing para. 399 of the Trial Judgement.
[756] *Ibid.*, para. 168.
[757] *Ibid.*, para. 169.
[758] *Ibid.*, para. 170.
[759] *Ibid.*, para. 177.
[760] Prosecution Response Brief, paras. 192 and 198.
[761] *Ibid.*, para. 199.
[762] *Ibid.*, para. 194.

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alleges, moreover, that Imanishimwe fails to demonstrate that the Trial Chamber did not take into account the evidence of Witnesses PFN, PBA, PGN and Essono;[763] it submits that, on the contrary, the Trial Chamber took into account all the evidence explicitly[764] even though it is not required to refer to evidence adduced or to detail why it accepted or rejected a particular testimony.[765]

386. In reply, Imanishimwe alleges that the Trial Chamber treated Prosecution witnesses more favourably than Defence witnesses (i) by not finding Witnesses LI, MA and MG "self-interested" because of their Tutsi origin and "the need to take revenge on the Accused, who are of Hutu origin",[766] and (ii) by wrongly rejecting the Defence testimonies, in particular that of Essono, as lacking in credibility owing to the time lapse.[767]

387. The Appeals Chamber recalls that the admissibility of evidence is governed by Rule 89(C) of the Rules, which provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value". Moreover, ICTR and ICTY case-law has, over the years, developed a number of guidelines for the assessment of evidence, depending on its nature.

388. Concerning direct evidence in form of statements made by witnesses in court, it must be presumed to be credible at the time it is admitted. That these statements are taken under oath and that witnesses can be cross-examined constitute at that stage satisfactory indicia of reliability. The decision to admit them does not in any way prejudice the weight and credibility that the Trial Chamber will, in its own discretionary assessment, accord to the evidence. In this regard, the Appeals Chamber of ICTY recently had the opportunity to recall that:

> Determinations as to the credibility of witnesses are bound up in the weight afforded to their evidence, as is readily apparent from any Trial Judgement.[768]

389. The Appeals Chamber notes that in the instant case, the Trial Chamber reviewed all the Prosecution and Defence testimonies about the events that took place in Karambo camp, and that it set out the main points thereof in paragraphs 341 to 385 of the Trial Judgement. In paragraphs 386 to 400, it proceeded to state its factual findings on these events, systematically indicating the evidence on which it relied and the credibility it accorded to that evidence. The Appeals Chamber will now analyse the Trial Chamber's assessment of the credibility of the Defence witnesses on the one hand and of the Prosecution witnesses on the other.

390. A reading of the hearing transcripts shows that the credibility of the Defence military witnesses was tested during their cross-examination by the Prosecution.[769] The Trial Chamber

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[763] *Ibid.*, para. 202, 203.
[764] *Ibid.*, paras. 206, 207, 209, 212.
[765] *Ibid.*, para. 210, citing *Musema* Appeal Judgement, para. 20, citing itself *Čelebići* Appeal Judgement, para. 483.
[766] Imanishimwe Brief in Reply, para. 128.
[767] *Ibid.*, para. 125.
[768] *Kvočka et al.* Appeal Judgement, para. 659. See also for the assessment of a witness's credibility: *Musema* Appeal Judgement, para. 20; *Kvočka et al.* Appeal Judgement, para. 23; *Ntakirutimana* Appeal Judgement, paras. 215 and 254; *Kamuhanda* Appeal Judgement, para. 248.

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did not assess the credibility of these witnesses piecemeal. Having heard all the Prosecution and Defence witnesses, it accepted certain portions of the testimonies of the military witnesses called by Imanishimwe (in particular, PNC, PNE, PKB, PCE and Essono) with regard to the layout of Karambo camp.[770] It did not, however, find credible certain testimonies of the same witnesses according to which "soldiers were never brought to or mistreated [*sic*] at the camp".[771] In so doing, it noted that it believed that those witnesses were not "credible or reliable *on this point*"[772] and set out its justification as follows:

> […] the Imanishimwe Defence witnesses are biased and self-interested because they previously served as soldiers under Imanishimwe's command and because acknowledging that civilians were brought to the camp would implicate them or their colleagues in the mistreatment.[773]

391. With specific reference to Imanishimwe's complaint that the Trial Chamber disregarded the testimony by Defence Witness Essono, which, according to him, demonstrated "the absurdity of Witness LI's account", the Appeals Chamber notes that the Trial Chamber had the opportunity to test Witness LI's credibility.[774] The Trial Chamber nonetheless accepted as credible Witness LI's allegations about the incarceration and the mistreatment of civilians by soldiers in Karambo camp at various times between April and July 1994,[775] as well as his escape.[776] It considered that the version of events given by Witness LI corroborated that of Witnesses MA and MG, who provided "similar first-hand and detailed accounts".[777] It is on the basis of this corroboration that the Trial Chamber found that soldiers had incarcerated and questioned civilians, and mistreated Witnesses LI and MG.

392. As regards Witness PNB, the Appeals Chamber notes that the Trial Chamber did not fail to take his testimony into consideration; rather it weighed the testimonies of Witnesses MG and PNB and found that Witness MG's testimony was more probative, as clearly shown in the Trial Judgement.[778]

393. The Appeals Chamber is of the view that the Trial Chamber applied the same treatment to the Defence witnesses and to Prosecution Witnesses LI and MG in assessing their credibility. After a balanced consideration of all Prosecution and Defence testimonies, and given that the testimonies of LI and MG corroborated one another,[779] the Trial Chamber accepted their credibility on the specific points of incarceration and mistreatment of civilians at various times between April and July 1994 by soldiers in Karambo camp.

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[769] For Witness PNC, see T.7 October 2002, pp. 40-43, pp. 46-47 and pp. 63-64 (closed session); for Witness PNE, see T.10 October 2002, pp. 16-17; for Witness PKB, see T.17 October 2002, pp. 4-6; for Witness PCD, see T.29 October 2002, pp. 52, 53 and 64-65; for Witness PCE, see T.30 October 2002, p. 42. Moreover, it was established that Witness PCC was on duty at the airport and that he had not gone to Karambo camp; see T.29 October 2002, p. 7 (closed session) and T.29 October 2002, p. 11.
[770] Trial Judgement, para. 400.
[771] *Ibid.*, para. 399. (A reading of the whole paragraph shows that the Trial Chamber refers in this sentence to the statements by Imanishimwe and his witnesses that no *civilian* was ever brought to or mistreated at the camp).
[772] Trial Judgement, para. 399 (emphasis added).
[773] *Ibid.*, para. 399.
[774] See, *inter alia*, T.30 January 2001, pp. 53-54 (closed session); T.30 January 2001, pp. 77-78.
[775] Trial Judgement, para. 392.
[776] *Ibid.*, paras. 692, 799.
[777] *Ibid.*, para. 398.
[778] *Ibid.*, para. 393.
[779] *Ibid.*, para. 398.

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394. For the above reasons, the Appeals Chamber finds that the Trial Chamber did not treat the witnesses differently when assessing their credibility, and that therefore it did not err in that regard.

2. Violation of the presumption of innocence

395. In his Appeal Brief, Imanishimwe contests the deductive approach adopted by the Trial Chamber, which, according to him, amounts to applying a presumption of guilt to Imanishimwe.[780] In support of this argument, Imanishimwe points to several findings made by the Trial Chamber on the basis of "speculations" and without sufficient evidence or despite evidence to the contrary: (1) Imanishimwe's presence during the raid at Kamembe on 6 June 1994;[781] (2) the order given by Imanishimwe to his soldiers to kill MG and his family[782] and (3) Imanishimwe's responsibility for the alleged murder of Witness LI's brother and a former classmate, as well as Witness MG's sister and her cellmate Mbembe.[783]

396. Imanishimwe denounces "the absurdity" of the two findings made by the Trial Chamber using this inferential approach, to the effect that: (i) the soldiers allegedly tried to have MG and his family killed by the *Interahamwe* when they could have done it themselves;[784] (ii) soldiers from Karambo camp, who were fewer and less fit, would, under Lieutenant Imanishimwe's command, went and pulled out people from the *gendarmerie* which was under the command of a Lieutenant-Colonel, and whose soldiers were more physically fit and had better logistical means.[785]

397. The Prosecution responds that the Trial Chamber was "entitled to rely on circumstantial evidence, or to draw reasonable inferences from given circumstances".[786] It contends that Imanishimwe failed to demonstrate that the Trial Chamber made unreasonable findings or in what way its inferences were tantamount to a violation of the principle of presumption of innocence. It adds that Imanishimwe reads the Trial Judgement piecemeal,[787] whereas the Trial Chamber duly applied an approach consistent with the established jurisprudence of the Tribunal. That approach consists in first considering the Prosecution evidence and assessing its reliability, and next considering the Defence evidence, which was not sufficient to cast reasonable doubt on the circumstances of the case.[788]

398. The Appeals Chamber recalls that the Trial Chamber has the inherent discretion to decide what approach it deems most appropriate for the assessment of evidence in the

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[780] Imanishimwe Appeal Brief, para. 171 (referring to para. 394 of the Trial Judgement), para. 172 (referring to paras. 656, 685, 735 of the Trial Judgement) para. 173 (referring to paras. 685, 735 of the Trial Judgement), para. 174 (referring to paras. 656, 685, 735 of the Trial Judgement), para. 175 (referring to paras. 655, 656, 687, 736, 739, 740 to 743, 746, 754 to 756, 761, 798, 801, 824 of the Trial Judgement) and para. 176.
[781] Imanishimwe Appeal Brief, para. 173.
[782] *Ibid.*, paras. 171-173.
[783] *Ibid.*, para. 175.
[784] *Ibid.*, para. 172.
[785] *Ibid.*, para. 173.
[786] Prosecution Response Brief, paras. 189, 214 (citing *Rutaganda* Appeal Judgement, paras. 577-581).
[787] Prosecution Response Brief, paras. 215-216.
[788] Prosecution Response Brief, paras. 185-187, referring to *Rutaganda* Appeal Judgement, paras. 177-178, para. 216.

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circumstances of the case;[789] however, "whenever such approach leads to an unreasonable assessment of the facts of the case, it becomes necessary to consider carefully whether the Trial Chamber did not commit an error of fact in its choice of the method of assessment or in its application thereof, which may have occasioned a miscarriage of justice".[790]

399. The Appeals Chamber recalls its findings in respect of the method of assessment of circumstantial evidence.[791] With regard to the inferential approach as a means of assessing circumstantial evidence, it refers to its previous exposition that the required standard of proof – beyond a reasonable doubt – necessitates that the accused can be found guilty on the basis of circumstantial evidence only where this is the sole possible reasonable inference from the available evidence. The same requirement must apply in inferring from the available evidence that there is an act upon which the accused's guilt depends and in inferring a finding upon which the accused's guilt depends from several distinct factual findings. [792]

400. The Appeals Chamber will now consider the specific findings challenged by Imanishimwe.

(a) Imanishimwe's presence during the search at Kamembe market

401. The Trial Chamber found that Imanishimwe was present at the Kamembe search on 6 June 1994 on the basis of MG's testimony,[793] which it held to be credible. The Appeals Chamber notes that in challenging this finding, Imanishimwe argues that the Chamber did not take into account (1) the account given by Defence witnesses, including Bagambiki, according to which the search was organized by the competent civilian authorities with the support of the *gendarmerie*; (2) the Decree of 23 January 1974[794] establishing the Rwandan National *Gendarmerie*. On this second point, Imanishimwe submits that the search on 6 June 1994 took place in accordance with the Decree, that is, according to him, under the authority of the commanding officer of the Cyangugu *Gendarmerie*.[795]

402. The Appeals Chamber notes in the first place that Imanishimwe mentions only Bagambiki as a Defence witness whose account would invalidate the finding that Imanishimwe was present at the Kamembe market search, without specifying the portion of the testimony that supports his contention. The Appeals Chamber notes further that Imanishimwe does not specify how the Defence witnesses' account could prove that Imanishimwe's presence at the search on 6 June 1994 was not established beyond a reasonable doubt. It notes, moreover, that Imanishimwe does not show, by his abstract, unelaborated reference to the 1974 Decree, that the Trial Chamber could reasonably have made a different finding when it found that Imanishimwe was present at the search on 6 June 1994.

403. The lack of precision and clarity of this submission, and of the references to the parts of the appeal record mentioned by Imanishimwe, do not permit the Appeals Chamber to

[789] *Rutaganda* Appeal Judgement, para. 28.
[790] *Kayishema and Ruzindana* Appeal Judgement, para. 119.
[791] See *supra,* paras. 304-306.
[792] See *supra*, para. 306.
[793] Trial Judgement, paras. 394, 405, 686, 735, 789; Witness MG, T.12 February 2001, pp. 13-19.
[794] Imanishimwe Appeal Brief, para. 173 (referring to Exhibit DIS12).
[795] Imanishimwe Appeal Brief, para. 173.

establish that the Trial Chamber could reasonably have made any finding other than that Imanishimwe was present at the Kamembe market search on 6 June 1994.

(b) Order given by Imanishimwe to his soldiers to kill MG and his family on their way to the *gendarmerie*

404. In order to assess whether the Trial Chamber's finding that Imanishimwe had ordered his soldiers to kill MG and his family needed to be established beyond a reasonable doubt, it must first be determined whether the order in question is an "an act upon which the Accused's guilt depends". In this regard, the Appeals Chamber notes that in making this submission, Imanishimwe is challenging the guilty verdict against him on the basis of Article 6(1) of the Statute for murder, torture and imprisonment, as crimes against humanity, and for serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.

405. A careful reading of the portion of the Trial Judgement on the Trial Chamber's legal findings reveals several references to the order which the Trial Chamber inferred was given by Imanishimwe to kill MG and his family on their way to the *gendarmerie*. The first reference appears in paragraph 656 of the Trial Judgement, in the analysis of Imanishimwe's responsibility. Together with other findings, it played part in the Trial Chamber's finding that "the Chamber finds that Imanishimwe can be held criminally responsible under Article 6(1) for ordering his subordinates to commit these acts".[796] The second reference appears in paragraph 686 of the Trial Judgement, under the Trial Chamber's consideration of the facts constituting genocide. There is a further reference to the disputed order in paragraphs 735 and 789 of the Trial Judgement, in the analysis of the offences constituting crimes against humanity and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II respectively.

406. First, the Appeals Chamber notes that the Trial Chamber mentions the order disputed by Imanishimwe in what can be regarded as an introductory summary,[797] before its analysis of the specific acts constituting crimes against humanity.

407. The Appeals Chamber notes that, to find Imanishimwe guilty of murder as a crime against humanity under Article 6(1) of the Statute, the Trial Chamber relied specifically on the murder of Witness LI's brother and his former classmate, and of Witness MG's sister and her cellmate Mbembe.[798] It did not rely on the attack on MG and his family when they were taken from Kamembe market to the *gendarmerie*, and hence the order allegedly given by Imanishimwe did not constitute a fact on which his guilt depended for that count. Consequently, the Appeals Chamber finds that the Trial Chamber was not required to establish this fact beyond a reasonable doubt.

408. As regards the guilty verdict for imprisonment as a crime against humanity under Article 6(1) of the Statute, the Appeals Chamber is of the view that an order for incarceration should be distinguished from an order for murder. While the first is clearly prohibited under imprisonment as a crime against humanity, the second cannot be considered in the same light,

[796] Trial Judgement, para. 656.
[797] *Ibid.*, paras 730-737.
[798] *Ibid.*, paras. 739, 740, 743.

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falling rather under murder as a crime against humanity. The Trial Chamber found Imanishimwe guilty on the count of imprisonment as a crime against humanity, and it noted the "incarceration of Witness LI and the six refugees arrested with him, Witness MG, his father, and two sisters, and Witness MA".[799] This finding, which is unrelated to the soldiers' attack on MG and his family just after the Kamembe market search, was not made on the basis of the order disputed by Imanishimwe, and his guilt for the crime of imprisonment was not based on that order.

409. In finding Imanishimwe guilty of torture as a crime against humanity, the Trial Chamber held as established that soldiers under Imanishimwe's effective control "partly in his presence mistreated seven refugees in their custody upon arresting them near Cyangugu Cathedral on 11 April 1994"[800] and that they "in his presence severely beat Witness MG and another detainee",[801] thus explicitly referring to mistreatment inflicted inside Karambo camp. Furthermore, the mistreatment inflicted is once again a different act from murder. For the count of torture as a crime against humanity and for the two other counts referred to earlier, the Appeals Chamber cannot regard the order given by Imanishimwe to kill MG and his family as an act on which Imanishimwe's guilt was based.

410. The Appeals Chamber considers that the same reasoning must apply to the guilty verdict against Imanishimwe for serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. The Trial Chamber makes reference to the order challenged by Imanishimwe in what must be regarded as an introductory summary,[802] before it analysis of the specific acts constituting serious violations under Article 4(a) of the Statute (murder, torture and cruel treatment). It did not, however, consider the attack on MG and his family when they were being taken from Kamembe market square to the *gendarmerie* under any of these three headings.

411. Accordingly, the Appeals Chamber cannot consider that the order given by Imanishimwe to kill MG and his family when they were being taken to the *gendarmerie* constitutes an act upon which Imanishimwe's guilt for serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II depended and to which the standard of the only reasonable inference should have been applied. Consequently, the Appeals Chamber rejects this argument and holds that the Trial Chamber was not required to establish this fact beyond a reasonable doubt because the conviction was based on other evidence.

(c) <u>Order given by Imanishimwe to kill Witness LI's brother and a former classmate, as well as Witness MG's sister and her cellmate Mbembe</u>

412. The Appeals Chamber notes first that Imanishimwe challenges in his Appeal Brief only the Trial Chamber's finding that Imanishimwe gave orders to his soldiers to kill Witness LI's brother and a former classmate, as well as Witness MG's sister and her cellmate

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[799] *Ibid.*, para. 756.
[800] *Ibid.*, para. 758.
[801] *Ibid.*, para. 759.
[802] *Ibid.*, paras. 784-791.

Mbembe.[803] He does not challenge the finding that he ordered the incarceration of the above-mentioned persons.

413. The Appeals Chamber must consider whether the disputed order for the murder of Witness LI's brother and a former classmate, as well as Witness MG's sister and her cellmate Mbembe, is an "act upon which the Accused's guilt depends". The Appeals Chamber will analyse below the guilty verdicts against Imanishimwe on the basis of Article 6(1) of the Statute in order to determine the standard of proof required to establish Imanishimwe's order for the murder of these persons.

414. The Appeals Chamber has already noted that the Trial Chamber explicitly based the convictions for murder as a crime against humanity on the order given to the soldiers by Imanishimwe to kill Witness LI's brother and a former classmate, as well as Witness MG's sister and her cellmate Mbembe.[804] That order must therefore be considered as an act upon which Imanishimwe's guilt depended for this count. Such a conclusion is equally imperative to the extent that, contrary to what was stated earlier about the order to kill MG and his family on their way to the *gendarmerie*, the order given by Imanishimwe to kill Witness LI's brother and a former classmate, as well as Witness MG's sister and her cellmate Mbembe, appears both in the introductory summary[805] that precedes the analysis of the acts constituting crimes against humanity and in the actual analysis of murder as a crime against humanity.[806]

415. In this respect, the Trial Chamber found that there was an order from Imanishimwe to kill Witness LI's brother and a former classmate, as well as Witness MG's sister and her cellmate Mbembe, on the basis of Witness LI's evidence.[807] It may reasonably be thought that several of the Trial Chamber's factual findings established on the basis of testimonies by several witnesses supported this finding:

- MG, his father and his two sisters were taken by soldiers to Karambo camp on 7 June 1994;[808]

- LI was arrested by soldiers on 11 April 1994 at the same time as his brother and a former classmate;[809]

- They were taken to Karambo camp where they were held together in captivity;[810]

- When they arrived at Karambo camp, Imanishimwe was there while soldiers mistreated them;[811]

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[803] Imanishimwe Appeal Brief, para. 175.
[804] See Trial Judgement, para. 743.
[805] *Ibid.*, para. 736.
[806] *Ibid.*, paras. 739, 740, 743.
[807] *Ibid.*, para. 392, 411 and 743.
[808] *Ibid.*, para. 395; T.12 February 2001, pp. 35 and 48.
[809] *Ibid.*, paras. 310, 392; T.30 January 2001, pp. 14-17; T.30 January 2001, pp. 44-45 (closed session).
[810] *Ibid.*, para. 392; T.30 January 2001, pp. 17-20; T.31 January 2001, pp. 9-10.
[811] *Ibid.*, para. 395; T.30 January 2001, pp. 17-21 and 84.

- During the mistreatment of LI by the soldiers, they threatened him with death;[812]

- During the mistreatment of LI by the soldiers, soldiers took away some refugees, and these did not return;[813]

- MG's sister was detained at Karambo camp in the same cell as Mbembe;[814]

- The name of MG's sister and that of Mbembe were called out one night during their incarceration at Karambo camp; they were subsequently taken away;[815]

- Since then, MG's sister had not been found, while Mbembe's body was found at Kadasomwa;[816]

- LI's brother and LI's former classmate are dead;[817]

- The soldiers at Karambo camp soldiers were under Imanishimwe's command.[818]

416. Having found that LI's brother and a former classmate,[819] as well as Witness MG's sister and her cellmate Mbembe,[820] had been killed at Karambo camp, the only inference made by the Trial Chamber from the factual findings was to find that the soldiers could not have participated in the murder of those persons "without Imanishimwe's knowledge and consent or orders".[821] Despite the vague – or even equivocal – nature of this formulation, the Appeals Chamber notes that it must be read in the light of paragraph 410 of the Trial Judgement, which clarifies it as follows: "the Chamber cannot accept that soldiers at the Karambo camp would have undertaken these activities, particularly on such a large scale, without orders from Imanishimwe."

417. Moreover, the Appeals Chamber stresses that to reach the conclusion that "Imanishimwe issued orders authorizing the arrest, detention, mistreatment, and execution of civilians with suspected ties to the RPF",[822] the Trial Chamber also took into account "the pattern and frequency of civilians being arrested and brought to the camp" and Imanishimwe's presence "during the detention and mistreatment of some of these civilians" as well as "the nature of a military command structure and hierarchy, the relatively small size of the camp, Imanishimwe's presence at the camp, Imanishimwe's testimony that he had control over the Karambo camp soldiers, the absence of any evidence suggesting that he

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[812] *Ibid.*, para. 392.
[813] *Ibid.*, para. 395; T.30 January 2001, p. 24.
[814] Trial Judgement, para. 395; T.13 February 2001, pp. 66-67.
[815] *Idem*.
[816] *Ibid.*, paras. 395, 396; T.13 February 2001, pp. 64-68.
[817] *Ibid.*, para. 392; T.30 January 2001, pp. 26-27.
[818] *Ibid.*, para. 392; T.30 January 2001, p. 18.
[819] Trial Judgement, para. 392.
[820] *Ibid.*, para. 396.
[821] *Ibid.*, para. 655. See also para. 656.
[822] *Ibid.*, para. 410. See also para. 687.

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lacked control over the soldiers, and the absence of any evidence of Imanishimwe preventing soldiers from mistreating civilians or punishing them for their abuse".[823]

418. For the foregoing reasons, the Appeals Chamber considers that a reasonable trier of fact could conclude that the only reasonable inference in the basis of the evidence was that Imanishimwe ordered the soldiers to kill Witness LI's brother and a former classmate, as well as Witness MG's sister and her cellmate Mbembe.

419. This conclusion in respect of Imanishimwe's conviction for murder as a crime against humanity also applies to the other convictions established on the basis of Article 6(1) of the Statute and renders moot the question whether the order to kill Witness LI's brother and a former classmate, as well as Witness MG's sister and her cellmate Mbembe, was also a determining factor in finding Imanishimwe guilty of torture and imprisonment as crimes against humanity and of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.

420. The Appeals Chamber thus considers that a reasonable trier of fact could arrive by inference at the conclusions challenged by Imanishimwe without violating Imanishimwe's presumption of innocence. Accordingly, the Appeals Chamber dismisses Imanishimwe's fifth ground of appeal.

D. Cumulative Convictions (3rd ground of appeal)

421. Imanishimwe submits that the Trial Chamber erred in entering multiple convictions based on Articles 2, 3 and 4 of the Statute.[824] He argues that in order to be concurrent, convictions must bear no relationship to one another: one must not be "special" in relation to the other, nor must it be the means of perpetrating the other or the "logical or natural consequence" of the other.[825]

422. In the first place, Imanishimwe takes issue with the Trial Chamber for convicting him, on the basis of the same facts, both of genocide under Article 2 of the Statute (Count 7) and of extermination as a crime against humanity under Article 3(b) of the Statute (Count 10). He argues that the two charges are not concurrent*, in that extermination is the means of perpetrating genocide, extermination being the "means crime" and genocide being the "end crime".[826] He further argues that the statutory provisions governing the two crimes defend the one and same value: "the sacred and inviolable nature of life and its protection against extermination".[827] Finally, he contends that the specific crime – genocide reason of its *mens rea* – should have been retained instead of general crime – extermination.[828] He also contends

[823] Trial Judgement, para. 410.
[824] Imanishimwe Notice of Appeal, paras. 17-20.
[825] Imanishimwe Appeal Brief, para. 110.
[826] *Ibid.*, paras. 111-116, 119. See also para. 122.
[827] *Ibid.*, para. 117, referring to *Kupreškić et al*. Trial Judgement, para. 694.
[828] *Ibid.*, paras. 118-120. In support of his argument, Imanishimwe refers to the *Kupreškić et al.* Trial Judgement, para. 707, and the following excerpt from the *Čelebići* Appeal Judgement, para. 413: "If a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision", Imanishimwe Appeal Brief, fn. 68. See also Imanishimwe Reply Brief, paras. 113-115.
* Translator's note: In the English version of the Appeal Brief, the word "not" is missing in the first sentence of paragraph 111.

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that the Trial Chamber committed an error by convicting him, on the basis of the same facts, of murder and torture as crimes against humanity under Articles 3(a) and 3(f) of the Statute (Counts 9 and 12) and of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II under Article 4(a) of the Statute (Count 13). He submits that Articles 3 and 4 of the Statute have the objective of ensuring the protection of the same "human values"[829] but also that the constitutive elements of the offences concerned are basically the same.[830]

423. To illustrate the prejudice he considers he suffered, Imanishimwe relies on the Separate and Dissenting Opinion of Judge Hunt and Judge Bennouna in the *Čelebići* Appeal Judgement, which refers to the social stigmatization inherent in being convicted of a crime and to the impact of cumulative convictions on the length of the sentence and on measures that may be taken while it is being served, for example early release.[831]

424. In response, the Prosecution submits that the Trial Chamber made no error in applying the principles that govern cumulative convictions.[832] It contends that the reasoning put forward by Imanishimwe stems from misinterpretation of the Appeals Chamber's jurisprudence on cumulative convictions. Relying on the test laid down in the *Čelebići* Appeal Judgement, the Prosecution affirms that multiple criminal convictions entered under different provisions of the Statute but based on the same conduct are permissible only if each provision involved has a materially distinct element not contained in the other.[833] The Prosecution then recalls that the Appeals Chamber has on several occasions considered that multiple convictions under Articles 2 and 3(b) of the Statute based on the same facts are possible, as each of the crimes has a materially distinct element not contained in the other, namely specific intent in the case of Article 2 and the existence of a "widespread or systematic attack against a civilian population" in the case of Article 3(b).[834] With regard to the convictions on the basis of the same facts pursuant to Articles 3 and 4 of the Statute, the Prosecution submits that they may be cumulative, as each of these provisions contains a materially distinct element: while Article 3 requires proof of the existence of a widespread or systematic attack against a civilian population, Article 4 requires proof of the existence of a nexus between the alleged crimes and the armed conflict.[835]

425. In line with the principles laid down in the *Čelebići* Appeal Judgement, the Appeals Chamber has already established that cumulative convictions entered under different provisions of the Statute but based on the same facts are permissible only if each of the provisions involved has a materially distinct constitutive element not contained in the

[829] Imanishimwe Appeal Brief, para. 138, referring to *Čelebćći* Appeal Judgement, para. 149.
[830] *Ibid.*, paras. 139-140.
[831] *Ibid.*, paras. 125 and 137, citing the Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, *Čelebići* Appeal Judgement, para. 23.
[832] Prosecution Response Brief, para. 136.
[833] *Ibid.*, paras. 140-141, citing *Čelibići* Appeal Judgement, paras. 412-413, and referring, *inter alia*, to *Musema* Appeal Judgement, paras. 358-370; *Rutaganda* Appeal Judgement, paras. 582-583; *Ntakirutimana* Appeal Judgement, para. 542; *Kordi}* and *Čerkez* Appeal Judgement, paras. 1032-1033.
[834] Prosecution Response Brief, paras. 141-142, referring to *Musema* Appeal Judgement, paras. 369-370; *Krstić* Appeal Judgement, paras. 219-227; *Ntakirutimana* Appeal Judgement, para. 542.
[835] Prosecution Response Brief, para. 151, referring to *Rutaganda* Appeal Judgement, para. 583.

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other.[836] An element is materially distinct from another if it requires proof of a fact that is not required by the other.[837]

426. The Appeals Chamber emphasizes that, having accepted Imanishimwe's first ground of appeal and accordingly having set aside his convictions under Article 6(3) of the Statute for the events at the Gashirabwoba football field, the question of cumulative convictions for genocide (Article 2 of the Statute) and extermination as a crime against humanity (Article 3(b) of the Statute) has become moot. Nevertheless, the Appeals Chamber wishes to recall that it has already established that multiple convictions may be entered for genocide and crime against humanity based on the same facts, as each of these crimes has a materially distinct constitutive element that is not contained in the other: "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" for the former, and the existence of a "widespread or systematic attack against a civilian population" for the latter.[838]

427. With regard to the convictions under Articles 3 and 4 of the Statute on the basis of the same facts, the Appeals Chamber observes that each of them requires a materially distinct element not required for the other. Whereas conviction under Article 3 requires proof of a widespread or systematic attack against a civilian population, conviction under Article 4 requires the existence of a nexus between the acts in question and the armed conflict.[839] The Appeals Chamber finds that the Trial Chamber committed no error by entering cumulative convictions under Articles 3 (murder and torture) and 4 (murder and cruel treatment) of the Statute based on the same set of facts.

428. Imanishimwe's third ground of appeal is dismissed.

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[836] See *Musema* Appeal Judgement, paras. 358-370, citing, *inter alia, Čelebići* Appeal Judgement, paras. 412-413. See also *Ntakirutimana* Appeal Judgement, para. 542; *Semanza* Appeal Judgement, para. 315.
[837] *Čelebići* Appeal Judgement, para. 412. See also *Musema* Appeal Judgement, paras. 361-363. The criterion was clarified in the *Kunarac* Appeal Judgement, paras. 168-174. See also *Krstić* Appeal Judgement, para. 218; *Ntakirutimana* Appeal Judgement, para. 542.
[838] See *Musema* Appeal Judgement, paras. 365-367, 370; *Ntakirutimana* Appeal Judgement, para. 542; *Semanza* Appeal Judgement, para. 318; see also *Krstić* Appeal Judgement, paras. 219-227.
[839] *Rutaganda* Appeal Judgement, para. 583.

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V. GROUNDS RELATING TO THE SENTENCE

A. Introduction

429 Under Article 24 of the Statute, the Appeals Chamber may "affirm, reverse or revise" a sentence imposed by a Trial Chamber. However, the Appeals Chamber recalls that Trial Chambers exercise a considerable amount of discretion in determining appropriate sentencing. This stems largely from their obligation to individualize a penalty to fit the individual circumstances of the accused and the gravity of the crime.[840] As a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a discernible error in exercising its discretion, or has failed to follow the applicable law.[841]

430. The factors that a Trial Chamber is obliged to take into account in sentencing a convicted person are set forth in Article 23 of the Statute and Rule 101 of the Rules. Under Rule 101(B)(ii), a Trial Chamber is legally required to take into account any mitigating circumstances. However, what constitutes a mitigating circumstance[842] and the weight to be accorded thereto[843] is a matter for the Trial Chamber to determine in the exercise of its discretion.

431. The Trial Chamber sentenced Imanishimwe to two concurrent terms of 15 years' imprisonment for his convictions pursuant to Article 6(3) of the Statute[844] for genocide (Count 7) and extermination as a crime against humanity (Count 10) in relation to the killings perpetrated by his subordinates at the Gashirabwoba football field. For the convictions under Counts 9, 11, 12 and 13,[845] it imposed concurrent sentences of 10, 3, 10 and 12 years imprisonment respectively,[846] giving a total term of 27 years' imprisonment.[847] In doing so, the Trial Chamber considered relevant sentencing practices, Rwandan law, as well as Imanishimwe's individual circumstances.[848] It further determined that the command role played by Imanishimwe in Cyangugu prefecture constituted an aggravating factor,[849] and noted the failure by Imanishimwe to present any submissions concerning "significant personal, medical or other relevant circumstances that could influence sentencing" in his favour.[850] The Trial Chamber did not consider his background, as submitted, to constitute a mitigating factor.[851]

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[840] *Naletili} and Martinovi}* Appeal Judgements, para. 593, referring to the *^elebi}i* Appeal Judgement, para. 717.
[841] *Naletili} and Martinovi}* Appeal Judgement, para. 593 ; *Musema* Appeal Judgement, para. 379; *Tadi}* Sentencing Appeal Judgement, para. 22; *Joki}* Sentencing Appeal Judgement, para. 8.
[842] *Musema* Appeal Judgement, para. 395.
[843] *Ibid.*, para. 396; *^elebi}i* Appeal Judgement, para. 775*; Kambanda* Appeal Judgement, para. 124.
[844] Trial Judgement, paras. 821-823.
[845] Murder (Count 9), imprisonment (Count 11) and torture (Count 12) as crimes against humanity under Article 6(1) of the Statute and serious violations of Article 3 Common to the Geneva Conventions for murder, torture and cruel treatment (Count 13) under Articles 6(1) and 6(3) of the Statute.
[846] Trial Judgement, para. 825.
[847] *Ibid.*, para. 827.
[848] *Ibid.*, para. 822.
[849] *Ibid.*, para. 819.
[850] *Ibid.*, para. 820.
[851] *Idem*.

B. Increase in sentence imposed for Genocide and Extermination (Prosecution's 11th ground of appeal)

432. The Prosecution submits under its eleventh ground of appeal that the Trial Chamber committed a discernable error in sentencing Imanishimwe to 15 years' imprisonment for Genocide and Extermination.[852]

433. The Appeals Chamber has accepted Imanishimwe's first ground of appeal and set aside his convictions under Article 6(3) of the Statute for the events at the Gashirabwoba football field. These were his only convictions for genocide and extermination as a crime against humanity. Accordingly, this ground of appeal has become moot, and the Appeals Chamber declines to discuss it further.

C. Consideration given to mitigating factors (Imanishimwe's 6th ground of appeal)

434. Imanishimwe submits under his sixth ground of appeal that the Trial Chamber erred in fact by failing to consider all mitigating factors in Imanishimwe's favour. Imanishimwe contends that the mitigating factors were dismissed because they were not pleaded in his closing argument.[853] He notes that in light of the Trial Chamber's request for brevity, given the detailed written submissions provided by both parties in their Closing Briefs,[854] he decided to address the Prosecution's closing arguments rather than rehash arguments relating to mitigation set out in his written submissions.[855] Imanishimwe makes reference to the relevant paragraphs in his Closing Brief, emphasising that his non-involvement in any previous criminal activity, his young age and his relatively low rank in the Rwandan military hierarchy constitute mitigating circumstances which should have been taken into account in determining his sentence.[856]

435. The Prosecution submits that none of the factors offered in mitigation of sentence could carry any weight given the crimes committed and Imanishimwe's role in their commission.[857] The Prosecution maintains that even if it were accepted that there were mitigating factors in Imanishimwe's favour that were not considered, such omission is inconsequential, in light of "the seriousness of the crimes he perpetrated, his active participation in those crimes, and his position of command and authority that he abused".[858]

436. Although the Trial Chamber has an obligation to take any mitigating circumstances into account in determining the appropriate sentence, the weight to be accorded to such circumstances lies within the discretion of a Trial Chamber, which is under no obligation to set out in detail each and every factor relied upon.[859] The Appeals Chamber notes that the Trial Chamber nonetheless expressly refers to Imanishimwe's Closing Brief in its discussion

[852] Prosecution Appeal Brief, para. 430.
[853] Imanishimwe Appeal Brief, paras. 178-184.
[854] *Ibid.*, para. 179, referring to the hearing of 11 August 2003.
[855] *Ibid.*, para. 180.
[856] *Ibid.*, paras. 181-184.
[857] Prosecution Response Brief, para. 232.
[858] Prosecution Response Brief, para. 231.
[859] *Kupreški~ et al.* Appeal Judgement, para. 430.

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of mitigating circumstances [860] and that this constitutes *prima facie* evidence that Imanishimwe's submissions were taken into account.[861]

437. Thus, the Appeals Chamber notes that specific reference is made to paragraphs 31 and 33 of Imanishimwe's Closing Brief in which his educational and professional background is presented. These paragraphs form part of a section of the Closing Brief which seeks to provide an objective presentation of Imanishimwe [862] under the title "Presenting the Accused", and includes other paragraphs describing his allegedly low rank within the Rwandan military,[863] the insignificance of the Karambo camp,[864] his previous lack of a criminal record,[865] and the fact that he was a young officer.[866] These are the factors Imanishimwe contends the Trial Chamber ought to have taken into account in mitigation of his sentence.[867] Although the Trial Chamber does not expressly refer to paragraphs 1203 and 1204 of Imanishimwe's Closing Brief, included under the heading "Mitigating Factors: First Offender", the substance of those paragraphs is subsumed within the section "Presenting the Accused".[868] There is therefore no reason to conclude that these submissions were not duly considered by the Trial Chamber.

438. The Appeals Chamber finds that the wording of paragraph 820 of the Trial Judgement that the "Defence made no sentencing submissions" simply reflects the fact that no oral sentencing submissions were made and not, as submitted by Imanishimwe, that his sentencing submissions were overlooked in their entirety.

439. The fact that the Trial Chamber decided that there were insufficient reasons to conclude that there were any mitigating factors in this case was within its discretion.[869] The factors referred to, namely, Imanishimwe's background, his "young" age at the time the crimes were committed, his lack of a previous criminal record, and his allegedly low rank within the greater Rwandan military hierarchy, are not such as to affect the sentence imposed on Imanishimwe. The lack of a previous criminal record is a common characteristic among many accused persons which is accorded little if any weight in mitigation absent exceptional circumstances.[870] Imanishimwe was 32 years old when he participated in the crimes[871] and it might be considered that the Trial Chamber, in underscoring the principle of gradation in

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[860] Trial Judgement, fn. 1685.
[861] *Joki}* Sentencing Appeal Judgement, para. 53; *Kupreški} et al.* Appeal Judgement, para. 430.
[862] Imanishimwe Closing Brief, paras. 30-42.
[863] *Ibid.*, paras. 34-37.
[864] *Ibid.*, para. 38.
[865] *Ibid.*, paras. 39-40.
[866] *Ibid.*, para. 41.
[867] Imanishimwe Appeal Brief, paras. 182-183.
[868] This is highlighted by Imanishimwe himself. See Imanishimwe Appeal Brief, paras. 181-183.
[869] *Kamuhanda* Appeal Judgement, para. 354.
[870] *Babi}* Sentencing Appeal Judgement, paras. 49-50; *Banovi}* Sentencing Judgement, para. 75; *Furund`ija* Trial Judgement, para. 284.
[871] By way of example young age was considered in the following cases: Dra`en Erdemovi} was 23, *Erdemovi}* Appeal Judgement, para. 16(i); Anto Furund`ija was 23, *Furund`ija* Trial Judgement, para. 284; and Esad *Land`o* was 19, *^elebi}i* Trial Judgement, para. 1283. In *Kvočka et al*. Milojica Kos' young age was taken into account. He was 29 years old. The Trial Chamber noted that he was the youngest of his co-accused, and had little experience and training as a police officer at the time he took up his duties in the camp. It also found that because he did not hold a position of high esteem in the community prior to his position in Omarska, he likely would not have been a role model for the guards and thus his silence would not carry the same degree of complicity in encouraging or condoning crimes. *Kvočka et al*. Trial Judgement, para. 732.

sentencing, would have taken into account his relative position of authority in this connection.[872]

440. The Appeals Chamber finds that Imanishimwe has not shown that the Trial Chamber failed to consider his submissions on individual and mitigating circumstances or that its discretion was improperly exercised, such that his sentence should be reduced.

441. For the foregoing reasons, the Appeals Chamber dismisses Imanishimwe's sixth ground of appeal in its entirety.

D. Consequences of the Appeals Chamber's conclusions

442 The Appeals Chamber recalls having set aside the convictions entered against Imanishimwe on the basis of Article 6(3) of the Statute for the crimes committed at the Gashirabwoba football field for genocide (Count 7 of the Bagambiki/Imanishimwe Indictment).[873] Therefore, the sentences pronounced by the Trial Chamber under Counts 7 and 10 – two concurrent sentences of 15 years to be served consecutively with the other sentences pronounced under the other counts[874] – must be set aside.

443. Having rejected the grounds of appeal relating thereto,[875] the Appeals Chamber upholds the convictions entered on the basis of Article 6(1) of the Statute for murder (Count 9 of the Bagambiki/Imanishimwe Indictment), imprisonment (Count 12 of the Bagambiki/Imanishimwe Indictment) and torture (Count 12 of the Bagambiki/Imanishimwe Indictment) as crimes against humanity. The Appeals Chamber therefore upholds the concurrent sentences of 10, 3 and 10 years pronounced respectively for those Counts.[876]

444. Having found Imanishimwe guilty of murder, torture and cruel treatment constituting serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 13 of the Bagambiki/Imanishimwe Indictment) on the basis of Articles 6(1) and 6(3) of the Statute,[877] the Appeals Chamber sentences Imanishimwe to 12 years imprisonment to run concurrently with the sentences pronounced under Counts 9, 11 and 12.[878] The Appeals Chamber recalls having set aside the conviction entered under that Count on the basis of Article 6(3) of the Statute for the crimes committed at the Gashirabwoba[879] football field, and upheld the sentence pronounced on the basis of Article 6(1) of the Statute.[880] Given the seriousness of the crimes of which Imanishimwe was found guilty under Article 6(3) of the Statute, the Appeals Chamber considers that it is needless to reconsider the sentence of 12 years pronounced under Count 13 following the setting aside of the conviction entered on the basis of Article 6(1) of the Statute. The Appeals Chamber is of the unanimous opinion that partial review of the verdict does not affect the 12 years sentence that is to run concurrently with the other sentences pronounced under Counts 9, 11,

[872] Trial Judgement, paras. 815-816.
[873] See *supra*, para. 165.
[874] Judgement, paras. 822,. 823 and 827.
[875] See *supra*, paras. 420 and 428.
[876] Judgement, para. 825.
[877] For separate acts.
[878] Judgement, para. 825.
[879] See *supra*, para. 165.
[880] See *supra*, paras. 420 and 428.

12 and imposed by the Trial Chamber under Count 13. By a majority, with Judge Schomburg dissenting, the Appeals Chamber concludes that the total sentence imposed on Imanishimwe is 12 years.

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VI. 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 hearings on 6 and 7 February 2006;

SITTING in open session;

RECALLS having unanimously dismissed the grounds of appeal raised by the Prosecutor against the Judgement in respect of André Ntagerura and Emmanuel Bagambiki and upheld their acquittal in the Disposition of the Appeal Judgement on the Prosecutor's appeal against the acquittal of André Ntagerura and Emmanuel Bagambiki pronounced on 8 February 2006;

DISMISSES, unanimously, the other grounds of appeal raised by the Prosecutor;

GRANTS, unanimously, the first ground of appeal raised by Samuel Imanishimwe against the convictions entered against him on the basis of Article 6(3) of the Statute for the events that occurred at the Gashirabwoba football field;

SETS ASIDE, accordingly, the convictions entered against Samuel Imanishimwe on the basis of Article 6(3) of the Statute for the crimes of genocide, extermination as crime against humanity, and serious violations of Article 3 Common to the Geneva Conventions and Additional Protocol II under Counts 7, 10 and 13 of the Bagambiki/Imanishimwe Indictment;

FINDS moot the second and fourth grounds of appeal raised by Samuel Imanishimwe against the convictions entered against him on the basis of Article 6(3) of the Statute for the events that occurred at the Gashirabwoba football field;

DISMISSES, unanimously, the third, fifth and sixth grounds of appeal raised by Samuel Imanishimwe regarding the cumulative convictions, the assessment of the evidence relating to the Karambo military camp, and the sentence;

UPHOLDS, unanimously, the convictions entered against Samuel Imanishimwe on the basis of Article 6(1) of the Statute for murder, imprisonment and torture as crimes against humanity under Counts 9, 11 and 12 of the Bagambiki/Imanishimwe Indictment and for murder, torture and cruel treatment constituting serious violations of Article 3 Common to the Geneva Conventions and Additional Protocol II under Count 13 of the Bagambiki/Imanishimwe Indictment;

REVERSES, unanimously, the two concurrent sentences of 15 years' imprisonment pronounced against Samuel Imanishimwe for genocide and extermination as crime against humanity under Counts 7 and 10 of the Bagambiki/Imanishimwe Indictment to be served consecutively with the other sentences pronounced under the other Counts;

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UPHOLDS the four concurrent sentences of 10, 3, 10 and 12 years' imprisonment pronounced against Samuel Imanishimwe under Counts 9, 11, 12 and 13 of the Bagambiki/Imanishimwe Indictment giving, with Judge Schomburg dissenting, a total term of 12 years' imprisonment;

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

ORDERS, in accordance with Rules 103(B) and 107 of the Rules of Procedure and Evidence, that Samuel Imanishimwe remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State where he will serve his sentence.

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

[Signed] [Signed] [Signed]

Fausto Pocar
Presiding

Mehmet Güney
Judge

Andrésia Vaz
Judge

[Signed] [Signed]

Theodor Meron
Judge

Wolfgang Schomburg
Judge

Judge Schomburg has appended a dissenting opinion to this Judgement.

Delivered on 7 July 2006 at Arusha, Tanzania.

[Seal of the Tribunal]

VII. JUDGE SCHOMBURG'S DISSENTING OPINION

1. I concur entirely with the decision concerning André Ntagerura and Emmanuel Bagambiki.

2. However, I am of the opinion that not only is the Indictment against André Ntagerura vague, but it must also be declared null and void as none of the crimes with which the Accused is charged is sufficiently pleaded and the scope of the charges is not sufficiently defined. Thus, the Indictment against André Ntagerura does not satisfy the two main functions of any indictment, namely:

- informing the accused of the charges against him or her (*information function* which enshrines the fundamental right to be heard) and

- limiting the individual and material scope of the charges (*limitation function*)

The Indictment against Emmanuel Bagambiki and Samuel Imanishimwe satisfies these basic functions only in respect of some counts.

3. Moreover, if these documents are considered to be partly or entirely void, it should be noted that it is not for the Appeals Chamber to determine if the maxim *ne bis in idem* (a person shall not be tried or punished twice for the same crime)[1] applies to the instant case. It is for the Prosecutor of this Tribunal,[2] first, (cf. Article 8 of the Statute) or any other representative of the public prosecutor's office within a competent jurisdiction, to try the crimes in question, determine the timeliness of commencing fresh criminal proceedings on the basis of a new indictment to the extent that the principle of *res judicata* does not bar the re-prosecution of André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe.[3]

4. May I recall that André Ntagurera was acquitted solely - and Emmanuel Bagambiki and Samuel Imanishimwe were mainly acquitted – on procedural grounds, for, to some extent, there was no indictment - the primary accusatory instrument – that could be cured. Absent such indictment, there cannot be a trial or, in any event, a fair trial, for the principle of fairness also takes into account the interests of victims and their families.

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[1] In principle, this maxim is applicable only to the same country/State. See for example Article 14(7) of the International Convention on Civil and Political Rights and Article 4 of Protocol No. 7 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ETS No. 17). It became internationally applicable by means, *inter alia*, of Article 54 of the Convention on the Implementation of the Schengen Agreement of 14 June 1985 between the Governments of the Benelux Economic Union, the Federal Republic of Germany and the Republic of France on the gradual elimination of control on the common borders, signed in Schengen on 19 June 1990 (CISA). Cf. Case No. C. 436/04 (Case of *Belgium v. Van Esbroeck*) Court of Justice of the European Communities, Judgement of 9 March 2006 (http://www.curia.eu.int), point 2 of the disposition: ["the existence of a body of inextricably linked facts, independently of the legal characterization of such facts or of the protected legal interest …"]

[2] The same supranational court/tribunal by analogy to the "same country/State"?

[3] For a distinction of formal defects (see *supra*, para. 2, line 2) resulting in acquittal on grounds of procedural defects, and the other defects tainting the indictment, see *Meyer-Goßner*, Strafprozessordnung, 49th ed., Munich 2006, para. 200, Nos. 26 and 27, referring to the case-law of Federal Court of Germany (Bundesgerichtshof).

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

Delivered on 7 July 2006 at Arusha, Tanzania.

[Signed]

Wolfgang Schomburg
Judge

[Seal of the Tribunal]

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ANNEX A: PROCEDURAL BACKGROUND

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

A. Filing of briefs

2. The Trial Judgement was delivered on 25 February 2004.

1. The Prosecution's Appeal

3. The Prosecution filed its Notice of Appeal on 25 March 2004 and its Appeal Brief on 8 June 2004. After having been granted an extension of time to file their respective Respondent's Briefs on 24 June 2004,[1] Bagambiki and Ntagerura each filed a "Response" to the Prosecution Notice of Appeal on 8 October 2004.[2] Because of substantial translation errors in the French translation of the Trial Judgement, the Pre-Appeal Judge ordered two weeks later the suspension of the time-limits for filing the appeal briefs until a new certified French version of the Trial Judgement was served on the Parties.[3] On 10 November 2004, at the request of the Prosecution,[4] the Pre-Appeal Judge ruled that Bagambiki and Ntagerura's Responses were inadmissible, on the ground that neither the Rules nor the Practice Directions applicable to appeal proceedings provided for a response to a notice of appeal.[5] In the said Decision, the Pre-Appeal Judge reminded Bagambiki and Ntagerura that their Respondent's Briefs should be filed within 20 days of the notification of the new certified French version of the Trial Judgment. Imanishimwe, Bagambiki and Ntagerura subsequently filed their Respondent's Briefs on 14, 16 and 17 February 2005, respectively. The Prosecution filed its Brief in Reply on 3 March 2005.

2. Samuel Imanishimwe's Appeal

4. On 3 March 2004, Imanishimwe filed a motion seeking an extension of time for filing both his Notice of Appeal and Appellant's Brief on the ground that he had not yet received the Trial Judgement in a language that he and his Counsel understood, namely, French.[6] On 24 March 2004, the Pre-Appeal Judge granted the requested extension, ordering

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[1] *Décision relative à la Requête d'André Ntagerura pour le report du délai de dépôt du Mémoire de l'Intimé*, 24 June 2004 ; *Décision relative à la Requête de la Défense d'Emmanuel Bagambiki en vue du report du délai de dépôt du Mémoire de l'Intimé*, 24 June 2004. See also *Décision relative à la Requête de Samuel Imanishimwe aux fins de prorogation des délais de dépôt du Mémoire de l'Intimé*, filed on 16 July 2004, whereby the Pre-Appeal Judge granted the same extension of time to Imanishimwe.

[2] *Réponse de l'Intimé André Ntagerura à l'Acte d'appel du Procureur selon l'article 2 de la Directive pratique relative à la procédure de dépôt des écritures en appel devant le Tribunal*, 8 October 2004; *Réponse de la Défense de Monsieur Emmanuel Bagambiki à l'Acte d'appel du Procureur conformément au paragraphe 2 de la Directive pratique relative à la procédure de dépôt des écritures en appel devant le Tribunal,* 8 October 2004 (together "Responses").

[3] *Ordonnance*, 21 October 2004.

[4] Prosecutor's Urgent Motion for Rejection of the Responses to the Prosecutor's Notice of Appeal filed by Respondents André Ntagerura and Emmanuel Bagambiki, 12 October 2004.

[5] *Décision (Requête urgente du Procureur aux fins de rejet des réponses à l'Acte d'appel du Procureur, Requête de la Défense d'Emmanuel Bagambiki en vue du report de délai de dépôt de sa réponse)*, 10 November 2004.

[6] Extremely Urgent Motion for Extension of Time Limit for filing a Notice of Appeal and an Appellant's Brief against the Judgement of 25 February 2004 entered against Samuel Imanishimwe – Rule 3, 108 and 116 of the Rules of Procedure and Evidence and Article 20 of the Statute, 3 March 2004.

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Imanishimwe to file his Notice of Appeal no later than 30 days from the day the French version of the Trial Judgement was served on him, and his Appellant's Brief within 75 days of the filing of his Notice of Appeal.[7] Imanishimwe filed his Notice of Appeal on 2 September 2004. On 21 October 2004, because of some substantial translation errors in the French version of the Trial Judgement, the Pre-Appeal Judge ordered the suspension of the time-limits for filing the Appeal Briefs until a new certified French version of the Trial Judgement was served on the Parties.[8] Imanishimwe's Appeal Brief was filed on 25 February 2005 and the Prosecution Response Brief on 5 April 2005. Following a motion seeking an extension of time,[9] Imanishimwe was given 15 days from the day the French version of the Prosecution Response Brief was served on him to file his Brief in Reply.[10] He eventually filed his Brief in Reply on 12 July 2005.

B. Assignment of Judges

5. On 23 March 2004, the following Judges were assigned to hear the appeal of Imanishimwe: Judge Theodor Meron, Presiding Judge; Judge Florence Mumba; Judge Mehmet Güney; Judge Fausto Pocar; and Judge Inés Mónica Weinberg de Roca.[11] Judge Mehmet Güney was designated as the Pre-Appeal Judge.[12] Following the filing of the Prosecution Notice of Appeal, the Presiding Judge of the Appeals Chamber ordered on 29 March 2004 that both appeals be heard as a single case by the same bench.[13] On 25 January 2005, Judge Wolfgang Schomburg was assigned to replace Judge Theodor Meron.[14] On 15 July 2005, Judge Andrésia Vaz was assigned to replace Judge Inés Mónica Weinberg de Roca.[15] Judge Mehmet Güney then became Presiding Judge. Having become Presiding Judge of the Appeals Chamber on 17 November 2005, Judge Fausto Pocar became Presiding Judge in the matter. On 18 November 2005, Judge Theodor Meron was assigned to replace Judge Florence Mumba.[16]

C. Additional Evidence

6. On 10 May 2004, the Prosecution filed a motion pursuant to Rule 115 of the Rules for the admission of two witness statements as additional evidence.[17] In Decisions rendered on 18 and 19 May 2004, the Pre-Appeal Judge granted leave to Bagambiki and Ntagerura to file their Response to said motion within 10 days of their being served with the French

[7] Decision on "*Requête en extrême urgence aux fins de prorogation des délais de dépôt de l'Acte d'appel et du Mémoire en appel contre le Jugement rendu le 25 février 2004 contre Samuel Imanishimwe*", 24 March 2004.
[8] *Ordonnance*, 21 October 2004.
[9] *Requête aux fins de suspension du délai de dépôt de la duplique* [*sic*] *de Samuel Imanishimwe conformément aux articles 20 du Statut, 3, 113 et 116 du Règlement de procédure et de preuve*, 11 April 2005.
[10] *Décision relative à la Requête de Samuel Imanishimwe aux fins de suspension du délai de dépôt du Mémoire en réplique*, 13 April 2005.
[11] Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 23 March 2004.
[12] *Idem*.
[13] *Ibid.*, 29 March 2004.
[14] Order of the Presiding Judge Replacing a Judge in a Case before the Appeals Chamber, 25 January 2005.
[15] Order Replacing a Judge in a Case Before the Appeals Chamber, 15 July 2005.
[16] *Ibid.*, 18 November 2005.
[17] Prosecution Motion for Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 10 May 2004.

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translation.[18] On 2 June 2004, the Pre-Appeal Judge issued an order enjoining the Prosecution to file confidentially a new motion appending the unredacted versions of the two witness statements of which it sought admission, and inviting the Prosecution to attach to this new motion the up-to-date details justifying the protective measures requested.[19] Pursuant to this order, the Prosecution filed on 7 June 2004 the unredacted versions of statements by the two witnesses under seal.[20] On the same day, the Prosecution filed a motion in which it renewed its application for protective measures for the two witnesses.[21] On 10 December 2004, the Appeals Chamber denied the motion for additional evidence on the ground that it was not persuaded that, had the evidence of the two witnesses been adduced at trial, it would have changed the outcome of the trial.[22]

D. <u>Hearing of the Appeal</u>

7. The appeal hearing was held in Arusha/Tanzania on 6 and 7 February 2006. On 8 February 2006, after the closing of the appeal hearing, the Appeals Chamber confirmed Ntagerura's and Bagambiki's acquittal.[23] The Appeals Chamber dismissed the Prosecution's grounds of appeal against Ntagerura's and Bagambiki's acquittal, indicating that the reasons for this decision would be delivered at the same time as the Appeal Judgement on the Prosecution's remaining grounds of appeal and on Imanishimwe's appeal.[24]

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[18] *Décision relative à la requête de la Défense d'Emmanuel Bagambiki en vue du report du délai du dépôt de la réponse à une requête du Procureur*, 18 May 2004; *Décision relative à la requête d'André Ntagerura pour report du délai de réponse à la requête du Procureur*, 19 May 2004.
[19] *Ordonnance*, 2 June 2004.
[20] Witness Statements Filed Confidentially in Relation to Prosecution's Motion for Additional Evidence under Rule 115, Under Seal, 7 June 2004.
[21] Prosecution Motion for Protective Measures for Witnesses whose Evidence is being tendered under Rule 115, 7 June 2004.
[22] Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004.
[23] *Dispositif de l'Arrêt concernant l'appel du Procureur s'agissant de l'acquittement d'André Ntagerura et Emmanuel Bagambiki*, 8 February 2006.
[24] *Dispositif de l'Arrêt concernant l'appel du Procureur s'agissant de l'acquittement d'André Ntagerura et Emmanuel Bagambiki*, 8 February 2006.

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ANNEX B: GLOSSARY

A. Defined Terms

1. Filings of the parties

Imanishimwe Notice of Appeal	Notice of Appeal from the Judgement and Sentence pronounced against Samuel Imanishimwe filed pursuant to Article 24 of the Statute, Rule 108 of the Rules of Procedure and Evidence and the Decision rendered on 24 March 2004, filed on 2 September 2004
Prosecution Notice of Appeal	Prosecutor's Notice of Appeal, filed on 25 March 2004
Imanishimwe Appeal Brief	Appellant's Brief on the Judgement and Sentence passed on Samuel Imanishimwe filed pursuant to Article 24 of the Statute, Rule 111 of the Rules of Procedure and Evidence, and the Order issued by the Pre-Appeal Judge on 21 October 2004, filed on 25 February 2005
Prosecution Appeal Brief	Prosecutor's Brief, filed on 8 June 2004
Bagambiki Response Brief	Emmanuel Bagambiki's Defence Brief in Response to the Prosecutor's Appellant's Brief, filed on 16 February 2005
Imanishimwe Response Brief	Respondent's Brief of Samuel Imanishimwe filed pursuant to Rule 112 of the Rules of Procedure and Evidence and to the Pre-Appeal Judge's Order of 21 October 2004, filed on 14 February 2005
Ntagerura Response Brief	Brief of Respondent André Ntagerura filed pursuant to Rule 112 of the Rules of Procedure and Evidence, filed on 17 February 2005
Prosecution Response Brief	Prosecutor's Respondent's Brief, filed on 5 April 2005
Imanishimwe Brief in Reply	Appellant Samuel Imanishimwe's Brief in Reply to the Respondent's Brief, filed pursuant to Article 24 of the Statute and Rule 113 of the Rules of Procedure and Evidence, filed on 12 July 2005
Prosecution Brief in Reply	Appellant's Brief in Reply, filed on 3 March 2005

2. Other References relating to the instant case

Bagambiki/Imanishimwe Initial Indictment	*The Prosecutor v. Bagambiki, Imanishimwe and Munyakazi*, Case No. ICTR-97-36-I, Indictment submitted on 9 October 1997 and confirmed on 10 October 1997
Bagambiki/Imanishimwe Indictment	Bagambiki/Imanishimwe Initial Indictment completed by the Amended Paragraph 3.14, submitted on 29 January 1998

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Ntagerura Initial Indictment	*The Prosecutor v. Ntagerurai*, Case No. ICTR-96-10-I, Indictment submitted on 9 August 1996 and confirmed on 10 August 1996
Annex 4	*The Prosecutor v. Ntagerura, Bagambiki, and Imanishimwe,* Cases Nos. ICTR- 96-10A-T, 96-36-I, 97-36-T, Prosecutor's Pre-Trial Brief, Appendix 4: Prosecutor's summary of anticipated witness testimony, filed on 3 July 2000
AT.	English version of the transcript of the appeal hearings held in Arusha on
CRA	French version of the transcript of the Trial Chamber hearings
CRA(A)	French version of the transcript of the appeal hearings
Bagambiki Final Trial Brief	*The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe,* Case No. ICTR-99-46-T, Brief by the Defence for Emmanuel Bagambiki, confidentially filed on 26 June 2003
Imanishimwe Final Trial Brief	*The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe,* Case No. ICTR-99-46-T, Defence Final Trial Brief for Lieutenant Samuel Imanishimwe, Commander of Cyangugu Military Barracks, confidentially filed on 26 June 2003
Ntagerura Final Trial Brief	*The Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samnuel Imanishimwe,* Case No. ICTR-99-46-T, Defence Final Trial Brief for André Ntagerura, filed under Rule 86(B) of the Rules of Procedure and Evidence, confidentially filed on 26 June 2003
Prosecution Final Trial Brief	*The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe,* Case No. ICTR-99-46-T, The Prosecutor's Closing Brief Filed under Rule 86(B) and (C) of the Rules of Procedure and Evidence, confidentially filed on 26 June 2003
Judge Dolenc's Opinion	Separate and Dissenting Opinion of Judge Dolenc appended to the Trial Judgement
Judge Ostrovsky's Opinion	Separate Opinion of Judge Ostrovsky appended to the Trial Judgement
Judge Williams' Opinion	Dissenting Opinion of Judge Williams appended to the Trial Judgement
Amended paragraph 3.14	*The Prosecutor v. Bagambiki, Imanishimwe and Munyakazi*, Case No. ICTR-99-46-I, amended paragraph 3.14, submitted on 10 August 1999
T.	English version of the transcript of the Trial Chamber hearings

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3. Other References

FAR	*Forces armées rwandaises*
RPF	Rwandan Patriotic Front
Geneva Conventions	Geneva Convention I to IV of 12 August 1949, 75 U.N.T.S. 31, 85, 135 and 287
UNAMIR	United Nations Assistance Mission for Rwanda
MRND	*Mouvement républicain national pour la démocratie et le développement*
Additional Protocol II	Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 U.N.T.S. 609
Rules	Rules of Procedure and Evidence of the Tribunal
RTLM	*Radio-Télévision Libre des Mille Collines*
Statute	Statute of the Tribunal established by Security Council Resolution 955 (1994)
ICTR	See Tribunal
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
Tribunal	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994

B. Cases cited

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

BAGILISHEMA
The Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-A, Grounds of appeal, 3 July 2002 ("*Bagilishema* Appeal Judgement")

GACUMBITSI
The Prosecutor v. Sylvestre Gacumbitsi, Case No. ICTR-2001-64-T, Judgment, 17 June 2004 ("*Gacumbitsi* Trial 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-95-54A-A, Judgement, 19 September 2005 ("*Kamuhanda* Appeal Judgement")

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

MUSEMA
The Prosecutor v. Alfred Musema, Case No. ICTR-96-13-T, Judgement and Sentence, 27 January 2000 ("*Musema* Trial Judgement")

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

NAHIMANA *et al.* ("Media Case")
The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003 ("*Nahimana et al.* Trial 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, Case No. ICTR-96-10-I, Decision on the Preliminary Motion filed by the Defence Based on Defects in the Form of the Indictment, 28 November 1997 ("Decision on Ntagerura Initial Indictment")

The Prosecutor v. Emmanuel Bagambiki, Samuel Imanishimwe and Yussuf Munyakazi, Case No. ICTR-97-36-I, Decision on the Defence Motion for Defects in the Form of the Indictment, 25 September 1998 ("Decision on the form of the Bagambiki/Imanishimwe Initial Indictment")

The Prosecutor v. Emmanuel Bagambiki, Samuel Imanishimwe and Yussuf Munyakazi, Case No. ICTR-96-10-I, Decision on the Prosecutor's Motion for Joinder, 11 October 1999 ("Decision on Joinder")

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The Prosecutor v. Ntagerura et al., Case No. ICTR-99-46-T, Oral Decision on Imanishimwe's Defence Motion for Judgement of Acquittal on Count of Conspiracy to Commit Genocide Pursuant to Rule 98*bis*, 6 March 2002 ("Rule 98*bis* Decision")

The Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe, Case No. ICTR-99-46-T, Judgement and Sentence, 25 February 2004 ("Trial Judgement")

NTAKIRUTIMANA
The Prosecutor v. Elizaphan and Gérard Ntakirutimana, Case No. ICTR-96-10 & ICTR-96-17-T, Judgement and Sentence, 21 February 2003 ("*Ntakirutimana* Trial Judgement")

The Prosecutor v. Elizaphan and Gérard Ntakirutimana, Case No. ICTR-96-10-A & ICTR-96-17-A, Judgement, 13 December 2004 ("*Ntakirutimana* Appeal Judgement")

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

SEMANZA
The Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003 ("*Semanza* Trial Judgement")

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

2. ICTY

ALEKSOVSKI
Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement")

BABIĆ
Prosecutor v. Milan Babić, Case No. IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005 ("*Babić* Sentencing Appeal Judgement")

BANOVIĆ
Prosecutor v. Pedrac Banović, Case No. IT-02-65/I-S, Judgement and Sentence, 28 October 2003 ("*Banović* Sentencing Judgement")

BLAŠKIĆ
Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement")

"ČELEBI|I"/DELALIĆ *et al.*/MUCIĆ *et al.*
Prosecutor v. Zejnil Delalić, Zdrako Mucić, Hazim Delić and Esad Landžo, Case No. IT-96-21-T, Judgement, 16 November 1998 ("*Čelebići* Trial Judgement")

Prosecutor v. Zejnil Delalić, Zdrako Mucić, Hazim Delić and Esad Landžo, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement")

ERDEMOVIĆ
Prosecutor v. Dražen Erdemović, Case No. IT-96-22-A, Judgement, 7 October 1997 ("*Erdemović* Appeal Judgement")

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

GALIĆ
Prosecutor v. Stanislav Galić, Case No. IT-98-AR73, Decision on Application by Prosecutor for Leave to Appeal, 14 December 2001 ("*Galić* 14 December 2001 Decision")

Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, Judgement and Opinion, 5 December 2003 ("*Galić* Trial Judgment")

JOKIĆ
Prosecutor v. Modrag Jokić, Case n°IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005 ("*Jokić* Sentencing Appeal Judgement")

KORDIĆ and ČERKEZ
Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-T, Judgement, 26 February 2001 ("*Kordić and Čerkez* Trial Judgement")

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement")

KRNOJELAC
Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-T, Judgement, 15 March 2002 ("*Krnojelac* Trial Judgement")

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnojelac* Appeal Judgement")

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

KUNARAC *et al.*
Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement")

KUPREŠKIĆ *et al.*
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MILUTINOVIĆ *et al.*
Prosecutor v. Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction - *Joint Criminal Enterprise*, 21 May 2003 ("*Ojdanić* Jurisdiction Decision")

NALETILIĆ and MARTINOVIĆ
Prosecutor v. Mladen Naletilić and Vinko Martinović, Case No. IT-98-34-A, Judgement, 3 May 2006 ("*Naletilić and Martinović* Appeal Judgement")

STAKIĆ
*Prosecutor v. Milomir Stakić***,** Case No. IT-97-24-T, Judgement, 31 July 2003 ("*Stakić* Trial Judgement")

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