UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda**
**Tribunal Pénal International pour le Rwanda**

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**IN THE APPEALS CHAMBER**

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| Before: | Judge Fausto Pocar, presiding<br>Judge Mohamed Shahabuddeen<br>Judge Mehmet Güney<br>Judge Andrésia Vaz<br>Judge Theodor Meron |
| Registrar: | Adama Dieng |
| Judgement of: | 28 November 2007 |

**Ferdinand NAHIMANA**
**Jean-Bosco BARAYAGWIZA**
**Hassan NGEZE**
(*Appellants*)

**v.**

**THE PROSECUTOR**
*(Respondent)*

Case No. ICTR-99-52-A

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# JUDGEMENT

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**TABLE OF CONTENTS** **Page**

# 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 and 31 December 1994 (respectively, "Appeals Chamber" and "Tribunal") is seized of appeals lodged by Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze against the Judgement rendered by Trial Chamber I on 3 December 2003 in the case of *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* ("Judgement").

## A. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze

2. Ferdinand Nahimana ("Appellant Nahimana") was born on 15 June 1950 in Gatonde commune, Ruhengeri *préfecture*, Rwanda. From 1977, he was an assistant lecturer in history at the National University of Rwanda; he held different positions in this University until 1984. He was appointed Director of ORINFOR (Rwandan Office of Information) in 1990 and remained in that post until 1992. In 1992 Ferdinand Nahimana and others set up a *comité d'initiative* ("Steering Committee") to establish a company known as *Radio télévision libre des mille collines* ("RTLM"), *S.A*. He was also a member of the *Mouvement révolutionnaire national pour le développement* ("MRND").[1]

3. Jean-Bosco Barayagwiza ("Appellant Barayagwiza") was born in 1950 in Mutura commune, Gisenyi *préfecture*, Rwanda. A lawyer by training, Barayagwiza was a founding member of the *Coalition pour la défense de la République* party ("CDR"), which was formed in 1992. He was a member of the Steering Committee responsible for the establishment of the company RTLM S.A. He also held the post of Director of Political Affairs at the Ministry of Foreign Affairs.[2]

4. Hassan Ngeze ("Appellant Ngeze") was born on 25 December 1957 in Rubavu commune, Gisenyi *préfecture*, Rwanda. From 1978 he worked as a journalist, and in 1990 he founded the newspaper *Kangura*, where he held the post of Editor-in-Chief. He was a founding member of the CDR.[3]

## B. The Indictments and the Judgement

5. The Judgement was rendered on the basis of three separate Indictments. The initial Indictment against Ferdinand Nahimana was filed on 22 July 1996[4] and last amended on 15 November 1999 ("Nahimana Indictment"). The initial Indictment against Jean-Bosco Barayagwiza was filed on 22 October 1997 and last amended on 14 April 2000[5]

[1] Judgement, para. 5.
[2] *Ibid*., para. 6.
[3] *Ibid*., para. 7.
[4] Signed on 12 July 1996.
[5] Signed on 13 April 2000.

("Barayagwiza Indictment"). The Indictment against Hassan Ngeze was filed on 6 October 1997[6] and last amended on 22 November 1999[7] ("Ngeze Indictment").

6. The Trial Chamber found the three Appellants guilty of conspiracy to commit genocide, genocide, direct and public incitement to commit genocide and persecution and extermination as crimes against humanity.[8] All three were acquitted on the counts of complicity in genocide and murder as a crime against humanity.[9] Appellant Barayagwiza was also found not guilty of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.[10]

## C. The appeals

7. In his Notice of Appeal, Appellant Nahimana adopts a thematic presentation of his grounds of appeal: in the first place, he challenges all of the interlocutory decisions rendered on issues relating to the validity of the proceedings;[11] he then alleges errors of law and fact in connection with the rules of a fair trial,[12] and errors of law and of fact in the decision on the merits.[13] His Appellant's Brief does not follow this categorisation,[14] and the grounds relating to the interlocutory decisions are addressed mainly in that part of the Brief relating to the right to a fair trial.[15]

8. Appellant Barayagwiza raises 51 grounds of appeal.[16] He first identifies five grounds which would allegedly justify annulment of the Judgement, then he enumerates the grounds relating to errors which are claimed to render the Judgement defective: Grounds 6 to 15 thus focus on errors relating to his conviction for genocide; Grounds 16 and 17 focus on errors concerning CDR; Grounds 18 to 22 identify errors relating to his superior responsibility within CDR; Grounds 23 to 29 identify errors relating to instigation of genocide; Grounds 30 and 31 concern errors relating to conspiracy to commit genocide; Grounds 32 and 33 concern errors relating to direct and public incitement to commit genocide; Grounds 34 to 41 identify errors relating to his convictions for crimes against humanity; Grounds 42 to 51 identify errors affecting the sentence.

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[6] Signed on 30 September 1997.
[7] Signed on 10 November 1999.
[8] Judgement, paras. 1092-1094.
[9] *Idem*.
[10] Judgement, para. 1093.
[11] Nahimana Notice of Appeal, pp. 2-6.
[12] *Ibid*., pp. 6-10.
[13] *Ibid*., pp. 10-17.
[14] In violation of the Practice Direction of Formal Requirements for Appeals from Judgement, para. 4 *in fine*.
[15] Nahimana Appellant's Brief is divided into two parts; the first part concerns the right to a fair trial (paras. 11-185), while the second alleges errors in the Judgement (paras. 186-652). The grounds identified in the first part are as follows: violation of the right to be tried by an independent and impartial tribunal (Ground 1); violation of temporal jurisdiction (Ground 2); violation of the right to be informed of the charges (Ground 3); violation of the right to have adequate time and facilities for the preparation of his defence (Ground 4); violation of the right to secure the attendance and examination of Defence witnesses under the same conditions as Prosecution witnesses (Ground 5). The second part comprises the following chapters: (1) Errors on the crime of direct and public incitement to commit genocide; (2) Errors on persecution as a crime against humanity; (3) Errors on the crime of genocide; (4) Errors on extermination as a crime against humanity; (5) Errors on the crime of conspiracy to commit genocide; (6) Errors on cumulative charges and convictions; (7) Errors in sentencing.
[16] See Barayagwiza Notice of Appeal.

9. Appellant Ngeze raises eight grounds of appeal.[17] In his first ground he contends that the Trial Chamber exceeded its jurisdiction *ratione temporis*, in violation of Article 7 of the Statute of the Tribunal ("Statute"). His second ground relates to his right to a fair trial and to equality of arms. The third ground relates to errors of law and of fact related to the dismissal of his alibi defence and the credibility of witnesses. From his fourth to seventh ground, the Appellant identifies errors of law and of fact relating to Articles 2, 3, and 6(1) of the Statute, as well as errors relating to cumulative convictions. His eighth ground concerns sentencing.

### D. *Amicus Curiae* Brief

10. On 12 January 2007, the Appeals Chamber allowed the non-governmental organization "Open Society Justice Initiative" ("*Amicus Curiae*") to file a brief ("*Amicus Curiae* Brief") on (1) the distinction between hate speech, direct and public incitement to commit genocide and genocide (including a section on the temporal jurisdiction of the Tribunal); and (2) the issue of whether hate speech could amount to persecution as a crime against humanity.[18] In that Decision the Appeals Chamber allowed the parties to respond to the *Amicus Curiae* Brief,[19] which they subsequently did within the prescribed time-limit.[20]

### E. Standards for appellate review

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

12. The party alleging an error of law must advance arguments in support of its claim and explain how the error invalidates the decision. However, even if the appellant's arguments do not support his claim, the Appeals Chamber may on its own initiative uphold on other grounds the claim that there has been an error of law.[21] Exceptionally, the Appeals Chamber may also hear arguments where a party has raised a legal issue which would not lead to the invalidation of the judgement, but which is of general significance for the Tribunal's jurisprudence.[22]

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[17] See Ngeze Notice of Appeal.
[18] Decision on the Admissibility of the *Amicus Curiae* Brief Filed by the "Open Society Justice Initiative" and on its Request to Be Heard at the Appeals Hearing, 12 January 2007 ("Decision of 12 January 2007").
[19] Decision of 12 January 2007, p. 4.
[20] The Appellant Jean-Bosco Barayagwiza's Response to the *Amicus Curiae* [Brief] filed by "Open Society Justice Initiative", 8 February 2007 ("Barayagwiza's Response to the *Amicus Curiae* Brief"); *Réponse au mémoire de l'*amicus curiae, 12 February 2007 ("Nahimana's Response to the *Amicus Curiae* Brief"); Appellant Hassan Ngeze's Response to *Amicus Curiae* Brief Pursuance [*sic*] to the Appeal [*sic*] Chamber's Decision of 12.01.2007, 12 February 2007 ("Ngeze's Response to the *Amicus Curiae* Brief"); Prosecutor's Response to the "*Amicus Curiae* Brief in *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor*", 12 February 2007 ("Prosecutor's Response to the *Amicus Curiae* Brief").
[21] See for example *Halilović* Appeal Judgement, para. 7; *Limaj et al*. Appeal Judgement, para. 9; *Muhimana* Appeal Judgement, para. 7; *Blagojević and Jokić* Appeal Judgement, para. 7; *Brđanin* Appeal Judgement, para. 9.
[22] See for example *Halilović* Appeal Judgement, para. 6; *Blagojević and Jokić* Appeal Judgement, para. 6; *Brđanin* Appeal Judgement, para. 8; *Simić* Appeal Judgement, para. 7; *Stakić* Appeal Judgement, para. 7; *Tadić* Appeal Judgement, para. 247.

13. If the Appeals Chamber finds that the Trial Chamber applied a wrong legal standard:

> it is open to the Appeals Chamber to articulate the correct legal standard and to review the relevant findings of the Trial Chamber accordingly. In doing so, the Appeals Chamber not only corrects a legal error, but applies the correct legal standard to the evidence contained in the trial record, in the absence of additional evidence, and must determine whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by [one of the parties], before that finding is confirmed on appeal.[23]

14. With regard to errors of fact, it is well established that the Appeals Chamber will not lightly overturn findings of fact made by a Trial Chamber.[24] Where an error of fact is alleged, the Appeals Chamber must give deference to the assessment of the Trial Chamber which received the evidence at trial, since the Trial Chamber is in a better position to evaluate testimony, as well as the demeanour of witnesses. The Appeals Chamber will only interfere with the findings of the Trial Chamber where no reasonable trier of fact could have reached the same finding, or where the finding is wholly erroneous. An erroneous finding will be set aside or revised only if the error occasioned a miscarriage of justice.[25]

15. As for the standard of review where additional evidence has been admitted on appeal, the *Naletilić and Martinović* Appeal Judgement recalled that:

> [t]he Appeals Chamber in *Kupreškić* established the standard of review when additional evidence has been admitted on appeal, and held:
>
> > The test to be applied by the Appeals Chamber in deciding whether or not to uphold a conviction where additional evidence has been admitted before the Chamber is: has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings.
>
> The standard of review employed by the Appeals Chamber in that context was whether a reasonable trier of fact could have been satisfied beyond reasonable doubt as to the finding in question, a deferential standard. In that situation, the Appeals Chamber in *Kupreškić* did not determine whether it was satisfied *itself,* beyond reasonable doubt, as to the conclusion reached, and indeed, it did not need to do so, because the outcome in that situation was that no reasonable trier of fact could have reached a finding of guilt.[26]

16. Arguments of a party which stand no chance of causing the impugned decision to be reversed or revised may be summarily dismissed by the Appeals Chamber and need not be considered on the merits.[27] The appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the judgement to which challenges are being

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[23] *Blaškić* Appeal Judgement, para. 15. See also *Halilović* Appeal Judgement, para. 8; *Limaj et al*. Appeal Judgement, para. 10; *Kordić and Čerkez* Appeal Judgement, para. 17.
[24] *Halilović* Appeal Judgement, paras. 9-10; *Limaj et al*. Appeal Judgement, para. 12; *Muhimana* Appeal Judgement, para. 8; *Blagojević and Jokić* Appeal Judgement, para. 9.
[25] See for example *Halilović* Appeal Judgement, para. 9; *Limaj et al*. Appeal Judgement, para. 13*; Muhimana* Appeal Judgement, para. 8; *Blagojević and Jokić* Appeal Judgement, para. 9.
[26] *Naletilić and Martinović* Appeal Judgement, para. 12 (footnotes omitted).
[27] See for example *Halilović* Appeal Judgement, para. 12; *Limaj et al*. Appeal Judgement, para. 14; *Muhimana* Appeal Judgement, para. 9; *Blagojević and Jokić* Appeal Judgement, para. 10; *Brđanin* Appeal Judgement, paras. 16-31.

made.[28] Furthermore, "one cannot expect the Appeals Chamber to give detailed consideration to submissions of the parties if they are obscure, contradictory, vague, or if they suffer from other formal and obvious insufficiencies".[29]

17. Finally, it should be recalled that the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned response in writing.[30] The Appeals Chamber will accordingly dismiss arguments which are manifestly unfounded without providing detailed reasoning.[31]

## II. INDEPENDENCE AND IMPARTIALITY OF THE TRIBUNAL

### A. Introduction

18. The Appellants contend that the Trial Chamber violated their right to be tried by an independent and impartial tribunal and, hence, their right to a fair trial as provided in Articles 19 and 20 of the Statute.[32]

19. The Appeals Chamber recalls that independence is a functional attribute which implies that the institution or individual possessing it is not subject to external authority and has complete freedom in decision-making; independence refers in particular to the mechanisms aimed at shielding the institution or person from external influences.[33]

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[28] Practice Direction on Formal Requirements for Appeals from Judgement, para. 4(b)(ii). See also, for example, *Halilović* Appeal Judgement, para. 13; *Limaj et al*. Appeal Judgement, para. 15; *Muhimana* Appeal Judgement, para. 10; *Blagojević and Jokić* Appeal Judgement, para. 11; *Brđanin* Appeal Judgement, para. 15.

[29] *Vasiljević* Appeal Judgement, para. 12. See also, for example, *Halilović* Appeal Judgement, para. 13; *Limaj et al*. Appeal Judgement, para. 15; *Muhimana* Appeal Judgement, para. 10; *Blagojević and Jokić* Appeal Judgement, para. 11.

[30] *Halilović* Appeal Judgement, para. 12; *Limaj et al*. Appeal Judgement, para. 16; *Muhimana* Appeal Judgement, para. 10; *Blagojević and Jokić* Appeal Judgement, para. 11; *Brđanin* Appeal Judgement, para. 16.

[31] *Halilović* Appeal Judgement, para. 12; *Limaj et al*. Appeal Judgement, para. 16; *Muhimana* Appeal Judgement, para. 10; *Blagojević and Jokić* Appeal Judgement, para. 11; *Brđanin* Appeal Judgement, paras. 18-31.

[32] Nahimana Notice of Appeal, p. 6; Nahimana Appellant's Brief, paras. 11-41; Barayagwiza Notice of Appeal, p. 1; Barayagwiza Appellant's Brief, paras. 10-45; Ngeze Notice of Appeal, paras. 22-27; Ngeze Appellant's Brief, paras. 109-114.

[33] See Basic Principles on the Independence of the Judiciary, UN Doc. A/CONF.121/22/Rev. 1 at p. 59 (1985), adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, and confirmed by the General Assembly in its Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, paras. 2-4:

> 2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
>
> 3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
>
> 4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

Impartiality is a personal attribute which implies lack of bias and prejudice;[34] it addresses the conduct and frame of mind to be expected of the Judges in a given case.[35]

20. The Appeals Chamber will first examine the allegations relating to independence.

## B. Independence of the Tribunal

21. In support of his first ground of appeal, Appellant Barayagwiza alleges that political pressure was exerted on the Tribunal in order to have the Decision of 3 November 1999 reviewed,[36] and that, in the circumstances, the procedure that led to the Decision of 31 March 2000[37] amounted to an abuse of process.[38] The Appeals Chamber takes this to mean that the Appellant is asserting that the Tribunal, and in particular the Judges of the Appeals Chamber, lacked independence in the conduct of the proceedings between the Decision of 3 November 1999 and the Decision of 31 March 2000.

### 1. Procedural history

22. On 17 November 1998 Trial Chamber II dismissed the preliminary motion filed by the Appellant contesting the legality of his arrest on 15 April 1996 and his detention until his transfer to the Tribunal's Detention Facility on 19 November 1997.[39] In its Decision of 3 November 1999, the Appeals Chamber granted the appeal lodged by the Appellant against this decision. It found that there had been a violation of the Appellant's right to be brought to trial without delay (pursuant to Rule 40 *bis* of the Rules of Procedure and Evidence ("Rules")) and of his right to an initial appearance without delay upon his transfer to the Tribunal's detention unit (Rule 62 of the Rules).[40] The Appeals Chamber further found that the facts of the case justified the application of the abuse of process doctrine, in that the Appellant's right to be informed without delay of the general nature of the charges brought against him and his right to challenge the legality of his continued detention had been violated.[41] Finally, the Appeals Chamber found that the Prosecution had failed in its obligation to prosecute the case with diligence.[42] The Appeals Chamber accordingly rejected the Indictment, directed a definitive halt to the proceedings, ordered the immediate release of

[34] Final Report by the Special Rapporteur, L.M. Singhvi, "The administration of justice and the human rights of detainees: study on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers", Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 38th Session, Item 9(c) of the provisional agenda, Doc. UN E/CN.4/Sub.2/1985/18/Add.1, 31 July 1985, para. 79.
[35] See *infra* section II. C. 1.
[36] *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision, 3 November 1999 ("Decision of 3 November 1999").
[37] *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000 ("Decision of 31 March 2000").
[38] Barayagwiza Appellant's Brief, paras. 22-32; Barayagwiza Brief in Reply, paras. 9, 11 and 13.
[39] *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-I, Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect, 17 November 1998.
[40] Decision of 3 November 1999, para. 100.
[41] *Ibid.*, para. 101.
[42] *Idem*.

the Appellant, and – point 4 of the Disposition – directed the Registrar to make the necessary arrangements for the delivery of the Appellant to the Cameroonian authorities.[43]

23. On 5 November 1999 Appellant Barayagwiza filed a "Notice for Review and Stay of Dispositive Order No. 4 of the Decision of the Appeals Chamber dated 3 November 1999", arguing that he could not be delivered to the Cameroonian authorities and requesting the Chamber to grant him the liberty to choose his final destination.[44] The Appellant withdrew this request on 18 November 1999, when he asked the Appeals Chamber to direct that its Decision of 3 November 1999 be implemented *in toto* without any further delay.[45] On 19 November 1999, the Government of Rwanda requested leave to appear as *amicus curiae* on the issue of delivering the Appellant to the Cameroonian authorities.[46]

24. On 22 November 1999 the Prosecutor informed the Appeals Chamber of her intention to file a request for review, or alternatively for reconsideration, of the Decision of 3 November 1999.[47] On 25 November 1999 the Appeals Chamber ordered that execution of the 3 November 1999 Decision be deferred pending the filing of the Prosecutor's Request for Review or Reconsideration.[48] On 1 December 1999 the Prosecutor filed her Request for Review or Reconsideration of the Decision of 3 November 1999.[49]

25. On 8 December 1999 the Appeals Chamber issued an Order maintaining the stay of execution ordered on 25 November 1999 and setting dates for the parties' filings.[50] It further stated that the Appeals Chamber would hear the arguments of the parties on the Prosecutor's Request for Review and Reconsideration, and provided for the Rwandan authorities to appear as *amicus curiae* with respect to the modalities of the release of the Appellant, if this question

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[43] *Ibid*., para. 113.

[44] *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Notice of Review and Stay of Dispositive Order No. 4 of the Decision of the Appeals Chamber dated 3 November 1999, filed on 5 November 1999, paras. 1-3.

[45] *The Prosecutor v. Jean-Bosco Barayagwiza,* Case No. ICTR-97-19-AR72, Withdrawal of the Defence's "Notice of Review and Stay of Dispositive Order No. 4 of the Decision of the Appeals Chamber dated 3rd November, 1999", dated on [*sic*] 5th November 1999, filed on 18 November 1999, para. 24.

[46] *The Prosecutor v. Jean-Bosco Barayagwiza,* Case No. ICTR-97-19-AR72, Request by the Government of the Republic of Rwanda for Leave to Appear as *Amicus Curiae* pursuant to Rule 74, filed in English on 19 November 1999 ("Request by Rwanda for leave to appear as *amicus curiae*").

[47] *The Prosecutor v. Jean-Bosco Barayagwiza,* Case No. ICTR-97-19-AR72, Notice of Intention to File Request for Review of Decision of the Appeals Chamber of 3 November 1999 (Rule 120 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda), dated 19 November 1999 but filed on 22 November 1999.

[48] *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Order, dated 25 November 1999 but filed on 26 November 1999 ("Order of 25 November 1999"), p. 3. The Appeals Chamber also specified that the release of Appellant Barayagwiza be subjected to the directive to the Registrar to make the necessary arrangements for the delivery of the Appellant to the Cameroonian authorities.

[49] *The Prosecutor v. Jean-Bosco Barayagwiza,* Case No. ICTR-97-19-AR72, Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber Decision rendered on 3 November 1999 in *Jean-Bosco Barayagwiza v. The Prosecutor* and Request for Stay of Execution, filed on 1 December 1999 and corrected on 20 December 1999 ("Prosecutor's Motion for Review or Reconsideration"). See also *The Prosecutor v. Jean-Bosco Barayagwiza,* Case No. ICTR-97-19-AR72, Brief in Support of the Prosecutor's Motion for Review of the Appeals Chamber Decision rendered on 3 November 1999 in *Jean-Bosco Barayagwiza v. The Prosecutor* following the Orders of the Appeals Chamber dated 25 November 1999, filed on 1 December 1999.

[50] *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Order, 8 December 1999 ("Order of 8 December 1999"), p. 3.

came to be addressed.[51] The Government of Rwanda filed its *Amicus Curiae* Brief on 15 February 2000[52] and the Prosecutor's Request for Review and Reconsideration was heard in Arusha on 22 February 2000.

26. On 31 March 2000 the Appeals Chamber reviewed its Decision of 3 November 1999 in light of the new facts, which diminished the role played by the Prosecution's failings and the extent of the violation of the rights of Appellant Barayagwiza,[53] although such violation was confirmed by the Chamber.[54] It considered that the new facts presented by the Prosecutor could have been decisive in the decision, in particular as regards the remedy which had been ordered.[55] As a consequence, the Appeals Chamber replaced the Disposition in the Decision of 3 November 1999, rejecting the Appellant's application for his release and deciding to modify the remedy ordered by providing either for financial compensation if the Appellant was found not guilty, or for reduction of his sentence if he was convicted.[56]

27. Thereafter, Appellant Barayagwiza filed a motion for review or reconsideration of the Decision of 31 March 2000,[57] and that motion was dismissed on 14 September 2000 without examination of the merits.[58] On 23 June 2006, the Appeals Chamber dismissed a further motion by Appellant Barayagwiza which *inter alia* requested the reconsideration and annulment of the Decision of 31 March 2000, as well as examination of the abuse of process allegedly committed by the Trial Chamber since the Decision of 3 November 1999; the Chamber held that the proper place for such requests was in an appeal against the Judgement on the merits.[59] The Appeals Chamber will consider below the arguments in this respect developed by the Appellant in his submissions on appeal.[60]

2. Examination of the Appellant's arguments

28. The right of an accused to be tried before an independent tribunal is an integral component of his right to a fair trial as provided in Articles 19 and 20 of the Statute.[61] Article 11(1) of the Statute provides that "[t]he Chambers shall be composed of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of nine *ad litem* independent judges appointed in accordance with article 12 *ter*,

[51] Order of 8 December 1999, p. 3.
[52] *The Prosecutor v. Jean-Bosco Barayagwiza,* Case No. ICTR-97-19-AR72, *Amicus Curiae* Brief of the Government of the Republic of Rwanda, filed pursuant to Rule 74 of the Rules of Procedure and Evidence, 15 February 2000.
[53] Decision of 31 March 2000, para. 71.
[54] *Ibid*., para. 74.
[55] *Ibid*., para. 71.
[56] *Ibid*., para. 75.
[57] *Jean-Bosco Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Appellant's Extremely Urgent Motion for Review and/or Reconsideration of the Appeals Chamber's Decision rendered on 31 March 2000 and Stay of Proceedings, 28 July 2000.
[58] *Jean-Bosco Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision on Motion for Review and/or Reconsideration, 14 September 2000 ("Decision of 14 September 2000").
[59] Decision on Appellant Jean-Bosco Barayagwiza's Motion Requesting Examination of Defence Motion dated 28 July 2000 and Remedy for Abuse of Process, 23 June 2006, as amended by the Corrigendum to the Decision on Appellant Jean-Bosco Barayagwiza's Motion Requesting Examination of Defence Motion dated 28 July 2000 and Remedy for Abuse of Process, 28 June 2006.
[60] See *infra* II. B. 2. and III.
[61] *Galić* Appeal Judgement, para. 37; *Kayishema and Ruzindana* Appeal Judgement, paras. 51 and 55; *Furundžija* Appeal Judgement, para. 177.

paragraph 2, of the present Statute, no two of whom may be nationals of the same State". The independence of the Judges of the Tribunal is guaranteed by the standards for their selection,[62] the method of their appointment,[63] their conditions of service[64] and the immunity they enjoy.[65] The Appeals Chamber further notes that the independence of the Tribunal as a judicial organ was affirmed by the Secretary-General at the time when the Tribunal was created,[66] and the Chamber reaffirms that this institutional independence means that the Tribunal is entirely independent of the organs of the United Nations[67] and of any State or group of States.[68] Accordingly, the Appeals Chamber considers that there is a strong presumption that the Judges of the Tribunal take their decisions in full independence,[69] and it is for the Appellant to rebut this presumption.

29. The Appeals Chamber observes that the Appellant provides various illustrations of what he terms "pressures", which allegedly prevented the Judges from reaching their decision in full independence; it will set these out, and then consider each of them in turn.

(a) Pressures exerted by the Government of Rwanda

30. The Appellant includes in the pressures allegedly exerted by Rwanda following the Decision of 3 November 1999: the official and public condemnation of this Decision by the Government of Rwanda; the subsequent suspension of its cooperation with the Tribunal;[70] the refusal to allow the Prosecutor to visit her office in Kigali;[71] the refusal to receive her and the

[62] See Article 12 of the Statute, which provides that the Judges of the Tribunal "shall be persons of high moral character, impartiality and integrity, who possess the qualifications required in their respective countries for appointment to the highest judicial offices".
[63] See Articles 12 *bis* and 12 *ter* of the Statute. In particular, the Judges of the Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, which prevents abusive or discriminatory nominations and ensures that no State or group of States shall play a dominating role in the nomination of Judges.
[64] The conditions of service and compensation for Judges of the Tribunal are established by the General Assembly (see for example, *Questions relating to the programme budget for the biennium 1998–1999*, UN Doc. A/RES/53/214, 11 February 1999, section VIII). These ensure that Judges have financial security during and after their mandate.
[65] The Judges' privileges and immunities set out in Article 29(2) of the Statute guarantee their independence by protecting them from personal civil suits for improper acts or omissions in the exercise of their judicial functions.
[66] Report of the Secretary-General pursuant to paragraph 5 of Security Council Resolution 955 (1994), 13 February 1995 (U.N. Doc S/1995/134) ("UN Secretary-General's Report, 13 February 1995"), para. 8.
[67] *Kayishema and Ruzindana* Appeal Judgement, para. 55.
[68] UN Secretary-General's Report, 13 February 1995, para. 8.
[69] The Appeals Chamber notes that the European Court of Human Rights ruled in the case of *Naletilić v. Croatia* (European Court of Human Rights, Decision as to the Admissibility of Application No. 51891/99, 4 May 2000, para. (1) on the impartial and independent character of the 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 ("ICTY"), and found that ICTY was "an international court which, in view of the content of its Statute and Rules of Procedure, offers all the necessary guarantees including those of impartiality and independence, in view of the content of its Statute and Rules of Procedure". It should be emphasised that these same guarantees were reproduced in the Statute and Rules of the Tribunal, the Statute of the Tribunal being an adaptation of that of ICTY and the Rules of the Tribunal being based on those of ICTY (see paragraphs 9 and 18 of the UN Secretary-General's Report of 13 February 1995 and Article 14 of the Statute which provides that the Judges would adopt the Rules of Evidence and Procedure of ICTY ("ICTY Rules") with such changes as they deemed necessary).
[70] Barayagwiza Appellant's Brief, para. 23.
[71] *Ibid*., para. 24. Barayagwiza refers in the footnote to a sentence which has as its sole reference: "World Africa. Thursday, November 11, 1999".

continued suspension of its cooperation after the filing of the Prosecutor's Request for Review and Reconsideration,[72] and the statements – akin to threats according to the Appellant – made by the Attorney General of Rwanda at the hearing of 22 February 2000.[73]

31. The Appellant submits that the political pressures exerted by the Government of Rwanda resulted in the refusal by the Registrar, in violation of the Decision of 3 November 1999, to release him,[74] and in the subsequent decisions rendered by the Appeals Chamber: (1) the stay of execution of the Decision of 3 November 1999, and the continued detention of the Appellant;[75] (2) the leave to appear as *amicus curiae* granted to the Government of Rwanda;[76] and (3) the review, on 31 March 2000, of its Decision of 3 November 1999. He further alleges that this review and the prior proceedings violated his right to a fair hearing or amounted to an abuse of process.[77]

32. The Appeals Chamber notes that certain official statements from Rwanda, following the Decision of 3 November 1999, may be regarded as an attempt to exert pressure on the Tribunal in order to prevent the release of the Appellant as ordered by that Decision. The same applies to the suspension of cooperation of Rwanda with the Tribunal. However, the Appeals Chamber considers that the fact that pressures were exerted is not enough to establish that the Judges who ruled in this context on the Prosecutor's Request for Review or Reconsideration were influenced by those pressures.

33. Concerning the release of Appellant Barayagwiza ordered by the Decision of 3 November 1999, the Appeals Chamber observes that such release could only have taken place after the Registrar had taken the necessary measures for delivering him to the Cameroonian authorities.[78] The Appeals Chamber notes that the Appellant produces no evidence capable of convincing the Appeals Chamber that the Registrar violated the terms of the Decision of 3 November 1999.[79]

34. As to the decision to order a stay of execution of the Decision of 3 November 1999, the Appeals Chamber observes that the Appellant merely makes a vague allegation without demonstrating how the Government of Rwanda influenced that order. The Appeals Chamber therefore rejects this contention.

35. Lastly, the Appeals Chamber recalls that the purpose of the request by the Government of the Republic of Rwanda for leave to appear as *amicus curiae* was to state Rwanda's position as to the choice of location for the release of the Appellant.[80] The Appeals

[72] *Ibid.*, para. 28. The Appellant further contends that Rwanda maintained this attitude until the Appeals Chamber reviewed the Decision of 3 November 1999, and that the Tribunal failed to issue any official protest against this.
[73] *Ibid.*, paras. 29-30.
[74] *Ibid*., para. 25.
[75] *Ibid*., para. 26.
[76] *Ibid*., para. 31.
[77] *Ibid*., paras. 31-32.
[78] This condition had in fact been expressly reaffirmed in the Order of 25 November 1999.
[79] Moreover, Appellant Barayagwiza can hardly argue that the Registrar violated the Decision of 3 November 1999, since on 5 November 1999 he himself filed a "Notice for Review and Stay of Dispositive Order No. 4 of the Decision of the Appeals Chamber dated 3 November 1999" (Dispositive Order No. 4 instructed the Registrar to take the necessary measures to transfer the Appelant to the Cameroon authorities), and only withdrew this on 18 November 1999.
[80] Request by Rwanda for leave to appear as *amicus curiae*, para. 2.

Chamber observes that Rule 74 of the Rules makes provision for a State to appear as *amicus curiae* when the Chamber considers it desirable for the proper determination of the case. The Appeals Chamber considers that the Government of Rwanda had a legitimate interest to be heard on the issue of the choice of location for the release of the Appellant, given that an international warrant of arrest had been issued against him by Rwanda, that that country had tried unsuccessfully to obtain his extradition from Cameroon,[81] and that it had concurrent jurisdiction to prosecute the Appellant.[82] The Appeals Chamber accordingly finds that the appearance of the Government of Rwanda as *amicus curiae* was consistent with Rule 74. The Appeals Chamber cannot accept the Appellant's submission that the Order of 8 December 1999 was the result of political pressure.

36. The Appeals Chamber finds that the Appellant confines himself to listing the pressures which, in his view, were exerted on the Tribunal by the Government of Rwanda, and to asserting that those pressures led to the "annulment" of the Decision of 3 November 1999.[83] However, at no time does he show that the Judges who rendered the Decision of 31 March 2000 were influenced by those pressures.

(b) Alleged statement by the spokesman for the United Nations Secretary-General

37. The Appellant asserts that the spokesman for the United Nations Secretary-General, in reaction to the Decision of 3 November 1999, expressed direct support for the Government of Rwanda, stating: "[w]hat about the human rights of his victims?", thereby compromising the independence of the Tribunal.[84]

38. The Appeals Chamber notes first that Appellant Barayagwiza has produced no evidence in support of this allegation, since the newspaper article he cites has never been tendered or admitted into evidence. The Appeals Chamber is further of the opinion that, even if these words had been said, that would not suffice to show that they played a role in the Judges' decision.[85]

(c) The statements by the Prosecutor at the hearing of 22 February 2000

39. The Appellant submits that the Prosecutor's statement at the hearing of 22 February 2000 that the Tribunal would be closed down if the Decision of 3 November 1999 was not "reversed" increased the pressure exerted by the Government of Rwanda on the Tribunal. He also argues that, by these statements, the Prosecutor failed in her duty to act independently.[86] Thus he appears to intimate that the Prosecutor, like the Government of Rwanda, compromised the independence of the Tribunal.

40. The Appeals Chamber notes that the Prosecutor's duty to act independently is distinct from that of the Judges, given the particular role played by the Prosecutor within the

[81] Decision of 3 November 1999, para. 6.
[82] Article 8(1) of the Statute.
[83] Barayagwiza Appellant's Brief, paras. 23 and 31.
[84] *Ibid*., para. 27, citing the *National Post* (Canadian newspaper) of 6 November 1999.
[85] In this regard, it should be recalled that the Tribunal and its Judges are independent of the other organs of the United Nations: see *supra*, para. 28.
[86] Barayagwiza Appellant's Brief, para. 30.

Tribunal. The Prosecutor is effectively a party to the proceedings like the accused.[87] The duty of the Prosecutor to act independently is laid down in Article 15(2) of the Statute:

> The Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any government or from any other source.

41. The Appeals Chamber finds that, in simply citing the statements made by the Prosecutor at the hearing of 22 February 2000, the Appellant has failed to provide any evidence tending to show that the Prosecutor acted on behalf of the Government of Rwanda.

42. As to the allegation that the Prosecutor undermined the independence of the Tribunal, the Appeals Chamber recalls that, in its Decision of 31 March 2000, the Chamber reacted in the following manner to the statements by the Prosecutor cited by Appellant Barayagwiza:

> The Chamber notes also that, during the hearing on her Motion for Review, the Prosecutor based her arguments on the alleged guilt of the Appellant, and stated she was prepared to demonstrate this before the Chamber. The forcefulness with which she expressed her position compels us to reaffirm that it is for the Trial Chamber to adjudicate on the guilt of an accused, in accordance with the fundamental principle of the presumption of innocence, as incorporated in Article 20(3) of the Statute of the Tribunal.[88]

43. The Appeals Chamber can only agree with this affirmation, and notes that, far from yielding to the alleged pressures applied by the Prosecutor, the Appeals Chamber strove to re-emphasize in its Decision of 31 March 2000 the respective roles of the Prosecutor and the Judges. It thus reaffirmed its concern and resolve to render justice in full independence. Consequently, the appeal on this point must fail.

### 3. Conclusion

44. The Appeals Chamber recalls that it reaffirmed its independence in its Decision of 31 March 2000:

> Before proceeding to consider the Motion for Review, the Chamber notes that during the hearing on 22 February 2000 in Arusha, Prosecutor Ms Carla Del Ponte made a statement regarding the reaction of the Government of Rwanda to the Decision. She stated that: "The Government of Rwanda reacted very seriously in a tough manner to the Decision of 3 November 1999". Later, the Attorney General of Rwanda appearing as representative of the Rwandan Government, in his submissions as "*amicus curiae*" to the Appeals Chamber, openly threatened the non co-operation of the peoples of Rwanda with the Tribunal if faced with an unfavourable Decision by the Appeals Chamber on the Motion for Review. The Appeals Chamber wishes to stress that the Tribunal is *an independent body*, whose decisions are based solely on justice and law. If its decision in any case should be followed by non-cooperation, that consequence would be a matter for the Security Council.[89]

45. The Appeals Chamber further recalls that, far from having "reversed" the Decision of 3 November 1999 as the Appellant contends,[90] what the Decision of 31 March 2000 did was

[87] See Rule 2 of the Rules, which defines the term "Party" to mean the Prosecutor or the Accused.
[88] Decision of 31 March 2000, para. 35.
[89] *Ibid.*, para. 34 (emphasis added). See also Declaration of Judge Rafael Nieto-Navia, paras. 11 and 14.
[90] Barayagwiza Appellant's Brief, para. 32.

to review the former Decision in the light of the new facts presented by the Prosecutor[91] by amending its Disposition.[92]

46. The Appeals Chamber finds that Appellant Barayagwiza has failed to show that there was any violation of the principle of judicial independence. This limb of his first ground of appeal is dismissed.

## C. Impartiality of the Judges

### 1. Applicable law

47. The right of an accused to be tried before an impartial tribunal is an integral component of his right to a fair trial as provided in Articles 19 and 20 of the Statute.[93] Furthermore, Article 12 of the Statute cites impartiality as one of the essential qualities of any Tribunal Judge, while Rule 14(A) of the Rules provides that, before taking up his duties, each Judge shall make a solemn declaration that he will perform his duties and exercise his powers "impartially and conscientiously". The requirement of impartiality is again recalled in Rule 15(A) of the Rules, which provides that "[a] judge may not sit in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality".

48. The Appeals Chamber reiterates that there is a presumption of impartiality which attaches to any Judge of the Tribunal and which cannot be easily rebutted.[94] In the absence of evidence to the contrary, it must be assumed that the Judges "can disabuse their minds of any irrelevant personal beliefs or predispositions".[95] Therefore, it is for the appellant doubting the impartiality of a Judge to adduce reliable and sufficient evidence to the Appeals Chamber to rebut this presumption of impartiality.[96]

49. In the *Akayesu* Appeal Judgement, the Appeals Chamber recalled the criteria set out by the ICTY Appeals Chamber regarding the obligation of impartiality incumbent upon a Judge:

> That there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:
>
> A. A Judge is not impartial if it is shown that actual bias exists.
>
> B. There is an unacceptable appearance of bias if:
>
> (i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is

[91] Decision of 31 March 2000, para. 74.
[92] *Ibid*., para. 75.
[93] *Galić* Appeal Judgement, para. 37; *Rutaganda* Appeal Judgement, para. 39; *Kayishema and Ruzindana* Appeal Judgement, paras. 51 and 55; *Furundžija* Appeal Judgement, para. 177.
[94] *Galić* Appeal Judgement, para. 41; *Kayishema and Ruzindana* Appeal Judgement, para. 55; *Akayesu* Appeal Judgement, para. 91; *Čelebići* Appeal Judgement, para. 707; *Furundžija* Appeal Judgement, paras. 196-197.
[95] *Furundžija* Appeal Judgement, para. 197.
[96] *Semanza* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 45; *Akayesu* Appeal Judgement, para. 91; *Čelebići* Appeal Judgement, para. 707; *Furundžija* Appeal Judgement, para. 197.

> involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
>
> (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[97]

50. The test of the reasonable observer, properly informed, refers to "an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality, apprised also of the fact that impartiality is one of the duties that Judges swear to uphold".[98] The Appeals Chamber must therefore determine whether such a hypothetical fair-minded observer, acting in good faith, would accept that a Judge might not bring an impartial and unprejudiced mind to the issues arising in the case.[99]

2. Examination of Appellant's arguments

(a) Distortion of evidence

51. Appellant Nahimana submits that the Judges showed bias in distorting the following evidence: Valérie Bemeriki's testimony;[100] interview of 25 April 1994;[101] and the article, "*Rwanda: Current Problems and Solutions.*"[102] The Appeals Chamber concludes below that the Trial Chamber did not distort the testimony of Witness Valérie Bemeriki.[103] The Appeals Chamber considers here the grievances concerning the interview of 25 April 1994 and the article, "*Rwanda: Current Problems and Solutions*".

(i) Interview of 25 April 1994

52. Appellant Nahimana claims that the Trial Chamber misinterpreted in four respects the interview recorded on 24 April 1994 and broadcast the following day on Radio Rwanda ("interview of 25 April 1994" or "Exhibit P105/2B"): (1) in concluding that the Appellant had associated the Tutsi ethnic group with the "enemy";[104] (2) in concluding that the Appellant had used a verb which could mean "to kill";[105] (3) in concluding that the Appellant knew of the events taking place in Rwanda at the time of the interview;[106] (4) in not taking account of the fact that the end of the interview, which showed the absence of genocidal intent, had been intentionally severed.[107]

a. Association of Tutsi with the enemy

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[97] *Akayesu* Appeal Judgement, para. 203, citing *Furundžija* Appeal Judgement, para. 189. See also *Galić* Appeal Judgement, paras. 38-39; *Rutaganda* Appeal Judgement, para. 39; *Čelebići* Appeal Judgement, para. 682.
[98] *Furundžija* Appeal Judgement, para. 190. See also *Galić* Appeal Judgement para. 40; *Rutaganda* Appeal Judgement, para. 40; *Kayishema and Ruzindana* Appeal Judgement, para. 55; *Čelebići* Appeal Judgement, para. 683.
[99] *Rutaganda* Appeal Judgement, para. 41; *Čelebići* Appeal Judgement, para. 683.
[100] Nahimana Appellant's Brief, paras. 30-31, referring to its paragraphs 455-471.
[101] *Ibid*., paras. 32-33, referring to paras. 271-287 of the Brief.
[102] *Ibid*., paras. 34-35, referring to paras. 250-270 of the Brief.
[103] See *infra* XIII. D. 1. (b) (ii) a. ii.
[104] Nahimana Appellant's Brief, paras. 274-275, 287.
[105] *Ibid*., paras. 280-282; Nahimana Defence Reply, paras. 87-88.
[106] *Ibid*., paras. 283-286; Nahimana Defence Reply para. 89.
[107] *Ibid*., paras. 276-279; *see* also Nahimana Defence Reply, paras. 86 and 88.

53. The Trial Chamber found that, in the interview of 25 April 1994, Appellant Nahimana associated the enemy with the Tutsi ethnic group.[108] The Appeals Chamber finds that in the interview Appellant Nahimana designates the enemy as the *Inkotanyi* or the *Inyenzi*.[109] The Appeals Chamber observes that the assimilation between *Inkotanyi* – recognized explicitly as the "enemy" in the interview – and the Tutsi ethnic group was frequent in the pro-Hutu media and, more particularly, in RTLM broadcasts.[110] The Appeals Chamber further notes that in the interview the Appellant expresses his satisfaction at the fact that RTLM had been instrumental in the awakening of the majority people,[111] thus alluding to the fact that the enemy was the Tutsi minority. In these circumstances, the Appeals Chamber is of the view that the Appellant has not demonstrated that the Trial Chamber exhibited bias in considering that he implicitly targeted the whole Tutsi population when he mentioned in his interview the efforts of the army and of the population to stop "the enemy".

b. Use of the verb "*gufatanya*"

54. In paragraph 564 of the Judgement, the Trial Chamber concluded that the Appellant used the verb "to work" as a euphemism for "to kill". The Appellant submits that he used the verb "*gufatanya*", which does not mean "to work", but "to collaborate with".[112]

55. The Appeals Chamber notes that Exhibit P105/2B attributes to Appellant Nahimana the use of the verb "to work together".[113] In order to determine whether an error was made in the translation contained in this Exhibit, the Pre-Appeal Judge ordered re-certification of the translation of the relevant portion of the interview.[114] Re-certification confirmed that the Appellant used the term "*bagafatanya*", which means "to collaborate" and not "to work".[115] There was thus a translation error in Exhibit P105/2B. This error is not, however, attributable to the Trial Chamber and does not demonstrate that it was biased. In light of the analysis below,[116] the Appeals Chamber considers it unnecessary to examine the possible impact of this translation error on the Trial Chamber's findings.

c. Knowledge of events in Rwanda

56. With regard to the argument of Appellant Nahimana that he had no knowledge of the events taking place in Rwanda on 25 April 1994, the Appeals Chamber observes that the Appellant admits that he was able to receive RTLM broadcasts from 18 April 1994.[117] After

[108] Judgement, para. 966.
[109] Exhibit P105/2B, pp. 1 and 3.
[110] See in this regard, the conclusions of the Trial Chamber at paragraphs 473, 481, 486 of the Judgement.
[111] Exhibit P105/2B, p. 2.
[112] Nahimana Appellant's Brief, para. 281.
[113] Exhibit P105/2B, p. 3.
[114] Order for Re-Certification of the Record, 6 December 2006 ("Order of 6 December 2006"), pp. 2 and 4.
[115] *Supports audio pour confirmation de témoignages* [Audio Confirmation of Testimony], 4 January 2007, p. 6.
[116] See *infra* XII. D. 1.
[117] Nahimana Appellant's Brief, para. 284. See also Judgement, para. 539, which summarises what Appellant Nahimana said in the interview of 25 April 1994 : "[…] *apart from Bujumbura where we could not listen to RTLM, but when we arrived in Bukavu, we could listen to radio Rwanda and RTLM Radio",* Exhibit P105/2B, p. 3. It was only between 12 and 17 April 1994, when he was in Burundi, that the Appellant was allegedly unable to listen to RTLM.

reading the relevant parts of the interview, the Appeals Chamber is of the view that the Appellant has not demonstrated that the Trial Chamber exhibited bias in finding that the Appellant was aware of the events taking place in Rwanda when he was interviewed. In particular, the Appeals Chamber notes that the Appellant did not deny the assertion by the Radio Rwanda journalist that the Appellant was aware of ongoing events, but, to the contrary, confirmed it implicitly.[118] The Appeals Chamber accordingly finds that Appellant Nahimana's argument on this point is unfounded.

d. Amputation of the end of the interview

57. For the reasons given below,[119] the Appeals Chamber is of the view that the Appellant has not shown that the Trial Chamber erred in relying on the 25 April 1994 interview, notwithstanding his assertion that it had been cut short. A fortiori, this could not demonstrate bias on the part of the Trial Chamber.

e. Conclusion

58. The Appeals Chamber finds that the Appellant has not demonstrated that the Trial Chamber showed bias by misinterpreting the interview of 25 April 1994.

(ii) "*Rwanda: Current Problems and Solutions*"

59. Appellant Nahimana argues that the Trial Chamber misinterpreted his article, *"Rwanda: Current Problems and Solutions"* in erroneously finding that it associated "the enemy" and "the Tutsi league" with the whole Tutsi population.[120]

60. The Trial Chamber analysed the article in detail in its Judgement,[121] before concluding that Appellant Nahimana had used the notion of "Tutsi league" as a "veiled reference" to the Tutsi population as a whole and had equated this group with the enemy of democracy in Rwanda.[122] The Appeals Chamber notes that, although the article in several instances identified the Rwandan Patriotic Front ("RPF") as the enemy, it also made reference to a "Tutsi league", whose membership was undefined,[123] which was seeking to overthrow the Government or to manipulate democracy and which had links with the RPF.[124] In light of the vague nature of the language used by Appellant Nahimana, the Appeals Chamber considers that it was not unreasonable to infer, based on the context, that the whole Tutsi population was targeted.

61. Appellant Nahimana further submits that his testimony and the evidence presented by the Defence were omitted or misinterpreted by the Trial Chamber in its analysis of the article. It was, however, open to the Trial Chamber to accept other evidence (in particular the testimony of Expert Witness Des Forges) and to form its own opinion as to the interpretation

[118] Exhibit P105/2B, p. 3.
[119] See *infra* VI. B. 2. and VI. B. 5.
[120] Nahimana Appellant's Brief, paras. 250-265; Nahimana Defence Reply, paras. 82-84.
[121] Judgement, paras. 634-667.
[122] *Ibid*, paras. 667 and 966.
[123] See Exhibit P25A, p. 5.
[124] See Exhibit P25A, pp. 6, 7 and 9.

of the article. The Appellant has failed to demonstrate that any impartial judge would have accepted his testimony in this regard; nor does he show how the Defence exhibits to which he refers[125] would have impelled any impartial judge to conclusions different from those reached by the Trial Chamber.

62. The Appeals Chamber concludes that the Trial Chamber did not misinterpret the article, "*Rwanda: Current Problems and Solutions*", and that Appellant Nahimana has thus failed to establish that the Trial Chamber showed bias.

(b) Failure to respond to crucial arguments by the Defence

63. Nahimana contends that the Judges demonstrated that they were indeed biased against him by failing in the Judgement to respond to his key submissions.[126] In particular, the Appellant identifies two crucial theses that the Trial Chamber allegedly failed to address: (1) his acts and statements show that he was never driven by any discriminatory intent against the Tutsi community; (2) between April and July 1994, Radio RTLM functioned under the effective and exclusive leadership of its Director, Phocas Habimana, and its Editor-in-Chief, Gaspard Gahigi, and was under the *de facto* control of the army.[127] However, Nahimana fails to provide any reference to specific evidence on file, or to explain which portions of his Closing Brief and closing arguments the Trial Chamber ignored.[128] In any event, the Appeals Chamber takes the view that the Trial Chamber did in fact, in various portions of its Judgement, consider the "crucial arguments" mentioned by Nahimana, but decided not to accord them any credit.[129] The appeal on this point is accordingly dismissed.

(c) The visit to Rwanda

64. Appellant Barayagwiza contends that, shortly before his trial was due to start, Judges Pillay and Møse visited Rwanda, in order to "reinforce relations between the Rwandan Government and the Tribunal which had been damaged by the [Decision of 3 November 1999]".[130] He submits that the visit "would have created in the mind of an

[125] Exhibit 1D142B is a war poem published in *Impuruza*, a publication linked, according to the Appellant, to the "Tutsi league" (T. 19 September 2002, p. 78). Exhibit 1D61 is a book entitled "*Les relations interethniques au Rwanda à la lumière de l'agression d'octobre 1990*" [Inter-Ethnic Relations in Rwanda in light of the Aggression of October 1990] and contains an analysis and critique of publications prepared by groups supporting the RPF and addressed to the refugee community.

[126] Nahimana Appellant's Brief, paras. 36-39.

[127] *Ibid*., para. 37.

[128] The Appeals Chamber notes, however, that paragraph 527 of Nahimana Appellant's Brief refers to pages 393-396 of Nahimana's Closing Brief with respect to the second "crucial argument".

[129] Regarding the acts and statements of Appellant Nahimana, see in particular Judgement, paras. 538 and 564 (noting the Appellant's assertion that he condemned RTLM for having become a tool for killing), and 634 to 667 (for the interpretation to be given to the article, "Rwanda: Current Problems and Solutions", rejecting that proposed by Appellant Nahimana). With respect to the argument relating to the absence of control over RTLM after 6 April 1994, see in particular Judgement, para. 538 (noting the allegation that the RTLM had been taken over by the army), 564 (rejecting the allegation that "RTLM was hijacked" and that Appellant Nahimana did not have *de facto* authority to stop the broadcasts) and 568 (to similar effect). The Appeals Chamber also dismisses the Appellant's argument that the Trial Chamber insufficiently explained its rejection of his thesis concerning the lack of control over RTLM after 6 April 1994 (see Nahimana Appellant's Brief, paras. 527-529).

[130] Barayagwiza Appellant's Brief, para. 34. See also *ibid*, paras. 36, 38-40. The Appeals Chamber notes that, in support of certain of his allegations, Appellant Barayagwiza refers to press reports which do not appear to be on file: see Barayagwiza Appellant's Brief, footnotes 32-33.

independent and objective observer a legitimate suspicion that the Judges concerned were not impartial",[131] because Judges Pillay and Møse "were received by President Kagame, the Rwandan Minister of Justice and the Rwandan Attorney General" and "held discussions with the highest Rwandan authorities and visited sites and monuments dedicated to the massacres".[132] Barayagwiza further points out that the visit, which he appears to assimilate to a site-visit, took place three weeks before his trial was due to start, that it was "not part of the trial or pre-trial phase", and that it took place without his having been given the opportunity to object to it.[133]

65. It is apparent that Judges Pillay and Møse went to Rwanda together with other Judges as representatives of the Tribunal; that the purpose of the visit was, in particular, to reinforce cooperation between Rwanda and the Tribunal and to pay respect to the victims of the 1994 events; that during the planning and in the course of the visit no individual case was mentioned; and that the visit was scheduled according to the availability of the Judges and had no relation to the start of the Appellant's case.[134] The Appeals Chamber considers that official visits to States likely to be called upon to cooperate with the Tribunal is part of the duties of the President and Vice-President of the Tribunal,[135] posts occupied by Judge Pillay and Judge Møse respectively at the time of the visit. Rwanda cannot be an exception to that rule, given moreover that cooperation with that country is of fundamental importance to the realization of the Tribunal's statutory mission.

66. The Chamber is further of the view that the visit cannot be assimilated to a visit to the scene of the crimes alleged in the instant case, and that it was therefore not necessary to involve the parties, or to respect specific formalities for its organization. Visits to massacre sites and memorials were made specifically to pay respect to the victims and to raise public awareness of the existence and activities of the Tribunal.[136]

67. In light of the foregoing, the Appeals Chamber finds that a reasonable observer, properly informed, would not be led to doubt the impartiality of Judges Pillay and Møse because of their visit to Rwanda shortly before the trial commenced; consequently, Barayagwiza has failed to rebut the presumption of impartiality which attaches to these Judges. The appeal on this point is dismissed.

[131] *Ibid*., para. 38. See also para. 41.
[132] *Ibid*., para. 34. See also para. 35.
[133] *Ibid*., para. 35.
[134] T. 11 September 2000, pp. 98-99 and 101 (closed session).
[135] Similarly, the ICTY President and Vice-President sometimes pay official visits to countries where crimes were committed in order to discuss various aspects of co-operation between those countries and the ICTY. In *Krajišnik*, a panel of Judges recalled the distinction between the administrative and judicial functions exercised by a President of the ICTY: *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-AR73.2, Report to the Vice-President pursuant to Rule 15(B)(ii) concerning Decision on Defence Motion that Judge Meron not sit on an appeal, 1 September 2006, pp. 4-5. *See also Milan Lukić and Sredoje Lukić v. Prosecutor,* Case No. IT-98-32/1-AR11*bis*.1, Order on Second Motion to Disqualify President and Vice-President from Appointing Judges to Appeal Bench and to Disqualify President and Judge Meron from Sitting on Appeal, 11 May 2007, paras. 7 and 8.
[136] T. 11 September 2000, p. 100 (closed session).

(d) The Oral Decision of 11 September 2000

68. On 7 September 2000 Counsel for Appellant Barayagwiza sent out two letters, one to Judge Pillay and the other to Judge Møse, requesting that they recuse themselves from the case because of their visit to Rwanda. In an Oral Decision of 11 September 2000,[137] Judges Pillay and Møse refused to recuse themselves and explained their refusal in detail. On 18 September 2000, Barayagwiza appealed that decision.[138] The Appeals Chamber dismissed the appeal on 13 December 2000,[139] on the ground that such a decision was not susceptible of appeal.[140]

69. Barayagwiza claims that the manner in which the Oral Decision of 11 September 2000 was taken shows an appearance of bias on the part of the Judges, since his requests for recusal of 7 September 2000 were rejected without examination of their merits,[141] and the decision was taken solely by Judges Pillay and Møse; Judge Gunawardana was not consulted.[142] In that regard, he stresses that the panel of three Judges of the Appeals Chamber who rejected his appeal against this decision without examination of its merits indicated that the two Judges who were asked to recuse themselves "should have discussed it with the third or referr[ed] the matter to the Bureau".[143]

70. First, the Appeals Chamber is concerned to emphasise that, contrary to what Appellant Barayagwiza has alleged, it was not his request for recusal of 7 September 2000 that was rejected without an examination of its merits, but his Appeal of 18 September 2000.[144]

71. Secondly, the Appeals Chamber notes that, at the hearing of 11 September 2000, Judge Pillay expressed herself as follows:

> […] I will now communicate to you the decision on the request for recusal addressed to me and Judge Møse. And - so, this then is the decision of the two judges.[145]

After quoting Rule 15(B) of the Rules of Procedure and Evidence, Judge Pillay stated:

> The request for withdrawal was addressed to Judge Møse and me. In my capacity as presiding judge, I have conferred with him. For the reasons which I will enunciate, I do not consider it necessary to refer the matter to the Bureau for determination.[146]

72. The Appeals Chamber recalls that Rule 15(B) of the Rules of 26 June 2000 provided:

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[137] *Ibid*., pp. 94-101, (closed session) ("Oral Decision of 11 September 2000").
[138] *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-AR72, Notice of Appeal, 18 September 2000. The Appeals Chamber notes that paragraph 80 of the Judgement did not refer to this appeal.
[139] *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, "Decision (Interlocutory Appeal Filed on 18 September 2000)", 13 December 2000, ("13 December 2000 Decision").
[140] See Rule 72(D) of the Rules of Procedure and Evidence of 3 November 2000.
[141] Barayagwiza Appellant's Brief, para. 33; Barayagwiza Brief in Reply, para. 8.
[142] *Ibid*., para. 36.
[143] *Ibid*., para. 37, referring to the Decision of 13 December 2000, p. 2.
[144] See Oral Decision of 11 September 2000.
[145] T. 11 September 2000, p. 94 (closed session).
[146] *Ibid*., p. 96 (closed session).

> Any party may apply to the Presiding Judge of a Chamber for the disqualification of a Judge of that Chamber from a case upon the above grounds. After the Presiding Judge has conferred with the Judge in question, the Bureau, if necessary, shall determine the matter. If the Bureau upholds the application, the President shall assign another Judge to sit in place of the disqualified Judge.[147]

This provision does not specify under what circumstances the question of recusal of a Judge is to be referred to the Bureau. The Appeals Chamber takes the view that the need to do so may arise under various circumstances.

73. First, the Appeals Chamber would point out that, under the principle that the same person cannot be both judge and party, the President of the Chamber cannot rule on a request for recusal if he or she is directly affected by such request.[148] However, Judge Pillay was in the position of both judge and party, as she had to rule on her own recusal following the submission of Appellant Barayagwiza's request. Faced with such a situation, she should have referred the issue to the Bureau.

74. Secondly, the Appeals Chamber recalls that it is necessary to refer the issue to the Bureau if, after consultation with the judge concerned, the President of the Chamber finds that it is not necessary to recuse that judge, but that decision is challenged.[149] Therefore, since Judge Pillay's decision to reject the request for recusal of Judge Møse was challenged by Barayagwiza (as evidenced by his Appeal of 18 September 2000), the issue should have been referred to the Bureau.

75. However, regarding the ground of appeal raised here, the Appeals Chamber takes the view that it is necessary to consider the alleged irregularities in light of the allegation of bias based on the visit to Rwanda.[150] Having found that the impartiality of Judges Pillay and Møse could not be impugned by reason of their visit to Rwanda, the Appeals Chamber considers that the procedural irregularities committed by the Trial Chamber in ruling on the motion for disqualification of Judges Pillay and Møse were not, in themselves, sufficient to create in the mind of a reasonable observer, properly informed, an appearance of bias, or to rebut the presumption of impartiality of those Judges. The appeal on this point is accordingly dismissed.

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[147] Regarding the procedure to be followed, this Rule has not been amended since.

[148] With respect to this issue, the ICTY Bureau decided in 1998 to rule in the absence of the Judge whose withdrawal had been requested. *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-PT, Decision of the Bureau, 4 May 1998, p. 1. The ICTY Appeals Chamber also affirmed in *Galić* that the Judge whose disqualification is sought is to have no part in the process by which the application for that disqualification is dealt with: *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR54, Appeals Chamber Decision on the appeal lodged against the dismissal of the request for the withdrawal of a Judge, 13 March 2003, para. 8. See also *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60, Decision of the Bureau on the request by Blagojević in application of Rule 15(B) of the Rules, 19 March 2003, para. 1.

[149] *Galić* Appeal Judgement, paras. 30-31; *The Prosecutor* v. *Athanase Seromba*, Case No. ICTR-01-66-AR, Decision on the Interlocutory Appeal against the Decision of the Bureau of 22 May 2006, para. 5 ("Rule 15(B) provides for a specific two-stage consideration of motions for disqualification of a judge. As clearly indicated in the said Rule, the request for disqualification of a judge is sent to the Presiding Judge of the Chamber […]. The Presiding Judge of the Chamber will then confer with the Judge in question. If the party challenges the decision of the Presiding Judge, the Bureau will rule on the issue after a *de novo* examination.")

[150] See *supra* II. C. 2. (c) .

(e) Submissions related to the *Akayesu* case

76. The Appellants submit that Judge Pillay's participation in the *Akayesu* trial compromised her ability to rule impartially in the present trial in light of the factual findings in the *Akayesu* Judgement regarding RTLM and *Kangura.*[151] In particular, Appellant Nahimana submits that, in the *Akayesu* Trial Judgement, Judge Pillay publicly expressed the belief that, since 1993, Radio RTLM had broadcast "anti-Tutsi propaganda" aimed at exterminating the Tutsi population in the form of "anti Tutsi attacks which became increasingly targeted and violent".[152] Appellant Barayagwiza also contends that his appeal against the decision rejecting his request for the recusal of Judge Pillay on account of her participation in the *Akayesu* Judgement was never heard.[153]

(i) Preliminary comments

77. First, the Appeals Chamber notes that Appellants Barayagwiza and Ngeze merely put forward vague allegations to the effect that Judge Pillay "should have withdrawn",[154] "had made specific disparaging comments about *Kangura*, the Appellant's newspaper",[155] "heard much that was negative about the newspaper".[156] Such allegations will not be examined because they do not satisfy the criteria for examination on appeal.[157] The Appeals Chamber recalls that it cannot accept allegations that are general and abstract, that are neither substantiated nor detailed, in order to rebut the presumption of impartiality.[158] The Chamber further notes that Appellants Barayagwiza and Ngeze appear to be relying on their arguments made in other proceedings.[159] The Appeals Chamber reiterates that this is unacceptable.[160]

(ii) Allegation of Judge Pillay's bias against RTLM and *Kangura* as a result of her participation in the *Akayesu* case

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[151] Nahimana Appellant's Brief, paras. 25-29; Barayagwiza Appellant's Brief, para. 33 and Barayagwiza Brief in Reply, paras. 7 and 12; Ngeze Appellant's Brief, paras. 110, 113-114; Ngeze Brief in Reply, paras. 4-5.
[152] Nahimana Appellant's Brief, para. 25, which cites the *Akayesu* Trial Judgement in paras. 100, 105 and 149.
[153] Barayagwiza Appellant's Brief, paras. 8(ii) and 33; Barayagwiza Brief in Reply, para. 12. Appellant Barayagwiza requested the recusal of Judge Pillay on 18 October 1999 (*The Prosecutor v. Jean-Bosco Barayagwiza,* Case No. ICTR-97-19-I, Extremely Urgent Application for Disqualification of Judges Laïty Kama and Navanethem Pillay ("Motion for Withdrawal of 18 October 1999")). That same day the Trial Chamber orally rejected that Motion: T. 18 October, pp. 82-88 ("Oral Decision of 18 October 1999"). Paragraph 78 of the Judgement mistakenly refers to an Oral Decision of 19 October 1999. On 19 October 1999, Appellant Barayagwiza appealed the Oral Decision of 18 October 1999, stating his intention to file a brief subsequently: *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-72, Notice of Appeal, 19 October 1999 ("Appeal of 19 October 1999"). Paragraph 78 of the Judgement omitted any reference to this appeal.
[154] Appellant Barayagwiza merely states in footnote 31 to paragraph 33 of his Appellant's Brief that the findings in question in the *Akayesu* Trial Judgement are those in paragraphs 123, 126, 127, 147 and 149; he thus contends that these concern issues that were determined in the Judgement, although no specific arguments were put forward to support this contention.
[155] Ngeze Appellant's Brief, para. 113. Appellant Ngeze did not indicate the content of the contentious statement.
[156] Ngeze Brief in Reply, para. 4.
[157] See *supra* I. E.
[158] *Akayesu* Appeal Judgement, paras. 92, 100-101.
[159] See in particular Barayagwiza Brief in Reply, para. 12 (which appears to refer back to the arguments put forward in the Motion for Withdrawal of 18 October 1999); Ngeze Appellant's Brief, para. 113 (apparent reference to the arguments developed in support of an appeal against a decision rejecting a motion for recusal of Judge Pillay, that appeal having already been rejected on procedural grounds).
[160] Practice Directions on Formal Requirements for Appeals from Judgement, para. 4.

78. The Appeals Chamber recalls that the Judges of this Tribunal and those of the ICTY are sometimes involved in several trials which, by their very nature, cover issues that overlap. It is assumed, in the absence of evidence to the contrary, that, by virtue of their training and experience, the Judges will rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case.[161] The Appeals Chamber agrees with the ICTY Bureau that "a judge is not disqualified from hearing two or more criminal trials arising out of the same series of events, where he is exposed to evidence relating to these events in both cases".[162]

79. In the instant case, the Appeals Chamber is not convinced that the mere reference to paragraphs in the *Akayesu* Trial Judgement is sufficient to prove an unacceptable appearance of bias on the part of Judge Pillay. The Appeals Chamber notes that the *Akayesu* Trial Judgement only marginally mentions propaganda, certain of *Kangura's* "articles and cartoons", and the issue of RTLM broadcasts,[163] whereas an entire section of the Judgement under appeal is devoted to that newspaper[164] and radio station.[165] Far from insisting on a view already expressed in the *Akayesu* Trial Judgement, Judge Pillay, along with the other Judges sitting in the present case who had not participated in the *Akayesu* trial, carefully assessed the evidence in the present case and relied thereon to make factual findings on *Kangura* and RTLM. The Appeals Chamber finds that a reasonable observer, properly informed, would not be led to doubt Judge Pillay's impartiality because she participated in the *Akayesu* case, and that therefore her presumption of impartiality has not been rebutted. The Appellants' appeal on these points is dismissed.

80. Regarding the issue of the failure to rule on the Appeal of 19 October 1999, this stems from the Decision of 3 November 1999,[166] in which the Appeals Chamber considered it unnecessary to decide the 19 October 1999 Appeal.[167] Even though this appeal was not decided after the proceedings against the Appellant resumed following the Decision of 31 March 2000, the Appellant was able to present the arguments made in his appeal of 19 October 1999 in the present appeal. The Appeals Chamber has considered and rejected these arguments. Accordingly, the Appeals Chamber is unable to see how the fact that the Appeal of 19 October 1999 was not decided could have had any impact on the Judgement under appeal. The appeal on this point is dismissed.

(iii) The Trial Chamber's citation in the Judgement of extracts from the *Akayesu* Trial Judgement

81. Appellant Nahimana further submits that the incorporation in the Judgement of quotations from what he calls the "positions adopted by the judges" in the *Akayesu* Trial Judgement clearly indicated the weight which the Trial Chamber attached to that precedent.[168]

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[161] *Akayesu* Appeal Judgement, para. 269.
[162] *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-PT, Decision of the Bureau, 4 May 1998, p. 2.
[163] *Akayesu* Trial Judgement, para. 123. No references were made to *Kangura* or to RTLM in the portions of the *Akayesu* Trial Judgement entitled "factual findings" and "legal findings".
[164] Judgement, paras. 122-257.
[165] *Ibid*., paras. 342-488.
[166] Decision of 3 November 1999, See *supra* II. B. 1.
[167] *Ibid*., para. 113.
[168] Nahimana Appellant's Brief, para. 28.

82. The Appeals Chamber considers that merely repeating extracts from an earlier judgement on the historical analysis of Rwanda would not lead a reasonable observer, properly informed, to apprehend bias. The appeal on this point is accordingly dismissed.

(f) Grounds of appeal associated with the *Ruggiu* case

83. Appellant Nahimana submits that the participation of Judges Pillay and Møse in the *Ruggiu* case created an unacceptable appearance of bias in light of the views already expressed regarding the charges against him.[169] In that regard, he submits that the Judges who sat in the *Ruggiu* trial held that the RTLM broadcasts between 6 January and 14 July 1994 constituted direct and public incitement to commit genocide and persecution as a crime against humanity;[170] Judges Pillay and Møse had thus decided, five months before the trial of the Appellant opened, that the constituent elements of two of the crimes with which he was charged had been established in fact and in law.[171] Similarly, he contends that the Judges in *Ruggiu* considered the Appellant to be the Director of RTLM and had emphasised the involvement of the managerial staff in the commission of the crimes charged;[172] Judges Pillay and Møse were therefore voicing their conviction, even before the Appellant's trial opened, that he must be held to have incurred criminal responsibility in respect of the crimes charged.[173] Lastly, the Appellant criticizes the Judges for relying on the *Ruggiu* Judgement to justify his conviction "by stating that Radio RTLM broadcasts had already been held to constitute the crime of persecution".[174]

84. The Appeals Chamber recalls that there is a presumption, in the absence of evidence to the contrary, that the Judges in a particular case reach their decision solely and exclusively on the basis of the evidence adduced in that case.[175] This presumption exists even when the Judges are called to rule on cases that overlap.[176] The Appeals Chamber is not convinced that Appellant Nahimana has succeeded in rebutting this presumption, or in showing an unacceptable fear of bias because of the participation of Judges Pillay and Møse in the *Ruggiu* Trial Judgement.

85. The Appeals Chamber notes that the *Ruggiu* Trial Judgement was rendered following the defendant's guilty plea, and that there was no adversarial debate regarding the acts admitted by Georges Ruggiu, or their characterization. Hence, the "views" in the paragraphs of the *Ruggiu* Trial Judgement cited by the Appellant were based solely on facts admitted by Georges Ruggiu. Moreover, the Judges in the instant case were careful not simply to repeat in the Judgement the factual findings in the *Ruggiu* Trial Judgement or the admissions made by Ruggiu in the criminal proceedings against him. On the contrary, the Judges made their findings based on evidence presented in the instant case.[177] In that regard, it should be noted

[169] *Ibid*., paras. 16-24 ; Nahimana Brief in Reply, paras. 2-14.
[170] *Ibid*., paras. 16-20, referring to *Ruggiu* Trial Judgement, paras. 17, 22, 43, 50-51.
[171] *Ibid*., para. 20. See also Nahimana Brief in Reply, paras. 2-12.
[172] *Ibid*., para. 21, referring to *Ruggiu* Trial Judgement, paras. 42-44(xiii).
[173] *Ibid*., para. 22. See also Nahimana Brief in Reply, paras. 2-14.
[174] *Ibid*., para. 24, referring to paragraph 1072 of the Judgement.
[175] See *supra* II. C. 2. (e) (ii) .
[176] *Akayesu* Appeal Judgement, para. 269.
[177] Judgement, paras. 342-619.

that the Trial Chamber Judges totally rejected Georges Ruggiu's testimony against the Appellants.[178]

86. Nor is the Appeals Chamber convinced that paragraph 1072 of the Judgement proves that the Trial Chamber Judges in fact relied on the precedent of the *Ruggiu* Trial Judgement "to justify the sentences against the [A]ppellant by stating that the Radio RTLM broadcasts had already been considered to constitute the crime of persecution".[179] Paragraph 1072 of the Judgement reads as follows:

> In *Ruggiu*, its first decision regarding persecution as a crime against humanity, the ICTR applied the elements of persecution outlined by the ICTY Trial Chamber in the *Kupreškić* case. *In these cases the crime of persecution was held to require "a gross or blatant denial of a fundamental right reaching the same level of gravity" as the other acts enumerated as crimes against humanity under the Statute*. The Chamber considers it evident that hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches this level of gravity and constitutes persecution under Article 3(h) of its Statute. *In Ruggiu, the Tribunal so held, finding that the radio broadcasts of RTLM, in singling out and attacking the Tutsi ethnic minority, constituted a deprivation of "the fundamental rights to life, liberty and basic humanity enjoyed by members of the wider society*". Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm.[180]

87. An analysis of paragraph 1072 and of the entire section of the Judgement in which it appears[181] shows that the Trial Chamber cited the *Ruggiu* and *Kupreškić et al.* Trial Judgements as part of its examination of the elements constituting a crime against humanity. While it would appear that the Trial Chamber replaced the phrase in the *Ruggiu* Trial Judgement,[182] "the acts […] acknowledged by the accused [Ruggiu]", by "the radio broadcasts of RTLM",[183] the overall context of paragraph 1072 within the Judgement under appeal indicates that the Trial Chamber was simply referring to the *Ruggiu* Trial Judgement in support of its legal finding that hate speech could constitute persecution. The appeal on this point is dismissed.

(g) <u>The decision to continue the trial in the absence of Appellant Barayagwiza</u>

88. Appellant Barayagwiza appears to argue that the Trial Chamber's decision to continue the trial in his absence demonstrates bias on the part of the Judges.[184] As will be discussed below,[185] the Appeals Chamber considers that the Trial Chamber did not err in continuing the trial in the absence of the Appellant. A fortiori, the decision to continue the trial in the absence of the Appellant does not demonstrate bias against him on the part of the trial Judges.

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[178] *Ibid*., para. 549.
[179] Nahimana Appellant's Brief, para. 24, referring to paragraph 1072 of the Judgement.
[180] Emphasis added, footnotes omitted.
[181] Judgement, paras. 1069-1084, "Persecution as crime against humanity".
[182] *Ruggiu* Trial Judgement, para. 22.
[183] Judgement, para. 1072.
[184] Barayagwiza Appellant's Brief, paras. 42-45.
[185] See *infra* IV. A. 1.

(h) Other arguments of Appellant Barayagwiza

89. Appellant Barayagwiza further argues in his fourth ground of appeal that the Trial Chamber exhibited bias in (1) failing to ensure effective representation in the context of the trial in his absence;[186] and (2) its treatment of his Counsel.[187] These arguments are addressed in the examination of the Appellant's fourth ground of appeal: the Appeals Chamber finds that, although the Trial Chamber committed errors in continuing the trial in the absence of Counsel for Appellant Barayagwiza, that is not sufficient to establish bias.[188]

3. Conclusion

90. The Appellants' grounds of appeal with respect to the impartiality of the Trial Chamber Judges are dismissed.

## III. LOSS OF JURISDICTION BY REASON OF ABUSE OF PROCESS

91. In his second ground of appeal Appellant Barayagwiza contends that the Tribunal lost jurisdiction to try him as a result of abuse of process.[189] He claims in particular that: (1) his "arbitrary arrest (…) on 21 February 1997 and illegal detention prior to being indicted vitiated all the proceedings which followed";[190] and (2) the proceedings which followed the Decision of 3 November 1999 (notably the Decisions of 25 November and 8 December 1999 to maintain him in custody, the hearing of 22 February 2000 and the Decision of 31 March 2000) amounted to an abuse of process because they were the result of improper political pressure on the Tribunal and the principles of due process were disregarded.[191]

92. The Appeals Chamber recalls first of all that the question of Appellant Barayagwiza's arrest and indictment was dealt with in the Decision of 3 November 1999, as amended by the Decision of 31 March 2000. It further recalls that it has already dismissed Appellant Barayagwiza's submissions regarding the legality of the proceedings which followed the Decision of 3 November 1999.[192] The Appeals Chamber therefore considers that the Appellant has failed to demonstrate that jurisdiction was lost by reason of abuse of process.

## IV. APPELLANT BARAYAGWIZA'S DEFENCE RIGHTS

### A. Absence of Appellant Barayagwiza from the trial and fairness of the proceedings

93. In his third ground of appeal, Appellant Barayagwiza contends that the Trial Chamber erred in conducting the trial in his absence, when there was no provision or practice at the time that allowed for trial *in absentia*.[193] He adds that, even if it had been found that he had

[186] See Barayagwiza Appellant's Brief, paras. 81, 89-91; Barayagwiza Brief in Reply, paras. 51-55.
[187] Barayagwiza Appellant's Brief, para. 89(xii), (a) to (c), (e).
[188] See *infra* IV. A. 2.
[189] Barayagwiza Notice of Appeal, p. 1; Barayagwiza Appellant's Brief, paras. 46-50.
[190] Barayagwiza Appellant's Brief, para. 50.
[191] *Ibid*., paras. 46-49.
[192] See *supra* II. B. 3.
[193] Barayagwiza Notice of Appeal, p. 1; Barayagwiza Appellant's Brief, paras. 51-61; T(A) 17 January 2007, pp. 56-57, 64-68, 87, 89-90, 92-94.

waived his right to be present at trial,[194] the Trial Chamber was required to guarantee the fairness of the proceedings against him (in particular, the right to effective representation), but failed to do so.[195] The Appellant develops his arguments on this subject mainly in his fourth ground of appeal.[196] The Appeals Chamber will begin by examining the question whether the Trial Chamber has jurisdiction to conduct a trial in a situation where the accused refuses to attend the proceedings.

1. The Trial Chamber's jurisdiction to conduct a trial in the absence of the accused

94. Appellant Barayagwiza contends that neither the Statute nor the Rules of Procedure and Evidence permitted the Trial Chamber to try him *in absentia*.[197] Invoking, notably, the *travaux préparatoires* of the Statute of the ICTY, he asserts that a trial *in absentia* was excluded when the ICTY was established, and that such exclusion was subsequently extended to the Tribunal.[198] In Appellant Barayagwiza's view, this proposition is confirmed by the case-law of the Tribunal,[199] while ICTY case-law entertains the possibility of trials *in absentia* only in the case of contempt of court proceedings.[200] The Appellant observes that it was only on 26 and 27 May 2003 that the Rules of Procedure and Evidence were amended to include Rule 82 *bis*, allowing the accused to be tried *in absentia*, and that this new Rule, which is non-retrospective, is inconsistent with the procedure and practice in force at the Tribunal.[201] Finally, he emphasizes that the Statute of the International Criminal Court does not provide for a trial *in absentia*.[202]

[194] In this regard, the Appellant concedes that the European Court of Human Rights, British jurisprudence and the Convention on Human Rights recognize that a trial may be conducted in the absence of the accused in certain circumstances; see Barayagwiza Appellant's Brief, paras. 62-63.
[195] Barayagwiza Appellant's Brief, paras. 62-67. The allegations in these paragraphs concerning the fairness of the trial and representation of the Appellant will be considered under the review of the Appellant's fourth ground of appeal.
[196] Barayagwiza Notice of Appeal, p. 1; Barayagwiza Appellant's Brief, paras. 68-99.
[197] Barayagwiza Appellant's Brief, para. 51. During the hearing on appeal, Counsel for the Appellant argued that the Trial Chamber could have forced him to attend in person (see T(A) 17 January 2007, pp. 64, 90, 92).
[198] *Ibid*., paras. 52-55, referring, *inter alia*, to the Secretary-General's Report of 3 May 1993, ("Secretary-General's Report of 3 May 1993"), para. 101, and to some of his remarks before the Security Council (Provisional Verbatim Record of 3217th Meeting of the Security Council, UN Doc S/PV.3217, 25 May 1993).
[199] *Ibid*., para. 56 referring to *The Prosecutor v. Augustin Bizimana et al.*, Case No. ICTR-98-44-I, Decision on the Prosecutor's Motion for Separate Trials and for leave to File an Amended Indictment, 8 October 2003, para. 3; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Severance of André Rwamakuba and Amendments of the Indictments, 7 December 2004, para. 24. During the appeal proceedings, the Appellant also invoked "an Appeals Chamber Decision in *Zigiranyirazo*" (see T(A) 17 January 2007, p. 57).
[200] Barayagwiza Appellant's Brief, paras. 57-58, referring respectively to *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR108 *bis*, Judgement on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 59, and to Salvatore Zappala, Human Rights in International Criminal Proceedings (Oxford: Oxford University Press, 2003), p. 128, referring, in turn, to *Čelebići*, but the Appellant provides no specific reference to this case.
[201] *Ibid*., para. 59. At paragraph 60, the Appellant contends that "[e]ven if Rule 82 *bis* were in conformity with the Statute of the ICTR and if it could have a retroactive effect, it is noted that the enumerated conditions were not observed before the trial of Appellant began on October 23, 2000". As this assertion is not developed further, the Appeals Chamber will not consider it.
[202] *Ibid*., para. 61.

95. The Appeals Chamber notes that, from 23 October 2000, the first day of hearing, until 22 August 2003, the last day of hearing, Appellant Barayagwiza, who was in detention at the Tribunal's Detention Facility, failed to appear at the hearings.[203]

96. The Appeals Chamber recalls that, pursuant to Article 20(4)(d) of the Statute, the accused is entitled to be present at trial. The Appeals Chamber notes that this article is modeled on Article 14(3)(d) of the International Covenant on Civil and Political Rights ("ICCPR") and to a very large extent reproduces it. The right of any accused to be tried in his or her presence is, moreover, fully provided for in regional human rights regimes.[204] The question is whether a trial can be held in the absence of the accused where he refuses to attend the proceedings.

97. As an initial point, the Appeals Chamber finds the jurisprudence invoked by Appellant Barayagwiza to be irrelevant. The Decisions in *Karemera et al*. and *Blaškić* concern trials "by default", in other words, a situation where an indictee has yet to be apprehended or is on the run and, not, as in the instant case, a situation where an accused who is in the custody of the Tribunal voluntarily chooses not to appear for trial. Thus, in both decisions in *Karemera et al.*, Trial Chamber III had to decide on a motion for separate trials in a situation where two of the six co-accused had not yet been apprehended.[205] In *Blaškić*, the ICTY Appeals Chamber envisaged a situation where a person accused of a crime under the ICTY Statute refused to participate in his trial, and held that "it would not be appropriate to hold *in absentia* proceedings against persons falling under the primary jurisdiction of the International Tribunal", stating in this connection that "even when the accused has clearly waived his right to be tried in his presence (Article 21(4)(d) of the Statute), it would prove extremely difficult or even impossible for an international criminal court to determine the innocence or guilt of that accused".[206] The Appeals Chamber notes, however, that the matter

[203] The absence is mentioned in the Judgement, paras. 83 and 98. The Appeals Chamber observes that Appellant Barayagwiza was also absent at the delivery of the Judgement; see T. 3 December 2003, pp. 2, 27.

[204] Even though this right is not stipulated in Article 6 of the European Convention on Human Rights, Article 8 of the American Convention on Human Rights or Article 7 of the African Charter on Human and Peoples' Rights, it is recognized by human rights institutions. The European Court of Human Rights has for long considered that "the right of the accused, to participate in the trial arises from the object and purpose of the Article taken as a whole" (*Colozza v. Italy*, European Court of Human Rights, No. 9024/80, ECHR, Judgement, 12 February 1985, para. 27; see also *Brozicek v. Italy*, European Court of Human Rights, No. 10964/84, ECHR, Judgement, 19 December 1989, para. 45; *Poitrimol v. France*, European Court of Human Rights, No. 14032/88, ECHR, Judgement, 23 November 1993, para. 35; *Van Geyseghem v. Belgium*, European Court of Human Rights, No. 26103/95, ECHR, Judgement of 21 January 1999, para. 33; *Krombach v. France*, European Court of Human Rights, No. 29731/96, ECHR, Judgement, 13 February 2001, para. 86). It seems that the Inter-American Commission followed a reasoning quite similar in a case involving the absence of an individual (charged with embezzlement) during the preliminary hearing on the merits. (See Report No. 50/00, Case 11.298, *Reinaldo Figueredo Planchart v. Venezuela*, 13 April 2000, para. 112). Finally, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, prepared by the African Human Rights Commission in 2001, provides that: "in criminal proceedings, the accused has the right to be tried in his or her presence", since "the accused has the right to appear in person before the judicial body". (Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, (N)(6)(c) Rights during a trial).

[205] *The Prosecutor v. Augustin Bizimana et al.,* Case No. ICTR-98-44-I, Decision on the Prosecutor's Motion for Separate Trial and for Leave to File an Amended Indictment, 8 October 2003, paras. 1-3; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, "Decision on Severance of André Rwamakuba and Amendments of the Indictments", 7 December 2004, para. 24.

[206] *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR108 *bis*, Judgement on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 59.

before the ICTY Appeals Chamber was of a totally different nature from that raised in the instant case[207] and that it thus ruled on the issue of trial in the absence of the accused only as an incidental matter; its ruling could not be interpreted as prohibiting the conduct of a trial in the absence of an accused who had clearly waived his right to attend and participate.

98. Moreover, contrary to Appellant Barayagwiza's assertion, the Secretary-General's Report of 3 May 1993 does not preclude conducting a trial in a situation where the accused refuses to attend the proceedings. While it is true that in paragraph 101 of the Report the Secretary-General states: "There is a widespread perception that trials *in absentia* should not be provided for in the statute as this would not be consistent with Article 14 of the International Covenant on Civil and Political Rights, which provides that the Accused shall be entitled to be tried in his presence", both its placement in the report[208] and the wording of this paragraph show that the expression "*in absentia*" refers here to an accused who has not yet been arrested by the Tribunal.

99. In view of the foregoing, the Appeals Chamber is not convinced that the precedents cited by the Appellant support the view that a trial in the absence of the accused is prohibited for and by the *ad hoc* Criminal Tribunals where an accused who has been apprehended and informed of the charges against him refuses to be present for trial. Conversely, in a recent interlocutory decision, this Appeals Chamber explicitly held that the right of an accused person to be present at trial is not absolute and that an accused before this Tribunal can waive that right.[209] However, in view of the fact that the non-absolute nature of the accused's right to be present at his trial was not contested by the Parties in the present case, and that the issue of waiver of this right was not the subject of the interlocutory appeal, the Appeals Chamber deems it appropriate to rule on this matter on the basis of a more thorough review.

100. The Appeals Chamber notes that Rule 82 *bis*, introduced into the Rules of Procedure and Evidence by an amendment of 27 May 2003, reads as follows:

> If an accused refuses to appear before the Trial Chamber for trial, the Chamber may order that the trial proceed in the absence of the accused for so long as his refusal persists, provided that the Trial Chamber is satisfied that:

[207] The Appeals Chamber had to determine the power of a Judge or of a Trial Chamber to issue a binding order and the appropriate remedies in case of non-compliance therewith. More specifically, the ICTY Appeals Chamber was contemplating a situation where a person called by either party to testify in a trial fails to answer ICTY's summons and, when prosecuted for contempt of court under Rule 77 of ICTY Rules as a result of such non-compliance, also fails to attend the contempt hearings. Moreover, footnote 83 of the Decision reveals that the Appeals Chamber of ICTY was referring to an accused who is not yet apprehended, and hence to a trial "by default", and not to a situation where a defendant in the custody of the Tribunal refuses to attend proceedings.

[208] The Appeals Chamber notes in this regard that paragraph 101 immediately precedes the paragraph on arrest and formal charging by the accused's initial appearance in court.

[209] *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-2001-73-AR73, "Decision on Interlocutory Appeal", 30 October 2006, para. 14. Prior to this Decision it seems that the Trial Chambers adopted a similar practice, sometimes based on Rule 82 *bis* of the Rules; see *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, T. 6 June 2005, pp. 2-5; *The Prosecutor v. Pauline Nyiramasuhuko et al.,* Case No. ICTR-98-42-T, T. 23 January 2006, pp. 13-14. Regarding the non-absolute nature of the accused's right to attend proceedings, the Appeals Chamber recalls for example that Rule 80(B) of the Rules allows a Trial Chamber to order the removal of an accused from the proceedings if he has persisted in disruptive conduct following a warning that he may be removed. See also *The Prosecutor v. Édouard Karemera et al.,* Case No. ICTR-98-44-AR73.10, Decision on Nzirorera's Interlocutory Appeal Concerning his Right to be Present at Trial, 5 October 2007, para. 11.

(i) the accused has made his initial appearance under Rule 62;

(ii) the Registrar has duly notified the accused that he is required to be present for trial;

(iii) the interests of the accused are represented by counsel.

101. Although this provision could have been applied to Appellant Barayagwiza's situation from 27 May 2003 pursuant to Rule 6(C) of the Rules, the Appeals Chamber will pursue its analysis, since the Appellant contends that there was no legal basis to conduct a trial in his absence prior to the adoption of Rule 82 *bis* of the Rules. The Appeals Chamber will take particular note of the case-law of international and regional human rights jurisdictions regarding the right of the accused to be present for trial prior to the amendment which introduced Rule 82 *bis*. The Appeals Chamber recalls in this respect that the principle of legality does not prevent a court from ruling on a matter through a process of interpretation and clarification of the applicable law, and reaffirms that, when the Appeals Chamber interprets specific articles of the Statute or the Rules, it is merely providing their correct interpretation, even if this may previously have been expressed in different terms.[210]

102. The fact that there is no prohibition on holding a trial in the absence of the accused if he refuses to attend emerges clearly from the practice deriving from international human rights instruments, as established prior to 23 October 2000, date of the first day of hearing in the present case. In particular, the Human Rights Committee had already held in 1983 that the provisions of Article 14 of the ICCPR do not prohibit proceedings in the accused's absence when, for example, "the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present".[211]

103. In *C v. Italy*, the European Commission of Human Rights recognized the possibility for an accused to waive his right to be present at trial.[212] This possibility was subsequently recognized by the European Court of Human Rights.[213]

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[210] *Ntagerura et al.* Appeal Judgement, para. 127.

[211] *Daniel Monguya Mbenge et al. v. Democratic Republic of the Congo*, Communication No. 16/1977, UN Doc. CCPR/C/18/D/16/1977, 25 September 1983, para. 14(1) (emphasis added).

[212] *C. v. Italy*, European Commission on Human Rights, No. 10889/84, ECHR, Decision of 11 May 1988 on the Admissibility of the Application. In that case, the Applicant had voluntarily refused to appear before an Italian Court and mandated his Counsel to represent him fully during the trial. He alleged before the Commission that he did not have a fair trial, accusing the Italian judicial authorities of failing to hear him personally on the charges brought against him. The Commission noted that the Applicant had clearly chosen not to participate in the proceedings and thus found that "the applicant failed to exercise the right to appear at the hearing afforded him under Italian law and to use the defence afforded him [...]. Insofar as the applicant argues that his non-participation in the committal proceedings irreparably impeded his defence, the Commission deemed that he could not avail himself of this circumstance since he did not use the means available to him in subsequent proceedings" (para. 3).

[213] See, *inter alia*, *Medenica v. Switzerland*, No. 20491/92, ECHR, Judgement, 14 June 2001, paras. 54-59; *Somogyi v. Italy*, No. 67972/01, ECHR, Judgement, 18 May 2004, para. 66; *Sejdovic v. Italy*, No 56581/00, ECHR, Judgement, 10 November 2004, paras. 30-31 (Judgement affirmed by the Grand Chamber of the European Court of Human Rights: Judgement, 1 March 2006); *R.R. v. Italy*, No. 42191/02, ECHR, Judgement, 9 June 2005, para. 50. The European Court of Human Rights recently stated that "neither the letter nor the spirit of Article 6 of the Convention prohibit a person from voluntarily waiving the guarantees of a fair trial in a tacit or express manner [...]. However, for consideration under the Convention, waiving the right to participate in the trial must be unequivocally established and covered by minimum guarantees in terms of its gravity" (unofficial translation): *Battisti v. France*, No. 28796/05, ECHR, (Second Section) *Décision sur la recevabilité du 12 décembre 2006 (irrecevabilité).*

104. Moreover, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provide that "[t]he accused may voluntarily waive the right to appear at a hearing, but such a waiver shall be established in an unequivocal manner and preferably in writing".[214]

105. The Appeals Chamber further notes that, even though the Rules of the ICTY do not contain a rule corresponding to Rule 82 *bis*, the jurisprudence of the ICTY recognizes that the right to be present at trial can be waived explicitly.[215]

106. Lastly, although its adoption occurred after 23 October 2000, the Appeals Chamber takes the view that Rule 60(A)(i) and (B) of the Rules of the Special Court for Sierra Leone sheds light on the aforementioned international practice in that it provides that an accused cannot be tried in his absence unless he has made his initial appearance, has been afforded the right to appear at his own trial, but refuses to do so.[216]

107. It clearly emerges from the aforementioned concurring instruments and jurisprudence that, however firmly the right of the accused to be tried in his presence may be established in international law, that did not, on 23 October 2000, preclude the beneficiary of such right from refusing to exercise it.[217] Insofar as it is the accused himself who chooses not to exercise his right to be present, such waiver cannot be assimilated to a violation by a judicial forum of the right of the accused to be present at trial. Such right is clearly aimed at protecting the accused from any outside interference which would prevent him from effectively participating in his own trial; it cannot be violated when the accused has voluntarily chosen to waive it.

108. According to the European Court of Human Rights, such a waiver must be given of the accused's free will, with knowledge of the nature of the proceedings against him and of the date of the trial; it must be unequivocal and must not run counter to any important public interest.[218] The Human Rights Committee also allows such a waiver provided that it is in the

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[214] The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, prepared by the African Human Rights Commission in 2001, point (N)(6)(c)(3).

[215] See *Prosecutor v. Milan Simić,* Case No. IT 95-9/2-S, Sentencing Judgement, 17 October 2002, para. 8 and footnote 18 (due to his medical condition, Milan Simić frequently waived his right to be present in court during the proceedings but participated by video-link and notified the Chamber in writing of each explicit waiver of his right).

[216] The original version of these provisions, dated 7 March 2003, reads as follows:

> "(A) An accused may not be tried in his absence, unless: (i) the accused has made his initial appearance, has been afforded the right to appear at his own trial, but refuses so to do [...].
>
> (B) In either case the accused may be represented by counsel of his choice, or as directed by a Judge or Trial Chamber. The matter may be permitted to proceed if the Judge or Trial Chamber is satisfied that the accused has, expressly or impliedly, waived his right to be present."
>
> The amendment of 1 August 2003 did not change the substance of this sub-paragraph.

[217] The Appeals Chamber notes that the language of Article 63(1) of the Statute of the International Criminal Court ("The accused shall be present during the trial") appears to express an obligation of the accused rather than a right. However, Article 61(2)(a) of the ICC Statute allows a Pre-Trial Chamber to hold a hearing to confirm the charges in the absence of the accused in the event that the accused has waived his or her right to be present.

[218] *R.R. v. Italy*, No. 42191/02, ECHR, Judgement of 9 June 2005, paras. 53 and 55, and *Sejdovic v. Italie*, No. 56581/00, ECHR, Judgement of 10 November 2004, paras. 33-34, both referring to *Kwiatkowska v. Italy*, No. 52868/99, ECHR, Admissibility Decision of 30 November 2000, and *Håkansson and Sturesson v. Sweden*, No. 11855/85, ECHR, Judgement, 21 February 1990, para. 66.

interest of the sound administration of justice, that the accused has been informed beforehand of the proceedings against him, as well as of the date and place of the trial, and that he has been notified that his attendance is required.[219]

109. Pursuant to the foregoing case-law, the Appeals Chamber concludes that waiver by an accused of his right to be present at trial must be free and unequivocal (though it can be express or tacit) and done with full knowledge.[220] In this latter respect, the Appeals Chamber finds that the accused must have had prior notification as to the place and date of the trial, as well as of the charges against him or her. The accused must also be informed of his/her right to be present at trial and be informed that his or her presence is required at trial. The Appeals Chamber finds further that, where an accused who is in the custody of the Tribunal decides voluntarily not to be present at trial, it is in the interests of justice to assign him or her Counsel in order, in particular, to guarantee the effective exercise of the other rights enshrined in Article 20 of the Statute.[221] Moreover, Rule 82 *bis* of the Rules, which allows the Trial Chamber to adjust the proceedings where an accused has refused beforehand to be present during his or her trial, also imposes such conditions.[222]

110. It remains for the Appeals Chamber to determine whether Appellant Barayagwiza waived his right to be present at trial in the instant case and, if so, whether such waiver satisfied the requirements set out above. The Appeals Chamber finds that Appellant Barayagwiza had been informed no later than 23 February 1998, date of his initial appearance,[223] of the charges against him. The Appeals Chamber further finds that the Appellant participated in the pre-trial stage of the proceedings before the Trial Chamber; in particular he attended the hearing of 18 October 1999[224] and then, following the joinder of proceedings, the hearing of 22 February 2000,[225] the Pre-Trial Conference of 11 September 2000[226] and the hearing of 26 September 2000.[227]

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[219] *Daniel Monguya Mbenge et al. v. Democratic Republic of the Congo*, Communication No. 16/1977, UN Doc. CCPR/C/18/D/16/1977, 25 September (*sic*) [March] 1983, para. 14(1).

[220] In fact, this is a similar standard to the one applied in assessing the validity of a suspect's waiver of his right to be assisted by counsel during his or her questioning pursuant to Rule 42(B) of the Rules, (see *The Prosecutor v. Bagosora et al.,* Case No. ICTR-98-41-T, Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C) of the Rules of Procedure and Evidence, 14 October 2004*,* paras. 18-19) or the validity of an accused's waiver of his right not to testify against himself (see *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Decision on Vidoje Blagojević's Oral Request, 30 July 2004, p. 8). See also *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Decision on Motion for Exclusion of Statement of Accused, 8 July 2005, paras. 22-23.

[221] Regarding this last point, the Appeals Chamber refers the reader to the section of the present Appeal Judgement on the right of Appelant Barayagwiza to legal assistance (*infra*, IV. A. 2. ).

[222] For an example of the application of Rule 82 *bis,* see *Rwamakuba* Trial Judgement, para. 9.

[223] In the opinion of the Appeals Chamber, Appellant Barayagwiza was also informed of the charges against him prior to the amendment of the initial Indictment of 14 Avril 2000. Thus, even though Appellant Barayagwiza refused to plead, the Appeals Chamber observes that he appealed the 11 April 2000 Decision (see Judgement, paras. 27-28).

[224] T. 18 October 1999, p. 3 (redacted).

[225] *Audience relative à la Demande du Procureur en révision ou réexamen de l'Arrêt rendu par la Chambre d'appel le 3 novembre 1999* [Hearing of the Prosecutor's Request for Review or Reconsideration of the Decision of the Appeals Chamber of 3 November], T. 22 February 2000, p. 2 (redacted).

[226] T. 11 September 2000, pp. 2 and 4 (closed session).

[227] T. 26 September 2000, p. 2 (Decisions).

111. By fax dated 16 October 2000 and filed at the Registry the following day, Appellant Barayagwiza notified the Tribunal through his Counsel of his intention not to attend the trial hearings, which were scheduled to commence on 23 October 2000.[228] On 20 October 2000, Judge Pillay, Presiding Judge in the case, requested the Registrar to inform the Appellant that his trial would commence "as planned and that all arrangements [which had been] made [would] remain in place, and that every opportunity [would] be made available to him to attend this trial".[229] She also requested the Commander of the Detention Facility to submit a report to the Chamber at the commencement of the proceedings.[230] In compliance with these instructions, that same day the Registrar informed the Appellant of the commencement date of the trial and of the instructions of the President of the Trial Chamber.[231]

112. On the first day of the trial, Judge Pillay, noting the absence of Appellants Barayagwiza and Ngeze,[232] questioned their respective Counsel. Counsel Marchessault presented to the Trial Chamber a document giving formal notice of Appellant Barayagwiza's unwillingness to participate in the hearings,[233] to which two documents he had written were attached: a document entitled *"Tribunal pénal international pour le Rwanda. Justice impossible"* [International Criminal Tribunal for Rwanda. Justice Impossible][234] and a statement dated 23 October 2000.[235] In the first document, the Appellant, expressing his lack of confidence in the Tribunal, stated:

> It appears for me useless to appear before a Court which is not able to guarantee a just trial and equitable to me and whose Judges showed, by their former decisions, that they cannot be independent and impartial and that they even sentenced me before trial.[236]

113. In his statement, Appellant Barayagwiza added: "Even though I am unwilling to participate in this travesty of justice, I am not at all waiving my inalienable right to a defence and to appear before an independent and fair Tribunal. I am instructing my lawyers that they are not to represent me in this trial that commences today. Nor do I wish to be present at this 'trial'."[237] Questioned by the Trial Chamber, the Deputy Commander of the Detention Facility stated that he and the security officer had notified the Appellant six times that he was to prepare to attend the trial, but the Appellant had refused to do so.[238] The Trial Chamber then rendered an oral decision reaffirming Appellant Barayagwiza's right to be present, found that he had chosen not to exercise it and decided to continue with the trial in his absence, adding:

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[228] Counsel's Marchessault's Letter to the Judges of Trial Chamber I, 16 October 2000, TCEXH1, TRIM Record No. 6542.
[229] Interoffice Memorandum from Presiding Judge Pillay to the Registrar, Mr. Okali, "*Prosecutor versus Jean-Bosco Barayagwiza* – Letter from Defence Counsel" dated 20 October 2000, TCEXH2, TRIM Record No. 6543, para. 2.
[230] *Ibid.*, para. 3.
[231] Interoffice Memorandum from Ms. Nyambe, Coordinator, Judicial and Legal Services Division, to Jean-Bosco Barayagwiza, "Commencement of Trial on 23 October 2000", dated 20 October 2000, TCEXH3, TRIM Record No. 6544, paras. 2-3.
[232] T. 23 October 2000, p. 6.
[233] Notice of Unwillingness to Participate in the Trial, 23 October 2000, TCEXH4, TRIM Record No. 6545.
[234] *Tribunal pénal international pour le Rwanda. Justice impossible*, 5 October 2000, TCEXH4B, TRIM Record No. 6547.
[235] Statement of Jean-Bosco Barayagwiza, 23 October 2000, TCEXH4A, TRIM Record No. 6546.
[236] *Tribunal pénal international pour le Rwanda. Justice impossible*, 5 October 2000, TCEXH4B, TRIM Record No. 6547, para. 222.
[237] Statement of Jean-Bosco Barayagwiza, 23 October 2000, TCEXH4A, TRIM Record No. 6546, p. 4.
[238] T. 23 October 2000, pp. 18-19.

"Every opportunity will remain in place for him to attend Court and whenever he changes his mind he is free to attend Court."[239] Further, it informed the two absent co-Accused that:

> We have taken note for the record, of the absence of both Accused, but we are simply informing them of their right and I expect that Counsel [...] would advice their clients of the consequences of their waiving this right.[240]

114. On 24 October 2000, Appellant Barayagwiza reiterated his position.[241] The next day, the Trial Chamber, ruling on Appellant Barayagwiza's representation, recalled that:

> Mr. Barayagwiza [...] has informed the Chamber that he does not wish to participate in his trial. Through his Counsel, and by written statements signed by him, one of which is 67 pages in length, handed to the Chamber by his Counsel, he has given his reasons for his stay away. [...] Mr. Barayagwiza has acted upon his decision by refusing to leave his detention cell to be transported to the courtroom on the 23rd of October 2000, the first day of trial. He has continued this stance in the days following. The Chamber took several steps to verify the election made by the Accused by letter, warning him that the trial will continue, by hearing the testimony of the officer in charge of the detention facility, and by directive to his Counsel, to enquire from the Accused, whether his decision was for a short duration and whether he understood the consequences of his action which included the prospect of his losing the right of his legal representation. [242]

115. A few days later, in its decision on Defence Counsel motion to withdraw, the Trial Chamber confirmed that it would proceed with the trial in the absence of the Accused, on the grounds that:

> [...] Mr. Barayagwiza is fully aware of his trial, but has chosen not to be present, despite being informed by the Chamber that he may join the proceedings at any time. In such circumstances, where the Accused has been duly informed of his ongoing trial, neither the Statute nor International Human Rights law prevent the case against him from proceeding in his absence.[243]

116. In light of the foregoing, the Appeals Chamber finds that Appellant Barayagwiza freely, explicitly and unequivocally expressed his waiver of the right to be present during his trial hearings, after he had been duly informed by the Trial Chamber of the place and date of the trial, of the charges laid against him, of his right to be present at those hearings, and that his presence was required. At this stage of the analysis, the Appeals Chamber cannot determine any error in the finding reached by the Trial Chamber in regard to the Appellant's refusal to attend trial. As to whether his interests were represented by counsel, the Appeals

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[239] *Ibid*., p. 23.
[240] *Ibid*., pp. 28-29.
[241] Jean-Bosco Barayagwiza's letter of 24 October 2000, annexed to the "Motion for Withdrawal of Assigned Counsel" of 26 October 2000: "I would like by the present to confirm to you the substance of my statement of 23 October 2000, in which I informed you of my decision not to participate in the so-called "media" trial before the Trial Chamber [...], for the reasons given in the said statement." [The French translation of this passage was taken from the French version of *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, 2 November 2000, para. 5. ] See also T. 2 November 2000, pp. 57-60.
[242] T. 25 October 2000, pp. 3-4.
[243] *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, 2 November 2000, para. 6.

Chamber will now address this question, and accordingly reserves its overall finding on his third ground of appeal until the end of that analysis.

2. Right to legal assistance

117. Appellant Barayagwiza asserts that the right to a fair trial, as guaranteed by Articles 19(1) and 20(2) of the Statute, includes the right to have effective representation, which entails that counsel for the accused has the opportunity to confront the Prosecution case and that there is an adversarial debate.[244] He contends that the Trial Chamber failed in its duty[245] to ensure his effective representation within the particular context of the trial held in his absence, [246] and that it showed bias against him.[247] In his Reply he argues that his lack of cooperation was not an "insurmountable obstacle" to organizing his defence[248] and that it did not imply any waiver of his right to a fair trial or of his right to be represented by competent counsel.[249]

118. Specifically, the Appellant makes the following submissions:

- The Trial Chamber failed in its duty to ensure the fairness of the trial by permitting the passive presence of Counsel Marchessault and Danielson between 23 October 2000 and 6 February 2001, without either discharging them of their obligations or requiring them to ensure his defence.[250] Further, once new Counsel were assigned, the Trial Chamber should have considered whether the witnesses heard between 23 October 2000 and 6 February 2001 ought to be recalled;[251]

- The Trial Chamber had no power to order the Registrar to assign Counsel (Messrs. Barletta-Caldarera and Pognon) against the Appellant's will;[252]

- Counsel Barletta-Caldarera and Pognon were not competent, and the Trial Chamber failed in its duty to ensure the Accused effective representation;[253]

[244] Barayagwiza Appellant's Brief, paras. 69-71, 76-78, 99.
[245] *Ibid.*, paras. 72, 73, 79-80; Barayagwiza Brief in Reply, paras. 36 and 55. In paragraph 79 of his Appellant's Brief, the Appellant asserts that it was impossible for the Judges to determine his guilt beyond reasonable doubt without having heard his defence in full; hence, before attempting to decide his guilt or innocence, the Chamber should have determined whether he had benefited from a fair trial, *i.e.*, had he received effective representation?
[246] *Ibid.*, paras. 45, 80-99. In paragraph 90 (and in paragraph 67), the Appellant asserts that the Trial Chamber prevented the Appellant from receiving a fair trial by belatedly authorising the joinder of his proceedings with those of Appellants Nahimana and Ngeze. In paragraph 93, the Appellant argues that he was deprived of adequate facilities for the preparation of his defence owing to the lack of cooperation from the Rwandan authorities. As these contentions are completely unsubstantiated, the Appeals Chamber will not consider them.
[247] *Ibid.*, paras. 81, 89-91; Barayagwiza Brief in Reply, paras. 51-55.
[248] Barayagwiza Brief in Reply, paras. 37-38.
[249] *Ibid.*, paras. 53-54.
[250] Barayagwiza Appellant's Brief, paras. 82-85, 89(iii) and (iv), 90.
[251] *Ibid.*, para. 89(ix).
[252] In this respect, Appellant Barayagwiza complains specifically of the Trial Chamber's "appointment of counsel against the express wishes of the Appellant" (Barayagwiza Appellant's Brief, para. 74) and states in paragraph 82 of his Appellant's Brief that the Trial Chamber acted without "consideration […] for the obligation to permit the accused to choose his counsel himself or to appoint counsel as *amicus curiae*".
[253] Barayagwiza Appellant's Brief, paras. 87, 88, 89(vii) and (xi), 95-99; Barayagwiza Brief in Reply, paras. 37-39, 42, 46-50.

- The Trial Chamber failed to adjourn the proceedings between 6 and 12 February 2001, when he was no longer represented by Counsel Marchessault and Danielson and his new Counsel, Mr. Barletta-Caldarera, had not yet arrived in Arusha.[254] Moreover, it refused to recall the witnesses who had been heard between those dates;[255]

- The Trial Chamber did not treat his Counsel in the same manner as the other trial Counsel or the Prosecution.[256]

The Appeals Chamber will examine these arguments after recalling the successive stages of Appellant Barayagwiza's representation at trial.[257]

(a) Appellant Barayagwiza's representation at trial

119. On 5 December 1997, Mr. Nyaberi was assigned as Counsel for Appellant Barayagwiza.[258] On 5 January 2000, the Appellant requested the Registry to withdraw his Counsel for incompetence, lack of diligence and interest in the case. His request, which was rejected by the Registrar[259] and then by the President of the Tribunal,[260] was granted by the Appeals Chamber on 31 January 2000. That same day, Ms. Marchessault and Mr. Danielson were appointed, respectively, Lead Counsel and Co-Counsel.[261] On 23 October 2000, those Counsel informed the Trial Chamber that the Appellant would not attend the trial and that he had instructed them not to represent him, although he had not terminated their mandate.[262] Counsel Marchessault and Danielson asked the Trial Chamber for permission to withdraw.[263] In the absence of a formal request by the Appellant for withdrawal of Counsel, the Trial Chamber ordered Ms. Marchessault and Mr. Danielson to continue to represent the Appellant pending a final decision on their request for withdrawal.[264] On 25 October 2000, the Trial Chamber rejected an oral request by Counsel to leave the courtroom,[265] on grounds that "the Accused had not expressed any complaints as to the competence of the appointed counsel or lack of confidence in them".[266]

[254] Barayagwiza Appellant's Brief., para. 89(v).
[255] *Ibid.*, para. 89(ix).
[256] *Ibid.*, para. 89(xii); Barayagwiza Brief in Reply, para. 51.
[257] In paragraphs 74, 75 and 91 of his Appellant's Brief, Appellant Barayagwiza alleges that the Trial Chamber erred in its assessment of the evidence. These allegations will be examined under the review of the Appellant's fortieth ground of appeal (see *infra* IV. B. 1. ).
[258] Registrar's letter, dated 5 December 1997, Re: "Your assignment as Counsel to Defend the Interests of Mr. Barayagwiza, ICTR Suspect".
[259] Letter from Didier Daniel Preira, OIC, Lawyers and Detention Facilities Management Section, dated 5 January 2000, entitled "*Votre demande de retrait de la commission d'office de votre conseil*" [Your Request for Withdrawal of Counsel]..
[260] *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-I, Decision on Review in Terms of Article 19(E) of the Directive on Assignment of Defence Counsel, 19 January 2000.
[261] See document entitled "Your Assignment as Co-Counsel to Defend the Interests of Mr. Jean-Bosco Barayagwiza, ICTR Accused", dated 2 February 2000, Ref. No. ICTR/JUD-11-6-2-0124.
[262] T. 23 October 2000, pp. 9-12.
[263] *Ibid*., p. 21.
[264] *Ibid*., pp. 23-24.
[265] T. 25 October 2000, p. 9.
[266] *Ibid*., pp. 7-8.

120. On 26 October 2000, Counsel Marchessault and Danielson filed a written motion for withdrawal of their assignment to represent Appellant Barayagwiza.[267] The Trial Chamber rendered its decision on 2 November 2000.[268] It held that there were no exceptional circumstances within the meaning of Rule 45(I) of the Rules,[269] and that the Appellant had not sought withdrawal of his Counsel in a "clear and unequivocal" manner.[270] At subsequent hearings, Counsel Marchessault and Danielson remained silent.[271] On 29 January 2001, Co-Counsel Danielson filed an "Application for Withdrawal by Co-Counsel".[272] The Appellant confirmed to his Counsel that he was ending their mandate "without any condition and unequivocally" in two letters dated 3 February 2001, which were attached to a letter, also dated 3 February 2001, in which Counsel Marchessault informed the Trial Chamber:

> we understand that there is no more ambiguity to the effect that said counsel and Co-Counsel do not hold any more powers to represent Mr. Jean-Bosco Barayagwiza before this Tribunal and that, consequently, they shall withdraw from the hearing.[273]

121. At the hearing of 5 February 2001,[274] only Counsel Marchessault was present. She informed the Trial Chamber that she no longer had a mandate to represent Appellant Barayagwiza and requested permission to leave the courtroom, but this was refused.[275] The hearing of a witness then commenced.

122. On 6 February 2001, the Trial Chamber directed the Registrar by an oral decision[276] to withdraw the assignment of Counsel Marchessault and Danielson as Defence Counsel for Appellant Barayagwiza and, relying on Article 20(4)(d) of the Statute, to assign new Counsel "with the goal of safeguarding the rights and interests of Barayagwiza".[277] The same day, Mr. Barletta-Caldarera was notified of his assignment as Lead Counsel for the Appellant;[278] he appeared for the first time before the Trial Chamber on 12 February 2001[279] and his

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[267] *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-I, *Requête en retrait de la commission d'office des conseils de Jean-Bosco Barayagwiza* [Motion for Withdrawal of Counsel for Jean-Bosco Barayagwiza], 26 October 2000.
[268] *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, 2 November 2000.
[269] Article 45(I) of the Rules, whose wording has not changed since its introduction on 1 July 1999, reads: "It is understood that Counsel will represent the accused and conduct the case to finality [...] Counsel shall only be permitted to withdraw from the case to which he has been assigned in the most exceptional circumstances."
[270] *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, 2 November 2000, para. 27.
[271] T. 6, 7, 8, 9 November 2000.
[272] *The Prosecutor v. Jean-Bosco Barayagwiza,* Case No. ICTR-97-19-I, Application for Withdrawal by Co-Counsel, 29 January 2001.
[273] Letter from Counsel Carmelle Marchessault to the Judges of the Trial Chamber, dated 3 February 2001, received at the Registry on 5 February 2001, notified to the Judges the same day and filed in case ICTR-99-52-T under index numbers 18632, 18631 and 18630.
[274] The trial was suspended after the hearing of 9 November 2000 until 5 February 2001.
[275] T. 5 February 2001, pp. 15, 16, 39-40.
[276] T. 6 February 2001, pp. 3-8.
[277] *Ibid.*, pp. 6-7.
[278] See document entitled "*Votre commission d'office pour la défense de M. Jean-Bosco Barayagwiza, accusé du TPIR*" [Your Assignment to Defend Mr. Jean-Bosco Barayagwiza, ICTR Accused], dated 6 February 2001, filed on 9 February 2001 under reference No. ICTR/JUD-11-5-2. See also the "*Déclaration de disponibilité*" [Statement of Availability] dated 6 February 2001, No. C0139. Counsel states that he was contacted by telephone by the Registrar's office on 7 February 2001, see T. 12 February 2001, p. 26 (closed session).
[279] T. 12 February 2001, p. 26 (closed session).

mandate continued after the Judgement, until 24 June 2004.[280] Co-Counsel Pognon was assigned on 21 February 2001.[281] He appeared for the first time at the hearing on 7 March 2001[282] and his mandate ended on 1 February 2003.[283]

(b) Appellant Barayagwiza's submissions relating to his representation from 23 October 2000 to 6 February 2001

123. The Appeals Chamber cannot accept the argument that the Trial Chamber failed in its duty to guarantee the fairness of the trial in allowing the passive presence of Counsel Marchessault and Danielson between 23 October 2000 and 6 February 2001. The Appeals Chamber notes first that the Appellant does not present any argument to show that the Trial Chamber erred in refusing to authorize Counsel Marchessault and Danielson to withdraw from the case before 6 February 2001. In this regard, it notes in particular that the competence of Counsel Marchessault and Danielson was never challenged before the Trial Chamber,[284] and that it was only on 5 February 2001 that the Trial Chamber was informed that the Appellant wished to terminate, "without conditions and unequivocally", the mandate of these Counsel.[285]

124. The Appeals Chamber further notes that it was the Appellant who instructed his Counsel "not to represent [him] in this trial", as is evident from the aforementioned excerpt from Appellant Barayagwiza's statement of 23 October 2000,[286] his letters of 23 and 24 October 2000[287] and the motion to withdraw Counsel for Jean-Bosco Barayagwiza.[288] The Appellant does not, moreover, contest that he gave such instruction to his Counsel. In the circumstances, the Appeals Chamber cannot find that the Trial Chamber should have

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[280] "*Décision de retrait de la commission d'office de Me. Giacomo Caldarera, Conseil principal de l'accusé Jean Bosco Barayagwiza*" [Decision to Withdraw the Assignment of Maître Giacomo Caldarera, Lead Counsel for the Accused Jean Bosco Barayagwiza], 24 June 2004 (Decision of the Registrar).

[281] See document entitled "*Notification commission d'office de Conseil adjoint*" [Notice of Assignment as Co-Counsel] dated 21 February 2001, filed on 22 February 2001 under reference No. ICTR/JUD-11-5-2-525.

[282] T. 7 March 2001, pp. 3-5.

[283] See fax dated 14 January 2003 to Maître Giacomo Barletta-Caldarera, entitled "Your letters of August 6, 2002 and November 5, 2002".

[284] To the contrary, the Appellant Barayagwiza stated in a letter dated 23 October 2000 annexed to the *Requête en retrait de la commission d'office des conseils de Jean-Bosco Barayagwiza* [Motion for Withdrawal of Counsel for Jean-Bosco Barayagwiza] of 26 October 2000:

> If this Chamber rules that my counsels are required to continue to be present at trial contrary to my instructions, I no longer wish to be represented by them. I would regret it if I am forced to make this decision because my counsel have properly represented me from the beginning.

See also *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-T, "Decision on Defence Counsel Motion to Withdraw", 2 November 2000, para. 14.

[285] See the two letters from Jean-Bosco Barayagwiza dated 3 February 2001 annexed to the letter of Counsel Marchessault adressed to the Judges of the Trial Chamber dated 3 February 2001 and received at the Registry on 5 February 2001 (*supra*, footnote 273).

[286] See *supra*, para. 113.

[287] Letters from Jean-Bosco Barayagwiza dated 23 and 24 October 2000 respectively, attached to the [Motion for Withdrawal of Counsel for Jean-Bosco Barayagwiza] of 26 October 2000. In the first letter, addressed to Presiding Judge Pillay, Appellant Barayagwiza states: "Under no circumstances are they authorized to represent me in any respect whatsoever in this trial". In the second letter, he reiterates: "[m]y counsels are instructed not to represent me in that trial".

[288] [Motion for Withdrawal of Counsel for Jean-Bosco Barayagwiza], 26 October 2000, paras. 2-4, 8.

compelled them to be more active in defending the Appellant. Such an intervention would not have been consistent with the role of a Trial Chamber of the Tribunal.[289] The appeal on this point is accordingly dismissed.

125. For the same reasons, the Appeals Chamber is not convinced that the Trial Chamber should have "[considered] the necessity of recalling the witnesses heard between 23 October 2000 and 6 February 2001",[290] or that it should not have relied on the evidence heard during that period as a foundation for the determination of the Appellant's guilt.[291] In effect, the Appellant's attitude amounted to a waiver of the right to examine or to have examined the witnesses who were being heard at the time.[292]

(c) Appellant Barayagwiza's submissions relating to his representation after 6 February 2001

(i) The Trial Chamber's jurisdiction to assign counsel to represent the Accused's interests

126. The Appellant Barayagwiza first argues that Counsel could not be assigned to him against his will.[293]

127. The Appeals Chamber would begin by noting that Rule 45 *quater* of the Rules expressly states that a "Trial Chamber may, if it decides that it is in the interests of justice, instruct the Registrar to assign a counsel to represent the interests of the accused". However, this rule was introduced by an amendment of 6 July 2002 and was therefore not applicable to the situation of Appellant Barayagwiza before this date. Nevertheless, the Appeals Chamber finds that Article 19(1) of the Statute already at that time allowed a Trial Chamber to instruct the Registry to assign a counsel to represent the interests of the accused, even against his will, when the accused had waived his right to be present and participate at the hearings. That Article reads:

> The Trial Chambers shall ensure that a trial is fair and expeditious and that the proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

In the instant case, it was open to the Trial Chamber to fulfil this obligation by requesting the Registrar to assign counsel to represent the interests of Appellant Barayagwiza.[294] The Appeals Chamber can find no error or abuse of power on the part of the Trial Chamber.

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[289] As the Appellant himself acknowledges (see, for example, Barayagwiza Appellant's Brief, para. 74), the proceedings at the Tribunal are essentially adversarial and it is the parties who are primarily responsible for the conduct of the debate. A Trial Chamber cannot dictate to a party how to conduct its case.
[290] Barayagwiza Appellant's Brief, para. 89(ix). See also T. 17 January 2007, p. 57.
[291] *Ibid.*, para. 83.
[292] In this respect, the Appeals Chamber notes that the ECHR recognized that an accused can waive his right to examine or cross-examine a witness. See, *inter alia*, *Vaturi v. France*, No. 75699/01, ECHR (first section), Judgement of 13 April 2006, para. 53, and *Craxi v Italy,* No. 34896/97, ECHR (first section), Judgement of 5 December 2002, paras. 90-91.
[293] See Barayagwiza Appellant's Brief, para. 74, where the Appellant objects to the assignment of counsel against his "express will".
[294] This is, moreover, the solution subsequently adopted with the introduction of Rule 82 *bis* of the Rules.

128. The Appellant also appears to take issue with the Trial Chamber for having violated his rights by not allowing him to choose his counsel himself.[295] This contention must fail, since: (1) the Appellant in fact refused any counsel; and (2) even when an indigent accused asks for assignment of counsel, he is not entitled to insist that he himself choose such counsel; it is settled case-law, both of this Tribunal and of ICTY, that the right to free legal assistance by counsel does not confer the right to choose one's counsel.[296]

129. The Appeals Chamber will now consider Appellant Barayagwiza's submissions relating to the competence of the counsel assigned to him.

(ii) The competence of Counsel Barletta-Caldarera and Pognon[297]

130. The Appeals Chamber has for long recognized, pursuant to Article 20(4)(d) of the Statute, the right of an indigent accused to be represented by competent counsel.[298] It recalls that Rule 44(A) of the Rules provides:

> Subject to verification by the Registrar, a counsel shall be considered qualified to represent a suspect or accused, provided that he is admitted to the practice of law in a State, or is a University professor of law.

Articles 13 and 14 of the Directive on the Assignment of Defence Counsel set out the qualifications and formal requirements that the Registrar must verify prior to the assignment of any counsel; the presumption of competence enjoyed by all counsel working with the Tribunal is predicated upon these guarantees. Therefore, for an appeal alleging incompetence of trial counsel to succeed, an appellant must rebut the presumption of competence of said counsel by demonstrating that there was gross professional misconduct or negligence which occasioned a miscarriage of justice.[299]

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[295] Barayagwiza Appellant's Brief, para. 82.

[296] *Blagojević and Jokić* Appeal Judgement, para. 17; Decision on Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel, 23 November 2006, para. 10; *Prosecutor v. Jadranko Prlić et* al., Case No. IT-04-74-AR73.1, *Décision relative à l'appel interjeté par Bruno Stojić contre la décision de la Chambre de première instance relative à sa demande de nomination d'un conseil* [Decision on the Appeal by Bruno Stojić against the Trial Chamber's Decision on his Request for Appointment of Counsel], 24 November 2004, para. 19; *Prosecutor v. Vidoje Blagojević et al*., Case No. IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003, para. 22; *Akayesu* Appeal Judgement, para. 61; *Kamband*a Appeal Judgement, para. 33.

[297] Co-Counsel Pognon is mentioned only in paragraphs 86, 89(xii)(a), (b) and (c) of the Appellant's Brief, but Appellant Barayagwiza appears to include him in his submissions when he refers to "his Counsel[s]" (see Barayagwiza Appellant's Brief, paras. 89(xi), 95, 97).

[298] *Akayesu* Appeal Judgement, paras. 76 and 78; *Kambanda* Appeal Judgement, para. 34 and footnote 49.

[299] *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Public Redacted version of the Decision on Motion to Admit Additional Evidence, 9 December 2004, para. 36; *Akayesu* Appeal Judgement, paras. 77, 78, 80; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Decision on the Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, paras. 48-49. These three cases refer to Counsel's "gross incompetence". In one decision in *Blagojević*, the ICTY Appeals Chamber refers to "misconduct or manifest professional negligence" (*Prosecutor v. Vidoje Blagojević*, Case No.IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003, para. 32). In paragraph 23 of the *Blagojević and Jokić* Appeal Judgement, the Appeals Chamber evokes gross incompetence.

131. In the instant case, Appellant Barayagwiza submits that the Trial Chamber failed in its duty to ensure the effective representation of the Accused. In this regard, the Appeals Chamber recalls that, under Article 19(1) of the Statute, the Trial Chamber is required to guarantee a fair and expedient trial and full respect for the rights of the accused.[300] However, the responsibility for drawing the Trial Chamber's attention, in accordance with the appropriate procedure, to what he considers to be a breach of the Tribunal's Statute and Rules lies in the first place with the appellant[301] who claims that his right to assistance of counsel at trial has been violated.[302] Failing that, he must establish on appeal that his counsel's incompetence was so manifest as to oblige the Trial Chamber to act.[303] He must further demonstrate that the Trial Chamber's failure to intervene occasioned a miscarriage of justice.

132. The Appeals Chamber notes first that, before representing Appellant Barayagwiza, Counsel Barletta-Caldarera had been assigned as Lead Counsel for another accused,[304] and that he was therefore conversant with the procedure before this Tribunal. Having practised in his capacity of criminal lawyer in Italy for nearly 50 years, with almost 30 years in the field of human rights, Mr. Barletta-Caldarera had, according to his CV[305] and the "Composition of the Defence Team Form" dated February 1999, *inter alia* conducted cases before French, Belgian, Swiss, Yugoslav and Romanian courts, in addition to his experience at the Italian Court of Cassation. He has published many works on criminal law, conducted training courses in criminal law for pupil advocates for over 10 years and been admitted to practise law before the European Community courts for nearly 20 years.

133. As for Co-Counsel Alfred Pognon, his CV shows that he is an advocate with the Cotonou Court of Appeal and a member of the Benin Bar for over 27 years, that he served as President of the Benin Bar for six years and as defence counsel in several cases – two before

[300] In this connection, the ICTY Appeals Chamber recently stressed: "Any accused before the International Tribunal has a fundamental right to a fair trial, and Chambers are obliged to ensure that this right is not violated", *Simić* Appeal Judgement, para. 71.

[301] *Kambanda* Appeal Judgement, para. 23. This principle was evoked by the ICTY Appeals Chamber in the *Tadić* Appeal Judgment, para. 55, in connection with the right to have the necessary time and facilities for the preparation of one's defence, and by the ICTR in the *Kayishema and Ruzindana* Trial Judgement, para. 64. The Appeals Chamber considers that this principle applies in the same way to any complaint as to the quality of an accused's representation.

[302] Under Article 45(H) of the Rules, the Trial Chamber may, under exceptional circumstances, intervene at the request of the accused or his counsel, by "[instructing] the Registrar to replace an assigned counsel, upon good cause being shown and after having been satisfied that the request is not designed to delay the proceedings". Articles 19 and 20 of the Directive on the Assignment of Defence Counsel set out the conditions for, respectively, withdrawal and replacement of Counsel.

[303] A recent decision of the European Court of Human Rights confirms the obligation on national authorities to intervene in the event of manifest incompetence by assigned Counsel: "the Court is of the view that the conduct of the applicant cannot in itself relieve the authorities of their duty to ensure that the Accused is effectively represented. The above-mentioned shortcomings of the court-appointed lawyers were manifest, which put the onus on the domestic authorities to intervene"; *Sannino v. Italy*, No. 30961/03, ECHR, Appeal Judgement of 27 April 2006, para. 51. See also *Kamasinski v. Austria*, No. 9783/82, ECHR, Appeal Judgement of 19 December 1989, para. 65 ("the competent national authorities are required under Article 6 §3(c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way.")

[304] Mr. Barletta-Caldarera represented Akayesu in the appeal proceedings from 9 February to 10 August 1999. See *Akayesu* Appeal Judgement, paras. 485 and 489.

[305] See *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Giacomo Barletta-Caldarera's *Curriculum Vitae*, attached to the form "Composition of the Defence", received at the Registry on 11 February 1999.

the Gitarama Court and one before the Kigali Court – in connection with the 1994 Rwandan genocide.[306]

134. In view of the foregoing, the Appeals Chamber has no reason to find that Counsel Barletta-Caldarera and Pognon failed to satisfy the conditions set forth in Article 13 of the Directive on the Assignment of Defence Counsel; they were presumed to be competent, just like any other counsel assigned by this Tribunal. The Appeals Chamber must now determine whether Appellant Barayagwiza has demonstrated gross professional misconduct or negligence or manifest incompetence on the part of Counsel, such as should have compelled the Trial Chamber to intervene in order to guarantee his right to legal assistance.

135. In this connection, the Appellant complains that Counsel Barletta-Caldarera failed to seek adjournment of the hearings so that he might familiarize himself with the case and prepare the cross-examination of the first witnesses,[307] and that the Trial Chamber did not adjourn of its own motion to enable new Counsel to become sufficiently conversant with the case.[308] He further contends that Counsel Barletta-Caldarera and Pognon were on a number of occasions[309] absent or late for the hearings, and argues that the Trial Chamber should have either compelled them to attend each hearing[310] or adjourned the trial.[311] The Appellant "further or in the alternative" points out certain failures which, though attributable to his Counsel, allegedly amounted to a "*laissez faire*" attitude by the Trial Chamber:[312]

- The alleged conflict of interests created by his Counsel when he made comments during one of the hearings;[313]

- His failure to seek the assistance of a Kinyarwanda speaker when the Kinyarwanda-speaking investigator appointed in 1998 withdrew from the case in February 2001;[314]

- His failure to conduct complete, adequate and exhaustive investigations;[315]

- The fact that Counsel Barletta-Caldarera obtained information prejudicing the Appellant's case from third parties without instructions from him;[316]

- Counsel's failure to put crucial questions for the defence of the Appellant;[317]

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[306] See the *Curriculum vitae* and form IL2 attached to the letter of 5 July 2000, from Mr. Pognon to Registrar Agwu Ukiwe Okali, entitled "*Demande de candidature en qualité d'avocat au TPIR*" [Application for Appointment as Counsel before the ICTR].
[307] Barayagwiza Appellant's Brief, paras. 87, 88, 98(i); Barayagwiza Brief in Reply, paras. 37-38.
[308] *Ibid.*, para. 89(vi)-(viii).
[309] *Ibid.*, paras. 89(xi), 98(viii); Barayagwiza Brief in Reply, para. 48.
[310] Barayagwiza Appellant's Brief, para. 89(xi).
[311] *Ibid.*, para. 98(viii).
[312] *Ibid.*, paras. 92, 94-97, 98(v).
[313] *Ibid.*, para. 98(ii); Barayagwiza Brief in Reply, para. 42.
[314] *Ibid.*, para. 89(x); Barayagwiza Brief in Reply, paras. 43 and 52.
[315] *Ibid.*, paras. 98(iv) and (vi); Barayagwiza Brief in Reply, para. 38.
[316] *Ibid*, para. 98(v).
[317] *Ibid.*, para. 98(vii); Barayagwiza Brief in Reply, paras. 46-47.

- Failure to have the Prosecution witnesses who had testified between 23 October 2000 and 6 February 2001 recalled;[318]

- Failure to cross-examine Witnesses AHI, EB and AEU,[319] as well as Witness Bemeriki and Appellant Ngeze;[320]

- The appearance, at the request of Counsel Barletta-Caldarera, of Expert Witness Fernand Goffioul, who ultimately supported certain allegations of the Prosecutor.[321]

The Appeals Chamber will examine each of these submissions in turn.[322]

a. Adjournment of the hearings to allow Counsel Barletta-Caldarera to familiarize himself with the case

136. The Appeals Chamber notes that at the hearing of 12 February 2001, which was devoted notably to the examination-in-chief of Witness AAM, Judge Pillay, presiding Judge, asked Counsel Barletta-Caldarera whether he intended to cross-examine Witness AAM and whether he would be able to do so the next day. Counsel Barletta-Caldarera replied:

> Mr. CALDERERA: As much as possible Ms President, yes. In other words the testimony of the witness allows me to put some questions to him. Unless you might want to push it further, say [24 hours] or 48 hours, so that I can have a more in-depth knowledge or acquaintance with the facts.
>
> Ms PRESIDENT: That is why I put the question to you. You may begin tomorrow if you are in a position to do so, and if you feel you require more time, you can address that tomorrow.[323]

137. It is apparent from this exchange that Judge Pillay enquired whether Counsel Barletta-Caldarera felt he would have adequate time to prepare for and conduct Witness AAM's cross-examination, and to continue with the trial.[324] The next day, Counsel Barletta-Caldarera asked the Trial Chamber for two extra days in order to consult Appellant Barayagwiza with a view to preparing the cross-examination of Witness AAM.[325] The Trial Chamber granted his

[318] Barayagwiza Brief in Reply, para. 39(i).
[319] *Ibid.*, para. 39(ii).
[320] *Ibid.*, para. 39(iii).
[321] Barayagwiza Appellant's Brief, para. 98(ix).
[322] Appellant Barayagwiza also asserts that his Counsel failed to comment on some documents which they themselves had filed: Barayagwiza Brief in Reply, para. 39(iv). Since the Appellant did not develop this argument in any way (by failing to show either how this amounted to misconduct or gross professional negligence or how it occasioned a miscarriage of justice), the Appeals Chamber will not consider it.
[323] T. 12 February 2001, p. 160.
[324] Earlier, Presiding Judge Pillay had made sure that Counsel Barletta-Caldarera would receive from the Prosecutor "[a]ll statements [by Witness AAM] in French […] Counsel could address us before cross-examination". See T. 12 February 2001, pp. 85-86. She had also requested the Registrar's representative to provide any assistance required by Counsel Barletta-Caldarera so that he could obtain all the documents in the case: T. 12 February 2001, pp. 28-29 (closed session).
[325] "Do you really believe that you can allow me to do the cross-examination the day after tomorrow, so that I can visit my client tomorrow, at the detention center because it would seem, it would seem I repeat that he is

request by adjourning the hearing and authorizing Counsel Barletta-Caldarera to conduct the cross-examination of Witness AAM two days later.[326] On 15 February 2001, Counsel Barletta-Caldarera started his cross-examination of Witness AAM and informed the Trial Chamber that he had not been able to meet with his client due to the latter's refusal to see him.[327]

138. In view of the foregoing, the Appeals Chamber finds that the Appellant has failed to demonstrate any gross professional misconduct or negligence on the part of Counsel Barletta-Caldarera, even though the adjournment of two days requested by Counsel seems particularly short, notably having regard to the complexity of the case. The Appeals Chamber finds that the Trial Chamber duly ensured that Counsel Barletta-Caldarera had the time he considered adequate for the preparation of the defence of Appellant Barayagwiza in the circumstances of the case, given in particular that Barayagwiza had chosen not to participate in his own trial and not to meet with his Counsel. The appeal on this point is dismissed.

b. Absences and lateness of Counsel

139. The Appeals Chamber considers that, when the accused is represented, the presence of his counsel or co-counsel at the hearing is essential. Thus, a counsel who absents himself without having ensured that his co-counsel will be present is committing gross professional misconduct. The same can be said for counsel or co-counsel absenting himself while being the only representative for the Defence of the accused and while the presentation of evidence continues (save in exceptional circumstances).[328] Furthermore, in both cases the manifest misconduct of the representatives of the accused obliges the Trial Chamber to act, for example by ordering an adjournment, and if necessary by sanctioning such behaviour.

140. The Appeals Chamber will now consider the allegations of lateness and absence raised by Appellant Barayagwiza. The Appeals Chamber is of the opinion that the evidence presented in the absence of Counsel and Co-Counsel of the Appellant cannot be relied on against him,[329] and it will determine below if the findings of the Trial Chamber should be upheld in the absence of that evidence.

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able to receive me and give me information concerning the cross-examination, and only after today", T. 13 February 2001, p. 76.

[326] T. 13 February 2001, pp. 77-78. See also T. 13 February 2001, p. 102: "So we are going to adjourn. There will be no sitting of Court tomorrow. We will resume at 0930 am on Thursday when you will be cross-examined by Defence Counsel, Mr. Caldarera."

[327] T. 15 February 2001, p. 23.

[328] In this regard, the Appeals Chamber notes that the appointment of legal assistants is not subject to the verifications provided for in Rule 44(A) of the Rules and Articles 13 and 14 of the Directive on the Assignment of Defense Counsel in order to guarantee the competence of Counsel and Co-Counsel (see *supra*, para. 130). In the absence of such guarantees, it cannot be considered that a legal assistant in a Defence team has authority to represent the accused on the same basis as Counsel or Co-Counsel under Article 20(4)(d) of the Statute. Hence, Counsel and Co-Counsel for Appellant Barayagwiza could not validly be replaced by legal assistants.

[329] In a recent decision, the Appeals Chamber referred back to the Trial Chamber the assessment of the prejudice resulting from continuation of the cross-examination of a witness in the absence of one of the co-accused, specifying that it falls to the Trial Chamber, if need be, to exclude the portion of the testimony taken in the appellant's absence or to recall the witness (*The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.10, *Decision on Nzirorera's Motion Interlocutory Appeal concerning his Right to Be Present at Trial*, 5 October 2007, para. 16). In the instant case, taking into account the impossibility of recalling the witnesses having testified in the absence of Appellant Barayagwiza and of his Counsel and Co-Counsel, the Appeals Chamber must dismiss all of the testimony against him obtained in these circumstances.

i. 21 May 2001

141. The Appeals Chamber notes that the absence of Counsel Barletta-Caldarera and Co-Counsel Pognon after the first break on 21 May 2001 was short and that the Trial Chamber resumed the hearing only after it had enquired about their presence and after Counsel Barletta-Caldarera had apologized for the absence of Co-Counsel Pognon and for his own lateness.[330] Therefore, the Appeals Chamber does not find that Counsel for Appellant Barayagwiza committed an act of gross professional misconduct or negligence on that occasion.

ii. 16 November 2001

142. The Appeals Chamber notes that Counsel Barletta-Caldarera was absent during the hearing of 16 November 2001,[331] that Co-Counsel Pognon was present at the opening of the session and for part of the hearing[332] devoted to the examination of Witness Serushago, but that he left the court in the course of the morning.[333] The transcripts do not show that the Trial Chamber formally and expressly authorized him to leave the court. The Appeals Chamber cannot determine the precise moment when Co-Counsel returned to court; the transcripts simply show that he returned to court before the hearing was adjourned at midday.[334] The Appeals Chamber finds that Co-Counsel Pognon left court for a maximum of a few hours during the hearing of 16 November 2001.

143. The Appeals Chamber finds that this absence – however brief – by the only representative of an accused at a hearing, while the examination of a witness continues, amounts to gross and manifest professional misconduct which required the Trial Chamber to act. Thus, the Appeals Chamber is of the view that this portion of the testimony of Witness Serushago against Appellant Barayagwiza should be excluded. It will now consider whether the result of this is to invalidate the Appellant's convictions.

144. The Appeals Chamber notes that, during the morning hearing of 16 November 2001, the Prosecutor examined his Witness Serushago about the training of *Interahamwe* at the Bigogwe and Bugesera camps, the distribution of weapons at Gisenyi in 1994, the murder of Tutsi at *Commune Rouge* between April and June 1994, his responsibilities and the structure of the *Interahamwe* in Gisenyi town, the meetings held by CDR, *Interahamwe* and *Impuzamugambi* leaders in Gisenyi, one particular meeting held at the Hôtel Méridien Izuba in June 1994 during which Appellant Barayagwiza allegedly collected funds, and the murder

[330] The reason given for the delay was that Co-Counsel Pognon had forgotten his badge and had been prevented from entering the courtroom. See T. 21 May 2001, p. 50.
[331] In a letter to Presiding Judge Pillay, dated 28 August 2001, Co-Counsel Pognon stated that he would represent Appellant Barayagwiza from 21 May to 12 July and from 13 November to 13 December 2001; see Co-Counsel Pognon's letter, reference No. ICTR-99-52-0866, accompanying another entitled "*Justification d'absence de Me Alfred Pognon, Co-Conseil*" [Justification of Absence of Co-Counsel, Maître Alfred Pognon], sent to the Trial Chamber on 4 September 2001.
[332] T. 16 November 2001, cover page. Another proof that Co-Counsel was present is that during this hearing Mr. Pognon asked the Trial Chamber several questions relating to Witness Serushago's statement. See T. 16 November 2001, pp. 6, 7 and 14. The record of the hearing shows that Counsel Barletta-Caldarera had been excused but does not refer to the temporary absence of Co-Counsel Pognon (See "Case Minutes", Trial Day 99, available on the Tribunal's official internet site).
[333] T. 16 November 2001, p. 24.
[334] *Ibid.*, p. 83.

of Stanislas Simbizi. When the hearing resumed, Witness Serushago continued testifying about the meeting held at the Hôtel Méridien Izuba in June 1994 and about his own responsibility as well as that of Appellant Ngeze in relation to the *Interahamwe*; he also described Appellant Ngeze's relationship with Hassan Bagoyi.[335]

145. The Appeals Chamber notes further that, in the Judgement, the Trial Chamber referred several times to the testimony of Witness Serushago at the hearing of 16 November 2001. It mentioned this testimony in relation to the integration of members of MRND and CDR into groups of *Interahamwe* and *Impuzamugambi* in Gisenyi,[336] the meetings between members of CDR and *Interahamwe* between April and June 1994,[337] the order for the murder of the director of a printing company allegedly given by Appellant Barayagwiza during a meeting at the Hotel Meridien Izuba in June 1994,[338] the distribution of weapons, raising of funds, and intimidation and looting allegedly carried out by Appellant Barayagwiza at Gisenyi between 1991 and 1994.[339]

146. However, the Appeals Chamber cannot identify any factual finding against Appellant Barayagwiza that ought to be annulled following the exclusion of the testimony of Witness Serushago for the morning of 16 November 2001. First, it should be noted that, citing the numerous inconsistencies and contradictions in the testimony of Witness Serushago, the Trial Chamber admitted this evidence "with caution, relying on it only to the extent that it is corroborated".[340] Thus it considered that Appellant Barayagwiza's order for the murder of the printing company director had not been proved.[341]

147. Furthermore, the Trial Chamber's finding that Appellant Barayagwiza "came to Gisenyi in April 1994, [...] with a truckload of weapons for distribution to the local population" and that he "played a leadership role in the distribution of these weapons" relied on the testimony of Witness AHB[342] and not on that of Serushago. Finally, the Chamber held that it had not been established that the Appellant had collected money to buy weapons, since the only evidence to this effect was that of Witness Serushago.

148. Accordingly, the exclusion of this portion of the testimony of Witness Serushago does not entail the reversal of any of the factual findings relied on in order to convict Appellant Barayagwiza.

iii. 20 February 2002

149. As for the absence from court on 20 February 2002, the Appeals Chamber notes that Co-Counsel Pognon was present at the opening of the session[343] for the hearing of Witness X. Here again, although the Appeals Chamber cannot determine the exact time Co-Counsel left

[335] *Ibid.*, pp. 15-67.
[336] Judgement, para. 327.
[337] *Ibid.*, paras. 733 and 785.
[338] *Ibid.*, para. 734.
[339] *Ibid.*, para. 784.
[340] *Ibid.*, para. 824.
[341] *Ibid.*, para. 735.
[342] Judgement, para. 730; the testimony of Witness AHB is set out in paragraphs 720 to 722 of the Judgement and evaluated in paragraphs 724 to 726.
[343] T. 20 February 2002, cover page.

court, it notes nonetheless that it was shortly after the resumption of the hearing, after the first recess, that his absence was noticed.[344] The transcripts clearly state that a member of the Registry was sent immediately to fetch Co-Counsel.[345]

150. In these circumstances, while the Appeals Chamber considers that there was misconduct on the part of Co-Counsel Pognon, it is not convinced that the Trial Chamber erred, since it intervened as soon as the absence of Co-Counsel was noticed. Furthermore, even if this portion of the testimony of Witness X were to be excluded, it would not have any impact on the convictions entered against Appellant Barayagwiza.[346]

### iv. 25 to 28 March 2002

151. As to the absences during the period 25 to 28 March 2002, the Appeals Chamber notes that Counsel Barletta-Caldarera had sought prior leave of the Trial Chamber to be absent, assuring the Trial Chamber that Co-Counsel Pognon would be present in his absence.[347] The Trial Chamber granted his request and, as announced by Lead Counsel, Co-Counsel Pognon attended the hearings on 25, 26, 27 and 28 March 2002 to defend Appellant Barayagwiza.[348] Consequently, the Appeals Chamber does not find that Counsel Barletta-Caldarera committed an act of professional misconduct or negligence by being absent from 25 to 28 March 2002.

### v. Absences in 2003

152. The Appeals Chamber notes that neither Lead Counsel nor Co-Counsel for Appellant Barayagwiza attended the hearings of 13 to 17 January 2003.[349] The Appeals Chamber further finds that no Counsel of the Appellant attended the hearings from 24 March to 11 April 2003, or on 5 and 6 May 2003, as Counsel Barletta-Caldarera was absent and Co-Counsel Pognon's assignment had terminated on 1 February 2003. The Appeals Chamber has

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[344] *Ibid.*, p. 42.
[345] *Idem*.
[346] The hearing of 20 February 2002 consisted in the cross-examination of Witness X by Co-Counsel for Appellant Nahimana, who particularly tried to undermine the credibility of this witness. Even though the Trial Chamber did not expressly mention the hearing of 20 February 2002 in the Judgement, it is obvious that it considered testimony given during this hearing in the paragraph on the evaluation of the credibility of Witness X. Thus, paragraph 547 of the Judgement mentions in particular the immunity from prosecution that Witness X had obtained in exchange for his testimony (see T. 20 February 2002, pp. 24-32), the payments that he received from the Witness Protection Section (*ibid.*, pp. 72-73) and the admission by the witness that his friends, members of *Interahamwe*, admitted having participated in massacres and that he himself had accepted a looted crate of beer (*ibid.,* pp. 58-66). Despite these matters, the Trial Chamber concluded that Witness X was credible: Judgement, para. 547. A fortiori, if this evidence is excluded, the conclusion of the Trial Chamber as to the credibility of this witness would be strengthened. The exclusion of this part of Witness X's testimony would thus not be beneficial to Appellant Barayagwiza.
[347] T. 22 March 2002, pp. 11-12.
[348] T. 25 March 2002, cover page; T. 26 March 2002, cover page (the cover page does not indicate Counsel Pognon's presence, but rather that of Counsel Barletta-Caldarera); T. 27 March 2002, cover page; T. 27 March 2002, cover page (closed session); T. 28 March 2002, cover page.
[349] Barayagwiza Appellant's Brief (footnote 99) erroneously makes reference to the period 13 to 17 March 2003, but his Brief in Reply (footnote 34) correctly refers to 13 January 2003.

no information explaining these absences.[350] The Appeals Chamber considers that the evidence admitted during these hearings should be excluded in respect of Appellant Barayagwiza.

153. The hearings conducted between 13 and 17 January 2003 were to hear the testimony of Defence Witnesses D3 and RM14.[351] The Appeals Chamber first notes that the Trial Chamber rejected the testimony of Witness RM14, which it considered not to be credible.[352] As for Witness D3, the Trial Chamber accepted his testimony[353] that the statement made at a CDR rally "showed an irreparable split between the Hutu and Tutsi".[354] This testimony supported the finding in paragraph 339 of the Judgement that "CDR was a Hutu party and party membership was not open to Rwandans of Tutsi ethnicity". However, the Appeals Chamber notes that the testimony of Witness D3 was not decisive in establishing this factual finding. As the Trial Chamber explicitly noted, Witness D3 indicated that he attended only one rally. Further, the Appeals Chamber notes that the above finding relies on several testimonies,[355] specifically cited in paragraphs 302 to 318 of the Judgement and found credible by the Trial Chamber. Accordingly, the Appeals Chamber cannot conclude that the convictions of the Appellant should be reversed because of the lack of representation during the testimony of Witnesses D3 and RM14.

154. The hearings held between 24 March and 10 April 2003 were devoted to hearing Defence Witness RM117 (called by Appellant Ngeze), Appellant Ngeze and Defence Witness Bemeriki (called by Appellant Nahimana).[356] Concerning Witness RM117, the Appeals Chamber notes that in paragraph 307 of the Judgement the Trial Chamber accepts his testimony that "there were Tutsi in CDR as well". Since the Trial Chamber found that the fact that a few Tutsi individuals might have been CDR members did not render the characterization of the CDR as a Hutu party inaccurate,[357] the exclusion of the testimony of Witness RM117 cannot invalidate the convictions against Appellant Barayagwiza. As to the testimony of Appellant Ngeze, the Appeals Chamber notes that the Trial Chamber emphasized Appellant Ngeze's lack of credibility and, consequently, did not make any findings on the basis of his testimony.[358] The same is true for Witness Bemeriki, whose testimony the Trial Chamber rejected in its entirety.[359] For these reasons, the exclusion of these testimonies can have no impact on Appellant Barayagwiza's convictions.

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[350] On reading the Transcript of 13 January 2003, p. 1, the Appeals Chamber notes, however, that Counsel Barletta-Caldarera had informed the Trial Chamber that he would be absent from 13 to 17 January 2003 and that Co-Counsel Pognon had apparently "expressed his desire to quit the team". See also "Case Records", Trial Days 198-202, in which the absences of Counsel Barletta-Caldarera and Co-Counsel Pognon seem to have been excused.
[351] Witness D3 had been called by Appellant Nahimana; Witness RM14 had been called by Appellant Ngeze.
[352] Judgement, para. 870.
[353] *Ibid*., para. 334.
[354] *Ibid.*, para. 311.
[355] The Appeals Chamber notes in particular those of Witnesses AFB, Nsanzuwera,, LAG, ABE, Des Forges, GO, AGX and AHB.
[356] The Appeals Chamber notes that Witnesses RM117 and Bemeriki were not cross-examined by Appellant Barayagwiza's defence team, but that Appellant Ngeze was briefly cross-examined by Legal Assistant Massidda, a member of that team: T. 8 April 2003, pp. 32-37.
[357] Judgement, para. 335.
[358] *Ibid.*, paras. 875-878.
[359] *Ibid.*, para. 551.

155. As to the hearing of 11 April 2003, the Appeals Chamber notes that it was a status conference. Again, even though the Trial Chamber should have ensured that an authorized representative of the Appellant was present (and not merely a legal assistant[360]), this does not mean that the Appellant's convictions should be quashed. The Appeals Chamber observes that the following matters were discussed at this status conference: (1) timetable for expert evidence[361] and time for filing of Prosecutor's motion for hearing of witnesses in rebuttal in respect of the cases of Appellants Ngeze and Nahimana;[362] (2) extension of the contract of Expert Witness Shuy called by the Defence for Ngeze;[363] (3) the motion from Appellant Ngeze for reconsideration of the decision on GF55;[364] and (4) the possibility of a meeting between Appellant Nahimana and Witness Bemeriki.[365] The Appeals Chamber therefore finds that only the scheduling of the hearing of expert witnesses was relevant to the defence of Appellant Barayagwiza. The Appeals Chamber notes, however, that the Trial Chamber did take the trouble to consult Ms. Glodjinon – a legal assistant authorized by Counsel Barletta-Caldarera to respond to this question[366] – concerning the dates set for the hearing of Expert Witness Goffioul called by the Defence for Appellant Barayagwiza.[367] In such circumstances, the Appeals Chamber does not find that the absence of Counsel Barletta-Caldarera from the status conference of 11 April 2003 could have had any impact on the verdict.

156. Regarding the hearings of 5 and 6 May 2003, these were devoted to the testimony of Expert Witness Strizek, called by the Defence for Appellant Nahimana. The Appeals Chamber notes that the testimony of this expert witness during the relevant period is mentioned only in paragraph 515 of the Judgement,[368] and that it was not relied on to support any factual or legal finding concerning Appellant Barayagwiza. Hence, its exclusion in respect of Appellant Barayagwiza can have no impact on his convictions.

157. In light of the foregoing, the Appeals Chamber finds that there are no grounds for annulling the factual findings underpinning the convictions of Appellant Barayagwiza. The Appeals Chamber further finds that the errors of the Trial Chamber in failing to suspend the trial are not sufficient to show that the Trial Chamber was biased against Appellant Barayagwiza, since the Appellant has in no way demonstrated that the Trial Chamber intentionally disregarded his right to be represented or that it sought to harm his case. Finally, the Appeals Chamber is not convinced that the errors committed by the Trial Chamber could have created an appearance of bias on its part. The appeal on this point is dismissed.

c. Allegation of conflict of interests

158. As to the alleged conflict of interest between Appellant Barayagwiza and his Counsel Barletta-Caldarera, the Appeals Chamber endorses the ICTY's view that "[a] conflict of interests between an attorney and a client arises in any situation where, by reason of certain

[360] In this connection, see *supra* note 328.
[361] T. 11 April 2003, pp. 1-5, 7-10, 17 (closed session).
[362] *Ibid.*, pp. 5-7, 10-13 (closed session).
[363] *Idem*.
[364] *Ibid.*, pp. 16, 21 (closed session).
[365] *Ibid.*, pp. 16, 17 (closed session).
[366] *Ibid.*, p. 4 (closed session).
[367] *Idem*.
[368] Judgement, para. 515, referring to T. 6 May 2003.

circumstances, representation by such an attorney prejudices, or could prejudice, the interests of the client and the wider interests of justice".[369]

159. To support his allegation of conflict of interests, Appellant Barayagwiza cites three statements by Counsel Barletta-Caldarera,[370] which should be placed in the context of the latter's statement at the hearing of 13 February 2001:

> *I have had the opportunity to appreciate the respect your Chamber has shown of human rights*. This is before my arrival, and even after my arrival. And it is for this reason that I wish to seek your legal understanding for the respect of human rights, that you give me a few minutes so that I can explain my situation. I know that the responsibility of what has taken place is not to be led [*sic*] upon the door step of the Registrar or the Tribunal. Depending on Mr. Barayagwiza's choice, *I can understand him from the humanitarian aspect, only on that aspect*. He chooses [*sic*] behaviour *on which you have ruled in a very proper manner according to the Rule of law* that you are bound to respect. […] But I am asking you, Your Honours, [… to] take into account one thing. I arrived here on Saturday night. On Sunday the [prison] was closed. Yesterday, I was [t]here and today also. [Can you] allow me to do the cross-examination the day after tomorrow, so that I can visit my client tomorrow, at the detention centre, because it would seem […] that he is able to receive me and give me information concerning the cross-examination.[371]

160. The Appeals Chamber does not see how the above statement prejudices or conflicts with the defence or interests of Appellant Barayagwiza. On the contrary, these comments clearly show that Counsel Barletta-Caldarera was asking for time to consult his client so that he could prepare the cross-examination of Witness AAM. The Appeals Chamber cannot therefore conclude from this that Counsel Barletta-Caldarera committed gross professional misconduct or negligence.

d. Lack of assistance from a Kinyarwanda speaker

161. The Appeals Chamber notes that the Appellant fails to explain, either in his Appeal Brief or in his Brief in Reply, how the failure to request the assignment of an additional team member speaking Kinyarwanda constituted gross professional misconduct or negligence leading to a miscarriage of justice. He merely refers in his Appellant's Brief to "the vast amount of material found in the broadcasts of the RTLM and Radio Rwanda, the publication of *Kangura* and documents of the CDR party" [372] and alleges that he suffered prejudice particularly "in relation to the conclusions made by the Chamber concerning the possible use by the Appellant of the term '*tubatsembatsembe*'".[373]

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[369] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.1, Decision on Appeal by Bruno Stojić against Trial Chamber's Decision on Request for Appointment of Counsel, 24 November 2004, para. 22 (footnote omitted). See also *Prosecutor v. Ante Gotovina et al.,* Case No. IT-06-90-AR73.2, Decision on Ivan Cermak's Interlocutory Appeal against Trial Chamber's Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković, 29 June 2007, para. 16; *Prosecutor v. Ante Gotovina et al.,* Case No. IT-06-90-AR73.1, Decision on Miroslav Šeparović's Interlocutory Appeal against Trial Chamber's Decisions on Conflict of Interest and Finding of Misconduct, 4 May 2007, para. 23.

[370] See Barayagwiza Appellant's Brief, para. 98(ii).

[371] T. 13 February 2001, pp. 75-76 (the statements identified by Appellant Barayagwiza in support of his allegation are italicized).

[372] Barayagwiza Appellant's Brief, para. 98(iii).

[373] *Idem*.

162. At the appeals hearing, when asked by the Judges what prejudice had arisen from the fact that no expert Kinyarwanda speaker was assigned, Counsel for Appellant Barayagwiza simply referred to the Pre-Appeal Judge's Order for Re-Certification of the Record dated 6 December 2006,[374] adding the following explanation:

> […] when you asked the Registrar for recertification. It's quite clear that the confusion about the terms *tubasembatsembe* and their derivatives which found their way to the translations some did not – clearly would not have arisen had the Trial Chamber had the benefit of an expert Kinyarwanda speaker. And, therefore, your own wish to have clarity about those terms is a cogent example of the difficulty the Trial Chamber itself found it was in back in 2000 to 2003.[375]

163. When the Appeals Chamber addresses the Appellant's seventh ground of appeal, it will consider the disputed finding that the Appellant had used the term *tubatsembatsembe* at meetings, as well as the meaning given by the Trial Chamber to that expression.[376] Since the Appellant did not indicate what other consequences the failure to assign a Kinyarwanda speaker could have had on his defence, the Appeals Chamber finds that, given the Appellant's decision not to assist his defence team and the fact that he spoke this language, he has failed to show that such a person was needed, and that the failure to request such assistance constituted grave misconduct or negligence by his Counsel. The Appeals Chamber dismisses the appeal on this point.

e. Failure to investigate and to ask crucial questions; use of information from third parties

164. The Appeals Chamber cannot accept Appellant Barayagwiza's submissions regarding the quality of the investigations conducted by his Counsel, the crucial questions that they allegedly failed to put to some witnesses, and the fact that they obtained information from third parties. At the appeal hearings, Appellant Barayagwiza explained what investigations his Trial Counsel could have conducted,[377] but he has not shown how the failure to carry out such investigations constituted an act of gross professional negligence on the part of his Counsel and that such failure resulted in a miscarriage of justice. Moreover, he does not suggest any question that should have been asked;[378] nor does he explain how the admission

[374] Order of 6 December 2006.
[375] T(A) 17 January 2007, p. 66.
[376] See Barayagwiza Appellant's Brief, paras. 111-124, considered *infra* XII. C. 3. (a) (ii) .
[377] T(A) 17 January 2007, p. 88:

> [As to investigations], there is evidence which you can read and which you heard. There is a failure of those counsel even to bother to check any locations in Rwanda. They could have gone and looked at the airways bills about the transmission of equipment to Muhe. They could have gone to Muhe itself; they could have gone to Gisenyi. They did none of those things. And when there was a witness who said, "Well, I talked to Ambassador Rawson", they didn't bother to contact Ambassador Rawson to get the first-hand account; they relied on hearsay.

[378] In his Appellant's Brief, as well as in his Reply, Appellant Barayagwiza merely refers to portions of transcripts of hearings without any attempt to mention the "crucial" questions omitted by his Counsel. The Appeals Chamber has carefully read these portions and does not find any gross failure on the part of Counsel. Barayagwiza Appellant's Brief, para. 98(vii); see also Barayagwiza Brief in Reply, paras. 46-47, in which Appellant Barayagwiza asserts that "the Counsel failures" appeared while cross-examining Witnesses AAM, AGR, ABE, Des Forges, AHB, AFB, X, ABC, Nsanzuwera, MK, Kamilindi and AFX, with no reference or

of various exhibits from third parties, filed by Co-Counsel Pognon, prejudiced his defence. He has manifestly failed to discharge his burden on appeal. The appeal on these points is accordingly dismissed.

f. Failure to recall Prosecution witnesses heard between 23 October 2000 and 6 February 2001

165. The Appeals Chamber has already held that the Trial Chamber was not obliged to consider the possibility of recalling Prosecution witnesses heard between 23 October 2000 and 6 February 2001, since Appellant Barayagwiza had refused to attend the hearings and instructed his Counsel "not to represent him", a stance amounting to a waiver of the right to examine or to have examined the witnesses heard at that time.[379] In such circumstances, the Appeals Chamber finds that the fact that Counsel Barletta-Caldarera and Pognon did not request the Trial Chamber to recall those Prosecution witnesses does not constitute gross professional misconduct or negligence.

g. Failure to cross-examine certain witnesses

166. Appellant Barayagwiza blames his Counsel for failing to cross-examine certain Prosecution and Defence witnesses.[380] The Appeals Chamber has already held that the absence of Counsel Barletta-Caldarera from court during the testimony of Witnesses Ngeze and Bemeriki – and consequently the failure to cross-examine such witnesses – did not result in a miscarriage of justice.[381]

167. Appellant Barayagwiza argues that it was necessary to cross-examine Witness EB because the witness had "specifically stated that the Appellant was one of the owners and editors of *Kangura* and that he was President of CDR Gisenyi before 1993".[382] The Appeals Chamber is of the view that the Appellant has not demonstrated that the failure to cross-examine Witness EB resulted in a miscarriage of justice. In this regard, the Appeals Chamber notes that the Trial Chamber relied on many witnesses and exhibits to find that Appellant Barayagwiza was the President of CDR Gisenyi,[383] and does not appear to have found that he was one of the owners and editors of *Kangura*.

168. Regarding Witnesses AEU and AHI, the Appeals Chamber notes once again that Appellant Barayagwiza fails to particularise his claims. Regarding the first of these witnesses, he merely asserts that "[Witness AEU] charged CDR and its members with massacres".[384] The Appellant further claims that Witness AHI "had information which needed to be confirmed and used in the interest of the Appellant",[385] notably "the information saying that the Appellant was not seen in Gisenyi before the fall of Kigali in the hands of RPF",[386]

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without specifying the nature of such failures, mentioning only the fact that "Counsel was unable to discover that the Appellant never used the term *Tubatsembatsembe*...".

[379] See *supra* IV. A. 2. (b) .

[380] Barayagwiza Brief in Reply, paras. 39(ii) and (iii).

[381] See *supra* IV. A. 2. (c) (ii) b. v.

[382] Barayagwiza Brief in Reply, para. 39(ii).

[383] See Judgement, paras. 264-265.

[384] Barayagwiza Brief in Reply, para. 39(ii).

[385] *Idem.*

[386] *Idem*.

although the extract from the transcripts of the hearing to which he refers does not support this claim.[387] Such assertions do not satisfy the requirement as to precision applicable to submissions on appeal.[388] The contentions regarding the failure to cross-examine these witnesses are accordingly dismissed.

h. Decision to call Expert Witness Goffioul

169. As to the appearance of Expert Witness Goffioul, the Appeals Chamber notes that Appellant Barayagwiza fails to identify any specific statement from the expert witness's testimony which supported certain of the Prosecutor's allegations. He merely contends in his Reply that "the incompetence was because from the outset Counsel Caldarera knew that in his expert report Mr. Goffioul supported the Prosecutor's theory on key questions relating to the charges",[389] without identifying these so-called "key questions". In the transcripts of the hearing of 1 May 2003 and in Witness Goffioul's Report,[390] there is nothing to suggest to the Appeals Chamber that the Expert Witness's written or oral statements supported the Prosecution case. Accordingly, no gross professional misconduct on the part of Counsel has been demonstrated, and the appeal on this point is dismissed.

(iii) Appellant Barayagwiza's submissions concerning the lack of representation between 6 and 12 February 2001

170. Appellant Barayagwiza complains that the Trial Chamber failed to adjourn the trial between 6 February 2001, when Counsel Marchessault and Danielson completed their assignment, and 21 February 2001, when Counsel Barletta-Calderera arrived, even though the Appellant had no representation.[391] He further complains that the Chamber refused to recall the witnesses heard between 6 and 12 February.[392] He thus appears to argue that the Chamber erred in relying on the evidence adduced during that period.[393]

171. The Appeals Chamber notes that only Witness FS was heard between the time when Counsel Marchessault and Danielson stopped representing the Appellant and his new Counsel arrived.[394] At the status conferences of 26 June 2001,[395] 14 September 2001[396] and 16 May 2002,[397] the necessity of recalling Witness FS was discussed both by the Prosecutor

[387] It should moreover be noted that, during the testimony of Witness AHI, the Trial Chamber questioned Counsel Barletta-Caldarera so as to ascertain whether he intended to cross-examine the witness, to which he replied: "Ms President, Your Honours, in a certain respect, in other words, after the answers the witness has given to the Prosecutor and my learned friends, I realise that I have nothing which would be of interest to criminal law in respect of Mr. Barayagwiza. I, therefore, have no questions to put to the witness. I thank you." T. 10 September 2001, p. 21.
[388] See Practice Direction on Formal Requirements for Appeals from Judgement, para. II(4)(b). See also *Gacumbitsi* Appeal Judgement, para. 10.
[389] Barayagwiza Brief in Reply, para. 49.
[390] *Curriculum Vitae* of Fernand Goffioul Fernand and Brief, filed on 10 February 2003.
[391] Barayagwiza Appellant's Brief, para. 89(v).
[392] *Ibid.*, paras. 89(ix) and 90.
[393] *Ibid.*, para. 83. (The Appellant refers to the period between 24 October 2000 and 6 February 2001, but also contends that the Trial Chamber failed to take into account Witness FS's testimony, heard on 7 and 8 February 2001).
[394] Witness FS was heard on 7 and 8 February 2001.
[395] T. 26 June 2001, p. 57 (closed session).
[396] T. 14 September 2001, p. 23 (closed session).
[397] T. 16 May 2002, p. 13 (closed session).

and Co-Counsel for Appellant Ngeze.[398] In the Scheduling Order of 5 June 2002, a sixty-minute cross-examination of Witness FS by Co-Counsel Appellant Ngeze and a fifteen-minute re-examination by the Prosecutor were scheduled for 12 July 2002.[399] It appears that Witness FS could not be recalled as arranged.[400] Citing both the Prosecutor's commitment to recall Witness FS and his right to have adequate time for cross-examination, Counsel for Appellant Ngeze requested the Trial Chamber to strike out Witness FS's testimony,[401] a request endorsed by Counsel for Appellant Barayagwiza.[402]

172. The Trial Chamber denied these requests on grounds that the right to cross-examine may be curtailed by the Trial Chamber by reason of "its discretion to apply evidentiary rules that are likely to result in a fair determination of the matter before it"[403] and that, in the instant case, not only should the time granted to Counsel for Appellant Ngezel "have been sufficient for purposive cross-examination",[404] but also that the residual questions concerned only the credibility of Witness FS.[405] Noting that the witness's credibility had been proven by the fact that, contrary to claims by Counsel for Appellant Ngeze, the witness had been able to give the names of his deceased wife and children,[406] the Trial Chamber stated that it would take into account unanswered questions by Counsel for Appellant Ngeze and the lack of representation for Appellant Barayagwiza on 7 and 8 February 2001 in weighing the probative value of Witness FS's testimony.[407] The Trial Chamber held in paragraph 901 of the Judgement that "Witness FS was consistent in his testimony; he answered questions clearly and patiently, despite the provocative nature of some of the questions put to him", and thus found him credible.

173. The Appeals Chamber has already found that, in the circumstances of the case, the Trial Chamber correctly considered that the interests of justice required that Appellant Barayagwiza be represented by counsel.[408] Thus, since the Trial Chamber had directed the Registry to terminate the assignment of Counsel Marchessault and Danielson on 6 February 2001, it should have adjourned the trial until the arrival of new counsel. In failing to do so,

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[398] Contrary to what the Appellant appears to claim (see Barayagwiza Appellant's Brief, para. 89(ix)), his Counsel never requested that Witness FS be recalled.
[399] Scheduling Order, 5 June 2002, p. 3.
[400] See Prosecutor's Response to the Ngeze Defence Motion to Strike Testimony of Witness FS, 6 September 2002, para. 20, in which it was stated that Witness FS was prevented by the Rwandan Government from coming to testify.
[401] Motion to Strike Testimony of FS, 20 August 2002, pp. 1-2.
[402] Counsel Barletta-Caldarera's objection on behalf of Mr. G. [*sic*] B. Barayagwiza to the Prosecutor's Response to the Defence Motion to Strike Testimony of Witness FS, filed by Counsel for Ngeze, 12 September 2002, p. 2 (in which Counsel Barletta-Caldarera argued that Witness FS's testimony could not be used "against Mr. Barayagwiza given that that testimony had been heard without representation for Mr. Barayagwiza"). It should be noted that, in his Motion for Acquittal of 16 August 2002, Counsel Barletta-Caldarera contested both the credibility and relevance of Witness FS's testimony and its use "against Barayagwiza since it was heard without representation for Barayagwiza" (See *Nahimana et al. v. The Prosecutor*, Motion for Acquittal, 16 August 2002, p. 96). Neither the Motion for Acquittal nor the aforementioned objection mentioned any request to recall Witness FS.
[403] Decision on Hassan Ngeze Defence's Motion to Strike the Testimony of Witness FS, 16 September 2002 ("Decision of 16 September 2002"), p. 3, paras. 2-3.
[404] *Ibid.*, para. 4.
[405] *Ibid.*, para. 5.
[406] *Ibid.*, paras. 5-6; see also Exhibit 3D128.
[407] *Ibid.*, pp. 3-4, paras. 5 and 7.
[408] See *supra* IV. A. 2. (c) (i) .

and in denying Mr. Barletta-Caldarera's request to strike out Witness FS's testimony in respect of Appellant Barayagwiza (even though it had become clear that the Appellant would in no way be able to cross-examine Witness FS as he could not be recalled),[409] the Trial Chamber undermined the fairness of the proceedings in respect of the Appellant, and in particular violated the principle of equality of arms as enshrined in Articles 20(1) and (2) of the Statute. In that regard, the Appeals Chamber observes that the equality of arms principle requires a judicial body to ensure that neither party is put at a disadvantage when presenting its case.[410]

174. Having found that the Trial Chamber should at the very least have struck out Witness FS's testimony in respect of Appellant Barayagwiza, the Appeals Chamber will now consider whether that error invalidates any of the convictions entered against Appellant Barayagwiza. Barayagwiza has not made any submission in that regard. Again, even though the lack of submissions may be sufficient grounds to dismiss his claims, the Appeals Chamber deems it necessary to consider this matter further because of its gravity.

175. The Appeals Chamber notes that Witness FS's testimony was referred to on various occasions in the Judgement:

- In paragraph 482, the Trial Chamber referred to a portion of his testimony in which he states that the name of his brother was mentioned on RTLM on 7 April 1994 and that he, together with several other people, were subsequently killed;[411] that testimony and others appear to have supported the Trial Chamber's finding in paragraph 949 of the Judgement that there was a causal connection between the RTLM broadcasts and the killing of a number of Tutsi;

- In paragraph 855, the Trial Chamber noted certain responses of Witness FS regarding the role played by the non-governmental organization *Ibuka*;[412]

- The Trial Chamber relied, *inter alia*,[413] on Witness FS's testimony[414] in finding, in paragraph 907 of the Judgement, that the Appellants had participated in an MRND meeting in 1993 at Nyamirambo Stadium and that at that meeting Appellant Barayagwiza had spoken about working together with CDR and using RTLM to fight the *Inyenzi*. The Trial Chamber subsequently

[409] In this connection, the Appeals Chamber refers to its statement *supra*, note 329.
[410] *Stakić* Appeal Judgement, para. 149; *Kordić and Čerkez* Appeal Judgement, para. 175; *Kayishema and Ruzindana* Appeal Judgement, para. 69. See also *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeal against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List, 21 August 2007, para. 26; *Prosecutor v. Naser Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005, paras. 7-9.
[411] See also Judgement, para. 487.
[412] That testimony appears to have supported the finding in paragraph 874 of the Judgement that no Prosecution witness was influenced by *Ibuka* in his or her testimony.
[413] Witness ABE also testified that he attended part of that meeting and confirmed Appellant Barayagwiza's presence; see Judgement, para. 896.
[414] Judgement, paras. 890-895, 898.

> referred to this in finding that there was a conspiracy among the Appellants to commit genocide.[415]

176. As to the first point, the Appeals Chamber is of the opinion that the finding that the RTLM broadcasts after 7 April 1994 contributed substantially to the killing of Tutsi should be upheld even without the testimony of Witness FS. In effect, this finding relies also on other testimonies, in particular those of Appellant Nahimana[416] and of Witnesses Nsanzuwera[417] and FW.[418] Appellant Barayagwiza has not challenged the Trial Chamber's assessment of the testimonies of Witness FW and Appellant Nahimana. As to Witness Nsanzuwera, the Appeals Chamber is of the view that the allegation that "the Trial Chamber repeatedly made errors of law by applying the burden of proof incorrectly when assessing the integrity and credibility of Prosecution witnesses' accounts, in particular the following witnesses (…) Nsanzuwera",[419] cannot succeed, since it is not supported by argument. The Appeals Chamber accordingly finds that, even if Witness FS's testimony is excluded, that does not affect the Trial Chamber's finding in paragraph 949 of the Judgement.

177. As to the second point, the Appeals Chamber cannot see in what way the Appellant's conviction should be reviewed as a result of the exclusion of Witness FS's testimony as set out in paragraph 855 of the Judgement.[420]

178. Lastly, the Trial Chamber expressly relied on Witness FS's account of the MRND rally at Nyamirambo Stadium in 1993 in finding Appellant Barayagwiza guilty of the charge of conspiracy to commit genocide.[421] Nonetheless, in light of the conclusions set out in the review of the Appellant's conviction for conspiracy to commit genocide,[422] the Appeals Chamber is of the view that it is unnecessary to consider whether Witness FS's testimony was a decisive factor in the finding that Barayagwiza was guilty of this crime.

179. As to the allegation of bias against the Appellant, the Appeals Chamber is not convinced that the errors made by the Trial Chamber demonstrate that it was biased against the Appellant. Further, the Appeals Chamber is not convinced by the argument that Judge Pillay gave an impression of bias in questioning Witness FS about the Appellant.[423] Appellant Barayagwiza has cited no specific question by Judge Pillay in support of this allegation, and the portion of the court transcript he cites does not support it.[424] Nor did Counsel for

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[415] *Ibid.*, para. 1050.
[416] *Ibid.*, paras. 460 and 482.
[417] *Ibid.*, paras. 444 and 482.
[418] *Ibid.*, paras. 449 and 482.
[419] Barayagwiza Appellant's Brief, para. 322, simply referring without further explanation to the hearings of "23 to 25 April and 2 May 2001".
[420] As stated above, this part of Witness FS's testimony appears to have been relied on by the Trial Chamber to support its finding that no Prosecution witness was influenced by *Ibuka*. However, that finding was made following the hearing and evaluation of some 19 testimonies – referred to in paras. 851 to 868 of the Judgement. Nowhere in his submissions did the Appellant show that that finding was unreasonable, or in what way it influenced his conviction.
[421] Judgement, para. 1050.
[422] See *infra* XIV. B. 4.
[423] See Barayagwiza Appellant's Brief, para. 89(xii)(d), relying on T. 8 February 2001, pp. 97-102.
[424] The questions put by Judge Pillay to Witness FS appear on pages 86 to 92 of the transcript of 8 February 2001 and read as follows: "Witness FS, I have a few questions relating to the evidence you gave about Jean-Bosco Barayagwiza. You said that you saw Barayagwiza and you gave a description of him in your

Appellant Barayagwiza give any further detail during the appeal hearings. Accordingly, the Appeals Chamber cannot see how Presiding Judge Pillay's interventions could be construed by a reasonable and informed observer as showing an appearance of bias; it accordingly dismisses the appeal on this point.

(iv) Treatment of Counsel for the Appellant during trial

180. Appellant Barayagwiza contends that the Trial Chamber drastically reduced the time his Counsel had for the cross-examination of the witnesses, especially Witnesses Rangira and Ruzindana,[425] thus subjecting him to discriminatory treatment vis-à-vis other co-Accused and the Prosecutor.[426] Barayagwiza thus appears to allege, over and above bias on the part of the Trial Chamber, a violation of his right to have the witnesses against him examined and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, as provided in Article 20(4)(e) of the Statute (Article 21(4)(e) of the Statute of ICTY).

a. Applicable Law

181. The Appeals Chamber accepts the view that the concept of a fair trial includes equal opportunity to present one's case and the fundamental right that criminal proceedings should be adversarial in nature, with both prosecution and accused having the opportunity to have knowledge of and comment on the observations filed or evidence adduced by either party.[427] Considering the latter right under the principle of equality of arms, the Appeals Chamber of ICTY held that Article 21(4)(e) of the Statute of ICTY:

> serves to ensure that the accused is placed in a position of procedural equality in respect of obtaining the attendance and examination of witnesses with that of the Prosecution. In other words, the same set of rules must apply to the right of the two parties to obtain the attendance and examination of witnesses.[428]

182. Under Rule 90(F) of the Rules, the Trial Chamber "shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to: (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time". The Appeals Chamber recalls that the Trial Chamber has

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defence. Can you tell us what you know about Mr. Barayagwiza? […] What do you mean he had militia? […] And you saw Barayagwiza with people carrying weapons, is that what you are saying? […] What makes you say that he was the leader of that group? […] And in which area did – from which areas did Barayagwiza about function? […] So, you saw him in Gisenyi, because that is also your Prefecture?"

[425] In paragraph 89(xii)(b) of his Appelllant's Brief, Appellant Barayagwiza also cites two transcripts without identifying any specific witness. Those transcripts correspond to the cross-examination of Witnesses Chrétien and BU.

[426] Barayagwiza Appellant's Brief, para. 89(xii)(a)-(c), (e).

[427] *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14-/2-A, Decision on Application by Mario Čerkez for Extension of Time to File his Respondent's Brief, 11 September 2001, para. 5. Even though the French version – the original being the English text – refers to "what is described as the fundamental right that criminal proceedings are *accusatoire* in nature – defined as meaning the opportunity for both the prosecution and the accused to have knowledge of and comment on the observations filed or evidence adduced by either party […]" (emphasis added), the term "*accusatoire*" is a wrong translation of the term "adversarial" and, in view of the references on which this relies, the term "*contradictoire*" should have been used.

[428] *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-AR73.3, Decision on Appeal by Dragan Papić against Ruling to Proceed by Deposition, 15 July 1999, para. 24.

discretion to determine the modalities of examination-in-chief, cross-examination and re-examination so as to accord with the purposes of Rule 90(F). In this regard, it should be emphasised that:

> the Presiding Trial Judge is presumed to have been performing, on behalf of the Trial Chamber, his duty to exercise sufficient control over the process of examination and cross-examination of witnesses, and that in this respect, it is the duty of the Trial Chamber and of the Presiding Judge, in particular, to ensure that cross-examination is not impeded by useless and irrelevant questions.[429]

When addressing a submission concerning the modalities of examination, cross-examination or re-examination of witnesses, the Appeals Chamber must ascertain whether the Trial Chamber properly exercised its discretion and, if not, whether the accused's defence was substantially affected.[430]

183. As to the issue of the Judges' impartiality, the Appeals Chamber refers to its findings above,[431] and notes that any appellant who challenges the impartiality of a Judge must adduce solid and sufficient evidence before the Appeals Chamber in order to overturn the presumption of impartiality.

b. Time allowed by the Trial Chamber for the cross-examination of Prosecution witnesses

184. Appellant Barayagwiza contends that the Trial Chamber drastically reduced the time his Counsel had for the cross-examination of witnesses, thus, in his view, showing bias against him. The Appeals Chamber notes first that, although the Appellant appears to make a general submission in respect of all Prosecution witnesses, he mentions only those hearings at which Witnesses Rangira, BU, Ruzindana, Des Forges and Chrétien appeared.[432] The Appeals Chamber will therefore restrict its analysis to the testimonies of those witnesses.

185. In the view of the Appeals Chamber, the submission in respect of Witness Rangira is not consistent with an analysis of the transcript of 14 March 2001. Reacting to a previous intervention by Co-Counsel Pognon,[433] the Trial Chamber simply checked whether he wished to cross-examine this witness.[434] Co-Counsel then confirmed that he did not wish to put any questions.[435] Thus, put in context, Judge Pillay's intervention neither shows any bias nor violates the principle of equality of arms; she simply enquired about the intentions of Counsel and then accepted his decision not to cross-examine Witness Rangira.

186. As to Witness BU, it should be noted that the Trial Chamber did not allow Counsel Barletta-Caldarera all the time he had requested for his cross-examination.[436] It granted him half an hour, taking the view that the line of questioning he had embarked on was

[429] *Rutaganda* Appeal Judgement, para. 45. See also *Akayesu* Appeal Judgement, para. 318.
[430] *Rutaganda* Appeal Judgement, paras. 99 and 102.
[431] See *supra* II. C. 1.
[432] Barayagwiza Appellant's Brief, para. 89(xii), (a) to (c), footnotes 100-108; Barayagwiza Brief in Reply, para. 51, footnote 35.
[433] T. 14 March 2001, pp. 182-183.
[434] *Ibid.*, p. 183.
[435] *Ibid.*, p. 184.
[436] Mr. Barletta-Caldarera had requested an hour and a half; see T. 23 August 2001, p. 145.

inconsistent with the role and limits of a cross-examination.[437] Nevertheless, the Trial Chamber stated on several occasions that that decision would not affect the overall time Counsel would have, and that it might in particular extend the time depending on the relevance of the questions that he would put to Witness BU.[438] The Appeals Chamber finds that this decision, together with the Trial Chamber's comments on avoiding irrelevant cross-examination, are entirely consistent with the exercise of its discretionary power. In any case, the transcript of 27 August 2001 shows that Counsel for Appellant Barayagwiza finally decided not to cross-examine Witness BU.[439] Thus the Trial Chamber did not abuse its discretionary power or harm the Appellant's defence in relation to Witness BU.

187. As regards Witness Ruzindana, the Appeals Chamber notes that, at the Status Conference of 31 May 2002, Co-Counsel Pognon had requested an hour for the cross-examination of this witness,[440] and that the Trial Chamber granted this request in the Scheduling Order of 5 June 2002.[441] At the hearing of 10 July 2002, shortly before the first adjournment, Co-Counsel reconsidered the time allowed and then requested more than two hours for the cross-examination of Expert Witness Ruzindana;[442] he said that he would put his questions on the basis of eight documents.[443] The Trial Chamber granted Co-Counsel's new request, allowing him to continue with his cross-examination.[444] Once this new time-limit had elapsed, Presiding Judge Pillay interrupted him and told him he had used up his time.[445] When he protested, Judge Pillay informed him that the Trial Chamber had already granted an additional 10 minutes and that, moreover, "those last questions had no connection" with Mr. Ruzindana's field of linguistic expertise.[446] Co-Counsel objected vehemently and the Trial Chamber allowed him to continue his cross-examination for another 20 minutes.[447] Shortly before the hearing was adjourned, Judge Pillay pointed out to Co-Counsel that he was reading from excerpts of documents filed; she urged him to examine the witness instead of reading documents on record.[448] She stopped the cross-examination shortly afterwards.[449]

188. The Appellant would seem to be claiming an appearance of bias on the part of the Trial Chamber as a result of alleged discriminatory treatment of Co-Counsel for the Appellant vis-à-vis the Prosecutor and Counsel for the other two Appellants. However, the

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[437] Counsel had indicated that he intended to cross-examine Witness BU about "his life in Belgium, Switzerland, his life in Rwanda". See T. 23 August 2001, p. 145. The Trial Chamber stressed that cross-examination should focus on "evidence that has been given in chief"; it further stated: "if he [a witness] made a statement in evidence in chief and Defence wishes to draw attention to a contrary statement in the written statement, […] you have to motivate the relevance of that to us, because it's quite a luxury to have to sit and listen to all the way people lived and what they did over many years in and outside their countries", T. 23 August 2001, pp. 147-148.
[438] T. 23 August 2001, pp. 145-148.
[439] T. 27 August 2001, p. 46.
[440] T. 31 May 2002, p. 26 (closed session).
[441] See Scheduling Order, 5 June 2002, p. 3.
[442] T. 10 July 2002, pp. 45-47.
[443] *Ibid.*, p. 90. The eight documents corresponded to the eight exhibits previously filed in the course of the trial: 2D17, 2D19, 2D20, 2D22, 2D25, 2D28, 2D32, 2D35. Only one new exhibit, 2D48, was filed by Co-Counsel during the hearing.
[444] T. 10 July 2002, pp. 95, 124-125.
[445] *Ibid.*, p. 88.
[446] *Idem*.
[447] *Ibid.*, p. 90.
[448] *Ibid.*, p. 122.
[449] *Ibid.*, p. 124.

Trial Chamber had relied on the estimates given by Co-Counsel Pognon himself in granting him the time required for his cross-examination. Before halting the cross-examination, the Trial Chamber had allowed almost three times the length of time requested by Co-Counsel. The Appeals Chamber accordingly considers that no reasonable and informed observer could reasonably infer that Judge Pillay's intervention showed bias.

189. With regard to Expert Witness Des Forges, the Appeals Chamber notes that the Trial Chamber had issued instructions at the beginning of the hearing on 29 May 2002 regarding cross-examination by Co-Counsel Pognon, stressing that cross-examination should focus on Appellant Barayagwiza.[450] During the cross-examination of Expert Witness Des Forges at that hearing, the Trial Chamber drew Co-Counsel's attention to his lengthy and repetitive lines of questioning;[451] he was then warned:

> Mr. Pognon, time that we are giving you now is to put questions, not to address the Court on your arguments. Now, you have to understand that, because if you do this one more time we will assume that you have no more questions to put to the witness, and then we will stop you.[452]

190. Having issued this warning, the Trial Chamber informed Co-Counsel that he had 20 minutes to complete his cross-examination.[453] However, at the end of the hearing, in view of the interest of the majority of the Trial Chamber in Co-Counsel's line of questioning and the lack of instructions from Barayagwiza, the Trial Chamber reconsidered and, at Co-Counsel's request, granted him an additional 30 minutes to complete his cross-examination.[454] At the next hearing, the Trial Chamber conceded him over two hours so that he could complete his cross-examination; it reminded him on several occasions of the time he had left.[455] When he asked the Trial Chamber to allow him to put one last question to Expert Witness Des Forges,[456] the Trial Chamber granted him a further six questions.[457] In light of the foregoing, the Appeals Chamber is convinced that, to the full extent possible, the Trial Chamber allowed Co-Counsel Pognon the time he had requested for the cross-examination of Expert Witness Des Forges. Moreover, the Appellant has not shown that he was in any way hindered in presenting his case. The Appeals Chamber accordingly dismisses the appeal on this point.

191. As regards Expert Witness Chrétien, Appellant Barayagwiza merely states that the Trial Chamber "reduced drastically" Mr. Barletta-Calderera's time for cross-examination.[458] In that regard, the reference given by the Appellant makes no mention of any attempt by the Trial Chamber to reduce the time for cross-examination. On the contrary, this portion of the transcript reveals that, at the end of the hearing of 3 July 2002, the Trial Chamber asked Counsel either to complete his cross-examination within the allotted time or to make

[450] T. 29 May 2002, p. 105.
[451] *Ibid.*, pp. 134, 163, 177, 211.
[452] *Ibid.*, p. 215.
[453] *Ibid.*, p. 223.
[454] *Ibid.*, pp. 233, 238-239.
[455] T. 30 May 2002, pp. 32 and 72.
[456] *Ibid.*, p. 82.
[457] *Ibid.*, pp. 82-86.
[458] See Barayagwiza Appellant's Brief, para. 89(xii)(b) and footnote 100. See also Barayagwiza Brief in Reply, para. 51 and footnote 35.

arrangements for more time with Counsel for one of the other two Accused.[459] Mr. Barletta-Calderera chose to come to an arrangement with a colleague and requested an additional 15 minutes at the beginning of the next hearing,[460] which was granted by the Trial Chamber.[461] The Appeals Chamber accordingly concludes that the Appellant's appeal on this point is totally without merit.

192. For the above reasons, the Appeals Chamber finds that Appellant Barayagwiza has failed to show that the Trial Chamber abused its discretionary power by violating the right of the Appellant to examine Prosecution witnesses. The allegation of bias is also rejected.

## B. Appellant Barayagwiza's submissions concerning the Trial Chamber's assessment of evidence

### 1. Assessment of the credibility of certain Prosecution witnesses

193. In his fortieth ground of appeal, Appellant Barayagwiza contends generally that the Trial Chamber erred in presuming that the Prosecution witnesses were credible unless proven otherwise in cross-examination, thus reversing the burden of proof.[462] He stresses that it is for the Prosecutor to establish that its witnesses are credible, that the accused should always be presumed innocent and that the testimony against him should therefore be "treated critically and sceptically".[463] He further contends that it was particularly dangerous to proceed as the Trial Chamber did in a case where the accused was to be tried *in absentia* and had given no instructions to Counsel, since the latter were restricted in the material they could deploy in order to challenge the witnesses' evidence.[464] The Appellant argues that this error of law invalidated the Trial Chamber's findings of credibility in the case of several Prosecution witnesses and seeks reversal of the Trial Chamber's findings based on their testimony.[465]

194. The Appeals Chamber recalls that statements made by witnesses in court are presumed to be credible at the time they are made; the fact that the statements are taken under oath and that witnesses can be cross-examined constitute at that stage satisfactory indicia of reliability.[466] However, the Trial Chamber has full discretionary power in assessing the appropriate weight and credibility to be accorded to the testimony of a witness.[467] This assessment is based on a number of factors, including the witness's demeanour in court, his role in the events in question, the plausibility and clarity of his testimony, whether there are contradictions or inconsistencies in his successive statements or between his testimony and other evidence, any prior examples of false testimony, any motivation to lie, and the witness's responses during cross-examination. Appellant Barayagwiza is therefore wrong in

[459] T. 3 July 2002, p. 243.
[460] *Idem*.
[461] T. 4 July 2002, pp. 21-22.
[462] Barayagwiza Appellant's Brief, paras. 74, 75, 91, 322-324; Barayagwiza Brief in Reply, para. 86.
[463] *Ibid.*, para. 324.
[464] *Ibid.*, para. 325. See also paras. 74-75 and 91, where the Appellant contends that the Trial Chamber undermined the fairness of trial by finding certain Prosecution witnesses credible simply because their testimonies had not been successfully challenged in cross-examination, whereas several witnesses were not cross-examined because of the incompetence of Counsel or as a result of a decision by the Trial Chamber.
[465] Barayagwiza Appellant's Brief, para. 326. As to the findings of fact which should be reversed, the Appellant refers to the "relevant sections" in his Brief, but without identifying them.
[466] *Ntagerura et al.* Appeal Judgement, para. 388.
[467] *Idem*.

invoking the principle of the presumption of innocence in order to contend that it was for the Prosecutor to establish that its witnesses were credible.[468]

195. Even though, in the sections of the Judgement entitled "Credibility of witnesses", the Trial Chamber *inter alia* discussed the responses of witnesses during cross-examination, it cannot be inferred that this was the only factor considered by the Trial Chamber in determining whether or not the witnesses were credible. Thus the Trial Chamber undoubtedly assessed the credibility of Prosecution witnesses by observing their demeanour in court and by evaluating their testimonies, even though it does not always mentioned this expressly.[469] Furthermore, the Appeals Chamber notes that, in assessing the credibility of several of the witnesses mentioned by the Appellant, the Trial Chamber did not confine itself to discussing the impact of cross-examination, but also expressly considered other factors relating to their credibility.[470] This ground of appeal therefore cannot succeed.

### 2. Assessment of expert witness testimonies

196. In his forty-first ground of appeal, Appellant Barayagwiza submits that the Trial Chamber erred in admitting the reports and testimonies of Expert Witnesses Des Forges, Chrétien and Kabanda.[471] Before considering the specific submissions advanced by the Appellant, it is necessary to recall certain principles that are applicable to expert witness testimonies.

197. Rule 94 *bis* of the Rules lays down specific rules for the disclosure of expert witness reports or statements and for the attendance of experts at hearings. Until its amendment on 27 May 2003, this Rule read as follows:

> (A) Notwithstanding the provisions of Rule 66 (A) (ii), Rule 73 *bis* (B) (iv) (b) and Rule 73 *ter* (B) (iii) (b) of the present Rules, the full statement of any expert witness called by a party shall be disclosed to the opposing party as early as possible and shall be filed with the Trial Chamber not less than twenty-one days prior to the date on which the expert is expected to testify.
>
> (B) Within fourteen days of filing of the statement of the expert witness, the opposing party shall file a notice to the Trial Chamber indicating whether:
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> (i) It accepts the statement of the expert witness;
>
> (ii) It wishes to cross-examine the expert witness;

[468] Barayagwiza Appellant's Brief, para. 324.
[469] In this regard, the Appeals Chamber recalls that the Trial Chamber's duty to provide a reasoned decision does not require that it articulate every step of its reasoning for each particular finding it makes: *Kvočka et al.* Appeal Judgement, para. 23; *Rutaganda* Appeal Judgement, footnote 43.
[470] See, for example, Judgement, para. 465 (where the Trial Chamber considered the consistency of Witness BI's previous statements with his testimony and found generally that his testimony was clear and consistent), 547 (where the Trial Chamber, in assessing Witness X's credibility, took into account the fact that he had agreed to testify on condition that he receive immunity from prosecution), 608 (where the Trial Chamber notes that Witness GO's testimony was supported by documentary evidence), 711 (where the Trial Chamber takes into consideration Witness AAM's previous statements), 775 (where the Trial Chamber takes into account that Witness AHI is imprisoned in Gisenyi and that his case is on appeal), 812 (where the Trial Chamber considers certain previous statements by Witness EB and finds that he was clear and consistent in his account of events, that he was careful to distinguish what he saw from what he was reporting), 813 (where the Trial Chamber finds that Witness AGX's testimony was clear and consistent).
[471] Barayagwiza Notice of Appeal, p. 3; Barayagwiza Appellant's Brief, paras. 327-338.

> (C) If the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

198. The Appeals Chamber recalls that the evidence of an expert witness is meant to provide specialized knowledge – be it a skill or knowledge acquired through training[472] – that may assist the fact finder to understand the evidence presented.[473] The Appeals Chamber recently held:

> Expert witnesses are ordinarily afforded wide latitude to offer opinions within their expertise; their views need not be based upon firsthand knowledge or experience. Indeed, in the ordinary case the expert witness lacks personal familiarity with the particular case, but instead offers a view based on his or her specialized knowledge regarding a technical, scientific, or otherwise discrete set of ideas or concepts that is expected to lie outside the lay person's ken.[474]

199. It is for the Trial Chamber to decide whether, on the basis of the evidence presented by the parties, the person proposed can be admitted as an expert witness.[475] The expert is obliged to testify "with the utmost neutrality and with scientific objectivity".[476] The party alleging bias on the part of an expert witness may demonstrate such bias through cross-examination, by calling its own expert witnesses or by means of an expert opinion in reply.

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[472] *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Oral Ruling on Qualification of Expert Witness Mbonyinkebe, 2 May 2005; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Oral Decision on the Qualification of Mr. Edmond Babin as Defence Expert Witness, 13 April 2005, para. 5; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, 3 June 2003, p. 4; *Prosecutor v. Stanislav Galić*, IT-98-29-T, Decision on the Expert Witness Statements Submitted by the Defence, 27 January 2003, p. 3.

[473] *Semanza* Appeal Judgement, para. 303. See also The *Prosecutor v. Casimir Bizimungu et al.,* Case No. ICTR-99-50-T, Decision on Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Déo Sebahire Mbonyinkebe (Rule 89(C)), 2 September 2005, para. 11; *The Prosecutor v. Théoneste Bagosora et al.,* Case No. ICTR-98-41-T, Decision on Motion for Exclusion of Expert Witness Statement of Filip Reyntjens, 28 September 2004, para. 8; *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness, 9 March 1998, p. 2.

[474] *Semanza* Appeal Judgement, para. 303.

[475] *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 February 2007 ("*D. Milošević* Decision of 15 Fevrier 2007"), para. 7; *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Defense's Submission of the Expert Report of Milisav Selukić pursuant to Rule 94 *bis*, and on Prosecution's Motion to Exclude Certain Sections of the Military Expert Report of Milisav Selukić, and on Prosecution Motion to Reconsider Order of 7 November 2006, 13 November 2006 ("*Martić* Decision of 13 November 2006"), p. 5; *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Defence's Submission of the Expert Report of Professor Smilja Avramov pursuant to Rule 94 *bis*, 9 November 2006 ("*Martić* Decision of 9 November 2006"), para. 5; *The Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-T, Decision on Expert Witnesses for the Defence, Rules 54, 73, 89 and 94 *bis* of the Rules of Procedure and Evidence, 11 November 2003 ("*Gacumbitsi* Decision of 11 November 2003"), para. 8.

[476] *Gacumbitsi* Decision of 11 November 2003, para. 8. See also *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness, 9 March 1998, p. 2: "in order to be entitled to appear, an expert witness must not only be recognized expert in his field, but must also be impartial in the case."

[477] *Martić* Decision of 9 November 2006, para. 11.

Just as for any other evidence presented, it is for the Trial Chamber to assess the reliability and probative value of the expert report and testimony.[477]

(a) Expert Witnesses Chrétien and Kabanda

200. Appellant Barayagwiza submits that, of the 21 chapters in Mr. Chrétien's report, only two were entirely drafted by him[478] and that Mr. Kabanda was not an impartial witness.[479] He concludes that the Trial Chamber erred by relying on the testimonies of these witnesses to reach its finding on conspiracy, since the testimonies were "partisan, distorted and unreliable[,] emanating largely from witnesses wrongly admitted as experts".[480]

201. The Appeals Chamber recalls that the original French version of Expert Witness Chrétien's report was disclosed in full to the Judges and to Counsel for the three Appellants on 18 December 2001.[481] Counsel for Appellants Nahimana and Ngeze filed written motions to challenge Mr. Chrétien's report and testimony,[482] while Counsel for Appellant Barayagwiza gave notice that he wished to cross-examine Expert Witness Chrétien.[483] The Trial Chamber admitted portions of Mr. Chrétien's report as an exhibit during the testimony of Expert Witness Kabanda on 13 May 2002 (chapters 2, 3, 6, 14, 15, 18, 19),[484] and other portions, namely chapters 5, 7 to 13, 16, 17, 20, 21 and its conclusion, during the testimony of Expert Witness Chrétien on 1 July 2002.[485] Expert Witness Chrétien testified during the hearing of 1 July 2002 that he had authored or co-authored eight of the 22 sections making up his report;[486] he also stressed that the report was a "collective work", that he coordinated the work, that he personally had had access to the Tribunal's files and that he personally had participated in the collection of documents and investigations in Rwanda.[487]

202. Recalling its discretion to admit the testimony of an expert witness, the Trial Chamber stated:

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[478] Barayagwiza Appellant's Brief, para. 333.
[479] *Ibid.*, para. 334.
[480] *Idem*.
[481] See also Interoffice Memorandum, entitled "Disclosure of Expert Report in ICTR-99-52-T", that accompanied the "*Rapport d'expertise par* Jean-Pierre Chrétien avec Jean-François Dupaquier, Marcel Kabanda, Joseph Ngarambe", dated 15 December 2001 and filed in French on 18 December 2001 ("Expert Report of Chrétien, Dupaquier, Kabanda et Ngarambe").
[482] As regards Appellant Nahimana, see Defence Motion for Inadmissibility of Reports and Testimonies of Expert Witnesses Jean-Pierre Chrétien and Alison Des Forges, dated 26 December 2001 but filed on 28 December 2001; Supplemental Brief to the Defence's Request to Have the Report and Testimony of Expert Witness Jean-Pierre Chrétien Declared Inadmissible, dated 11 January 2002 and filed on 14 January 2002 and *Requête aux fins de contester la recevabilité du rapport d'expertise de Monsieur Jean-Pierre Chrétien et l'audition de Monsieur Jean-Pierre Chrétien* [Motion Challenging the Admissibility of the Report and Testimony of Expert Witness Jean-Pierre Chrétien], 26 June 2002. As regards Appellant Ngeze, see Motion for the Exclusion of Expert Jean-Pierre Chretien's Testimony, 25 June 2002.
[483] See Notification Rule 94 *bis* of the Rules of Procedure and Evidence, 5 April 2002. Given that the report was disclosed on 18 December 2001, it therefore appears that the relevant notification was not given within the time-limit prescribed under Rule 94 *bis*.
[484] Exhibit P117A; See T. 13 May 2002, p. 166.
[485] Exhibit P163A; see T. 1 July 2002, p. 70.
[486] Expert Witness Chrétien stated that he was the author or co-author of the Introduction, Chapters 3, 15-19 and the Conclusion of the report, T. 1 July 2002, pp. 15- 20.
[487] T. 1 July 2002, pp. 15, 20, 24, 33-34 and 38.

> With regard to the expert report, […] it is clear that he is familiar with all the chapters, that he supervised the collection of the various contributions, he was either the principal contributor to a significant number of these chapters or worked in the collective assimilation of the report.[488]

The Chamber then authorized Mr. Chrétien to testify as an expert witness on the written and electronic press.[489] In doing so, the Chamber stated that it would take into consideration, when assessing the probative value of the expert witness's testimony, "[t]he chapters of which he was the main author, the sources consulted […] and also what he will have said before the Chamber".[490] The Appeals Chamber finds that Appellant Barayagwiza has failed to show on appeal that the Trial Chamber erred in any way in admitting Mr. Chrétien as an expert witness and in its subsequent assessment of the reliability or probative value of his report and testimony.

203. With respect to Expert Witness Kabanda, Appellant Barayagwiza simply refers to the transcripts of the hearing of 13 May 2002,[491] without in any way substantiating his allegation of bias. However, neither of the references sheds any further light on this allegation.[492]

204. For these reasons, the Appeals Chamber dismisses these appeal submissions in respect of Expert Witnesses Chrétien and Kabanda.

(b) Expert Witness Des Forges

205. With respect to Expert Witness Des Forges, Appellant Barayagwiza challenges both her qualification in the areas in which the Trial Chamber admitted her as an expert witness and her impartiality.[493] The Appellant further contends that the Trial Chamber erred in relying on her evidence in reaching the findings of fact on the role and purpose of the CDR and more specifically on the Appellant's role, influence and racial motivation.[494] The Appeals Chamber will now consider these appeal submissions in turn.

206. The Appeals Chamber notes that the original version of Expert Witness Des Forges' report was disclosed to the Judges and to Counsel for the three Appellants on 1 March 2002.[495] On 10 May 2002, Counsel for Appellant Nahimana filed a written motion to

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[488] *Ibid.*, p. 45.
[489] *Ibid.*, p. 47.
[490] *Ibid.*, pp. 48-49.
[491] Barayagwiza Appellant's Brief, para. 334, referring to T. 13 May 2002, pp. 18, 107.
[492] At page 18 of T. 13 May 2002, Mr. Kabanda talks about his studies and training; page 107 of T. 13 May 2002 (corresponding to pages 127 and 128 of the French version of the transcripts) quotes part of Counsel Barletta-Caldarera's intervention, where he disputes in general terms, and by analogy, the proposition that an historian can be recognized as an expert.
[493] Barayagwiza Appellant's Brief, paras. 328, 330-332, 335; see also T(A) 17 January 2007, pp. 91-92; T(A) 18 January 2007, p. 63.
[494] Barayagwiza Appellant's Brief, para. 336.
[495] See Interoffice Memorandum, entitled Disclosure of Expert Report, dated 1 March 2002, that accompanied the report of Ms. Alison Des Forges; reference ICTR-S-99-52-0042. For the French version of that report, see Interoffice Memorandum, entitled "French Translation of the Report of Expert Witness Alison Des Forges", that accompanied "*Rapport du Témoin expert Alison Des Forges dans le procès Nahimana, Ngeze, and Barayagwiza devant le Tribunal pénal international pour le Rwanda*", dated 29 April 2002; reference ICTR-S-99-52-0045.

restrict this witness' testimony of the expert witness.[496] At the 20 May 2002 hearing – where Ms. Des Forges appeared for the first time – the Trial Chamber invited the Appellants to conduct a preliminary cross-examination of this witness in order to test her capacity to testify on the proposed fields of expertise. In cross-examination, Counsel for Appellants Ngeze[497] and Barayagwiza[498] informed the Trial Chamber that they did not object to Ms. Des Forges testifying as an expert, but only disputed her impartiality; only Counsel for Appellant Nahimana contested the scope of her expertise.[499] The Trial Chamber recognized Ms. Des Forges as an expert in human rights and in the socio-political history of Rwanda;[500] the Chamber also admitted the full report as an exhibit.[501]

207. The Appeals Chamber is of the view that Appellant Barayagwiza has failed to show that the Trial Chamber erred in any way in admitting Ms. Des Forges as an expert witness. Even if the Appeals Chamber were to disregard the fact that Counsel for the Appellant had himself conceded at trial that she was qualified to be admitted as an expert witness, the fact remains that the Appellant advanced no specific argument in support of his contention that Ms. Des Forges should not have been recognized as an expert in the areas of human rights and the political and social history of Rwanda.

208. As regards the allegation of bias against Expert Witness Des Forges, Appellant Barayagwiza relies first on the circumstance that Ms. Des Forges was allegedly "party to a civil action against him in another jurisdiction", but adduces no specific reference in support of his allegation.[502] However, Expert Witness Des Forges herself informed the Chamber at the hearing of 20 May 2002 that she had "provided testimony, written testimony, and documentation in a civil proceeding in the United States".[503] Cross-examined on this point by the Co-Counsel for Appellant Barayagwiza, she stated:

> I did not testify in any trial against Mr. Barayagwiza. I contributed documentation and witness testimonies to a civil proceeding which was heard without contest, and because there was no contest there was no trial.[504]

209. Expert Witness Des Forges spontaneously disclosed her participation in civil proceedings against the Appellant in the United States, and the Trial Chamber was informed of that circumstance.[505] It is the view of the Appeals Chamber that Appellant Barayagwiza has

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[496] See Motion to Restrict the Testimony of Alison Desforges [*sic*] to Matters Requiring Expert Evidence, 10 May 2002.
[497] T. 20 May 2002, p. 30.
[498] *Ibid.*, p. 76.
[499] *Ibid.*, pp. 48, 77-96, 106-121. Appellant Nahimana argued, in particular, that Ms. Des Forges could not be recognized as an expert witness in matters relating to the military and the press: see T. 20 May 2002, pp. 87-88.
[500] *Ibid.*, pp. 121-126.
[501] Exhibit No. P158A (English version) and P158B (French version); see T. 23 May 2002, pp. 246-247.
[502] Barayagwiza Appellant's Brief, para. 332, which refers to the cross-examination of Expert Witness Des Forges by Counsel for Appellants Ngeze and Barayagwiza. The Appellant also filed a motion seeking the admission of additional evidence in support of this ground (Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115), 7 July 2006), but this motion was dismissed because the Appellant gave no valid reason for the delay in filing the motion (Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006 ("Decision of 8 December 2006"), paras. 16-20).
[503] T. 20 May 2002, p. 8.
[504] T. 29 May 2002, p. 217.
[505] See also Decision of 8 December 2006, paras. 18-19.

failed to establish that, based on these facts, the Trial Chamber wrongly assessed the probative value of the report and testimony of Expert Witness Des Forges.

210. As regards Appellant Barayagwiza's allegation that Witness Des Forges held "clearly partisan views" on the ethnic conflict in Rwanda,[506] the Appeals Chamber notes once again that Appellant Barayagwiza provides no evidence in support of his allegation. He merely submits that in her analysis Expert Witness Des Forges omitted, or failed to give them sufficient weight, the causes and circumstances of the attack on the President's plane; the attack on the population by an invading army; the role of the RPF; and the atrocities committed by it. Such an assertion does not show the alleged bias of the expert witness, particularly since, contrary to the Appellant's claim, the various points that he mentions are briefly addressed in her report.[507] Lastly, the Appeals Chamber finds that Appellant Barayagwiza had ample opportunity to cross-examine Ms. Des Forges on these points with a view to clarifying them during her testimony. The appeal on this point is dismissed.[508]

211. Appellant Barayagwiza also appears to contend that the Trial Chamber erred in relying on this witness's interpretation of "documents reflecting the Appellant's writings".[509] However, he does not cite any exhibit, or even a document, nor does he indicate how the Trial Chamber erred. The Appeals Chamber will therefore not consider this contention.

212. As regards the submission that the Trial Chamber placed undue reliance on the testimony of Expert Witness Des Forges in order to reach certain findings of fact concerning the CDR and Appellant Barayagwiza:[510] as recalled above, expert witness testimony is intended chiefly to provide specialized knowledge to assist the Judges in assessing the evidence. Thus, while the report and testimony of an expert witness may be based on facts narrated by ordinary witnesses or facts from other evidence, an expert witness cannot, in principle, testify himself or herself on the acts and conduct of accused persons[511] without having been called to testify also as a factual witness and without his or her statement having been disclosed in accordance with the applicable rules concerning factual witnesses.[512] However, an expert witness may testify on certain facts relating to his or her area of expertise. In this case, the Appeals Chamber is of the view that, Ms. Des Forges having been recognized as an expert in the social and political history of Rwanda, the Trial Chamber could allow her to testify on certain facts related to her expertise.

213. The Appellant cites paragraphs 257, 278, 279, 303, 314, 322, 339, 340 and 341 of the Judgement in support of his allegation that the Trial Chamber relied on the testimony of

[506] Barayagwiza Appellant's Brief, para. 335.
[507] Exhibit P158B, pp. 17- 21, 33, 35, 46 and 54.
[508] The Appeals Chamber will not address the argument advanced during the appeal hearings that Expert Witness Des Forges was allegedly biased because of her status as a "human rights activist" (see T(A) 18 January 2007, p. 65), the Appellant having failed to establish that no reasonable trier of fact could have concluded that her testimony was credible.
[509] Barayagwiza Appellant's Brief, para. 336.
[510] *Idem*.
[511] Also, it should be recalled that an expert witness cannot pronounce on the criminal responsibility of the accused: see *D. Milošević* Decision of 15 February 2007, para. 11; *Martić* Decision of 13 November 2006, p. 5; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on the admissibility of the expert testimony of Binaifer Nowrojee, 8 July 2005, para. 12.
[512] In this regard, see Rules, 66(A)(ii), 73 *bis* (B)(iv)(b) and 73 *ter* (B)(iii)(b).

Expert Witness Des Forges in order to make certain factual findings. The Appeals Chamber notes initially that the factual finding in paragraph 257 of the Judgement – concerning the *Kangura* competition – is in no way based on the testimony of Expert Witness Des Forges.[513] The Appeals Chamber notes that paragraphs 278, 303, 314 and 322 of the Judgement summarize some portions of the testimony of Expert Witness Des Forges;[514] these portions and other evidence discussed below support the findings made in paragraphs 339 to 341 of the Judgement.

214. In light of the above criterion, the Appeals Chamber will consider whether the portions of the testimony of Expert Witness Des Forges contained in the paragraphs referred to by the Appellant correspond to the testimony of an ordinary witness on the facts of the case, or, on the contrary, to testimony on facts related to her field of expertise. The Appeals Chamber is of the view that, save for one exception discussed below (the allegation relating to the telephone conversation between Appellant Barayagwiza and Ambassador Rawson), Expert Witness Des Forges only testified on issues fulling corresponding to the field of expertise for which she had been accepted as an expert by the Trial Chamber, *i.e.* the social and political history of Rwanda.[515] Accordingly, the Trial Chamber could validly rely on these portions of the testimony of Expert Witness Des Forges to support the factual findings in paragraphs 339 to 341 of the Judgement.

215. Concerning the testimony of Expert Witness Des Forges on the facts reported to her by the Ambassador of the United States to Rwanda, the Appeals Chamber finds that that part of her testimony corresponds more to the testimony of a factual witness than to that of an expert witness. However, the Appeals Chamber reaffirms that in principle it is not open to a party to refrain from making an objection to a matter which was apparent at the trial, and to raise it only on appeal in the event of an adverse finding against that party.[516] Here, the Appellant did not object during the trial[517] to that part of Expert Witness Des Forges's

[513] As stated in paragraphs 255 and 256 of the Judgement, the Trial Chamber relied on both documentary evidence – Exhibits P115 and P119, containing issue No. 58 of *Kangura* and P103/190, a transcript of an RTLM broadcast – and on the testimony of Expert Witness Kabanda to reach its finding on this issue.

[514] Paragraph 279 of the Judgement discusses Exhibit P136 rather than the testimony of Expert Witness Des Forges.

[515] See Judgement, paras. 278 and 280 (summarizing the testimony of Expert Witness Des Forges on the objectives of CDR and her interpretation of an exhibit admitted at trial), 303 (where the Trial Chamber notes the statement by Expert Witness Des Forges that "although the legal documents establishing the CDR were free of discriminatory language, the party's practices caused the cabinet and the Minister of Justice to seek dissolution of the party in August 1992"), 314 (in the first part of the paragraph, the Trial Chamber notes the testimony of Expert Witness Des Forges on the events of February 1994 in Rwanda), 322 (on the testimony of Expert Witness Des Forges on the relationship between the CDR and MRND before 1994).

[516] See, for example, *Niyitegeka* Appeal Judgement, para. 199; *Kayishema and Ruzindana* Appeal Judgement, para. 91. The Appeals Chamber nevertheless recalls that a limited category of questions, for example allegations on defects in the indictment, can be excluded from the waiver rule and considered, even though raised for the first time on appeal: see Decision on the Prosecutor's Motion to Pursue the Oral Request for the Appeals Chamber to Disregard certain Arguments made by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007, 5 March 2007 ("Decision of 5 March 2007"), para. 15; *Niyitegeka* Appeal Judgement, para. 200.

[517] Exhibit P158B, p. 71, footnote 212 and p. 72, footnote 218. The Appeals Chamber notes in this regard that the Appellant's Defence was informed of this telephone conversation in the expert witness's report, ensuring thereby "a minimum degree of transparency in the sources and methods used required at the stage of admission […]" (*Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision on the Expert Witness Statements Submitted by the Defence, 27 January 2003, p. 5).

testimony, or to the corresponding part in her report.[518] Moreover, he has not established on appeal that the failure to object constituted gross professional misconduct by his Counsel.[519] The appeal on this point is therefore dismissed. The Appeals Chamber also dismisses the Appellant's submission that this part of the testimony of Expert Witness Des Forges amounted to hearsay,[520] since this would not be sufficient to render her evidence inadmissible or unreliable.[521] Moreover, that part of her testimony was not relied on to convict the Appellant; hence no error invalidating the verdict has been shown.[522]

## V. SHOULD THE JUDGEMENT BE ANNULLED BY REASON OF A MISCARRIAGE OF JUSTICE?

216. In his fifth ground of appeal Appellant Barayagwiza contends that the Judgement against him should be annulled in the interests of justice.[523] At the appeal hearing Counsel for the Appellant explained that the basis of this ground of appeal was that the Judgement must be annulled because holding a trial *in absentia*, the absence of a genuine defence owing to inadequate representation, and the absence of any real adversarial debate, amounted to a miscarriage of justice.[524]

217. The Appeals Chamber recalls that it has already dismissed Appellant Barayagwiza's arguments concerning proceedings *in absentia* and his representation at the trial stage.[525] Accordingly, there can be no question of a miscarriage of justice justifying the annulment of the Judgement. The appeal on this point is dismissed.

[518] Only Co-Counsel for Appellant Nahimana objected when Expert Witness Des Forges mentioned this telephone conversation: T. 21 May 2002, p. 154. Furthermore, the Appeals Chamber notes that the Trial Chamber advised the Appellants' Counsel to request the transcript of the telephone conversation in issue (see T. 21 May 2002, pp. 154-155), but they do not seem to have done so.
[519] At the appeal hearings, the Appellant merely asserted that his trial counsel should have contacted Ambassador Rawson to obtain his version of the events recounted by Ms. Des Forges: T(A) 17 January 2007, p. 88.
[520] See Barayagwiza Appellant's Brief, para. 336.
[521] *Gacumbitsi* Appeal Judgement, paras. 115 and 133; *Naletilić and Martinović* Appeal Judgement, para. 217; *Semanza* Appeal Judgement, para. 159; *Kordić and Čerkez* Appeal Judgement, para. 281; *Rutaganda* Appeal Judgement, para. 34; *Akayesu* Appeal Judgement, paras. 284-287; *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.
[522] See *infra* XII. D. 2. (b) (vi) .
[523] Barayagwiza Notice of Appeal, p.1; Barayagwiza Appellant's Brief, paras. 100-102. In paragraph 102 of his Appellant's Brief, Appellant Barayagwiza gives an example where he contends that he was denied access to evidence which might have included exculpatory material, without, however, substantiating his argument or providing any references.
[524] T(A) 17 January 2007, p. 57.
[525] See *supra* IV. A.

# VI. ALLEGED VIOLATIONS OF APPELLANT NAHIMANA'S DEFENCE RIGHTS

## A. Introduction

218. In his fourth ground of appeal Appellant Nahimana contends that the Trial Chamber violated his right to have adequate time and facilities for the preparation of his defence and the equality of arms principle, and that these violations invalidate the Judgement.[526]

219. In his fifth ground of appeal Appellant Nahimana contends that the Trial Chamber violated his right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, and the equality of arms principle.[527] According to the Appellant, these violations seriously undermined the fairness of the trial and invalidate the Judgement.[528]

220. The Appeals Chamber notes that Appellant Nahimana's fourth and fifth grounds of appeal cite various rights of the accused protected by Article 20 of the Statute. The Appeals Chamber has already recalled the applicable law relating to certain of the fair trial guarantees invoked by Appellant Nahimana.[529] As to the principle of equality of arms, the Appeals Chamber adds that this does not amount to material equality between the parties in terms of financial and/or human resources.[530] As to the right to have adequate time and facilities for the preparation of a defence, that right is enshrined in Article 20(4)(b) of the Statute. When considering an appellant's submission regarding this right, the Appeals Chamber must assess whether the Defence as a whole, and not any individual counsel, was deprived of adequate time and facilities.[531] Furthermore, the Appeals Chamber agrees with the Human Rights Committee[532] that "adequate time" for the preparation of the defence cannot be assessed in the abstract and that it depends on the circumstances of the case. The Appeals Chamber is of the view that the same goes for "adequate facilities". A Trial Chamber "shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case".[533] However, it is for the accused who alleges a violation of his right to have adequate time and facilities for the preparation of his defence to draw the Trial Chamber's attention to what he considers to be a breach of the

[526] Nahimana Notice of Appeal, pp. 6-7; Nahimana Appellant's Brief, paras. 122-160.
[527] *Ibid.*, p. 7; Nahimana Appellant's Brief, paras. 161-185.
[528] Nahimana Appellant's Brief, paras. 180-185.
[529] As to the equality of arms principle, as enshrined in Article 20(1) and (4) of the Statute, see *supra* IV. A. 2. (c) (iii) and (iv). As to the right to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, as enshrined in Article 20(4)(e) of the Statute, see *supra* IV. A. 2. (c) (iv) a.
[530] *Kordić and Čerkez* Appeal Judgement, para. 176; *Kayishema and Ruzindana* Appeal Judgement, para. 69. See also *Prosecutor v. Tihomir Bla{ki}*, Case No. IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in *Prosecutor v. Blaškič*, 16 May 2002, paras. 19-20.
[531] *Aloys Ntabakuze v. The Prosecutor*, Case No. ICTR-98-41-AR72(C), Decision (Appeal of the Trial Chamber I "Decision on Motions by Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses" of 9 September 2003), 28 October 2004, p. 4.
[532] *Paul Kelly v. Jamaica*, Communication No. 253/1987 (10 April 1991), UN Doc. CCPR/C/41/D253/1987, para. 5.9. See also *Aston Little v. Jamaica*, Communication No. 283/1988 (19 November 1991), UN Doc. CCPR/C/43/D/283/1988 (1991), para. 8.3; General Comment No. 13, UN Doc. HRI/GEN/1/Rev.1, 13 April 1984, para. 9.
[533] *Tadić* Appeal Judgement, para. 52.

Tribunal's Statute and Rules; he cannot remain silent about such a violation, then raise it on appeal in order to seek a new trial.

221. The Appeals Chamber will now examine the specific errors alleged by Appellant Nahimana.

## B. Violation of the right to have adequate time and facilities for the preparation of the defence

### 1. The Decision of 3 June 2003 allowing the Prosecutor to tender into evidence translations of RTLM broadcasts

222. Appellant Nahimana complains that the Trial Chamber granted the Prosecutor leave, after the close of the Defence case, to tender into evidence several hundred pages consisting of translations of recordings of RTLM broadcasts.[534] He asserts that this denied him the possibility of properly responding to that evidence by producing exculpatory evidence.[535] He contends that, out of the 51 excerpts analysed in the Judgement, 16 were from this belatedly adduced evidence, a proportion which, in his view, meant that "the said evidence played a determining role" in the Judgement.[536]

223. The Appeals Chamber notes that, shortly after the Prosecutor had completed the presentation of his case, the Trial Chamber addressed the question of the translation of the transcripts of RTLM broadcasts:

> As far as possible, we expect translations to be handed in in respect of material already referred to in the courtroom. If there's anything else being tendered, we will ask Defence if they have objections in each instance.[537]

In its Decision of 3 June 2003, the Trial Chamber referred to this oral decision[538] and noted that all translations offered by the Prosecutor were materials that had already been tendered as evidence in Kinyarwanda or had been made available to the Defence in the form of tapes, without any objection from the latter.[539] The Trial Chamber accordingly granted the Prosecutor leave to tender as evidence translations of the transcripts of RTLM broadcasts.[540]

224. The Appeals Chamber notes that Appellant Nahimana has failed to identify the 16 excerpts from the recordings analysed in the Judgement whose belated filing allegedly caused him prejudice, nor has he shown in what respect the Decision of 3 June 2003 was erroneous. He also fails to specify the prejudice he allegedly suffered or the findings in the Judgement whose validity was affected by the improper admission of the 16 excerpts. The

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[534] Nahimana Appellant's Brief, paras. 125-128. The Appellant cites the "Decision on the Prosecution's Application to Admit Translations of RTLM Broadcasts and *Kangura* Articles" of 3 June 2003 ("Decision of 3 June 2003").
[535] Nahimana Appellant's Brief, para. 128.
[536] *Ibid*., para. 131; see also paras. 129-130.
[537] T. 12 July 2002, p. 185.
[538] Decision of 3 June 2003, p. 2 and footnote 1 (erroneously referring to Transcript of 12 July 2003).
[539] *Ibid*., pp. 2-3.
[540] *Ibid*., p. 3.

Appeals Chamber accordingly dismisses the appeal on this point without further consideration.[541]

2. Admission of the radio interview with Appellant Nahimana of 25 April 1994

225. Appellant Nahimana contends that the Trial Chamber committed a "serious error of law" in admitting in evidence the recording of the radio interview of 25 April 1994, even though the Prosecutor had never disclosed to the Defence the complete version of the recording in question and its missing section was, according to the Appellant,"totally exculpatory".[542]

226. The Appeals Chamber notes that the Appellant advances no specific legal argument in support of this ground of appeal, merely asserting that the recording is suspect by nature due to its origin, and alleging violation of Rules 66, 68 and 95 of the Rules, without specifying how these Rules were violated by admission of the impugned material.[543] The Appeals Chamber notes that the Trial Chamber was aware of the incomplete nature of the recordings, and that the Appellant had the opportunity to cross-examine Expert Witness Ruzindana[544] and to testify[545] on the matter. Further, the Appeals Chamber recalls that it found that the Prosecutor had adequately explained how the recording of the interview was obtained and came to be incomplete.[546] It was for the Appellant to show that the Trial Chamber erred in admitting this material into evidence and relying on it in the Judgement;[547] he has failed to do so. The appeal on this point is accordingly dismissed without further consideration.

3. Amendment of the list of Prosecution witnesses

227. Appellant Nahimana contends that the Trial Chamber violated his right to be informed promptly of the evidence against him, in that, on 26 June 2001, more than eight months after the commencement of trial, it granted the Prosecutor's application to add 18 witnesses, two of whom were expert witnesses.[548] Moreover, according to the Appellant, "only three of their

[541] In his Appellant's Brief (paras. 129-130), Appellant Nahimana merely refers to paragraphs 342-433 of the Judgement, without specifying the impugned findings, and to Exhibit C7, without any detail (Exhibit C7 contains thousands of pages of transcriptions).
[542] Nahimana Appellant's Brief, paras. 132-135. See also paras. 277-279.
[543] *Ibid.*, paras. 134-135. See also para. 279.
[544] T. 27 March 2002, pp. 155-161.
[545] See T. 24 September 2002, pp. 36-37, where the Appellant gives his own account of the missing part of the interview.
[546] *Décision sur la requête de Ferdinand Nahimana aux fins de communication d'éléments de preuve disculpatoires* [sic] *et d'investigations sur l'origine et le contenu de la pièce à conviction P105*, [Decision on Ferdinand Nahimana's Motion for Disclosure of Exculpatory Evidence and of Materials from Investigations into the Origin and Content of Exhibit P105], 12 September 2006 ("Decision of 12 September 2006 "), para. 12.
[547] As recalled in the "*Décision sur les requêtes de Ferdinand Nahimana aux fins de divulgation d'éléments en possession du Procureur et nécessaires à la défense de l'Appelant et aux fins d'assistance du Greffe pour accomplir des investigations complémentaires en phase d'appel*" [Decision on Ferdinand Nahimana's Motions for Disclosure of Materials in the Possession of the Prosecutor and Necessary for the Defence of the Appellant, and for Assistance from the Registry for Additional Investigations at the Appeals Phase], 8 December 2006, para. 25.
[548] Nahimana Appellant's Brief, paras. 136-137. The Appellant refers, without quoting it, to the Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001 ("Decision of 26 June 2001"). The Appellant contends that these 18 witnesses represent more than one third of the total number of Prosecution witnesses who testified at trial.

statements [*i.e.*, of the new witnesses] had been disclosed to the Defence before the hearings began in October 2000".[549] The Appellant claims that this violated Rule 66 of the Rules, and that such a violation invalidates the Judgement.[550]

228. Rule 73 *bis* (E) of the Rules provides that, after commencement of the trial, the Prosecutor "may move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called". The Appellant gives no indication as to how the Decision of 26 June 2001 was wrong, or as to how his capacity to prepare his defence was impaired by the addition of 18 witnesses to the Prosecution witness list during the course of the trial. He cites no difficulties in the preparation of his defence owing to the belated disclosure of the statements of the witnesses added to the list on 26 June 2001, nor does he indicate what was the impact of these statements – which are themselves not precisely identified – on the findings in the Judgement.

229. Neither does the Appellant explain how the Decision of 26 June 2001 constituted a violation of Rule 66 of the Rules. Insofar as the Appellant might seek to argue that the statements of all the witnesses whom the Prosecutor intended to call should have been disclosed to the Defence not later than 60 days before the date set for trial,[551] that is an argument which cannot succeed, since it is clear that the statements of any new witness can never be disclosed to the Defence within the time-limit prescribed in the first sub-clause of Rule 66(A)(ii) when the Chamber grants the Prosecutor leave to amend his witness list during trial. In such cases, the Chamber sets a time-limit for disclosure of the statements of the new witnesses, as provided in the second sub-clause of Rule 66(A)(ii). And that indeed is what the Trial Chamber did in this instance.[552] This ground of appeal is dismissed without further consideration.

### 4. Allowing Prosecution Witness X to testify

230. Appellant Nahimana contends that the Trial Chamber violated his right "to be informed of the evidence against him so as to adequately prepare his defence"[553] and violated Rule 66 of the Rules in authorizing the Prosecutor on 14 September 2001 – that is, three months after the Decision of 26 June 2001, which, according to the Appellant, was "the final decision on the list of Prosecution witnesses" – to call a new witness, Witness X, described as a key witness.[554] He alleges that, contrary to the Prosecutor's assertion that he decided to call this witness only in the summer of 2001, the "use"[555] of this witness had been envisaged even before the commencement of trial, since the witness is mentioned under a different pseudonym in the material submitted in support of the Indictment.[556] In support of this contention, Appellant Nahimana refers to the arguments advanced in his "Brief of June 2001"[557] and to those voiced by Judge Gunawardana in his Dissenting Opinion appended

[549] Nahimana Appellant's Brief, para. 136, footnote 16.
[550] *Ibid*., para. 137. See also the heading of the relevant section.
[551] Rule 66(A)(ii) of the Rules.
[552] Decision of 26 June 2001, p. 9.
[553] Nahimana Appellant's Brief, para. 141.
[554] *Ibid*., para. 138, referring to the Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001 ("Decision of 14 September 2001").
[555] *Ibid.*, para. 139.
[556] *Ibid*., paras. 139-140.
[557] The Appellant gives no precise reference.

to the Decision of 14 September 2001.[558] He adds that the prejudice caused by allowing Witness X to testify was compounded by the Trial Chamber's refusal to hear Defence Witness Y, whose testimony was intended mainly to rebut certain allegations made by Witness X.[559]

231. The Appeals Chamber will not consider the arguments advanced in the "Brief of June 2001". Appellant Nahimana cannot, on appealing a judgement, merely refer in general to arguments already put forward during the course of his trial. When challenging a Trial Chamber decision, he must demonstrate an error of law invalidating that decision, or an error of fact having occasioned a miscarriage of justice.[560] Likewise, the Appellant must enunciate the facts and law underlying his ground of appeal, and not merely make reference to a dissenting opinion of one of the Judges of the Trial Chamber.

232. The Appeals Chamber notes that Appellant Nahimana advances only one argument in support of his submission, namely that, contrary to the Prosecutor's assertions, the latter intended to call Witness X even before the commencement of trial. However, the Appellant does not specify in what respect the Decision of 14 September 2001 is erroneous or violates Rule 66 of the Rules; neither does he provide any details regarding the prejudice he claims to have suffered in the preparation of his defence.

233. The Appeals Chamber recalls that it was open to the Prosecutor to seek to vary his list of witnesses under Rule 73 *bis* (E) of the Rules. The Appeals Chamber further notes that the Prosecutor's application to call Witness X[561] was filed on 11 June 2001, at a time when his application of 4 June 2001 to vary the witness list was still pending before the Trial Chamber. The Appeals Chamber can discern no error in the Trial Chamber's decision to treat the two applications separately, and to authorise Witness X to testify by a further decision taken three months after the Decision of 26 June 2001. To have done otherwise would only have delayed the decision on the Prosecutor's oral request of 4 June 2001 and afforded no advantage whatsoever to Appellant Nahimana in the preparation of his defence. Proper conduct of the proceedings required a prompt ruling on the request for leave to amend the Prosecution witness list.[562] The appeal on this point is dismissed.

### 5. Obstruction to Defence investigations

234. Invoking the arguments presented in support of his motion to stay the proceedings owing to the obstructions to Defence investigations,[563] Appellant Nahimana contends that the

[558] Nahimana Appellant's Brief, para. 142, referring to the Separate and Dissenting Opinion of Judge Asoka de Z Gunawardana on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, annexed to the Decision of 14 September 2001.
[559] *Ibid*., para. 143. The Appeals Chamber will examine below the contention that the Trial Chamber erred in refusing to hear Witness Y (See *infra* VI. C. 2. ).
[560] See *supra* I. E.
[561] Prosecutor's Ex-Parte Application to the Trial Chamber Sitting in Camera for Relief From Obligation to Disclose the Existence, Identity and Statements of New Witness X, filed *ex parte* on 11 June 2001 ("Application of 11 June 2001").
[562] The Appeals Chamber notes that it was only on 5 and 6 September 2001 that the Parties were heard on the Application of 11 June 2001.
[563] Nahimana Appellant's Brief, paras. 144-145, referring to the Skeleton Argument for Defence Application to Stay Proceedings, 8 May 2003 (Annex 3 to Nahimana Appellant's Brief). The motion *per se* (Motion to Stay the Proceedings in the case of Ferdinand Nahimana) was filed on 13 May 2003.

decision rejecting that motion was wrong.[564] He maintains that the Trial Chamber, at the very least, committed an error of law by basing its decision on "evidence which it should have excluded due to serious shortcomings that undermine the fairness of the trial resulting from obstructions to the Defence conduct of its investigations aimed at rebutting the said evidence", and gives the example of the interview of 25 April 1994.[565]

235. In the view of the Appeals Chamber, the reference by the Appellant to the arguments in support of his motion for a stay of proceedings is not sufficient to demonstrate that the Decision of 5 June 2003 was erroneous[566] and caused prejudice to the Defence. As for the argument that the Trial Chamber should have excluded the interview of 25 April 1994 because the Defence never obtained a complete transcript, the Appeals Chamber refers back to the discussion above.[567] The appeal on this point is dismissed.

### 6. Translation of Prosecution Briefs

236. Appellant Nahimana points out that neither he nor his Lead Counsel are proficient in the English language.[568] He therefore takes issue with the Trial Chamber for having dismissed his request that the period for filing his response to the Prosecutor's Final Trial Brief[569] should run from the date on which the Defence received those arguments in both working languages of the Tribunal.[570] He adds that failure to disclose to the Defence a French version of the Prosecutor's Closing Brief and rebuttal arguments[571] deprived him of "adequate facilities for the preparation of his defence".[572]

237. In a motion filed on 15 May 2003, the Appellant requested the Trial Chamber to order the Prosecutor to file his Closing Brief simultaneously in French and English.[573] The Trial Chamber denied the motion, but directed the Parties to make arrangements with the Registry for the translation of filings, and also to rely on their counsel fluent in the other language.[574] Appellant Nahimana does not explain whether such arrangements were made with the Registry, or how the matter was resolved. He cites no subsequent objection to the continuation of the trial without translations of the Prosecution Briefs. The Appeals Chamber recalls that Appellant Nahimana's Co-Counsel, Diana Ellis, is English-speaking and that several parts of the Nahimana Closing Brief[575] were written in English, thus showing that his

[564] *Ibid.*, para. 147, footnote 18, referring to Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana, 5 June 2003 ("Decision of 5 June 2003").
[565] *Ibid.*, para. 148.
[566] In this regard, the Appeals Chamber notes that, in its Decision of 5 June 2003 (see paras. 4-19), the Trial Chamber carefully examined the arguments advanced by the Appellant in support of his request.
[567] S*upra* VI. B. 2.
[568] Nahimana Appellant's Brief, para. 150.
[569] Prosecutor's Closing Brief filed under Rule 86(B) and (C) of the Rules of Procedure and Evidence, filed confidentially on 25 June 2003 ("Prosecutor's Closing Brief").
[570] Nahimana Appellant's Brief, paras. 151-152.
[571] The Prosecutor's Brief in Reply filed under Rule 86(B) and (C) of the Rules of Procedures and Evidence (Confidential), 15 August 2003 ("Prosecutor's Brief in Reply (Trial)").
[572] Nahimana Appellant's Brief, paras. 153-155.
[573] Motion to Request an Order for Translation of the Prosecutor's Closing Argument into French and thereafter Simultaneous Provision to the Defence of the Closing Arguments in both French and English, 15 May 2003, para. 4.1.
[574] Revised Scheduling Order, 16 May 2003, p. 3.
[575] Defence Closing Brief, filed confidentially on 1 August 2003 ("Nahimana's Closing Brief").

Defence was capable of working in both of the Tribunal's working languages. The appeal on this point is dismissed.

### 7. Right of rejoinder

238. According to the Revised Scheduling Order of 16 May 2003: (1) the Prosecutor was to file his Closing Brief by 25 June 2003; (2) all Defence Teams were to file their Closing Briefs by 1 August 2003; (3) the Prosecutor was to file a reply, if any, by 15 August 2003; and (4) the Closing Remarks were to be heard from 18 to 22 August 2003.[576]

239. Appellant Nahimana argues that the schedule set by the Trial Chamber did not give the Defence the possibility of filing a written rejoinder or adequate time for the preparation of a written or oral rejoinder before the date set for the hearing of 18 August 2003,[577] thereby violating his rights under Rule 86 of the Rules and Article 20(4)(b) of the Statute.[578]

240. Rule 86(A) provides that, after the presentation of all the evidence, the Prosecutor may present a closing argument, as may the Defence, the Prosecutor having a right of rebuttal and the Defence a right of rejoinder; but it does not stipulate the form in which this right may be exercised.[579] Rule 86(B) provides that a party shall file a closing brief not later than five days prior to the day set for the presentation of that party's closing argument.

241. The Appeals Chamber is of the opinion that it was open to the Trial Chamber to allow the Prosecutor to file a written reply to the Appellants' Closing Briefs. However, it should then have granted the Defence of each Appellant leave to file a written rejoinder in accordance with the equality of arms principle.

242. The Appeals Chamber notes that on 15 August 2003 (three days prior to the commencement of the hearing on closing arguments) the Prosecutor filed a Reply, in English only and consisting of 158 pages, to the Closing Briefs of the Appellants.[580] The Appeals Chamber further notes that on 1 August 2003 the Defence for Appellant Nahimana had filed a motion with the Trial Chamber, requesting that the time-limits be varied in order to enable him to file a written rejoinder.[581] Furthermore, at the opening of the hearing on closing arguments Appellant Nahimana's Counsel asked the Trial Chamber to exclude the Prosecutor's Brief in Reply (Trial) from the proceedings;[582] however, the Trial Chamber does not appear to have acceded to that request.[583]

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[576] Revised Scheduling Order, 16 May 2003, p. 3.
[577] Nahimana Appellant's Brief, paras. 156-157.
[578] *Ibid*., para. 149.
[579] Rule 86(A) of the Rules:

> After the presentation of all the evidence, the Prosecutor may present a closing argument. Whether or not the Prosecutor does so, the Defence may make a closing argument. The Prosecutor may present a rebuttal argument to which the Defence may present a rejoinder.

[580] Prosecutor's Brief in Reply (Trial).
[581] Motion for an Amendment of the Scheduling Order, 1 August 2003. In the Judgement, the Trial Chamber explains that it dealt with the matter by giving an opportunity to the Defence to respond to the Brief in Reply in Closing Arguments, during which they were permitted the right of rejoinder (Judgement, para. 93).
[582] T. 18 August 2003, pp. 3-4:

> I would like, further, to raise some other difficulty at the beginning of these closing arguments. On Saturday, towards the end of the morning, we received a 168-page brief

243. The Appeals Chamber is of the opinion that the Trial Chamber violated the spirit of Rule 86(B)[584] by authorising the Prosecutor to file a Brief in Reply less than five days prior to the date set for the presentation of closing arguments. Moreover, the Trial Chamber shifted the equality of arms in the Prosecutor's favour by allowing him to file a written Brief in Reply to Appellant Nahimana's Closing Brief without the latter being given the possibility of filing a written rejoinder or adequate time to prepare an oral rejoinder.

244. The Appeals Chamber is nonetheless of the opinion that the Appellant has not demonstrated that such errors invalidate his conviction. The Appellant cites no argument in the Brief in Reply to which he could not respond, which was accepted by the Trial Chamber and which had an impact on the verdict.[585] The appeal on this point is accordingly dismissed.

### 8. Translation of Nahimana's Closing Brief

245. Appellant Nahimana contends that the Trial Chamber "in fact"[586] denied him the right to properly make his case, since the English translation of his Closing Brief was filed only on 28 November 2003, that is, four days before the Judgement was delivered, whereas, allegedly, neither the Judges nor their assistants knew French.[587] In support of this contention, he asserts that at no point does the Judgement refer to his Closing Brief.[588]

246. A combined reading of Articles 20 and 31 of the Statute shows that the Accused's right to defend himself against the charges against him implies his being able, in full equality with the Prosecutor, to put forward his arguments in one of the working languages of the Tribunal and to be understood by the Judges. However, the Appeals Chamber is of the opinion that in this instance Appellant Nahimana has failed to demonstrate that the Trial Chamber Judges could not consult his Closing Brief. It notes that, contrary to the Appellant's assertion, the Judgement refers to his Closing Brief in footnote 1052 (Judgement, para. 912), which would appear to indicate that the Judges were able to acquaint themselves with the Closing Brief. The Appeals Chamber further notes that Appellant Nahimana cites no

> from the Office of the Prosecutor, which, as you would have understood, Ms President, Your Honour, it is not a response. At least two-thirds of it amounts to an additional brief or a supplementary brief, which has been submitted out of the time limit, out of the deadline. Nahimana's Defence will not respond to that brief, not because it does not seek to respond, but because it is unable to do so for obvious practical reasons. Filing such a brief two days before this session, 168 pages of supplementary arguments, makes it impossible to exercise the right of response or rejoinder as provided in Rule 86 of Rules of Procedure and Evidence.
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> Finally, Nahimana's Defence is of the view that it has been deprived of its right to provide a rejoinder. It has been so deprived, whereas the Bench had had its attention drawn to the difficulty following a motion that was filed at the appropriate time. In that regard, therefore, the only solution that would be legally acceptable is that that brief be purely shelved from the proceedings.

[583] See T. 18 August 2003, pp. 4-8.
[584] Although Rule 86(B) of the Rules only deals with the parties' closing briefs, and not with reply or rejoinder briefs, it is clear that its purpose is to allow the parties enough time after the filing of closing briefs to prepare for the hearing on closing arguments.
[585] The Appeals Chamber further notes that the Judgement does not appear to make reference to the Prosecutor's Brief in Reply (Trial).
[586] Nahimana Appellant's Brief, para. 160.
[587] *Ibid*., paras. 158-160.
[588] *Ibid*., para. 160.

arguments from his Closing Brief that was ignored by the Trial Chamber and could have had an impact on the verdict. The mere fact that Nahimana's Closing Brief was not available in English until 28 November 2003 thus does not suffice to prove that the Trial Chamber violated his right to an effective defence. The appeal on this point is dismissed.

## C. Violation of the right to secure the attendance and examination of Defence witnesses under the same conditions as Prosecution witnesses

### 1. Restrictions imposed on the testimony of Defence expert witnesses

247. Appellant Nahimana contends that the Trial Chamber denied him the possibility of providing full answer and defence by not allowing his expert witnesses to address two issues:[589] (i) the attack of 6 April 1994 against the two Hutu Heads of the States of Rwanda and Burundi and its consequences "among the Rwandan people", whereas the testimony of the Defence expert witnesses on this issue was intended to counter the allegation that the genocide was planned prior to 6 April 1994 and, hence, the charge of conspiracy to commit genocide;[590] (ii) the interpretation of Appellant Nahimana's writings, whereas the hearing of the Defence expert witnesses on this issue was intended to counter the Prosecution argument that those writings provided evidence of the Appellant's criminal intent.[591] He submits that these restrictions violated the principle of equality of arms, since, in order to bolster the argument of a "criminal conspiracy prior to 6 April 1994" and to demonstrate that the Appellant had a criminal intent, the Prosecutor was allowed to call four expert witnesses[592] "whose testimonies were not subject to any limitations".[593]

248. By a decision dated 24 January 2003, the Trial Chamber allowed the Appellant to call three expert witnesses: Peter Caddick-Adams, on the role of the media and the use of propaganda in times of war; Barrie Collins, on the economic and political situation in Rwanda and in the Great Lakes Region between the late 80s and 1994; and an unidentified military expert.[594] The testimony of Helmut Strizek, which was intended to focus on the destruction of the presidential plane in flight and the interpretation of the Appellant's writings was rejected, because the Trial Chamber held that the issue of the destruction of the plane was irrelevant, and that interpretation of the Appellant's writings could be provided by himself or his Counsel.[595] In response to the Appellant's motion for review of that decision, the Trial Chamber issued a fresh ruling on 25 February 2003, taking into account additional information provided orally by the Appellant on 30 January 2003, as well as Helmut Strizek's *curriculum vitae*, filed by the Appellant on 6 February 2003. The Trial Chamber upheld its Decision of 24 January 2003, on the ground that no additional information had been furnished to persuade the Chamber to reconsider it.[596]

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[589] Nahimana Appellant's Brief, paras. 162-165.
[590] *Ibid*., para. 163.
[591] *Ibid*., para. 164. See also paras. 180-182.
[592] *Ibid*., paras. 166.
[593] *Ibid*., paras. 166-168. See also para. 183.
[594] Decision on the Expert Witnesses for the Defence, 24 January 2003 ("Decision of 24 January 2003"), paras. 5-8, 11 and p. 5.
[595] Decision of 24 January 2003, para. 10.
[596] Decision to Reconsider the Trial Chamber's Decision of 24 January 2003 on the Defence Expert Witnesses, 25 February 2003 ("Decision of 25 February 2003"), pp. 4-5. The Appellant's appeal of 4 March 2003 against this Decision was deemed inadmissible by the Appeals Chamber: *Décision* (*Appel de la Décision de la Chambre*

249. Ultimately, the Appellant did not call the three expert witnesses who had been authorized to testify. On 11 April 2003, the Trial Chamber gave him leave to call Helmut Strizek to testify in place of Barrie Collins;[597] Co-Counsel for Appellant Nahimana assured the Trial Chamber that Expert Witness Strizek would only discuss the historical context before the genocide and not the destruction of President Habyarimana's plane.[598] Helmut Strizek was subsequently recognized as an expert by the Trial Chamber on 5 May 2003, following a *voir-dire* examination.[599]

250. In the opinion of the Appeals Chamber, the Appellant has failed to demonstrate that the Trial Chamber abused its discretion by not allowing the expert witness to testify on the destruction of the presidential plane on 6 April 1994. In the view of the Appeals Chamber, the finding that this issue was irrelevant in order to decide on the charges brought against the Appellant is reasonable. In particular, even if, as the Appellant claims, the presidential plane was shot down on 6 April 1994 by the RPF (a matter that the Appeals Chamber does not have to determine here), that would not be sufficient to demonstrate that the Appellant was not involved in a conspiracy to commit genocide prior to that date.

251. Regarding the issue of interpretation of the Appellant's writings, a matter whose relevance is not in dispute, the Appeals Chamber notes that the expert witnesses called by the Prosecutor were able to testify as to how the writings should be interpreted,[600] but that the Trial Chamber refused to allow the Appellant to call an expert witness to testify on this matter, stating in its Decision of 24 January 2003 that "interpretations of Nahimana's writings [were] best provided by the Accused Nahimana himself or addressed in Counsel's Closing Brief".[601] The Appeals Chamber is of the opinion that, in so acting, the Trial Chamber violated the principle of equality of arms between the parties, since the Appellant's or his Counsel's testimony could not replace that of an expert witness. However, the Appeals Chamber notes that the Appellant has never specified how Helmut Strizek's training and experience qualified him to interpret the Appellant's writings. Moreover, he has not given the slightest indication as to how the testimony of this witness would have led the Trial Chamber to interpret his writings differently, merely stating that "[t]he analysis made by the Judges is based on an interpretation of the text which gives it an implicit meaning that is different from the explicit assertions made in it".[602] The appeal on this point is accordingly dismissed .

### 2. Defence Witness Y

252. Appellant Nahimana submits that, by denying the Defence the material possibility of calling Witness Y to testify, the Chamber prevented the Defence from adducing crucial defence arguments, thereby breaching the principle of equality of arms between the parties.[603] He claims in this connection that the failure of Witness Y to appear deprived him of the

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*de première instance I du 25 février 2003*) [Decision (Appeal from the Decision of Trial Chamber I of 25 February 2003)], 28 March 2003, pp. 3-4.

[597] T. 11 April 2003, p. 7 (closed session).

[598] *Ibid*., p. 8 (closed session).

[599] T. 5 May 2003, pp. 27-28.

[600] In particular, Expert Des Forges commented on the Appellant's article, "Rwanda: Current Problems and Solutions": see Judgement, para. 652 *et seq*.

[601] Decision of 24 January 2003, para. 10.

[602] Nahimana Appellant's Brief, para. 181.

[603] *Ibid*., paras. 173 and 185.

possibility of effectively challenging the credibility of Witness X, a key Prosecution witness.[604] He further claims that Witness X was granted special protective measures for himself and his family, together with an express assurance from the Prosecutor "effectively guaranteeing him immunity from prosecution",[605] whereas Witness Y was denied assistance by the Registrar solely on the ground that he had been revealed to be in possession of a forged passport.[606] He submits that the discrepancies in the treatment of the two witnesses "in the same administrative situation"[607] amounts to a breach of the principle set out in Article 20(4)(e) of the Statute.[608]

253. Following the status conferences of 11 and 12 December 2002, the Trial Chamber decided to allow the Defence to call Witness Y to testify.[609] Recognizing the special circumstances relating to the poor health of this witness and the possible threat to his security, the Trial Chamber granted on 10 April 2003 Appellant Nahimana's motion to hear his evidence by deposition.[610] It was, however, impossible to bring Witness Y to The Hague on 1 and 2 May 2003 as scheduled,[611] and the Registrar refused to continue the arrangements to secure travel documents for Witness Y because the identity papers that he had submitted were

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[604] *Ibid*., paras. 174-175. In support of his statement that Witness X was a key Prosecution witness, the Appellant notes that the Judgement frequently cites Witness X's testimony "to support the charge of conspiracy […] and to try to demonstrate the Appellant's role in Radio RTLM": Nahimana Appellant's Brief, para. 184, referring to paragraphs 310-327 (conspiracy issue) and 509 (Appellant's role in RTLM) of the Judgement.
[605] *Ibid*., para. 177, referring to paragraph 547 of the Judgement.
[606] *Ibid*., para. 178.
[607] *Ibid*., para. 176.
[608] *Ibid*., para. 179.
[609] Decision on the Defence Motion to Re-instate the List of Witnesses for Ferdinand Nahimana, Pursuant to Rule 73 *ter*, 13 December 2002. pp. 2-3.
[610] Decision on the Defence Request to Hear the Evidence of Witness Y by Deposition, 10 April 2003, ("Decision of 10 April 2003") pp. 3-4.
[611] See Decision on the Defence *Ex-Parte* Motion for the Appearance of Witness Y, 3 June 2003 ("Decision of 3 June 2003 on the Appearance of Witness Y"), pp. 2-3 (footnote omitted):

> Pursuant to a decision issued on 10 April 2003 by the Chamber, Witness Y was allowed to testify by deposition at The Hague on 1-2 May 2003. WVSS (D) [Witness and Victims Support Section in charge of Defence witnesses] received the witness identification form from the Defence Counsel, Mr. Biju-Duval on 11 April 2003, which indicated that Witness Y did not have any legal status in the country of residence. On 14 April 2003, WVSS (D) contacted the Ministry of Foreign Affairs, the UNDP, and Witness Y, who informed WVSS (D) that he was not willing to travel to The Hague to testify. WVSS (D) communicated this to Mr. Biju-Duval, who contacted Witness Y, and subsequently withdrew Witness Y from the list of Defence witnesses. As a result, WVSS (D) halted arrangements for Witness Y's travel to The Hague.
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> On 17 April 2003, Mr. Biju-Duval informed the Registrar that Witness Y had changed his mind and was now willing to testify. WVSS (D) resumed its efforts and approached Witness Y to provide additional documents to support the request for the issuance of a travel document. The documents were received by WVSS (D) on 24 April 2003. As a consequence of time lost over the withdrawal and reinstatement of the witness, intervention of the Easter public holidays and difficulties over contacting the authorities in the country of residence of Witness Y after changes in their personnel, the loss of the assistance of UNHCR upon their transfer out of the country concerned; and the Protection Order limiting revelation or access to Witness Y's personal file, WVSS was not able to facilitate Witness Y's appearance at the Deposition hearing in The Hague on 1-2 May 2003.

forgeries.[612] Considering, *inter alia*, that the Registry was not responsible for the witness's failure to appear, that exceptional measures had already been taken to allow him to testify and that the Registry's decision not to continue the arrangements to secure travel documents for Witness Y was justified, the Trial Chamber refused on 3 June 2003 to set a new date for his deposition.[613]

254. On 11 June 2003, the Appellant filed with the Trial Chamber a motion for certification of appeal against the Decision of 3 June 2003 rejecting the request to set a new deposition date.[614] Although the motion was time-barred under Rule 73(C) of the Rules,[615] the Trial Chamber decided to rule on it. The Chamber explained that, even if a new date were to be set for the deposition of the witness, it was not certain that the witness could be present to testify in The Hague because of the illegalities referred to above. Recalling that a trial cannot be extended indefinitely in order to meet the particular demands and requirements of each potential witness, the Trial Chamber noted the exceptional measures already taken to accommodate the risks posed by the health and security situation of Witness Y. With regard to the possibility of reopening the trial in order to comply with the principle of equality of arms, the Trial Chamber observed, in light of the summary of the facts on which Witness Y was to testify,[616] that, while his testimony might affect the credibility of Witness X, it did not, however, relate to the main charges against the Appellant. The Trial Chamber concluded that its refusal to set a new date for the hearing of the said witness was not likely substantially to affect the fairness of the trial and its outcome, and it therefore denied the Appellant leave to appeal.[617]

255. Having considered all these decisions, the Appeals Chamber finds that the Appellant has failed to demonstrate that the Trial Chamber abused its discretion by refusing to set a new date for the deposition of Witness Y. In regard to the Appellant's claim that Prosecution Witness X was accorded special treatment, the Appeals Chamber notes that the Trial Chamber and the Registry spared no effort to ensure that Witness Y testified.[618] The protection measures granted to Witness X by the Trial Chamber appear to be consistent with

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[612] It appears that Witness Y had furnished the Registry (Victims and Witnesses Support Section) with copies of false passports, one of which purported to have been issued by the witness's country of residence. In the circumstances, the Registry could not seek the assistance of the authorities of that country by stating that the witness did not have travel documents without concealing the fact that the witness had a passport purportedly issued by that State. Fearing that such action could compromise the integrity of the Tribunal's diplomatic initiatives, the Registry refused to continue with its attempts to obtain travel documents for Witness Y. See Decision of 3 June 2003 on the appearance of Witness Y, para. 3. See also the letter from the Victims and Witnesses Support Section to the Appellant's Counsel, dated 1 May 2003 (Annex III of the Registar's Response to Mr. Biju-Duval's *Ex Parte* Motion for the Appearance of Witness Y (Confidential), 12 May 2003).

[613] See Decision of 3 June 2003 on the Appearance of Witness Y, paras. 7-9. See also Judgement, para. 69.

[614] *Requête* ex parte *de la Defence aux fins de certification de son appel contre la Décision de la Chambre de première instance I en date du 3 juin 2003* [*Ex parte* Application for Certification of Defence Appeal against the Decision of Trial Chamber I of 3 June 2003], 11 June 2003.

[615] Decision on the Defence's *Ex Parte* Request for Certification of Appeal Against the Decision of 3 June 2003 with regard to the Appearance of Witness Y (Confidential and *Ex Parte*), 16 June 2003 ("Decision of 16 June 2003"), para. 5.

[616] *Ex Parte* Unedited Material for the Consideration of Trial Chamber I in Respect of the Defence Application to Call Witness Y by Deposition, Annex I, 27 March 2003.

[617] Decision of 16 June 2003, pp. 3-4.

[618] See in this connection Decision of 10 April 2003, paras. 7-8; Decision of 3 June 2003 on the appearance of Witness Y, paras. 7-9; Decision of 16 June 2003, paras. 7-8.

those normally granted by the Tribunal and the Appeals Chamber is not aware of any issue of a new identity to him, or of his resettlement in a safe country.[619]

256. Lastly, the Appeals Chamber notes that Appellant Nahimana has not specified what effect Witness Y's deposition would have had on the findings in the Judgement; neither has he explained in what regard the Trial Chamber underestimated its importance.

257. For these reasons, the Appeals Chamber finds that the Appellant has failed to demonstrate that his right to have the Defence witnesses appear under the same conditions as Prosecution witnesses was violated. The appeal on this point is accordingly dismissed.

## VII. ALLEGED VIOLATIONS OF APPELLANT NGEZE'S DEFENCE RIGHTS

258. Appellant Ngeze contends that the Trial Chamber violated his right to a fair trial (1) by refusing to have all the issues of the *Kangura* newspaper translated;[620] (2) by failing to grant his request to replace his Counsel and Co-Counsel;[621] (3) by denying him the right personally to cross-examine the Defence witnesses;[622] (4) by authorizing Witnesses Ruzindana, Chrétien and Kabanda to appear as experts[623] and by preventing the Appellant from calling an expert witness;[624] (5) by refusing to order the appearance of Colonel Tikoca and of seven individuals detained at the UNDF.[625] The Appeals Chamber will consider each of these submissions in turn.

### A. Failure to translate all the issues of *Kangura*

259. Appellant Ngeze submits that the Trial Chamber erred by refusing to order the translation – requested by the Appellant prior to the opening of his trial[626] – of all the issues of *Kangura,*[627] from Kinyarwanda into the Tribunal's working languages. He claims that, in so doing, the Trial Chamber denied the Appellant the right to have the necessary time and facilities for the preparation of his defence, since his Counsel were not able to familiarize themselves with the principal item of evidence adduced against him, and no expert capable of assessing the content of *Kangura* could be found.[628]

260. In response, the Prosecutor states that the Appellant has failed to demonstrate that there was any miscarriage of justice, since, with his command of Kinyarwanda and in his

[619] Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001, paras. 23-38.
[620] Ngeze Notice of Appeal, paras. 28-32; Ngeze Appellant's Brief, paras. 115-126; Ngeze Brief in Reply, paras. 45-51.
[621] *Ibid.*, paras. 33-37; Ngeze Appellant's Brief, paras. 127-143; Ngeze Brief in Reply, paras. 52-54.
[622] *Ibid.*, paras. 38-42; Ngeze Appellant's Brief, paras. 144-156; Ngeze Brief in Reply, paras. 55-58.
[623] *Ibid.*, paras. 43-50; Ngeze Appellant's Brief, paras. 157-169; Ngeze Brief in Reply, para. 60.
[624] *Ibid.*, paras. 53-55; Ngeze Appellant's Brief, paras. 174-181; Ngeze Brief in Reply, paras. 59-62.
[625] *Ibid.*, paras. 51-52; Ngeze Appellant's Brief, paras. 170-173; Ngeze Brief in Reply, para. 63.
[626] Ngeze Appellant's Brief, paras. 121-122.
[627] *Ibid.*, para. 115.
[628] *Ibid.*, paras. 116, 118 and 124. In paragraph 117, the Appellant further submits that the Trial Chamber erred in law "in using partially translated tracts [*sic*] from *Kangura* rather than in context" because "this violates the common law rule of evidence known as the theory of completeness". Since nothing has been put forward in support of this argument, the Appeals Chamber does not consider it necessary to respond to it. Moreover, the Appeals Chamber recalls that, under Rule 89(A) of the Rules, the Chambers of this Tribunal "shall not be bound by national rules of evidence".

position as editor of *Kangura*, he could have guided his Counsel to the articles of *Kangura* which he considered relevant to his defence.[629]

261. The Appellant replies that his Counsel could not rely on him to obtain information or documents to be used at trial[630] and that, being "primarily responsible for the conduct of the case", his Counsel should have been in possession of the Prosecution evidence in a language they could understand.[631] Moreover, the fact that the Defence could have received a translation of the issues or extracts which they wanted to use would not guarantee the fairness of the trial, since the Prosecutor himself benefited from the assistance of Kinyarwanda speakers.[632]

262. The Appeals Chamber notes that, in its Rescheduling Order of 6 October 2000, the Trial Chamber dismissed a request for translation of 71 issues of *Kangura* into the two working languages of the Tribunal. The Trial Chamber stated in that Order that it was not possible to have all the issues of *Kangura* translated because such an exercise served no useful purpose, and the Tribunal's limited resources would not permit it; the Chamber explained that only those extracts deemed relevant by the parties and on which they were to rely should be translated, and requested Counsel to seek the cooperation of their clients.[633]

263. Appellant Ngeze has not demonstrated that there was any error in the reasoning in the Order of 6 October 2000, or indicated in what way his right to prepare his defence was affected by the failure to translate the other issues of *Kangura*. The Appeals Chamber is of the opinion that the Appellant wrongly evokes Defence Counsel's obligation to exercise independent professional judgement, since such obligation does not prohibit them from seeking their clients' assistance. Consequently, as the Trial Chamber indicated in the above-mentioned Order, the Appellant, who is proficient in Kinyarwanda, could very well have contributed to the preparation of his defence by indicating to his Counsel the issues or extracts therefrom that he considered relevant. On appeal, he gives no indication of how the translation of a given issue of *Kangura* or of extracts therefrom could have been helpful for his defence, or of how findings in the Judgement were affected by the Trial Chamber's inability to review the content of the untranslated issues of *Kangura*.[634] The appeal on this point is accordingly dismissed.

### B. The right to legal assistance

264. Invoking Article 20(4)(d) and (b) of the Statute, the jurisprudence of the Tribunal and that of the United States Supreme Court,[635] Appellant Ngeze contends that the Trial Chamber violated his right to have legal assistance of his own choosing and to communicate with his

[629] Respondent's Brief, paras. 219-220.
[630] Ngeze Brief in Reply, paras. 46-47.
[631] *Ibid.*, para. 48.
[632] *Ibid.*, para. 50.
[633] Rescheduling Order, 6 October 2000, para. 3.
[634] Moreover, it has already been found on appeal that it was not necessary to translate all the issues of *Kangura*: see T. 15 December 2004, pp. 3-4, where the Pre-Appeal Judge dismissed the motion entitled "Appellant Hassan Ngeze's Urgent Motion for Supply of English Translation of 71 *Kangura* Newspapers Filed by the Prosecutor with the Registry during Trial", filed on 3 December 2004.
[635] Ngeze Notice of Appeal, para. 33; Ngeze Appellant's Brief, paras. 127, 134 (erroneously citing the *Akayesu* Trial Judgement while clearly referring to the *Akayesu* Appeal Judgement), 135, 137, 143; Ngeze Brief in Reply, para. 52.

Counsel when, in its Decision of 29 March 2001, it denied his motion for withdrawal of his Counsel, Messrs. Floyd and Martel.[636] In this regard, the Appellant asserts that the Trial Chamber erred by dismissing without further enquiry his allegation of failure on the part of his Defence Counsel to hold sufficient consultations with him and to carry out further investigations,[637] resulting in substantial injustice and invalidating the entire trial proceedings.[638]

265. While not deeming it necessary to reiterate all the legal principles evoked above,[639] the Appeals Chamber recalls that the right of an indigent defendant to effective representation does not entitle him to choose his own counsel. The Appeals Chamber is not persuaded that the Appellant has sufficiently demonstrated in this instance that the Trial Chamber should have granted his motion for withdrawal of his Counsel. In addition to the fact that the Trial Chamber noted in its Decision of 29 March 2001 that Counsel communicated with their client in the courtroom and that, when present in the courtroom, the Appellant participated actively in his defence,[640] the trial records further show that Appellant Ngeze notified the Trial Chamber on many occasions, in particular during the hearing of 20 February 2001, that he had met with his Counsel.[641] Accordingly, it was open to the majority of the Trial Chamber Judges to consider the Appellant's motion without merit, even though Judge Gunawardana dissociated himself from the Decision of 29 March 2001.[642] The Appeals Chamber can discern no error on the part of the Trial Chamber in this regard.[643]

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[636] Ngeze Appellant's Brief, paras. 137, 139 and 142; Ngeze Brief in Reply, para. 52.

[637] *Ibid.*, para. 132. At the the appeal hearings, the Appellant suggested that the Trial Chamber could have verified this by inspecting the visitation record of the United Nations Detention Facility: T(A) 17 January 2007, p. 35.

[638] Ngeze Appellant's Brief, paras. 137, 139, 142 and 143. The Appellant's only complaint seems to be that Witness AGX was not effectively challenged due to lack of assistance and consultation with his Counsel: Ngeze Appellant's Brief, para. 142. This argument is examined and dismissed *infra* VII. C. 2.

[639] See *supra* IV. A.

[640] *The Prosecutor v. Hassan Ngeze*, Case No. ICTR-97-27-I, Decision on the Accused's Request for Withdrawal of his Counsel, 29 March 2001, p. 3.

[641] See, *inter alia*, T [French]. 20 February 2001, p. 121 (closed session): "*À la minute, aujourd'hui, j'ai 102 heures seulement avec Floyd*" (the English version states: "I said that I spent only 72 hours with Mr. Floyd"); T. 11 June 2001, p. 35 (closed session): "I had only 86 hours working with Floyd"; Internal Memorandum entitled "Translation of Selected *Kangura* Newspapers" dated 20 November 2001 and referenced No. ICTR-99-52-0674, para. 1; T. 4 July 2002, p. 7: "I have worked with Counsel Floyd and Martel; with counsel Floyd 110 hours and 30 minutes only; with Martel, 22 hours and 30 minutes only" [the French version states:]*"J'ai travaillé avec Maîtres Martel et Floyd environ 130 heures — avec Maître Martel, il s'agit de 22 heures 30 minutes*"; See T. 4 July 2002, p. 6. Moreover, he himself indicated that he refused to meet with his Counsel in a document entitled "Notice of Hassan Ngeze", dated 15 November 2001, and referenced No. ICTR-99-52-0920, in which he asked his Counsel "Floyd, Martel […] avoid any contact with Mr. Ngeze inside the court room and at UNDF".

[642] *The Prosecutor v. Hassan Ngeze*, Case No. ICTR-97-27-I, Separate and Dissenting Opinion of Judge Gunawardana on the Accused's Request for Withdrawal of His Counsel, 29 March 2001, p. 2.

[643] In paragraph 141 of his Appellant's Brief, the Appellant refers to "others oral motions […] during the trial […] all denied" and refers in footnote 46 to the Status Conference of 26 June 2001 and to the hearing of 4 July 2002. Not only does Appellant Ngeze fail to explain how dismissal of his motions amounted to an error that warrants the intervention of the Appeals Chamber, but the record (see *supra*, footnote 641) clearly shows that the Appellant indicated in those motions that he had consulted with his Counsel. The Chamber therefore considers this claim to be without merit.

## C. The right to examine and cross-examine witnesses

266. Invoking Article 20(4)(e) of the Statute, Appellant Ngeze alleges first that the Trial Chamber denied him the right to cross-examine Prosecution witnesses by refusing to allow him to question witnesses himself – after having initially allowed him to do so –[644] and by ordering that he provide his questions to the Trial Chamber or to his Counsel,[645] notwithstanding that he had asked that his Counsel be withdrawn.[646] The Appellant contends that, because of this error, "the Trial Chamber ought to have struck out the direct testimony of Witnesses AGX, Serushago, Chrétien and Kabanda".[647] He points out in his Brief in Reply that Judge Møse and Judge Gunawardana agreed that "an accused can be allowed to put questions to a witness in special circumstances", and contends that such special circumstances existed, since he was permanently in conflict with his Counsel.[648]

267. The Appeals Chamber notes at the outset that the permission accorded to the Appellant on 15 May 2001 to cross-examine witnesses (under the control of the Chamber) was a temporary measure,[649] as the Appellant himself acknowledges.[650] Accordingly, that permission lapsed when the circumstances justifying it were no longer in place. In view of the fact that the Appellant was represented by his Counsel and that the Trial Chamber was justified in denying his request for their withdrawal, it was for Counsel, in principle, to conduct the cross-examination.[651] Nonetheless, the Appeals Chamber will consider whether the Appellant has demonstrated that, in light of special circumstances, the Trial Chamber should have allowed him to cross-examine the aforementioned witnesses.

### 1. Prosecution Witness Serushago

268. The Appeals Chamber would begin by observing that Witness Serushago was examined by the Prosecutor on 15 and 16 November 2001, and cross-examined by Counsel for the three Appellants at the hearings of 16, 19, 20, 21, 22 and 26 November 2001; Counsel

[644] Ngeze Notice of Appeal, para. 40, and Ngeze Appellant's Brief, paras. 145 and 155, all referring to the Oral Decision of 15 May 2001 (see T. 15 May 2001, pp. 95-96).
[645] *Ibid.*, paras. 38, 39 and 41; Ngeze Appellant's Brief, paras. 144-147 and 154.
[646] Ngeze Appellant's Brief, para. 154.
[647] *Ibid.*, para. 156. In his Brief in Reply, Appellant Ngeze indicates that he is appealing against "decisions where the Trial Chamber denied his right to cross-examine witnesses" to the extent that they caused him prejudice and denied him a fair trial (see Ngeze Brief in Reply, paras. 55 and 58).
[648] Ngeze Brief in Reply, paras. 56-57.
[649] See T. 15 May 2001, pp. 95-96.
[650] Ngeze Brief in Reply, para. 56.
[651] Article 20(4)(e) of the Statute guarantees the accused's right "to examine, or have examined, the witnesses against him or her". Where an accused is represented by counsel, and except in special circumstances, it is for Counsel to conduct the cross-examination on his behalf. Thus Article 20(4)(d) of the Statute provides for a choice as between the right of an accused to conduct his own defence and his right to have legal assistance; where an accused (or appellant) has legal assistance, his Counsel "shall deal with all stages of the procedure and all matters arising out of the representation of the accused or of the conduct of his Defence": Article 15(A) of the Directive on the Assignment of Defence Counsel. See also Scheduling Order, 16 November 2006, p. 3; Confidential Decision on Hassan Ngeze's Motions Concerning Restrictive Measures of Detention, 20 September 2006, p. 7. The ICTY Appeals Chamber has also recalled that the right of the accused to participate directly in his trial could be limited in order to avoid waste of time and to protect the right of co-accused to a fair and rapid trial (*Jadranko Prlić et al. v. The Prosecutor*, Case No. IT-04-74-AR73.5, Decision on Praljak's Appeal of the Trial Chamber's 10 May 2007 Decision on the Mode of Interrogating Witnesses, 24 August 2007, para. 11).

for Appellant Ngeze himself cross-examined the witness for 11 hours[652] during the proceedings of 16, 19 and 20 November. On 26 November 2001, the Appellant made an oral application to the Trial Chamber for leave to put 10 questions to Witness Serushago.[653] The Appellant and his Lead Counsel indicated that they had prepared these questions together.[654]

269. In their Oral Decision of 27 November 2001,[655] rendered in the absence of the presiding Judge, Judges Møse and Gunawardana revealed differences in their respective positions.[656] Nonetheless, they found common ground, whereby, on the basis of – otherwise undefined – exceptional circumstances, they authorised Appellant Ngeze to write down five questions that the Judges would themselves put to Witness Serushago following his re-examination, with a view to retaining "control of the proceedings".[657] At that same hearing, Judge Møse announced that the questions prepared by Appellant Ngeze would be asked; Judge Gunawardana then put a series of 20 questions to Witness Serushago, 11 of which related directly to Appellant Ngeze.[658]

270. The Appeals Chamber is of the opinion that the Oral Decision of 27 November 2001 did not in any way violate the right guaranteed by Article 20(e) of the Statute, but afforded Appellant Ngeze the opportunity to cross-examine further Witness Serushago. The Trial Chamber was entitled under Rule 90(F) of the Rules[659] to exercise control over the manner in which this additional cross-examination was conducted. Appellant Ngeze has not demonstrated that the Trial Chamber exercised its discretion improperly,[660] or, a fortiori, that the Judges' decision to put the questions to Witness Serushago themselves substantially affected the Appellant's defence. The Appeals Chamber accordingly dismisses the appeal on this point.

### 2. Prosecution Witness AGX

271. At the start of the hearing of 11 June 2001, devoted to the testimony of Witness AGX, Appellant Ngeze claimed that he had not had the opportunity to consult with his Counsel concerning this witness, and asked the Trial Chamber for leave to cross-examine the witness himself.[661] Counsel Floyd denied the Appellant's claim, explaining that he had unsuccessfully tried to meet with his client, but that the latter had refused to do so, as the Appellant himself ultimately acknowledged.[662] The Trial Chamber invited Appellant Ngeze to meet his Counsel that evening.[663] Witness AGX's cross-examination was conducted the next day by Mr. Floyd and continued on 13 and 14 June 2001[664] without any objection from the Appellant.[665] The

[652] T. 27 November 2001, p. 4.
[653] T. 26 November 2001, pp. 124-127, 129.
[654] *Ibid.*, pp. 124-126, 133-134.
[655] T. 27 November 2001, pp. 1-8.
[656] *Ibid*., pp. 4-6.
[657] *Ibid.*, pp. 7-8. The Judges also emphasized that this was the solution proposed by Counsel Floyd.
[658] *Ibid.*, pp. 64-72.
[659] See *supra* IV.A.2. (c) (iv) a.
[660] The Appeals Chamber notes that Appellant Ngeze does not challenge the Trial Chamber for asking other questions in addition to the ones he put forward.
[661] T. 11 June 2001, pp. 1-2.
[662] *Ibid.*, pp. 32-36 (status conference, closed session).
[663] *Ibid.*, p. 35.
[664] T. 12 June 2001, pp. 1-65; T. 13 June 2001, pp. 1-72; T. 14 June 2001, pp. 1-50.

Appeals Chamber can discern no error on the part of the Trial Chamber. The appeal on this point is dismissed.

### 3. Prosecution Expert Witness Chrétien

272. At the start of the hearing of 4 July 2002, devoted to the testimony of Expert Witness Chrétien, Appellant Ngeze presented an oral motion for withdrawal of his Counsel, and for leave to put questions to the expert witness himself, alleging that his Counsel had not consulted him in preparing the cross-examination of this witness.[666] His Counsel objected, pointing out that they had tried to contact him by telephone several times, but that he had at first refused to talk to them. However, Co-Counsel Martel was eventually able to meet him for more than three hours prior to that day's hearing, and had received sufficient information from him "to cross-examine Mr. Chrétien for three weeks".[667] After this discussion, having noted that there had been consultation between the Appellant and his Counsel,[668] the Trial Chamber denied both requests, indicating that the cross-examination of Expert Witness Chrétien would be conducted by Co-Counsel Martel, that the Appellant could give his Counsel the questions which he felt should be asked, and that the Trial Chamber would check that the Appellant's instructions had been followed.[669]

273. When Co-Counsel Martel set about cross-examining Expert Chrétien, the Presiding Judge asked Appellant Ngeze to sit next to his Co-Counsel so as to participate actively in the cross-examination.[670] During the cross-examination, Appellant Ngeze intervened to point out two *Kangura* excerpts which, in his view, had been misinterpreted by the expert witness.[671] Judge Pillay, the presiding Judge, ordered him to stop interrupting the proceedings.[672] The Appellant tried to intervene on two other occasions,[673] but was called to order by Judge Pillay;[674] his Co-Counsel went on with the cross-examination, which continued during the hearing of 5 July 2002. At the start of that hearing, the Appellant requested the floor, but Judge Pillay denied his request.[675] During cross-examination, he asked to be allowed to consult briefly with Co-Counsel Martel; that request appears to have been granted.[676]

274. The Appeals Chamber is of the opinion that Appellant Ngeze has not demonstrated that the Trial Chamber violated his rights under Article 20(e) of the Statute. In this instance, the Trial Chamber properly exercised its discretion, first by facilitating the Appellant's active participation in the cross-examination conducted on his behalf by his Counsel and then by overruling any interruptions it considered irrelevant and needlessly disruptive of the

[665] At the hearing of 13 June 2001, Appellant Ngeze interrupted the cross-examination of Witness AGX by his Counsel, seeking clarification of the witness' answer, but made no requests or raised any objection to the witness' cross-examination. The Trial Chamber therefore asked Counsel Floyd to consult his client, T. 13 June 2001, pp. 47-49.
[666] T. 4 July 2002, pp. 3-12.
[667] *Ibid.*, pp. 12-18.
[668] *Ibid.*, p. 19.
[669] *Ibid.*, pp. 19-21.
[670] *Ibid.*, p. 50.
[671] *Ibid.*, pp. 96-97.
[672] *Ibid.*, p. 97.
[673] *Ibid.*, pp. 104-105, 114.
[674] *Ibid.*, pp. 105, 114.
[675] T. 5 July 2002, p. 1.
[676] *Ibid.*, p. 52.

proceedings. Appellant Ngeze has not shown how this impaired his defence. The Appeals Chamber dismisses the appeal on this point.

#### 4. Prosecution Expert Witness Kabanda

275. At the end of the cross-examination of Expert Witness Kabanda by Counsel for Appellant Ngeze, Judge Pillay denied without debate Ngeze's request to put two questions to the witness.[677] The Appellant repeated his request, but was again refused, and warned that he would be removed from the courtroom, for he and his Counsel had already had the biggest slice of time.[678] At the status conference immediately following the hearing, Appellant Ngeze was given the floor; he presented three oral motions, but at no point did he indicate that he had other questions for the expert witness.[679]

276. Even if the Appeals Chamber were to take the view that the Trial Chamber erred in denying Appellant Ngeze's request to ask a limited number of additional questions at the end of the cross-examination conducted by his Counsel, the Appellant has not demonstrated how such an error affected his defence; he has neither indicated the additional questions he sought to ask nor how they would have affected assessment of the credibility of the witness. The appeal on this point is accordingly dismissed.

### D. Qualifications of the expert witnesses

277. First, Appellant Ngeze contends that the Trial Chamber failed to apply the relevant criteria concerning the qualifications of Expert Witnesses Ruzindana, Kabanda and Chrétien,[680] since they "lacked the requisite education, training and experience to be considered as an expert".[681] Secondly, he alleges that the Trial Chamber unfairly disqualified the two Defence expert witnesses,[682] and failed to apply the same criteria to each side's expert witnesses, thus showing its bias.[683] He contends that the difference in the treatment of Prosecution and Defence witnesses demonstrates the unfairness of the trial.[684] The Appeals Chamber will examine each of these various claims in turn, while not needing to reiterate here the legal principles on the admissibility and assessment of expert witness testimony as recalled above.[685]

#### 1. Prosecution Expert Witness Ruzindana

278. Appellant Ngeze questions the qualification of Mr. Ruzindana as Expert Witness;[686] he criticizes the Trial Chamber for having failed to consider in its Judgement the witness' lack of qualifications and expertise in sociolinguistics in the light of the criticisms expressed

[677] T. 12 July 2002, p. 76. The Appeals Chamber notes that the Appellant interrupted the proceedings twice; T. 12 July 2002, pp. 27-28, 45-46.
[678] *Ibid.*, pp. 122-123.
[679] *Ibid.*, pp. 32-35 (closed session).
[680] Ngeze Appellant's Brief, para. 157.
[681] *Ibid.*, para. 158.
[682] *Ibid.*, paras. 174-181.
[683] *Ibid.*, paras. 157-158.
[684] Ngeze Brief in Reply, para. 62.
[685] See *supra* IV. B. 2.
[686] Ngeze Appellant's Brief, paras. 159-163.

by Defence Expert Witness Shuy.[687] He also appears to argue in his Brief in Reply that Expert Witness Ruzindana was biased.[688]

279. The Appeals Chamber notes that the Trial Chamber authorized Mr. Ruzindana to testify as an expert[689] following *voir-dire* proceedings, during which the Parties had the opportunity to put forward their objections and arguments, and then to examine and cross-examine Mr. Ruzindana in order to test both his qualifications and his neutrality.[690] Those proceedings followed two oral motions by Appellants Barayagwiza[691] and Ngeze to disqualify Mr. Ruzindana; only Appellant Ngeze's motion contended that Mr. Ruzindana was biased because he was a salaried employee of the Tribunal.[692]

280. It should be noted that during his studies at the University of Rwanda in Butare, from 1976 to 1981, Mr. Ruzindana *inter alia* took courses in general linguistics and Kinyarwanda linguistics, and that he holds a PhD in Applied Linguistics from the University of Reading, England; further, in Rwanda he studied semantics, communication theory and sociolinguistics, a discipline he defined as dealing with language as it is used in society within a given country; he also studied discourse analysis, phonetics and phonology, and supervised research in both this discipline and sociolinguistics in his capacity as lecturer.[693]

281. As to Witness Ruzindana's qualifications, in light of the foregoing the Appeals Chamber can discern no error in the Trial Chamber's decision to accept him as an expert witness in sociolinguistics, since Appellant Ngeze has not established on appeal that the Trial Chamber exceeded its discretion in finding that Mr. Ruzindana's training, experience and knowledge of Kinyarwanda, English and French qualified him to give views of a technical nature on the meaning of the matters in question.

282. As to the allegation of bias, the Appellant puts forward no argument to establish that in this way the Trial Chamber abused its discretionary power by qualifying Witness Ruzindana as an expert. The appeal on this point is accordingly dismissed. The Appeals Chamber concurs, moreover, with the principle set forth by a Trial Chamber of ICTY that "the mere fact that an expert witness is employed by or paid by a party does not disqualify him or her from testifying as an expert witness".[694]

### 2. Prosecution Expert Witness Chrétien

283. While conceding that Mr. Chrétien is an expert in the history of the Central African Region, Appellant Ngeze questions his qualification as an expert, arguing that he does not speak Kinyarwanda and only supervised the book and expert report that were tendered into evidence.[695] According to Appellant Ngeze, the witness' testimony was not to enlighten the

[687] *Ibid.*, paras. 161-163. See also Ngeze Brief in Reply, para. 60.
[688] Ngeze Brief in Reply, para. 60.
[689] T. 19 March 2002, pp. 141-143.
[690] *Ibid.*, pp. 71-141.
[691] *Ibid.*, pp. 71-73.
[692] *Ibid.*, pp. 73-75.
[693] *Ibid.*, pp. 82-92.
[694] *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, 3 June 2003, p. 2.
[695] Ngeze Appellant's Brief, para. 164.

Trial Chamber on specific issues of a technical nature, but rather on questions that it was for the Trial Chamber to decide, and "to fill the gap in the Prosecution's case".[696]

284. As to the allegation that Expert Witness Chrétien only supervised the expert report, the Appeals Chamber refers to its observations above,[697] where it recalls that Mr. Chrétien's expert report was a collective work, which he coordinated and wrote in part, and that the Trial Chamber indicated that in assessing the evidence it would take account of the fact that Witness Chrétien did not write all the chapters of his report. Appellant Ngeze has failed to develop any argument establishing that the Trial Chamber abused its discretion in finding Expert Witness Chrétien's expert report and testimony reliable and of probative force.

285. As to the allegation that the witness did not speak Kinyarwanda, the Appeals Chamber observes first that, during cross-examination on this point by Counsel for Appellant Nahimana, Expert Witness Chrétien stated that he could manage in Kinyarwanda when faced with "ordinary issues" in Rwanda and "*contrôler les traductions de texte de cette langue dans la langue française*" ["check translations of documents in this language into French"].[698] Even though the level of his knowledge of the language disqualified him from enlightening the Trial Chamber on questions concerning the meaning of expressions in Kinyarwanda, the Appeals Chamber finds that it was open to the Trial Chamber, in the light of Mr. Chrétien's *curriculum vitae* and given the discretion that the Trial Chamber has, to consider him qualified in the area of broadcasting and the printed press in Rwanda. Moreover, the Appeals Chamber recalls that the expert report was a collective work presented by a group of analysts, of whom at least one, Mr. Kabanda, was fluent in Kinyarwanda. The appeal on this point is dismissed.

286. The Appeals Chamber will not examine Appellant Ngeze's claim that Expert Witness Chrétien's testimony was not on the technical issues falling within the purview of an expert witness, the Appellant having failed to put forward any argument in support thereof.

### 3. Prosecution Expert Witness Kabanda

287. Appellant Ngeze contends that the Trial Chamber erred in law in permitting Mr. Kabanda to testify as an expert on print media, although he had no experience or theoretical background on the subject, never visited Rwanda between 1990 and 1994, and his only qualifications were an advanced degree in history and the fact that he spoke Kinyarwanda.[699]

288. Mr. Kabanda's *curriculum vitae* shows that he has studied in the fields of history, development, cooperation and information, and that he also has professional experience in

[696] *Ibid.*, paras. 165 and 169. The Appeals Chamber understands that the Appellant also impugns the impartiality of Expert Witness Chrétien.
[697] See *supra* IV. B. 2. (a) .
[698] T. 1 July 2002, pp. 30-31.
[699] Ngeze Appellant's Brief, para. 166. At paragraphs 167 and 168, he appears to be attempting to discredit Expert Witness Kabanda in alleging that his opinions were "ridiculous" and that he "himself said that he was unable to find the answers to the contest questions". He further asserts that the witness' testimony was used "to fill the gap in the prosecutor's case and answer the questions the Trial Chamber had the obligation to decide" and that it went beyond the temporal jurisdiction of the Tribunal (see Ngeze Appellant's Brief, para. 169). The Appeals Chamber will not examine these unsubstantiated claims.

these three areas.[700] His expertise in the media stems from his participation in writing the book, *Les médias du génocide* [The Media of Genocide], in 1995 under the supervision of Mr. Chrétien, and writing part of the expert report presented by Mr. Chrétien in the instant case, his collaboration in a university research project on the crises in the Great Lakes Region, in which he analyses the press in Rwanda, as well as the two years he spent "working with a firm providing services", where he "analysed the press for main banking, insurance and other firms".[701]

289. While conceding that he had no experience as a journalist, editor-in-chief or newspaper editor[702] and was not an "expert in journalism", Mr. Kabanda testified that he was "able to understand the significance, the meaning, of a newspaper, of a journal, a message, a speech and the meaning that it has for Rwandans and [...] its consequences on Rwandans";[703] he presented himself as an "expert on *Kangura*" because he had studied it along with other Rwandan newspapers in preparing his expert report.[704]

290. The Trial Chamber allowed Mr. Kabanda to testify as an expert witness on the written press in Rwanda.[705] The reasoning underlying this decision shows that the Trial Chamber took account of the fact that, while there was no specific discipline in this particular area of expertise, it could be viewed from a multidisciplinary approach, including history, linguistics and journalism; the Chamber noted the witness' language skills, research methodology and training and experience as a historian, as well as his extensive knowledge of the Rwandan media, as revealed by the fact that, "out of a list of 51 publications, newspaper publications and journals that were put to him, he was familiar or was aware of 43 of those".[706] The Chamber's decision remained subject, moreover, to a subsequent assessment of the weight of the witness' expert testimony. Appellant Ngeze has failed to demonstrate that the Trial Chamber abused its discretionary power by qualifying Mr. Kabanda as an expert.

291. As to the argument that Mr. Kabanda was away from Rwanda between 1990 and 1994, the Appeals Chamber recalls that he did not testify as a witness of fact, and that his task as an expert was to enlighten the Trial Chamber using his technical, scientific or linguistic knowledge in accordance with established methods for assessing admitted evidence. Hence his absence from Rwanda during the period 1990 to 1994 did not disqualify him from testifying as an expert. The Appellant's claims under this head are dismissed.

### 4. Defence Expert Witnesses

292. Appellant Ngeze takes issue with the Trial Chamber for having refused to allow Mr. Baker to appear as an expert witness, arguing that Mr. Baker was to testify not only on the legal issue of freedom of expression and of the press, but also on the evidence of the Prosecution expert witnesses – especially that of Mr. Chrétien – regarding Appellant Ngeze and *Kangura.*[707] The Appellant asserts that the fact that the Trial Chamber itself, in its

[700] *Curriculum vitae* of Marcel Kabanda, Exhibit P114, tendered on 13 May 2002.
[701] T. 13 May 2002, pp. 12 *et seq* (quotation at p. 12).
[702] *Ibid.*, pp. 44-45.
[703] *Ibid.*, p. 42.
[704] *Ibid.*, pp. 68-69.
[705] *Ibid.*, pp. 128-133.
[706] *Ibid.*, p. 132.
[707] Ngeze Appellant's Brief, paras. 174-181.

Decision of 10 May 2000, noted the importance of the issue of freedom of expression and of the press for the consideration of the merits of the case should have moved the Chamber to allow the Appellant to present evidence on that issue.[708] Appellant Ngeze submits that the Trial Chamber's decision was prejudicial to him and rendered the trial unfair.[709]

293. In its Decision of 24 January 2003, the Trial Chamber refused to allow Mr. Baker to appear as a witness on the ground that his testimony did not relate to matters of a technical nature, but only to legal matters which might be addressed by Counsel in oral or written arguments.[710] On 25 February 2003, the Chamber reaffirmed the rejection of Mr. Baker's testimony on the ground that his report – filed on 7 February 2003[711] – covered law-related issues that should properly be determined by the Trial Chamber and could be addressed by the parties in their Closing Briefs.[712]

294. The Appeals Chamber is of the view that the Trial Chamber had discretion to refuse to allow Mr. Baker to be called as an expert witness, in particular since Appellant Ngeze's motion had not mentioned that Mr. Baker's report was also intended to rebut some parts of Expert Witness Chrétien's report.[713] In any case, this refusal was based on the fact that the Appellant could present his legal arguments in closing argument, which he in fact did, since large portions of his Closing Brief[714] – particularly paragraphs 750 to 816 – reproduce the arguments made by Mr. Baker in his report. The appeal on this point is dismissed.

#### 5. Conclusion

295. For the foregoing reasons, the Appeals Chamber rejects Appellant Ngeze's allegation that the Trial Chamber showed bias in relation to the admission of Defence and Prosecution expert witness testimony.

### E. Refusal to summon Colonel Tikoca and seven UNDF detainees to appear as witnesses

296. Appellant Ngeze takes issue with the Trial Chamber for having refused, contrary to Article 20(e) of the Statute, to summon Colonel Tikoca, who was deputy to General Roméo Dallaire and head of intelligence for UNAMIR in 1994, to appear as a Defence witness. The purpose of Colonel Tikoca's testimony was to confirm that in early 1994 the Appellant provided information that could have prevented the genocide.[715] The Appellant further

[708] *Ibid.*, para. 176.
[709] *Ibid.*, para. 181.
[710] Decision on the Expert Witnesses for the Defence, 24 January 2003, paras. 21-22.
[711] Report of C. Edwin Baker in the case of Hassan Ngeze, dated 31 January 2003 and referenced ICTR-99-52-1145.
[712] Decision to Reconsider the Trial Chamber's Decision of 24 January 2003 on the Defence Expert Witnesses, 25 February 2003, p. 4.
[713] *The Prosecutor v. Hassan Ngeze*, Case No. ICTR-97-27-I, Motion to Allow Ngeze Expert Witnesses' Report and Testimony, 11 February 2003.
[714] Defence Closing Brief (Rule 86 of the Rules of Procedure and Evidence), filed confidentially on 1 August 2003 ("Ngeze's Closing Brief").
[715] Ngeze Appellant's Brief, paras. 170 -172.

appears to criticize the Trial Chamber for having refused to order the appearance, under immunity from prosecution, of seven UNDF detainees.[716]

297. By decision of 25 February 2003, the Trial Chamber denied Appellant Ngeze's motion[717] to compel Colonel Tikoca to appear, on the ground that it was not *prima facie* convinced of the probative value of such evidence, since (1) other documentary and oral evidence had been and was to be adduced with respect to the specific point on which Colonel Tikoca was to testify; (2) the witness's appearance could only be of limited benefit because of the restrictions imposed by the United Nations on the scope of his testimony; (3) the Appellant had provided neither his statement nor even a summary thereof; (4) Colonel Tikoca was reluctant to testify.[718] The Appeals Chamber is of the view that the Appellant has in no way demonstrated that the Trial Chamber acted *ultra vires* by refusing to call Colonel Tikoca as a witness. The Appeals Chamber moreover notes that the Appellant has not indicated any further steps he took to obtain more detailed information on the content of Colonel Tikoca's testimony. Consequently, the appeal on this point is dismissed.

298. With respect to the submission relating to the Trial Chamber's refusal to compel seven accused to appear before the Tribunal to testify, the Appeals Chamber notes that the Appellant has neither clearly formulated his claim nor proffered arguments in support thereof. It therefore cannot succeed.

## VIII. TEMPORAL JURISDICTION

### A. Parties' submissions

299. Appellants Nahimana,[719] Barayagwiza,[720] and Ngeze[721] contend that the Trial Chamber exceeded its temporal jurisdiction in convicting them on the basis of acts prior to 1994. Appellants Nahimana and Ngeze add that this affected the fairness of the trial in that they could only reasonably plan to prepare their defence in respect of acts falling within the

[716] *Ibid.*, para. 173.
[717] *The Prosecutor v. Hassan Ngeze*, Case No. ICTR-97-27-I, Confidential Motion to Ask that the Chamber Call Col. Isoa Tikoca as a Chamber Witness because of UN Interference with Ngeze Defence by the United Nations in New York, 11 February 2003.
[718] Confidential Decision on the Defence Motion for the Chamber to Call Col. Isoa Tikoca as Chamber Witness (Pursuant to Rule 98 of the Rules of Procedure and Evidence), 25 February 2003, p. 3.
[719] Nahimana Notice of Appeal, p. 6; Nahimana Appellant's Brief, paras. 42-82; Nahimana Brief in Reply, paras. 25-27. In particular, Appellant Nahimana alleges that the Trial Chamber wrongly admitted facts – specifically the RTLM broadcasts – pre-dating 1 January 1994 in establishing the *mens rea* and *actus reus* of the crimes of genocide, direct and public incitement to commit genocide, conspiracy to commit genocide and crimes against humanity (persecution and extermination) and in finding Appellant Nahimana individually responsible: Nahimana Appellant's Brief, paras. 49-52, 71-82.
[720] Barayagwiza Notice of Appeal, p. 3; Barayagwiza Appellant's Brief, paras. 108-110, 250-261; Barayagwiza Brief in Reply, paras. 17-23. Appellant Barayagwiza submits that the Trial Chamber's findings in respect of the *mens rea* of genocide and the convictions for conspiracy to commit genocide and direct and public incitement to commit genocide are invalid, as they were based on facts pre-dating 1 January 1994: Barayagwiza Appellant's Brief, paras. 109-110, 256, 261; Barayagwiza Brief in Reply, paras. 21-22.
[721] Ngeze Notice of Appeal, paras. 6, 7, 9, 10; Ngeze Appellant's Brief, paras. 12-59; Ngeze Brief in Reply, paras. 17-44. Appellant Ngeze submits that the Trial Chamber erred in finding him guilty of genocide, direct and public incitement to commit genocide, conspiracy to commit genocide and crimes against humanity on the basis of acts committed prior to 1 January 1994: Ngeze Appellant's Brief, paras. 39-56.

jurisdiction of the Tribunal,[722] and the Trial Chamber Judges themselves had, before the trial opened, held that acts which occurred before 1 January 1994 would be taken into consideration only in order to assess the context of the alleged crimes, and with a view to recalling the history of events.[723] Appellant Nahimana further avers that the Trial Judges relied on events that occurred in March 1992 in order to show that his testimony lacked credibility and that he had a propensity to commit crimes of the same nature as those with which he was charged.[724]

300. In support of their assertions, the Appellants contend that the Trial Chamber's interpretation of its temporal jurisdiction is contrary to (1) the language of Article 7 of the Statute;[725] (2) the debate in the Security Council at the time of the Statute's adoption;[726] (3) the principle that criminal law must be interpreted strictly;[727] (4) the Appeals Chamber Decisions of 5 and 14 September 2000.[728]

301. The Appellants further contend that the Trial Chamber erred in holding that the crimes of conspiracy to commit genocide and direct and public incitement to commit genocide continue up to the time of the commission of genocide, and thereby unlawfully extended its temporal jurisdiction.[729]

302. The Prosecutor contests the restrictive interpretation that the Appellants advocate and submits that, as to the temporal jurisdiction of the Tribunal, Article 7 of the Statute must be read in conjunction with Article 1.[730] In this connection, the Prosecutor submits that the ordinary sense of the words used in Article 1 show that the temporal jurisdiction of the

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[722] Nahimana Notice of Appeal, p. 6, invoking Articles 20(4)(a) and (b) of the Statute; Nahimana Appellant's Brief, paras. 42, 61 and 62 (At paragraph 27 of his Brief in Reply, Appellant Nahimana further contends that the Indictment only referred to crimes committed between 1 January and 31 December 1994); Ngeze Appellant's Brief, paras. 34-36.

[723] Nahimana Appellant's Brief, paras. 63-64; Nahimana Brief in Reply, para. 27; Ngeze Appellant's Brief, paras. 37-38. Both Appellants invoke the Decision on the Defence Preliminary Motion, Pursuant to Rule 72 of the Rules of Procedure and Evidence, 12 July 2000, which was affirmed by the Appeals Chamber in *Hassan Ngeze and Ferdinand Nahimana v. The Prosecutor*, Cases Nos. ICTR-97-27-AR72 and ICTR-96-11-AR72, Decision on the Interlocutory Appeals, 5 September 2000 ("Decision of 5 September 2000").

[724] Nahimana Appellant's Brief., paras. 65-70.

[725] *Ibid*., paras. 43, 53; Nahimana Brief in Reply, para. 26; Barayagwiza Appellant's Brief, paras. 251-252; Ngeze Appellant's Brief, paras. 15, 17, 18, 20 and 26; Ngeze Brief in Reply, para. 20.

[726] *Ibid.*, para. 45; Nahimana Brief in Reply, para. 26; Barayagwiza Brief in Reply, paras. 17-18; Ngeze Appellant's Brief, para. 26; Ngeze Brief in Reply, para. 23.

[727] *Ibid.*, para. 54; Nahimana Brief in Reply, para. 26; Ngeze Appellant's Brief, para. 22; Ngeze Brief in Reply, para. 21; Ngeze's Response to *Amicus Curiae* Brief, pp. 6-7.

[728] *Ibid.*, paras. 44, 45, 63; Nahimana Brief in Reply, para. 27; Barayagwiza Appellant's Brief, paras. 252, 254 (referring erroneously to the Decision of 5 September 2001) and 261; Barayagwiza Brief in Reply, para. 19; Ngeze Appellant's Brief, paras. 19, 37 and 57 (in paragraph 16, Appellant Ngeze avers that the Chamber also ignored the Separate Opinions of Judge Shabbuddeen and of Judges Vohrah and Nieto-Navia appended to the Decision of 5 September 2000).

[729] As regards conspiracy to commit genocide, see: Nahimana Appellant's Brief, paras. 55-57; Barayagwiza Appellant's Brief, paras. 250, 253-255; Barayagwiza Brief in Reply, paras. 20-22; Ngeze Appellant's Brief, paras. 24, 25 and 31; Ngeze Brief in Reply, para. 26. Direct and public incitement to commit genocide: Nahimana Appellant's Brief, paras. 55-60; Barayagwiza Appellant's Brief, paras. 258-261; Barayagwiza Brief in Reply, paras. 21-22; Ngeze Appellant's Brief, paras. 14-15, 24-33 and 43; Ngeze Brief in Reply, paras. 26, 29-38. See also A*micus Curiae* Brief, pp. 19-24; Nahimana's Response to A*micus Curiae* Brief, p. 4; Barayagwiza's Response to *Amicus Curiae* Brief, para. 15; Ngeze's Response to *Amicus Curiae* Brief, p. 6.

[730] Respondent's Brief, paras. 120-121.

Tribunal is established as long as the serious violation of international humanitarian law alleged against the accused occurred in 1994, even if the accused's actions were carried out before that year.[731] Moreover, if the drafters of the Statute had intended to exclude from the purview of the Tribunal all conduct prior to a certain date, they would clearly have so stated, as was done with respect to Articles 11(1) and 24(1) of the Statute of the International Criminal Court.[732]

303. The Prosecutor further contends that the Appellants' interpretation of the temporal jurisdiction of the Tribunal ignores a situation in which a serious violation of humanitarian law occurred before 1993 and then continued into 1994; he submits that in such cases the Tribunal must have jurisdiction over the totality of an accused's conduct.[733] In this respect, the Prosecutor submits that the Trial Chamber was right to hold that it had jurisdiction to deal with crimes of conspiracy to commit genocide and direct and public incitement to commit genocide having commenced before 1994 and continued into 1994.[734]

304. As to the admissibility of evidence on events antedating 1994, the Prosecutor argues that "[l]ogically, matters which go towards proof of events happening in 1994 may antedate 1994"; he concludes that, unless the Statute expressly prohibits the reception of evidence on events pre-dating 1994, such evidence is plainly admissible.[735] He submits that the Appellants confuse the concept of "jurisdiction" (concerning the matters upon which the Tribunal can adjudicate) with that of "admissibility", the means which the Tribunal can use to make the adjudication.[736]

305. In response to Appellant Nahimana's contention that the use of pre-1994 evidence was solely meant to "blacken" his character, the Prosecutor submits that such evidence "was used […] circumstantially to prove the *mens rea* of the Appellant, and in part the *actus reus* of his crimes."[737]

306. In reply, Appellant Ngeze challenges both the Prosecutor's reading of Article 7 in conjunction with Article 1 of the Statute and the distinction drawn – in his view erroneously –

[731] *Ibid*., para. 121 ("Under the plain meaning of the language used in Article 1, the temporal jurisdiction of the ICTR is fixed by the timing of a serious violation of international humanitarian law, and not by the commission of acts which lead to the said violation. That is, the temporal jurisdiction is concerned with the timing of the results of an accused's actions rather than the timing of the means by which an accused brought about the result"). See also para. 122 ("As long as the violation occurs in 1994, the ICTR is vested with the jurisdiction to try an accused brought before it").
[732] Respondent's Brief, paras. 123-124.
[733] *Ibid*., para. 125.
[734] *Ibid*., paras. 126-140, 143-147. See also Prosecutor's Response to the A*micus Curiae* Brief, paras. 9, 21-22.
[735] *Ibid*., para. 149, citing *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-AR72.2, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, 29 July 2004, p. 3.
[736] *Ibid.*, para. 150. The Prosecution draws a parallel with the geographical jurisdiction of the Tribunal and submits that, just as evidence of acts occurring outside the geographical jurisdiction of a court is admissible to prove liability for crimes occurring within that jurisdiction, so evidence pertaining to acts which occurred outside a court's temporal jurisdiction can validly prove crimes which occurred during the period for which it has jurisdiction.
[737] *Ibid.*, para. 151.

between the time of commission of the acts and the time when their effects are felt.[738] He also challenges the parallel drawn by the Prosecutor between the provisions of the Statute of the Tribunal and those of the Statute of the International Criminal Court, both querying its relevance[739] and citing the Tribunal's *ad hoc* character and limited duration and the reason for its establishment.[740] Appellant Ngeze further challenges the Prosecutor's use of the concept of "continuing offence" in order to justify extension of the temporal jurisdiction of the Tribunal.[741] While concurring with the Prosecutor's argument that the Statute allows for punishing ongoing conduct, he stresses that such a "process" must nevertheless fall within the temporal jurisdiction of the Tribunal.[742] Finally, as to the admissibility of evidence of events antedating 1994, Appellant Ngeze avers that "the Trial Chamber is bound by Article 7 of the Statute"[743] and that evidence on events antedating 1994 should be admitted only "in exceptional circumstances".[744]

## B. Analysis

### 1. Conclusions of the Trial Chamber

307. The Trial Chamber discussed the question of temporal jurisdiction mainly in paragraphs 100 to 104 of the Judgement. It first recalled that the Appellants could not be held liable for crimes committed before 1994.[745] It then went on to say that:

> with regard to the commission of crimes in 1994, […] pre-1994 material [broadcasts, publications, and other dissemination of media] may constitute evidence of the intent of the Accused or a pattern of conduct by the Accused, or background in reviewing and understanding the general manner in which the Accused related to the media at issue. To the extent that such material was re-circulated by the Accused in 1994, or the Accused took any action in 1994 to facilitate its distribution or to bring public attention to it, the Chamber considers that such material would then fall within the temporal jurisdiction established by its Statute.[746]

308. The Trial Chamber further held that the crimes of conspiracy to commit genocide and direct and public incitement to commit genocide were crimes that continued in time "until the completion of the acts contemplated"[747] and that, since the genocide occurred in 1994, it had jurisdiction to convict for these crimes even if they had begun before that year.[748]

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[738] Ngeze Brief in Reply, paras. 17-18. See also para. 22, where the Appellant submits that, if the logic of the Prosecution's argument was correct, the ICTR would be vested with jurisdiction to try persons for acts which could "be in 1970 or any other period back in time".
[739] *Ibid*., para. 20.
[740] *Ibid*., para. 19.
[741] *Ibid*., paras. 23-26.
[742] *Ibid*., para. 27.
[743] *Ibid*., para. 43.
[744] *Idem*, referring to *The Prosecutor v. Théoneste Bagosora et al.,* Case No. ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, without specifying the paragraph.
[745] Judgement, para. 100.
[746] *Ibid.*, para. 103.
[747] *Ibid.*, para. 1017. See also Judgement, para. 104 ("The Chamber adopts the view expressed by Judge Shahabuddeen with regard to the continuing nature of a conspiracy agreement until the commission of the acts contemplated by the conspiracy. The Chamber considers this concept applicable to the crime of incitement as well, which, similarly, continues to the time of the commission of the acts incited").
[748] *Ibid.*, paras. 104 and 1017.

2. Provisions of the Statute

309. Article 7 of the Statute provides that "the temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994". This Article must be read in conjunction with Article 1 of the Statute, which provides that the Tribunal "shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed [...] between 1 January and 31 December 1994".[749]

310. There is no doubt that, pursuant to these Articles, an accused can only be held responsible by the Tribunal for a crime referred to in Articles 2 to 4 of the Statute having been committed in 1994.[750] The question is whether, in a situation where an accused did not personally commit the crime, his acts or omissions establishing his responsibility for such a crime (pursuant to one or more of the modes of responsibility provided for in Article 6(1) and (3) of the Statute) must also have occurred in 1994. The jurisprudence has so far not provided a clear answer to this question.

311. The Appeals Chamber notes, however, that the Security Council appears to have intended to give the Tribunal jurisdiction to prosecute only criminal conduct having occurred in 1994, as is shown by the statements of certain delegations at the time of the adoption of Resolution 955 on the establishment of the Tribunal. Hence, the representative of the French delegation noted with satisfaction that the choice of the time period for the temporal jurisdiction made it possible "to take into account possible acts of planning and preparation of genocide",[751] while the representative of New Zealand stated that "[t]he temporal jurisdiction of the Tribunal has been expanded backwards, from April, as originally proposed, to January 1994, so as to include acts of planning for the genocide that occurred in April".[752] Most importantly, the address of the Rwandan representative clearly reveals that the Statute of the Tribunal as adopted by the Security Council must be construed as excluding from its jurisdiction acts committed prior to 1 January 1994 for which an accused could be held

[749] See also Article 15(1) of the Statute:

> The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

[750] In this regard, see Decision of 5 September 2000, p. 6 (which states that no one may be indicted for a crime that was not committed between 1 January and 31 December 1994, even though an indictment can make reference, "as an introduction, to crimes previously committed by an accused"). See also *Kajelijeli* Appeal Judgement, para. 298; *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-AR72.2, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, 29 July 2004, p. 3; *Emmanuel Rukundo v. The Prosecutor*, Case No. ICTR-2001-70-AR72, Decision (Appeal against Decision of 26 February 2003 on the Preliminary Objections), 17 October 2003, p. 5; *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-T [*sic*], Appeal Judgement (Notice of Appeal against the Decision Dismissing the Defence Motion Objecting to the Jurisdiction of the Tribunal), 16 November 2001, p. 4; *Aloys Ntabakuze v. The Prosecutor*, Case No. ICTR-97-34-A, Decision on the Interlocutory Appeal against the Decision of 13 April 2000 of Trial Chamber III, 13 November 2000, p. 5; *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Interlocutory Appeals against the Decision of the Trial Chamber dated 11 April and 6 June 2000), 14 September 2000 ("Decision of 14 September 2000 on the Interlocutory Appeals"), p. 4.

[751] UN Doc. S/PV.3453 (8 November 1994), address of Mr. Mérimée, p. 3.

[752] *Ibid*., address of Mr. Keating, p. 5.

responsible. In explaining the reasons for his country's negative vote, the Rwandan representative stated:

> […] [M]y delegation regards the dates set for the *ratione temporis* competence of the International Tribunal for Rwanda from 1 January 1994 to 31 December 1994 as inadequate. In fact, the genocide the world witnessed in April 1994 was the result of a long period of planning during which pilot projects for extermination were successfully tested.[…] An international tribunal which refuses to consider the causes of the genocide in Rwanda and its planning, and that refuses to consider the pilot projects that preceded the major genocide of April 1994, cannot be of any use to Rwanda.[753]

Rwanda specifically expressed its regret at the fact that the Statute of the Tribunal does not provide for prosecution of those individuals who were responsible for the acts of planning committed prior to 1 January 1994.

312. The Appeals Chamber observes that the Secretary-General's Report of 13 February 1995 takes a similar view:[754]

> The temporal jurisdiction of the Tribunal is to one year: from 1 January 1994 to 31 December 1994. Although the crash of the aircraft carrying the Presidents of Rwanda and Burundi on 6 April 1994 is considered to be the event that triggered the civil war and the acts of genocide that followed, the Council decided that the temporal jurisdiction of the Tribunal would commence on 1 January 1994, in order to capture the planning stage of the crimes.

313. In the opinion of the Appeals Chamber, this clearly indicates that it was the intention of the framers of the Statute that the Tribunal should have jurisdiction to convict an accused only where all of the elements required to be shown in order to establish his guilt were present in 1994. Further, such a view accords with the principle that provisions conferring jurisdiction on an international tribunal[755] or imposing criminal sanctions should be strictly interpreted. Accordingly, the Appeals Chamber finds that it must be shown that:

1- The crime with which the accused is charged was committed in 1994;

2- The acts or omissions of the accused establishing his responsibility under any of the modes of responsibility referred to in Article 6(1) and (3) of the Statute occurred in 1994, and at the time of such acts or omissions the accused had the requisite intent (*mens rea*) in order to be convicted pursuant to the mode of responsibility in question.

314. The Appeals Chamber finds that the Trial Chamber was wrong insofar as it convicted the Appellants on the basis of criminal conduct which took place prior to 1994; the Appeals Chamber will review those convictions below. However, as will now be explained, it was open to the Trial Chamber to rely, for certain purposes, on evidence in respect of events prior to 1994.

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[753] *Ibid*., address of Mr. Bakuramutsa, p. 15.
[754] UN Secretary-General's Report, 13 February 1995, para. 14.
[755] In this regard, see Decision of 5 September 2000, Joint Separate Opinion of Judges Lal Chand Vohrah and Rafael Nieto-Navia, para. 17 and footnote 22.

### 3. Admissibility of evidence on pre-1994 events

315. It is well established that the provisions of the Statute on the temporal jurisdiction of the Tribunal do not preclude the admission of evidence on events prior to 1994, if the Chamber deems such evidence relevant and of probative value[756] and there is no compelling reason to exclude it. For example, a Trial Chamber may validly admit evidence relating to pre-1994 acts and rely on it where such evidence is aimed at:

- Clarifying a given context;[757]
- Establishing by inference the elements (in particular, criminal intent) of criminal conduct occurring in 1994;[758]
- Demonstrating a deliberate pattern of conduct.[759]

316. The Appeals Chamber accordingly dismisses the Appellants' contentions that the Trial Chamber exceeded its jurisdiction or that it breached the fairness of the trial simply because it relied on evidence concerning pre-1994 events.

### 4. Continuing crimes

317. The Appeals Chamber has held above that the Tribunal may only convict an accused for criminal conduct having occurred in 1994. The existence of continuing conduct is no exception to this rule. Contrary to what the Trial Chamber appears to have held in paragraph 104 of the Judgement, even where such conduct commenced before 1994 and

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[756] Rule 89(C) of the Rules. See also *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-AR72.2, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, 29 July 2004, p. 4 ("[…] it will be for the Trial Chamber to decide whether to admit evidence relating to events falling outside the temporal jurisdiction of the Tribunal in accordance with Rule 89(C) of the Rules of Procedure and Evidence of the Tribunal").

[757] *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-AR72.2, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, 29 July 2004, p. 3; *Aloys Ntabakuze v. The Prosecutor*, Case No. ICTR-97-34-A, Decision on the Interlocutory Appeal against the Decision of 13 April 2000 of Trial Chamber III, 13 November 2000, p. 5; Decision of 14 September 2000 on the Interlocutory Appeals, p. 4; Decision of 5 September 2000, p. 6, and Separate Opinion of Judge Shahabuddeen, paras. 21, 26, 32.

[758] *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-AR72.2, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, 29 July 2004, p. 3; *Emmanuel Rukundo v. The Prosecutor*, Case No. ICTR-2001-70-AR72, Decision (Notice of Appeal against Decision of 26 February 2003 on the Preliminary Objections), 17 October 2003, p. 5; *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-T [*sic*], Appeal Judgement (Appeal against the Decision of 13 March 2001 dismissing the Defence Motion Objecting to the Jurisdiction of the Tribunal), 16 November 2001, p. 4; Decision of 5 September 2000, Separate Opinion of Judge Shahabuddeen, paras. 9-17.

[759] Rule 93 of the Rules. See also *The Prosecutor v. Théoneste Bagosora et al.,* Case No. ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, paras. 11-14; Decision of 5 September 2000, Separate Opinion of Judge Shahabuddeen, paras. 20-26. In this respect, the Appeals Chamber recalls that there is a difference between trying to establish a specific deliberate pattern of conduct (expressly permitted under Rule 93 of the Rules) and trying to demonstrate an accused's propensity to commit crimes (which is impermissible, in view of the low probative value of such a demonstration and its prejudicial effect: See *The Prosecutor v. Théoneste Bagosora et al.*, Cases Nos. ICTR-98-41-AR93 and ICTR-98-41-AR93.2, Decision on Prosecutor's Interlocutory Appeals Regarding the Exclusion of Evidence, 19 December 2003, paras. 13-14).

continued during that year, a conviction may be based only on that part of such conduct having occurred in 1994.[760] Judge Pocar dissents from this finding.

318. The Trial Chamber found that it had jurisdiction to convict for the crimes of direct and public incitement to commit genocide and conspiracy to commit genocide, even if they had begun before 1994, by characterising them as continuing offences.[761] The Appeals Chamber will determine later whether direct and public incitement to commit genocide is a continuing crime.[762] However, in light of its finding on conspiracy to commit genocide,[763] the Appeals Chamber does not consider it necessary to determine whether the Trial Chamber was wrong in finding that this crime is a continuing offence.

### 5. Credibility and propensity to commit crimes

319. As to Appellant Nahimana's submission that the Trial Chamber relied on acts falling outside the temporal jurisdiction of the Tribunal in order to demonstrate the lack of credibility of his testimony and his propensity to commit crimes, the Appeals Chamber recalls that Rule 89(C) of the Rules permits a Trial Chamber "to admit any relevant evidence which it deems to have probative value". A Trial Chamber can also exclude evidence whose admission could affect the fairness of the proceedings.[764] Hence, the real issue is not the temporal jurisdiction of the Tribunal, but rather whether the Trial Chamber erred in the exercise of its discretion in accepting evidence concerning the Appellant's involvement in events having occurred in March 1992 and in drawing certain inferences in that regard.[765] The Appellant argues that these facts had no direct bearing on the crimes charged, which were allegedly committed in 1994, that they were mentioned only in an attempt to show his propensity to commit the crimes charged, and to discredit his testimony; he therefore submits that the fairness of the proceedings required that the said facts be excluded.[766]

320. The reasons why the Trial Chamber considered the events of March 1992 are not clearly articulated in the Judgement.[767] Paragraphs 689 and 695 of the Judgement, cited by the Appellant, suggest that the Trial Chamber took the view that Appellant Nahimana's answers to questions relating to these events during his testimony were unsatisfactory; this and other problems affecting his testimony led the Trial Chamber to dismiss the greater part thereof.[768] However, it should be noted that the Trial Chamber made no subsequent reference to those events in its findings on the Appellant's responsibility. The Appeals Chamber is thus not satisfied that the Appellant has demonstrated any error by the Trial Chamber in the exercise

[760] In this respect, see Decision of 5 September 2000, Joint Separate Opinion of Judges Lal Chand Vohrah and Rafael Nieto-Navia, paras. 6, 9 and 10.
[761] Judgement, paras. 104, 1017 and 1044.
[762] See *infra* XIII. B.
[763] See *infra* XIV.
[764] Accordingly, a Trial Chamber can refuse to admit evidence whose probative value is significantly inferior to its prejudicial effect for the Defence.
[765] The Trial Chamber's findings are set out in paragraph 691 of the Judgement.
[766] Nahimana Appellant's Brief, paras. 69 (referring to the Judgement, paras. 689 and 695) and 70.
[767] The Appeals Chamber notes that the Prosecutor appears to have relied on the events of 1992 as precedents demonstrating a deliberate pattern of conduct: Nahimana's Indictment, paras. 5.24 to 5.26.
[768] See Judgement, paras. 692-696.

of its discretion, still less an error invalidating his conviction.[769] The appeal on this point is therefore dismissed.

## IX. THE INDICTMENTS

### A. Introduction

321. The three Appellants raise various grounds of appeal relating to the Indictments, contending substantially that the Trial Chamber convicted them on the basis of facts not pleaded, or pleaded too imprecisely, in their respective Indictments.[770] The Prosecutor requests that all of these grounds of appeal be dismissed, pointing out that in no case did the Appellants raise any objection at trial, and arguing that they suffered no material prejudice.[771] After recalling the law applicable to indictments, the Appeals Chamber will address each of the Appellants' appeal submissions in turn.

### B. The law applicable to indictments

322. Under Articles 17(4), 20(2), 20(4)(a) and 20(4)(b) of the Statute and Rule 47(C) of the Rules, the Prosecutor must state the material facts underpinning the charges in the indictment, but not the evidence by which such facts are to be proved.[772] The indictment is pleaded with sufficient particularity only if it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him or her so that he or she may prepare his or her defence.[773] An indictment which fails to duly set forth the specific material facts underpinning the charges against the accused is defective.[774] The Appeals Chamber emphasises that the issue as to whether a fact is material or not cannot be determined in the abstract: whether or not a fact is considered "material" depends on the nature of the Prosecution's case.[775]

323. The Appeals Chamber has, however, made it clear that, whenever an accused is charged with superior responsibility on the basis of Article 6(3) of the Statute, the material

[769] In particular, the Appellant does not demonstrate how the finding of the Trial Chamber with respect to his credibility would have been different. In this respect, it should be recalled that the Trial Chamber invokes several other matters in explaining its dismissal of Appellant Nahimana's testimony: see Judgement, paras. 692-696.
[770] Nahimana Notice of Appeal, p. 7; Nahimana Appellant's Brief, paras. 83-121; Nahimana Brief in Reply, paras. 15-24; Ngeze Notice of Appeal, paras. 12-21; Ngeze Appellant's Brief, paras. 62-108; Ngeze Brief in Reply, paras. 6-16, 64-68. While Appellant Barayagwiza raises no submission in relation to the Indictment in his Notice of Appeal, he does raise two such issues in his Appeal Brief (see Barayagwiza Appellant's Brief, paras. 283 and 307). Appellant Barayagwiza also raised new grounds of appeal relating to the Indictment at the appeals hearings; these were subsequently admitted by the Appeals Chamber: see *infra* IX. D. and Annex A to the present Judgement.
[771] Respondent's Brief, paras. 59-60; T(A) 18 January 2007, p. 16; The Prosecutor's Response to the Six New Grounds of Appeal Raised by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007, 14 March 2007, paras. 5-7.
[772] See, *inter alia*, *Simić* Appeal Judgement, para. 20; *Ntagerura et al*. Appeal Judgement, para. 21; *Kupreškić et al*. Appeal Judgement, para. 88.
[773] *Simić* Appeal Judgement, para. 20; *Ntagerura et al*. Appeal Judgement, para. 22; *Kupreškić et al*. Appeal Judgement, para. 88.
[774] *Ntagerura et al*. Appeal Judgement, para. 22; *Niyitegeka* Appeal Judgement, para. 195; *Kupreškić et al.* Appeal Judgement, para. 114.
[775] *Ndindabahizi* Appeal Judgement, para. 16; *Ntagerura et al*. Appeal Judgement, para. 23.

facts which must be pleaded in the indictment are: (i) that the accused is the superior of sufficiently identified subordinates over whom he had effective control – in the sense of material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible; (ii) the criminal acts committed by those others for whom the accused is alleged to be responsible; (iii) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and (iv) the conduct of the accused by which he may be found to have failed to take necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[776] As regards this last element, it will be sufficient in many cases to plead that the accused did not take any necessary and reasonable measure to prevent or punish the commission of criminal acts.

324. An indictment may also be defective when the material facts that the Prosecutor invokes are pleaded without sufficient specificity.[777] In this regard, the Prosecutor's characterization of the alleged criminal conduct and the proximity between the accused and the crime charged are decisive factors in determining the degree of specificity with which the Prosecutor must plead the material facts of his case in the indictment.[778]

325. Where the Appeals Chamber finds that the Trial Chamber tried the accused on the basis of a defective indictment, it must consider whether the accused has nevertheless been accorded a fair trial, in other words, whether the defect noted caused prejudice to the Defence.[779] In some cases, a defective indictment can indeed be "cured" and a conviction handed down if the Prosecutor provided the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him.[780] This information could, *inter alia* and depending on the circumstances, be supplied in the Prosecutor's pre-trial brief or opening statement.[781] The Appeals Chamber would nonetheless emphasize that the possibility of curing defects in the indictment is not unlimited. A clear distinction has to be drawn between vagueness or ambiguity in the indictment and an indictment which omits certain charges altogether. While it is possible to remedy ambiguity or vagueness in an indictment by providing the defendant with timely, clear and consistent information detailing the factual basis underpinning the charges, omitted charges can be incorporated into the indictment only by formal amendment under Rule 50 of the Rules.[782]

326. The Appeals Chamber reaffirms that a vague or imprecise indictment which is not cured of its defects by providing the accused with timely, clear and consistent information constitutes a prejudice to the accused. The defect can be deemed harmless only if it is

[776] *Ntagerura et al*. Appeal Judgement, para. 26, citing *Naletilić and Martinović* Appeal Judgement, para. 67, and *Blaškić* Appeal Judgement, para. 218.
[777] *Muhimana* Appeal Judgement, paras. 76, 167, 195 and 217; *Ntagerura et al*. Appeal Judgement, para. 27.
[778] *Ntagerura et al*. Appeal Judgement, para. 23, referring to *Kvočka et al*. Appeal Judgement, para. 28. See also *Ntakirutimana* Appeal Judgement, paras. 73-74; *Kupreškić et al.* Appeal Judgement, para. 89.
[779] Article 24(1)(a) of the Statute.
[780] *Muhimana* Appeal Judgement, paras. 76, 195 and 217; *Simić* Appeal Judgement, para. 23; *Ntagerura et al*. Appeal Judgement, para. 28.
[781] *Ntagerura et al*. Appeal Judgement, para. 130. See also *Naletilić and Martinović* Appeal Judgement, para. 27; *Ntakirutimana* Appeal Judgement, para. 34; *Niyitegeka* Appeal Judgement, para. 219.
[782] *Ntagerura et al.*, para. 32.

established that the accused's ability to prepare his defence was not materially impaired.[783] Where the failure to give sufficient notice of the legal and factual reasons for the charges against him violated the right to a fair trial, no conviction can result.[784]

327. When the Appellant raises a defect in the indictment for the first time on appeal, then he bears the burden of showing that his ability to prepare his defence was materially impaired. When, however, an accused has previously raised the issue of lack of notice before the Trial Chamber, the burden rests on the Prosecutor to prove on appeal that the ability of the accused to prepare a defence was not materially impaired.[785] All of this is subject to the inherent jurisdiction of the Appeals Chamber to do justice in the case.[786]

## C. Issues raised by Appellant Nahimana

### 1. RTLM editorials

328. Appellant Nahimana complains that the Trial Chamber relied on the fact that he "wrote editorials read by RTLM journalists" in order to establish that he exercised control over the journalists of Radio RTLM and was personally involved in the broadcasts.[787] He argues that, in relying on this evidence – which he characterises as a material fact – even though it did not appear in the Indictment or in the Prosecutor's Pre-trial Brief,[788] the Trial Chamber compromised the fairness of the trial.[789]

329. Having examined the evidence on RTLM brought before it, the Trial Chamber found, in paragraph 567 of the Judgement, that "Nahimana also played an active role in determining the content of RTLM broadcasts, writing editorials and giving journalists texts to read".[790] The Appeals Chamber observes that the Trial Chamber did not mention this specific fact in its legal findings, which relied on the Appellant's control over RTLM and his responsibility for the editorial line in order to convict him.[791] However, paragraph 970 of the Judgement refers explicitly to paragraph 567, and it appears logical to assume that the Trial Chamber intended to refer to all of its factual findings on control of RTLM, including the fact that the Appellant had written editorials and given journalists texts to read. Moreover, this fact falls squarely within the more general assertion that Appellants Nahimana and Barayagwiza were responsible for the editorial policy of RTLM. Accordingly, the Appeals Chamber is of the view that it must assumed that the Trial Chamber relied on the disputed fact in order to convict the Appellant.

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[783] *Simić* Appeal Judgement, para. 24; *Ntagerura et al*. Appeal Judgement, para. 30; *Ntakirutimana* Appeal Judgement, para. 58.
[784] *Ntagerura et al*. Appeal Judgement, para. 28; *Naletilić and Martinović* Appeal Judgement, para. 26; *Ntakirutimana* Appeal Judgement, para. 58.
[785] *Muhimana* Appeal Judgement, paras. 80 and 199; *Simić* Appeal Judgement, para. 25; *Ntagerura et al*. Appeal Judgement, para. 31; *Kvočka et al.* Appeal Judgement., para. 35; *Niyitegeka* Appeal Judgement, para. 200.
[786] *Ntagerura et al*. Appeal Judgement, para. 31; *Niyitegeka* Appeal Judgement, para. 200.
[787] Nahimana Appellant's Brief, para. 94.
[788] Prosecutor's Pre-Trial Brief Pursuant to Rule 73 *bis* (B)(i), 9 September 2000 ("Prosecutor's Pre-Trial Brief").
[789] Nahimana Appellant's Brief, paras. 96-97.
[790] Judgement paras. 517 and 557.
[791] See *ibid*., paras. 970-974.

330. The Appeals Chamber considers, however, that this was not a material fact that should have been pleaded in the Indictment, but simply evidence showing that the Appellant had effective control over RTLM journalists and staff. This latter fact, which is material to the charges under Article 6(3) of the Statute, is clearly pleaded in paragraph 6.20 of the Nahimana Indictment. The appeal on this point is dismissed.[792]

2. Intervention in favour of UNAMIR

331. Appellant Nahimana argues that the Trial Chamber erred in relying on his alleged intervention with the RTLM journalists, asking them to halt the broadcasts directed against the United Nations Assistance Mission for Rwanda ("UNAMIR"), as evidence that he had *de facto* control over RTLM until July 1994.[793] The Appellant submits that this material fact appeared neither in the Indictment nor in the Prosecutor's Pre-Trial Brief. He adds that this allegation was deliberately removed from the final version of the Indictment by the Prosecutor prior to the commencement of trial, at the same time that he dropped from his witness list the sole factual witness (AFI) in respect of this matter. The Appellant further submits that the Judges themselves, throughout the trial, "consistently considered [this fact] irrelevant".[794]

332. In response, the Prosecutor submits that the fact referred to is not a material fact but mere evidential material. He asserts that the material fact that Nahimana maintained control over RTLM throughout 1994 was made explicit in the Indictment, and that this allegation is clearly set forth in paragraph 6.20 of the Nahimana Indictment. According to the Prosecutor, the Appellant's intervention with RTLM journalists merely amounts to evidence to show that his control continued after 6 April 1994.[795] After pointing out that the Appellant raised no objection when the evidence concerning the intervention was submitted,[796] the Prosecutor adds that the Appellant has no basis for his claim because it must have been very clear to him that the Prosecutor was seeking to tender this evidence against him,[797] and that the Appellant clearly suffered no prejudice in preparing his defence.[798]

333. Appellant Nahimana replies that failure to disclose this "material fact" seriously affected the fairness of the trial. In this regard, he complains of the excessively general nature of the allegation in the Indictment and denounces the fact that the Judges "explicitly dissuaded [him] from presenting his defence" on this allegation, although it was relied on as

[792] Even though this is not mentioned in paragraph 974 of the Judgement, it is possible that the Trial Chamber relied also on the fact that Appellant Nahimana wrote editorials and gave texts for RTLM journalists to read out, in order to convict him under Article 6(1) of the Statute. It could thus be necessary to decide whether the Trial Chamber convicted Appellant Nahimana under Article 6(1) of the Statute in reliance on a material fact not pleaded in the Indictment. However, the Appeals Chamber finds that it need not decide this matter, as it considers in any case that it was not established that Appellant Nahimana wrote or had texts read out that directly incited violence against Tutsi, and hence he could not be convicted under Article 6(1) of the Statute; see *infra* XII. D. 1. (b) (ii) .
[793] Nahimana Appellant's Brief, paras. 88-93.
[794] *Ibid.*, paras. 91-92, referring to Annex 2 of the same Brief. See also T(A) 17 January 2007, pp. 18 and 22.
[795] Respondent's Brief, paras. 76-78, 86.
[796] *Ibid.*, para. 80.
[797] *Ibid.*, paras. 81-84: The Prosecutor submits that the impugned fact was not only mentioned in Alison Des Forges' Expert Report disclosed on 1 March 2002 and the will-say statement of Witness AFI disclosed among 300 other exhibits on 26 August 2000, but that it was also openly discussed at the hearing of 10 July 2001.
[798] Respondent's Brief, para. 85.

the sole basis for the finding that he wielded effective control over RTLM after 6 April 1994.[799]

334. The Trial Chamber considered that the success of Appellant Nahimana's intervention in halting the RTLM attacks against UNAMIR was "an indicator of the *de facto* control he had but failed to exercise after 6 April 1994".[800] It was on this basis in particular that the Trial Chamber found that the Appellant exercised "superior responsibility for the broadcasts of RTLM"[801] and then found him guilty of direct and public incitement to commit genocide and persecution as a crime against humanity pursuant to Article 6(3) of the Statute.[802]

335. The Appeals Chamber has already recalled above the material facts which must be pleaded in the indictment when an accused is charged under Article 6(3) of the Statute.[803] In the instant case, the Appeals Chamber notes that:

(i) The fact that Appellant Nahimana wielded authority and control over RTLM S.A., the radio journalists, its announcers and other staff between January and July 1994 is clearly pleaded in paragraph 6.20 of the Nahimana Indictment;[804]

(ii) The criminal acts perpetrated by persons supposedly under the Appellant's responsibility are set forth in paragraphs 6.23 to 6.27 of the Nahimana Indictment;[805]

(iii) In paragraphs 6.21 to 6.24 and 6.27 of the Nahimana Indictment, the Prosecutor sets out the conduct of the Appellant supporting the charge that he knew or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and

(iv) In paragraph 6.23 of the Nahimana Indictment, the Prosecutor indeed makes it clear that the Appellant failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators.

336. The Appeals Chamber accordingly finds that the Prosecutor discharged his burden of informing the Accused, not only of the nature and grounds of the charge brought against him, but also of the material facts underlying the charge in question. What mattered in the instant case was that Appellant Nahimana was clearly informed in the Indictment of the Prosecutor's intention to charge him on account of the effective control he wielded up to July 1994 over staff of RTLM who were guilty of criminal activities. The fact that the Appellant intervened to bring about an end to attacks on UNAMIR is not a material fact; but it is evidence to show the alleged control. That, moreover, is the use to which the Trial Chamber puts this evidence

[799] Nahimana Brief in Reply, paras. 18-24. See also T(A) 18 January 2007, pp. 41-42.
[800] Judgement, para. 568. See also para. 972.
[801] *Ibid.*, para. 973.
[802] *Ibid.*, paras. 1033 and 1081.
[803] See *supra* IX. B.
[804] See also Nahimana Indictment, paras. 6.2 and 6.21.
[805] *Ibid.*, paras. 6.6-6.19.

in paragraph 972 of the Judgement.[806] The Appeals Chamber finds that the Nahimana Indictment was not defective in this respect.

337. The Appeals Chamber points out that Appellant Nahimana's argument that the Trial Chamber allegedly dissuaded him from presenting his defence on this charge is not a matter relating to the Indictment but to the rules governing evidence. In any event, the Appeals Chambers finds the argument unfounded. On reading the Trial Chamber decisions cited by the Appellant in support of his argument, the Appeals Chamber considers that the Trial Chamber in no way "explicitly ruled out discussion" of this particular evidence.[807]

338. Appellant Nahimana's appeal on this point is therefore dismissed in its entirety.

### 3. Broadcasts made prior to 6 April 1994

339. Appellant Nahimana complains that the Trial Chamber convicted him of direct and public incitement to commit genocide on the basis of RTLM broadcasts prior to 6 April 1994, whereas the Prosecutor had indicated both in the Indictment and in the Pre-Trial Brief the intention to charge him only on the basis of broadcasts subsequent to that date.[808]

340. The Trial Chamber convicted Appellant Nahimana of direct and public incitement to commit genocide on the basis of RTLM broadcasts, but it did not explain precisely which of those broadcasts constituted incitement, confining itself to giving an example.[809] It appears, however, that the Chamber relied for this purpose on broadcasts made both before and after 6 April 1994.[810]

341. For Appellant Nahimana to be in a position to prepare his defence, he had to be duly informed in the Indictment that the Prosecution intended to charge him with the crime of incitement on the basis of broadcasts made before and after 6 April 1994. And indeed the Prosecution does not dispute its obligation to cite this material fact.[811] On reading the Nahimana Indictment, the Appeals Chamber considers that the Prosecution discharged this burden in indicating unambiguously the intention to charge the Appellant with direct and

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[806] Judgement, para. 972: "That Nahimana and Barayagwiza had the *de facto* authority to prevent this harm is evidenced by the one documented and successful intervention of Nahimana to stop RTLM attacks on UNAMIR and General Dallaire."

[807] See in particular the Decision on the Prosecutor's Application for Rebuttal Witnesses, 9 May 2003 – essential to the Appellant's line of argument – following which the Trial Chamber denied the Prosecutor's request to call evidence in reply on the grounds, *inter alia*, that (1) calling Witness AZZC was not essential to truth-seeking (para. 59); and that (2) the evidence that might be adduced in reply by Witness AFI was not directly relevant and would not in any case prove that Appelant Nahimana in fact had control of RTLM (para. 62). The Appeals Chamber notes that the Trial Chamber limited itself to considering the evidence in reply which the Prosecutor sought to have admitted, and did not consider evidence already admitted.

[808] Nahimana Appellant's Brief, paras. 98-107.

[809] Judgement, para. 1032, referring to a broadcast of 4 June 1994.

[810] *Ibid.*, paras. 486-487 ("Both before and after 6 April 1994, RTLM broadcast [...]"), 971 (" [...] programming followed its trajectory, steadily increasing in vehemence and reaching a pitched frenzy after 6 April"), 1017 ("[…] the entirety of RTLM broadcasting, from July 1993 through July 1994, the alleged impact of which culminated in events that took place in 1994, falls within the temporal jurisdiction of the Tribunal to the extent that the broadcasts are deemed to constitute direct and public incitement to genocide"). See also Judgement, paras. 345-389, where the Trial Chamber assesses the content of broadcasts made before 6 April 1994.

[811] See Respondent's Brief, paras. 92-98.

public incitement to commit genocide on the basis of RTLM broadcasts made between January and July 1994. The Appeals Chamber makes particular reference here to paragraphs 5.11, 5.22, 6.6, 6.9, 6.15, 6.20 and 6.23 of the Nahimana Indictment, on which the Prosecution relied for the count of direct and public incitement to commit genocide.[812] The Appeals Chamber further notes that the Prosecution confirmed the intention to charge the Accused for responsibility for broadcasts prior to April 1994 in the Pre-Trial Brief.[813] The fact that the final list of audio tapes for the trial appended to the Prosecutor's Pre-Trial Brief contains a number of broadcasts prior to 6 April 1994 is equally significant. The Appeals Chambers accordingly holds that the appeal on this point is unfounded.

4. RTLM broadcasts promoting *Kangura* and the competition of March 1994

342. Appellant Nahimana submits that the Trial Chamber erred in convicting him of the crime of conspiracy to commit genocide on the basis of two "material facts" which were mentioned neither in the Indictment nor in the Prosecutor's Pre-Trial Brief, namely the broadcast by RTLM of publicity for the newspaper *Kangura* and the competition organized jointly by that newspaper and the radio station in March 1994.[814]

343. The Trial Chamber found Appellant Nahimana guilty of conspiracy to commit genocide[815] after finding that "this evidence establishes, beyond a reasonable doubt, that Nahimana, Barayagwiza and Ngeze consciously interacted with each other, using the institutions they controlled to promote a joint agenda, which was the targeting of the Tutsi population for destruction".[816] In the Trial Chamber's opinion, the broadcast of advertisements for *Kangura* and the joint organization of the competition were part of this evidence.[817]

344. The Appeals Chamber takes the view that the broadcast of advertisements for *Kangura* and the organising of a joint competition indeed constituted evidence of the alleged conspiracy. Defined as an agreement between two or more persons to commit the crime of genocide,[818] the crime of conspiracy as set forth in Article 2(3)(b) of the Statute comprises two elements, which must be pleaded in the indictment: (i) an agreement between individuals aimed at the commission of genocide; and (ii) the fact that the individuals taking part in the agreement possessed the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such.[819] These material facts were clearly set forth in paragraphs 5.1, 6.26 and 6.27 of the Nahimana Indictment. The facts cited in the appeal do not fall into this category, but are rather evidence establishing the personal involvement and institutional

[812] Nahimana Indictment, p. 18.
[813] Prosecutor's Pre-Trial Brief, paras. 47, 50, 56, 61 and 64.
[814] Nahimana Appellant's Brief, paras. 112-115.
[815] Judgement, para. 1055.
[816] *Ibid.*, para. 1054.
[817] *Ibid.*, para. 1051: "Institutionally also, there were many links that connected the Accused to each other. *Kangura* was a shareholder, albeit limited one, of RTLM, and the newspaper and radio closely collaborated. RTLM promoted issues of *Kangura* to its listeners. *Kangura* and RTLM undertook a joint initiative in March 1994, a competition to make readers and listeners familiar with the contents of the past issues of *Kangura* and to survey readers and listeners on their views regarding RTLM broadcasts. One of the prizes offered was for CDR members only."
[818] *Ntagerura et al*. Appeal Judgement, para. 92.
[819] See *infra* XIV. A.

coordination invoked by the Prosecution in support of the charges. Accordingly, these two matters did not need to be pleaded in the Indictment. The Appeals Chamber considers that Appellant Nahimana was clearly put on notice in the Nahimana Indictment regarding the material facts underpinning the count of conspiracy to commit genocide. Thus there were no defects in the Nahimana Indictment. The Appellant's appeal on this point is therefore dismissed.

### 5. Facts establishing genocidal intent

345. Appellant Nahimana's final submission under this ground of appeal is that, in order to establish his genocidal intent, the Trial Chamber relied on (i) the interview of 25 April 1994, whereas this "material fact" was not pleaded in the Indictment, and on (ii) the RTLM broadcasts and the article, "*Rwanda: Current Problems and Solutions*", which were only mentioned therein "far too briefly", without being presented as an expression of the Appellant's criminal intent.[820] The Appellant contends that the interview was mentioned for the first time only 17 months after the commencement of the trial[821] and that he suffered serious prejudice in the preparation of his defence, particularly since the recording of the interview of 25 April 1994 was incomplete and he was unable to obtain a full version of it.[822]

346. The Trial Chamber found that Appellant Nahimana had the intent to commit genocide on the basis of, among other evidence, facts mentioned here by the Appellant. The relevant parts of the Judgement[823] read as follows:

> 965. [...] Individually, each of the Accused made statements that further evidence his genocidal intent.
>
> 966. Ferdinand Nahimana, in a Radio Rwanda broadcast on 25 April 1994, said he was happy that RTLM had been instrumental in awakening the majority people, meaning the Hutu population, and that the population had stood up with a view to halting the enemy. At this point in time, mass killing – in which RTLM broadcasts were playing a significant part - had been ongoing for almost three weeks. Nahimana associated the enemy with the Tutsi ethnic group. His article Current Problems and Solutions, published in February 1993 and recirculated in March 1994, referred repeatedly to what he termed as the "Tutsi league", a veiled reference to the Tutsi population as a whole, and associated this group with the enemy of democracy in Rwanda. As the mastermind of RTLM, Nahimana set in motion the communications weaponry that fought the "war of media, words, newspapers and radio stations" he described in his Radio Rwanda broadcast of 25 April as a complement to bullets. Nahimana also expressed his intent through RTLM, where the words broadcast were intended to kill on the basis of ethnicity, and that is what they did.

347. With respect to *mens rea*, the Appeals Chamber recalls that the indictment may either (i) plead the state of mind of the accused, in which case the facts by which that matter is to be

[820] Nahimana Appellant's Brief, paras. 116-118.
[821] *Ibid.*, para. 119: Appellant Nahimana is referring to the testimonies of Witnesses Rizvi and Ruzindana of March 2002.
[822] *Ibid.*, paras. 120-121.
[823] See also Jugement, para. 969: "Based on the evidence set forth above, the Chamber finds beyond a reasonable doubt that Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze acted with intent to destroy, in whole or in part, the Tutsi ethnic group."

established are matters of evidence, and need not be pleaded; or (ii) the evidentiary facts from which the state of mind is to be inferred.[824]

348. The Appeals Chamber notes that, for each of the counts in the Nahimana Indictment that are based on Article 2 of the Statute, the Prosecution pleads Appellant Nahimana's intent "to destroy, in whole or in part, an ethnic or racial group as such".[825] The Appeals Chamber therefore considers that the Prosecution satisfied its obligation to plead in the Indictment the Accused's *mens rea*, in this case the intent to commit genocide. Even though the interview granted to Radio Rwanda is not pleaded in the Nahimana Indictment, and even though the article, "*Rwanda: Current Problems and Solutions*", and the RTLM broadcasts are referred to without being presented therein as an expression of the Appellant's criminal intent,[826] this does not amount to a defect in the Indictment. The Appeals Chamber considers these three items to be matters of evidence establishing that the Appellant had the intent alleged by the Prosecution, which did not need to be pleaded in the Indictment. Therefore the Trial Chamber did not commit an error in finding, in reliance on these items, that the Appellant possessed genocidal intent. The appeal on this point is dismissed.

## D. Appellant Barayagwiza's new grounds of appeal

349. In addition to the two heads of appeal set out in his Appellant's Brief,[827] at the appeal hearing of 17 January 2007 Appellant Barayagwiza raised six additional grounds, which he had not raised previously in his appeal submissions. In the circumstances of the case and in the interests of justice, the Appeals Chamber decided to admit these additional grounds[828] and authorised the Prosecutor to file a response[829] and Appellant Barayagwiza to file a reply.[830]

350. By way of preliminary point, the Appeals Chamber states that it will not examine Appellant Barayagwiza's submission with regard to the widespread or systematic attacks carried out prior to 1994,[831] since the Appellant makes no specific argument in support thereof, failing to point to any error on the part of the Trial Chamber or its possible impact on the verdict.

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[824] *Blaškić* Appeal Judgement, para. 219.
[825] Nahimana Indictment, p. 17 (Count 1), p. 18 (Counts 2 and 3), p. 19 (Count 4).
[826] There is a brief reference to the article in paragraph 5.15 of the Nahimana Indictment (see also para. 5.17) while there are numerous references to RTLM broadcasts (see *inter alia*, paragraphs 5.11, 6.6 and 6.12 of the Nahimana Indictement).
[827] Barayagwiza Appellant's Brief, paras. 283 and 307.
[828] Decision of 5 March 2007.
[829] The Prosecutor's Response to the Six New Grounds of Appeal Raised by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007, 14 March 2007 ("Prosecutor's Response to the New Grounds of Appeal").
[830] Appellant Jean-Bosco Barayagwiza's Reply to "Prosecutor Response to the Six New Grounds of Appeal Raised by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007", 21 March 2007 ("Barayagwiza's Reply to the New Grounds of Appeal"*)*. The Appeals Chamber observes that Appellant Nahimana authorised himself to file a reply to the Prosecutor's Response to the New Grounds (*Réponse de la Défense à* The Prosecutor's Response to the Six New Grounds of Appeal Raised by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007", filed on 20 March 2007). The Appeals Chamber will not examine the reply filed by Appellant Nahimana, as it is not provided for in the Statute or the Rules and was not authorised by the Appeals Chamber.
[831] Barayagwiza Appellant's Brief, para. 283.

1. Broadcasts prior to 6 April 1994

351. Appellant Barayagwiza submits that the Trial Chamber erred in finding him guilty of direct and public incitement to commit genocide and persecution as a crime against humanity[832] on the basis of RTLM broadcasts prior to 6 April 1994, since these broadcasts were not pleaded in the Barayagwiza Indictment or in the Prosecutor's Pre-Trial Brief.[833]

352. While emphasizing that this submission by Appellant Barayagwiza was not raised in his Notice of Appeal, but rather in his Appellant's Brief, and that this would suffice for the Appeals Chamber to refuse to consider it, the Appeals Chamber would nonetheless refer to its analysis of a similar submission by Appellant Nahimana, following which it found that there were no defects in the Nahimana Indictment.[834] Since the Barayagwiza Indictment contains the same information in this regard as the Nahimana Indictment,[835] the Appeals Chamber reiterates its finding and dismisses the appeal on this point.

2. Appellant Barayagwiza's position within RTLM

353. Appellant Barayagwiza submits that the Trial Chamber relied on facts that were not pleaded or not set out in sufficient detail in his Indictment in finding him liable on the basis of the RTLM broadcasts.

(a) Superior-subordinate relationship

354. Appellant Barayagwiza submits that the Trial Chamber erred in finding him criminally responsible as an RTLM superior pursuant to Article 6(3) of the Statute, whereas the Indictment set out the alleged superior-subordinate relationship in very general terms and failed to inform him of the material facts relating to his alleged control over RTLM employees.[836] In his Reply to the New Grounds of Appeal, the Appellant adds that neither the Prosecutor's Pre-Trial Brief nor the Opening Statement[837] cured the defects identified and submits that he suffered serious prejudice in the preparation of his defence.[838]

355. The Trial Chamber found Appellant Barayagwiza guilty of genocide, direct and public incitement to commit genocide, extermination and persecution as crimes against humanity, by virtue of his position as a superior of RTLM. It was satisfied that the Appellant incurred criminal responsibility under Article 6(3) of the Statute for "his active engagement

[832] Even though Appelant Barayagwiza does not expressly refer to the existence of defects in the Indictment in relation to the crime of persecution, the Appeals Chamber understands that he is raising the point, since Ground 36 is set out in his Appellant's Brief under the heading, Crime of Persecution.
[833] Barayagwiza Appellant's Brief, para. 307, referring to Nahimana Appellant's Brief, paras. 102-109, which in turn refer to paras. 1.30, 1.32 and 6.6-6.17 of the Nahimana Indictment – the same paragraphs as those in the Barayagwiza Indictment, except for paras. 6.6 and 6.17 – and to paras. 47 and 48 of the Prosecutor's Pre-Trial Brief.
[834] See *supra* IX. C. 3.
[835] The Appeals Chamber refers to paras. 5.10, 5.20, 6.6, 6.9, 6.15, 6.20 and 6.23 of the Barayagwiza Indictment.
[836] T(A) 17 January 2007, pp. 58-59.
[837] T. 23 October 2000 ("Opening Statement").
[838] Barayagwiza's Reply to the New Grounds of Appeal, paras. 11-13, 16, 18-19.

in the management of RTLM prior to 6 April, and his failure to take necessary and reasonable measures to prevent the killing of Tutsi civilians instigated by RTLM".[839]

356. The Appeals Chamber has already recalled the material facts that must be pleaded with respect to responsibility under Article 6(3) of the Statute.[840] In this instance, the Appeals Chamber notes that the Barayagwiza Indictment states that:

(i) Appellant Barayagwiza "was a member of the *Comité d'initiative* for the private company *Radio Télévision Libre des Mille Collines* (RTLM s.a.) and a senior official of its radio station, RTLM"[841] and that he exercised "authority and control over RTLM Ltd., RTLM radio, reporters, announcers and employees, like Georges Ruggiu, Valérie Bemeriki and others";[842]

(ii) His subordinates were broadcasting messages inciting the general public and the militia groups in exterminating all the Tutsis and eliminating the moderate Hutus and some Belgian nationals;[843]

(iii) Between January and July 1994, Appellant Barayagwiza "knew or had reason to know that his subordinates [...] were broadcasting messages inciting, aiding and abetting the population and the militia groups in exterminating the Tutsis and eliminating the moderate Hutus and Belgian nationals"[844] and "knew or had reason to know that the programs, speeches, or messages broadcast by RTLM resulted in widespread massacres of the Tutsi population";[845] and

(iv) The Appellant "did not take reasonable steps to prevent or punish the perpetrators".[846]

357. In view of the foregoing, the Appeals Chamber considers that the material facts relating to Appellant Barayagwiza's superior responsibility at RTLM were set forth in the Indictment with sufficient clarity. As he was informed of each of the aforementioned allegations for each count under Article 6(3),[847] the Appellant was, in the opinion of the Appeals Chamber, fully in a position to prepare his defence. The Appeals Chamber finds that the Indictment contained no defects in this regard and accordingly dismisses the Appellant's appeal on this point.

[839] Judgement, para. 973. See also paras. 1034, 1064 and 1082, referring to para. 973 (the Appeals Chamber considers that the reference to paragraph 977 in paragraph 1034 must be a typographical error).
[840] See *supra* IX. B.
[841] Barayagwiza Indictment, para. 4.2. See also para. 7.13.
[842] *Ibid.*, para. 6.20. See also para. 4.4.
[843] *Ibid.*, paras. 6.6-6.19. See also para. 5.20.
[844] *Ibid.*, para. 6.23.
[845] *Ibid.*, para. 6.24.
[846] *Ibid.*, para. 6.23.
[847] *Ibid.*, pp. 25-29, referring to the relevant paragraphs.

(b) Status as "number two" and active member of the RTLM Steering Committee

358. Appellant Barayagwiza submits that the Trial Chamber erred in basing itself on his status as "number two" at RTLM and active member of the Steering Committee whereas these facts were not pleaded in the Indictment.[848]

359. The Trial Chamber found that Appellant Barayagwiza was the "No. 2" of RTLM[849] and that he was one of the most active members of its Steering Committee.[850] It went on to find that the Appellant exercised superior responsibility for RTLM broadcasts by virtue of, *inter alia*, these two positions, and it found him guilty of genocide, direct and public incitement to commit genocide, extermination and persecution as crimes against humanity pursuant to Article 6(3) of the Statute.[851]

360. The Appeals Chamber finds that the fact that Appellant Barayagwiza's positions as "number two" and active member of the RTLM Steering Committee are not pleaded in the Barayagwiza Indictment does not render the Indictment defective. The Appeals Chamber considers that these two facts do not amount to material facts, but rather to matters of evidence establishing the authority or control exercised by the Appellant over RTLM employees, as alleged in the Indictment.[852] The Appeals Chamber dismisses the appeal on this point.

3. Appellant Barayagwiza's position within the CDR

361. Appellant Barayagwiza complains that the Trial Chamber relied on facts that were not pleaded or not clearly set forth in the Barayagwiza Indictment in finding him guilty on the basis of his activities within the CDR.

(a) The elements of superior responsibility

362. As in the case of RTLM, Appellant Barayagwiza contends that the Indictment did not inform him of the material facts pleaded in support of the allegation that he was a superior who had effective control over members of the CDR.[853] In particular, he denounces: (1) the fact that he was not provided with sufficiently detailed information on the identity of his alleged subordinates and on the alleged criminal acts committed by them, and (2) the fact that the Indictment contained no indication regarding his material ability "to prevent or punish any crime imputed to his supposed subordinates".[854] Appellant Barayagwiza further contends that the Indictment did not sufficiently plead his conduct showing that (1) he "knew or had reasons to know" that crimes were about to be committed or had been committed by his subordinates; (2) failed to take necessary and reasonable measures to prevent such criminal acts or to punish their perpetration.[855]

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[848] T(A) 17 January 2007, p. 75. See also Barayagwiza's Reply to the New Grounds of Appeal, paras. 23-27.
[849] Judgement, paras. 560 and 567.
[850] *Ibid.*, paras. 554 and 562.
[851] *Ibid.*, para. 973. See also paras. 1034, 1064 and 1082, referring to para. 973 (as explained in footnote 839, the Appeals Chamber considers the reference to paragraph 977 in paragraph 1034 to be a typographical error ).
[852] Barayagwiza Indictment, paras. 4.2, 4.4, 6.20-6.22 and 7.13.
[853] T(A) 17 January 2007, pp. 57-59.
[854] *Idem*. See also Barayagwiza's Reply to the New Grounds of Appeal, paras. 11-15, 17-19.
[855] *Ibid.*, p. 58. See also Barayagwiza's Reply to the New Grounds of Appeal, paras. 13 and 14.

363. The Prosecutor responds that the Indictment clearly set forth the alleged superior-subordinate relationship, the criminal conduct of his subordinates and the fact that he had the requisite knowledge within the meaning of Article 6(3) of the Statute.[856]

364. The Trial Chamber found that Appellant Barayagwiza "had superior responsibility over members of the CDR and its militia, the *Impuzamugambi*", and found him guilty of genocide pursuant to Article 6(3) of the Statute "for his active engagement in CDR, and his failure to take necessary and reasonable measures to prevent the killing of Tutsi civilians by CDR members and *Impuzamugambi*".[857] It also found him guilty of direct and public incitement to commit genocide, as well as extermination and persecution as crimes against humanity pursuant to Article 6(3) of the Statute, for "the acts of direct and public incitement to commit genocide caused by CDR members",[858] for "the killing of Tutsi civilians by CDR members and *Impuzamugambi*"[859] and for "the advocacy of ethnic hatred or incitement of violence against the Tutsi population by CDR members and *Impuzamugambi*".[860]

365. The Appeals Chamber notes that the Barayagwiza Indictment states that:

(1) In his capacity as a CDR official, Appellant Barayagwiza exercised effective control over members of the CDR and the *Impuzamugambi* militiamen;[861]

(2) Between January and July 1994, in Kigali and in Gisenyi *préfecture*, his subordinates committed or participated in crimes against the Tutsi population and numerous moderate Hutus;[862] and

(3) The Appellant "knew or had reason to know that his subordinates [...] had committed" such crimes.[863]

366. While it finds that the material facts enumerated above were set forth with the requisite detail, the Appeals Chamber notes nonetheless that the Barayagwiza Indictment does not plead the fact that Appellant Barayagwiza was charged with failure to take necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof. The Barayagwiza Indictment is therefore defective in that it does not inform the Appellant of one of the material facts underpinning the charge based on Article 6(3) of the Statute.

367. The Appeals Chamber notes that the Barayagwiza Indictment was not cured of its defect by the timely disclosure of clear and consistent information on this subject. While the Prosecutor evokes the Appellant's direct participation in the commission of crimes by the

[856] Prosecutor's Response to the New Grounds, paras. 8-11, 13, 15 and 16, referring to the Barayagwiza Indictment, paras. 4.4, 7.3-7.10, and to the Prosecutor's Pre-Trial Brief, paras. 71, 87, 89, 90, 92-96.
[857] Judgement, para. 977.
[858] *Ibid.*, para. 1035, referring to para. 977.
[859] *Ibid.*, para. 1066, referring to para. 977.
[860] *Ibid.*, para. 1083, referring to para. 977.
[861] Barayagwiza Indictment, paras. 4.4 and 7.13.
[862] *Ibid.*, paras. 7.1-7.4, 7.7-7.10 and 7.13.
[863] *Ibid.*, paras. 7.10 and 7.13.

CDR militiamen,[864] in his Pre-Trial Brief he simply mentions – extremely vaguely and without referring to the Appellant – that, in order to establish command responsibility, it is necessary to prove that the Accused did not use his ability to prevent or punish.[865] None of the summaries of the anticipated testimonies of Prosecution witnesses makes reference to this allegation[866] and neither does the Prosecutor make reference thereto in his Opening Statement.[867]

368. The Appeals Chamber notes, however, that at no time during the trial did Appellant Barayagwiza complain about the vagueness of the Indictment in relation to this specific point.[868] It was therefore for him to show that his ability to prepare his defence was seriously impaired, but he has failed to do so: with the exception of very general allegations of prejudice, the Appellant has failed to demonstrate that he suffered material prejudice as a result of the Prosecution's failure to comply with its obligations. The Appeals Chamber accordingly dismisses the Appellant's appeal on this point.

(b) National President and membership in the Executive Committee

369. Appellant Barayagwiza contends that the Trial Chamber erred in finding that he had become the CDR National President after the murder of Martin Bucyana[869] and that he was a member of CDR's Executive Committee[870] – facts on which the Indictment was silent.

370. The Trial Chamber relied, *inter alia*, (i) on the fact that Appellant Barayagwiza was CDR's National President in finding him liable under Article 6(3),[871] and (ii) on the fact that he was a member of the national Executive Committee in finding him liable under Article 6(1).[872] Even though these facts were not pleaded in the Barayagwiza Indictment — which referred to his duties as Chairman of the CDR's regional committee for Gisenyi *préfecture*[873]

[864] See, *inter alia,* the allegations of distribution of weapons and money, instigation and orders in paragraphs 84-86, 89, 90, 92 of the Prosecutor's Pre-Trial Brief.
[865] Prosecutor's Pre-Trial Brief, para. 216.
[866] See Summary of Anticipated Testimonies of 25 September 2000, attached to the Prosecutor's Pre-Trial Brief, made available in French on 4 December 2000.
[867] The Prosecutor's statements that "I have found no instance in which any of the three defendants […] opposed the policy of Hutu Supremacy, sought to revoke it or to have it changed" and "None of the defendants […] took any steps to dissociate themselves from the genocide or to exit the conspiracy" (Prosecutor's Opening Statement, T. 23 October 2000, p. 134) are far too vague in the opinion of the Appeals Chamber to constitute clear information, especially as they were made in relation to RTLM and the *Kangura* publications.
[868] In his Motion on Defects in the Indictment, of 19 July 2000, Appellant Barayagwiza impugns only the vagueness of the Indictment with respect to the identity of his alleged subordinates and to the fact that he knew of, or had reason to know of, their criminal conduct: *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR 97-19-T, Objection Based on Defects in the Indictment (Rule 72 of the RPE), 19 July 2000 ("Objection on Defects in the Indictment of 19 July 2000"), p. 23. See also Closing Brief for Jean Bosco Barayagwiza, filed confidentially on 31 July 2003 ("Barayagwiza's Closing Brief"), pp. 48-53 (on the Appellant's capacity as a superior), 56 (on the violation of the Appellant's rights) and 66-69 (on the Appellant's role within the CDR).
[869] T(A) 17 January 2007, p. 59. See also Barayagwiza's Reply to the New Grounds of Appeal, paras. 20 to 22.
[870] *Ibid.*, p. 68. See also Barayagwiza's Reply to the New Grounds of Appeal, para. 23.
[871] Judgement, para. 977 (genocide). See also paras. 1035 (direct and public incitement to commit genocide), 1066 (extermination) and 1083 (persecution) referring to para. 977.
[872] Judgement, para. 975 (genocide) and 1035 (direct and public incitement to commit genocide) referring to para. 276 in particular. See also paras. 1065 (extermination) and 1083 (persecution) referring to para. 975.
[873] Barayagwiza Indictment, paras. 4.2 and 7.6.

— the Appeals Chamber finds that the Trial Chamber made no error. In the Chamber's view, these were not material facts that should have been pleaded in the Indictment, but rather evidence designed to show the authority, influence or power of instigation exercised by the Appellant over CDR members, as was pleaded in his Indictment.[874] The appeal on this point is dismissed.

### 4. Distribution of weapons in Mutura

371. Appellant Barayagwiza contends that neither the Indictment, or any other of the Prosecutor's pre-trial filings, included the allegation that he had come to Mutura, Gisenyi *préfecture*, a week after President Habyarimana's death, in order to deposit weapons in Ntamaherezo's house for onward distribution to three *secteurs*, as claimed by Witness AHB.[875] The Appellant denounces in particular the fact that he was not notified before or during the trial of: (1) the exact date on which he distributed the weapons; (2) the allegation that he came to Mutura in a red vehicle driven by a driver bringing "tools" to kill the Tutsi; (3) the exact identity of the other people involved in the distribution of weapons and his ties with them; (4) the names and description of Mizingo, Kabari, Kanzenze, Cyambara and Muhe villages; (5) the gatherings of Hutu in Kanzenze, Nyamirambo and Cyambara *secteurs* for the distribution of weapons; and (6) the alleged inauguration of an RTLM antenna in 1994.[876]

372. The Prosecutor responds that he had provided Appellant Barayagwiza with timely, clear and consistent information in respect of this charge. He submits that the Barayagwiza Initial Indictment,[877] Barayagwiza's Indictment,[878] the Prosecutor's Pre-Trial Brief,[879] and all the supporting materials disclosed on 22 October 1997,[880] 28 June 1999[881] and 14 April 2000[882] stated expressly that Appellant Barayagwiza had distributed weapons to CDR militiamen in Gisenyi *préfecture* and, in particular, that he had transported weapons from Kigali to Mutura in order to distribute them to the *Impuzamugambi*.[883] The Prosecutor

[874] *Ibid.*, paras. 4.4, 5.1, 6.20, 6.23, 7.3, 7.4, 7.6 and 7.13.
[875] The Appellant refers to Witness AHB's written statement dated 22 June 2000 and to his testimony before the Trial Chamber.
[876] T(A) 17 January 2007, pp. 77-78.
[877] Barayagwiza Initial Indictment, para. 3.5.
[878] Barayagwiza Indictment, paras. 5.1 and 5.17.
[879] Prosecutor's Pre-Trial Brief, paras. 91-96, 106, 135.
[880] *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-T, Summary of supporting material, 22 October 1997 ("Supporting material of 22 October 1997"), para. 3.5, pp. 4-8.
[881] *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-T, Supporting Material, 28 June 1999 ("Supporting material of 28 June 1999"), p. 68.
[882] *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-T, Supporting Material, filed in English on 14 April 2000 and in French on 15 April 2000 ("Supporting Material of 14 April 2000"), para. 5.17, pp. 71-74 of the English version.
[883] Prosecutor's Response to the New Grounds of Appeal, paras. 25-28. The Prosecutor further argues that it was stated in the summary of the Prosecution's proposed will-say statements of 25 September 2000 that Witness AHB would corroborate Witness AAJ's testimony on this charge (referring to the summary of the Prosecution's anticipated testimonies of 25 September 2000, p. 3687 (Registry pagination), and also to T. 13 June 2001, p. 131 (closed session on Prosecution motion)). The Prosecutor further referred to Witness AHB's written statement disclosed on 29 May 2001 and summaries of anticipated testimony of Prosecution witnesses disclosed on 7 June 2001 (Prosecutor's Response to the New Grounds of Appeal, paras. 29-30, referring to the Summary of Anticipated Testimony of Additional Prosecution Witnesses for Disclosure to Defence and Judges of Trial Chamber I, 7 June 2001, p. 2238 (Registry pagination)).

further submits that the Appellant cross-examined Witness AHB on this issue without raising any objection. Lastly, he argues that the Appellant contested the merit of the testimony in his Closing Brief, demonstrating his ability to defend himself against the charge.[884]

373. In his reply, Appellant Barayagwiza reiterates that he had not been informed of the material facts and was thus not in a position to challenge the new allegations by Witness AHB because of the incompetence of his Counsel at that time.[885]

374. On the basis of Witness AHB's testimony, the Trial Chamber found that Appellant Barayagwiza "came to Gisenyi, one week after 6 April, with a truckload of weapons that were distributed to the local population and used to kill individuals of Tutsi ethnicity" and that he had "played a leadership role in the distribution of these weapons".[886] It relied on this fact to find the Appellant guilty, under Article 6(1) of the Statute, of extermination as a crime against humanity "for his acts in planning the killing of Tutsi civilians".[887]

375. The distribution of weapons charge was pleaded in paragraph 5.17 of Barayagwiza's Indictment:

> Between June 1993 and July 1994, in Gisenyi *préfecture*, the *Interahamwe* and CDR militiamen, the *Impuzamugambi*, underwent military training and received weapons from Jean-Bosco Barayagwiza and Hassan Ngeze, an *Interahamwe* leader.

376. The Appeals Chamber further notes that the Indictment stated that Appellant Barayagwiza had, in 1990, "worked out a plan" to distribute weapons to militiamen with the intent to exterminate the Tutsi population;[888] that in 1991, the Appellant had, in collaboration with others, "planned the killing of Bagogwe Tutsis in Mutura *commune*, Gisenyi *préfecture* and Bugesera" and distributed weapons to *Interahamwe* and *Impuzamugambi* militiamen;[889] and that "starting on 7 April 1994, in Gisenyi, members of the CDR, including Hassan Ngeze, militiamen and military personnel […] distributed weapons".[890]

377. While paragraph 5.17, read in light of the entire Indictment, provided some information about the alleged distribution of weapons, the Appeals Chamber finds that it manifestly lacked specificity as to the dates and locations of the alleged distributions. The indication that the distributions took place between "June 1993 and July 1994" was not specific enough for Appellant Barayagwiza to know what incidents were referred to. The reference to "Gisenyi *préfecture*" was also too imprecise for the Appellant to understand that it was specifically about Mutura. However, there can be no grounds for appeal in regard to the failure to mention the other points listed by the Appellant, since these were either evidentiary matters or mere contextual points.

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[884] Prosecutor's Response to the New Grounds of Appeal, paras. 32-33. See also Confidential Annexes to the Prosecutor's Response to the New Grounds of Appeal raised by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007, 14 March 2007, reproducing Witness AHB's written statement, pp. 10000/A to 10003/A (Registry pagination).
[885] Barayagwiza's Reply to the New Grounds of Appeal, paras. 28-33.
[886] Judgement, para. 954, referring to the factual findings made in para. 730. See also paras. 720-729.
[887] *Ibid.*, para. 1067, referring to para. 954.
[888] Barayagwiza Indictment, para. 5.1.
[889] *Ibid.*, para. 5.22.
[890] *Ibid.*, para. 7.7.

378. The Appeals Chamber will now examine whether Appellant Barayagwiza received timely, clear and coherent information as to the dates and locations of the alleged distribution of weapons.

379. As regards the specific location of the distribution of weapons, the Appeals Chamber notes that the summary of Witness AAJ's anticipated testimony disclosed in the Supporting Material of 14 April 2000,[891] and in the summary of testimonies scheduled by the Prosecutor of 25 September 2000,[892] specifically mentioned Barayagwiza's involvement in the distribution of weapons in Mutura. This echoes the information disclosed in the Supporting Material of 22 October 1997[893] and 28 June 1999.[894] Moreover, the Appellant himself referred to the location in connection with the charge of weapons distribution in one of his motions on the form of the Indictment.[895] Although it was disclosed late to the Appellant, Witness AHB's written statement also made a clear reference to Mutura *commune*.[896] In view of the foregoing, the Appeals Chamber is of the view that Barayagwiza Indictment was cured of its defect as to the location of the distribution of weapons by the timely disclosure of clear and coherent information.

380. As to the date of the distribution of weapons, the Appeals Chamber notes that neither the Supporting Material of 22 October 1997, 28 June 1999 and 14 April 2000, nor the Prosecutor's Pre-Trial Brief, nor the Opening Statement, provided precise information. However, the Chamber notes that Witness AHB referred more precisely to "April 1994" in his written statement disclosed on 29 May 2001,[897] temporal information which was also given in the summary of Witness AHB's anticipated testimony,[898] disclosed in June 2001. As that disclosure was made several months after the trial started, it could not fully cure the defect in the Barayagwiza Indictment.

381. The Appeals Chamber notes that Appellant Barayagwiza had complained about the vagueness of the dates before the Trial Chamber.[899] It was therefore incumbent on the Prosecutor to demonstrate that the Appellant's ability to prepare his defence had not been significantly impaired. The Appeals Chamber considers that the Prosecutor did this. The content of Witness AHB's cross-examination carried out by Counsel for the Appellant[900] and the fact that, in his Closing Brief, the Appellant specifically contested at length AHB's testimony about the distribution of weapons in Mutura *commune*, "a week after the

[891] Supporting Material of 14 April 2000, summary of Witness AAJ's anticipated testimony, para. 5.17, p. 70.
[892] Prosecution's Summary of anticipated testimony of 25 September 2000, p. 3687 (Registry pagination).
[893] Supporting Material of 22 October 1997, para. 3.5, pp. 6-7.
[894] Supporting Material of 28 June 1999, para. 5.17, pp. 73-74 (Witness AAJ).
[895] *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-T, Defence Submissions on the Motion on Defects in the Form of the Indictment, 18 October 1999, p. 10.
[896] Witness AHB's written statement disclosed to the Appellant on 29 May 2001 (See annex to the Prosecutor's Response to the New Grounds of Appeal, Confidential Annex 1, pp. 10003/A to 10000/A (Registry pagination).
[897] Summary of Anticipated Testimony of Additional Prosecution Witnesses for Disclosure to Defence and Judges of Trial Chamber I, 7 June 2001, p. 22381 (Registry pagination).
[898] Annex to the Prosecutor's Response to the New Grounds of Appeal, Confidential Annex 1, pp. 10003/A to 10000/A (Registry pagination).
[899] Objection Based on the Defects in the Form of the Indictment of 19 July 2000, p. 16.
[900] T. 27 November 2001, pp. 160-181 and T. 28 November 2001, pp. 1-93. The Appeals Chamber refers to its analysis *supra* (IV. A. 2. ) of the Appellant's submission in respect of the incompetence of his Counsel.

assassination of President Habyarimana",[901] show that the Appellant's ability to prepare his defence was not significantly impaired. The appeal on this point is dismissed.

### 5. Supervision of roadblocks

382. Appellant Barayagwiza contends that the Trial Chamber relied on the fact that he was supervising roadblocks manned by *Impuzamugambi*, whereas the Indictment gave no detail as to the identity of the CDR members or militiamen manning the said roadblocks or as to the date on which the Appellant had been seen at the roadblocks giving them orders.[902] The Appellant submits that this defect, which he raised before the Trial Chamber, was not cured by the pre-trial filings.[903]

383. The Trial Chamber relied on the fact that Appellant Barayagwiza supervised roadblocks manned by *Impuzamugambi* in finding him guilty of genocide, direct and public incitement to commit genocide, persecution and extermination as crimes against humanity under Articles 6(1) and 6(3) of the Statute.[904]

384. The charge relating to the supervision of roadblocks in Kigali was set out in paragraph 7.3 of the Barayagwiza Indictment:

> After 6 April 1994, Jean-Bosco Barayagwiza supervised roadblocks located between Kiyovu hotel and the *Cercle Sportif de Kigali*, in the neighbourhood in which he resided. He supervised these roadblocks along with a member of the Presidential Guard. Jean-Bosco Barayagwiza instructed the CDR militiamen and members who were manning the roadblocks to eliminate all the Tutsis and Hutu opponents.

385. The Appeals Chamber considers that the Barayagwiza Indictment states with the required degree of precision the crime he was accused of, the nature of the subordinate relationship between the Appellant and his subordinates, the identity of those subordinates and the crimes they were charged with, as well as the identity of the victims[905] and the geographical boundaries within which the crimes were committed. However, the Appeals Chamber concedes that the time period stated may at first sight appear too imprecise.

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[901] Barayagwiza's Closing Brief, p. 191. See also pp. 188-198.

[902] T(A) of 17 January 2007, p. 82. See also the Barayagwiza's Reply to the New Grounds of Appeal, paras. 34-36.

[903] *Idem*. See also Barayagwiza's Reply to the New Grounds of Appeal, para. 35, referring to Objection Based on the Defects in the Form of the Indictment of 19 July 2000. Appellant Barayagwiza also refers to an oral decision of 26 September 2000, T. 26 September 2000, pp. 13-15 ("Oral Decision of 26 September 2000 (Barayagwiza)").

[904] Judgement, paras. 975, 977, 1035, 1065-1067 and 1083. See also para. 954, referring to the factual findings made in para. 719; para. 707 (Witness ABC). Although the Trial Chamber did not rely expressly on those acts in relation to Article 6(3) of the Statute, the Appeals Chamber is of the view that it implicitly referred to them when it stated in para. 977 of the Judgement that Appellant Barayagwiza "supervised his subordinates, the CDR members and *Impuzamugambi* militia, in carrying out the killings and other violent acts". See also paras. 1035, 1066 and 1083.

[905] The Appeals Chamber stresses that where the Prosecution alleges that an accused personally committed the criminal acts in question, it must plead the identity of the victim with the greatest precision. See *Ntagerura et al.* Appeal Judgement, para. 23; *Naletitić and Martinović* Appeal Judgement, para. 58 (*a contrario*); *Kupreškić et al.* Appeal Judgement, paras. 89-90.

386. In his Motion of 19 July 2000 alleging defects in the form of the Indictment, Appellant Barayagwiza contested the lack of specificity as to dates.[906] The Trial Chamber dismissed that allegation in its Oral Decision of 26 September 2000 (Barayagwiza) on the grounds that "the terms and expressions listed in the motion are not such as to deprive the Accused of an understanding of the charges against him".[907]

387. The Appeals Chamber endorses the Trial Chamber's findings in respect of the charge relating to the roadblocks. Considered within the context of the entire chapter in which it was set out ("Statement of facts: other violations of international humanitarian law"), the charge in paragraph 7.3 is understood as being confined to the period April to July 1994.[908] Although that period of time was approximate and relatively long, it was not too imprecise in the Appeals Chamber's view considering the nature of the charge: it was not a question of one or two isolated incidents but repeated acts over a period of time. A review of the Indictment shows that Appellant Barayagwiza knew that he was accused of having supervised the "roadblocks located between Kiyovu hotel and the *Cercle Sportif de Kigali*" during that period. The summaries of the anticipated testimonies of the two witnesses disclosed by the Prosecutor in support of the allegation also made mention of several incidents.[909]

388. The Appeals Chamber considers that the time-frame indicated by the Prosecutor in paragraph 7.3 provided sufficient information for Appellant Barayagwiza to understand the charge against him and to prepare his defence. The appeal on this point is therefore dismissed.

### E. Appellant Ngeze's submissions

389. In his Notice of Appeal, Appellant Ngeze submits that the Trial Chamber erred in: (i) allowing the Prosecutor to amend the Initial Indictment by adding the count of genocide;[910] (ii) dismissing not only his Motion for specificity of the Indictment dated 19 January 2000, but also all of his preliminary objections to defects in the Indictment;[911] and (iii) basing its factual and legal findings on the competition jointly organized by RTLM and *Kangura* in

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[906] Objection Based on the Defects in the Form of the Indictment of 19 July 2000, pp. 17-18. See also *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-T, Defence Brief on the Amendment of the Indictment of 23 October 1997 presented by the Prosecution on 28 June 1999, filed on 19 October 1999, para. 60.

[907] T. 26 September 2000 (Decisions), pp. 13-14:

> In the decision it rendered in *The Prosecutor v. Ferdinand Nahimana*, this Trial Chamber held – and I quote, in substance, page 5 of the decision:
>
> The Trial Chamber considers that the lack of certain information in the allegations of the indictment does not render the indictment defective, provided the Accused is in a position to understand the charges against him. The Chamber adopts the same position in the present case. The terms and expressions listed in the motion are not such as to deprive the Accused of an understanding of the charges against him.
>
> As regards the alleged lack of specificity of dates and locations in the indictment and the role played by the Accused, the Chamber recalls that the indictment should be read in conjunction with the supporting material.

[908] See Barayagwiza Indictment, para. 7.11.

[909] Supporting Material of 14 April 2000, p. 119 (Witnesses FT and ABC).

[910] Ngeze's Notice of Appeal, paras. 13-15.

[911] *Ibid.*, para. 16.

March 1994, whereas this material fact was not pleaded in the Indictment.[912] Each of these submissions will now be considered in turn by the Appeals Chamber.

1. Authorization to amend the Indictment

390. Appellant Ngeze argues that the Trial Chamber erred when, on 5 November 1999, it authorized the Prosecutor to add a count of genocide to the Indictment against him. He first argues that that amendment should not have been authorized, since he did not receive in a timely manner the supporting materials appended to the Prosecutor's motion of 1999 to amend the Indictment ("Annex C")[913] and that he was not therefore able to respond properly to the motion.[914] The Appeals Chamber understands that the Appellant, despite the confusion in his argument, also alleges a contradiction between the Decision of 5 November 1999 (granting leave to amend the Indictment)[915] and an oral decision of 26 September 2000[916] (dismissing the preliminary objections raised by the Appellant)[917] on the consideration of said supporting material by the Trial Chamber.[918] The Appeals Chamber further understands that the Appellant denounces the fact that the Trial Chamber in its Decision of 5 November 1999 authorized the addition of the count of genocide notwithstanding that it had been dismissed by the Confirming Judge and that the Prosecutor was presenting the same "material facts" in support of the Amended Indictment.[919]

391. The Appeals Chamber notes that Appellant Ngeze has referred only in very general terms to the prejudice he allegedly suffered from the fact that the supporting materials were not disclosed to him until 5 November 1999. In its Decision of 5 November 1999, the Trial Chamber held that the disclosure of supporting material "is required only if the proposed amendment is granted and if, pursuant to Rule 50, the accused makes another initial appearance on the new charges".[920] The Trial Chamber further held that, "pursuant to Rule 72(B)(ii) of the Rules, the Defence has the opportunity to raise any objections […] within sixty days following disclosure of the supporting material".[921] In any event, the Trial

[912] *Ibid.*, paras. 17-21.
[913] *The Prosecutor v. Hassan Ngeze*, Case No. ICTR-97-27-I, Prosecutor's Request for Leave to File an Amended Indictment, 1 July 1999, and Brief in support of the Prosecutor's Request for Leave to File an Amended Indictment, 14 October 1999 (together "Request for Leave to File an Amended Indictment").
[914] Ngeze Appellant's Brief, para. 68.
[915] *The Prosecutor v. Hassan Ngeze*, Case No. ICTR-97-27-I, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 5 November 1999 ("Decision of 5 November 1999").
[916] T. 26 September 2000 (Decisions), pp. 2-8 ("Oral Decision of 26 September 2000 (Ngeze)").
[917] *Ibid*., pp. 3-4.
[918] Ngeze Appellant's Brief, paras. 69-70. The Appellant argues that the Oral Decision of 26 September 2000 (Ngeze) stated that the Decision of 5 November 1999 was based on an extensive review of the documents annexed to the motion, whereas the Trial Chamber stated in the Decision of 5 November 1999 that it did not take into account Annex C.
[919] Ngeze Appellant's Brief, paras. 71-74, referring to *The Prosecutor v. Hassan Ngeze*, Case No. ICTR-97-27-I, Decision to Confirm the Indictment, 3 October 1997, in which Judge Aspegren dismissed the count of genocide on grounds that the supporting material did not provide reasonable grounds for believing that the Accused himself had committed genocide. The Appellant argues that a comparison of the 1997 and 1999 Indictments showed that the same material facts had been presented, albeit in a different way, in support of the count of genocide dismissed by the Confirming Judge. See also Ngeze's Brief in Reply, para. 65: "a study of both indictments of 1997 and 1999 does not show any particular reasons that compelled the Trial Chamber to reconsider the decision to confirm the indictment of 3 October 1997 and to amend the indictment".
[920] Decision of 5 November 1999, para. 6.
[921] *Ibid.*, para. 8.

Chamber indicated that it had not taken account of Annex C, but, rather, had based its decision on the oral arguments and written submissions presented by Defence and Prosecution.[922] The Appellant has failed to give any indication of how the Trial Chamber erred or how its decision in practice affected the preparation of his defence. The appeal on this point is therefore dismissed.

392. Furthermore, the Appeals Chamber is of the view that, while the Trial Chamber indicated in its Oral Decision of 26 September 2000 (Ngeze) that it had relied "on an extensive review of the documents annexed to the motion" in rendering the Decision of 5 November 1999[923] – whereas in its Decision of 5 November 1999 it noted that it had not taken account of the supporting material in Annex C in granting leave to amend the Indictment[924] – that in itself does not imply a contradiction, much less an invalidation, of the Decision of 5 November 1999. In effect, the Appeals Chamber understands the Trial Chamber's remark as an assurance given to the parties that their submissions were duly taken into consideration. The manner in which that assurance was formulated might possibly be considered infelicitous in the circumstances of the case, but it cannot be reasonably construed as a denial of the statement that Annex C was not take into account. Moreover, the Appeals Chamber notes that, in its Oral Decision of 26 September 2000 (Ngeze), the Trial Chamber laid strong emphasis on the draft of the Amended Indictment presented in Annex B. It follows that Appellant Ngeze's argument regarding the disputed supporting material lacks merit; moreover, he has failed to prove the prejudice that he claims to have suffered. The appeal on this point is dismissed.

393. Lastly, the Appeals Chamber dismisses the Appellant's argument that the Trial Chamber should not have granted leave in 1999 to add the count of genocide to the Indictment, since that count had been dismissed in 1997 by the Confirming Judge. Such dismissal did not preclude the Trial Chamber from subsequently authorizing the amendment of the Indictment, in light of new circumstances. The Appellant has not shown that the Trial Chamber erred.

### 2. Rejection of Appellant Ngeze's motions relating to the Indictment

394. Appellant Ngeze submits that the Trial Chamber erred in law, in its Decision of 16 March 2000,[925] in rejecting his Motion for a Bill of Particulars.[926] He contends that the

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[922] *Ibid.*, para. 7.

[923] T. 26 September 2000 (Decisions), pp. 3-4:

> With regard to the non-compliance of the amended indictment with the decision of the Trial Chamber dated 5 November 1999, the Trial Chamber notes that its decision of 5 November 1999 granting leave to amend the indictment was based on an extensive review of the documents annexed to the motion, and the Chamber examined all the relevant issues. The proposed amended indictment was one of the documents annexed as Exhibit B. Therefore, by granting the amendment to add three new counts to the existing indictment, the Chamber has necessarily granted the inclusion of new allegations.

[924] Decision of 5 November 1999, para. 7.

[925] *The Prosecutor v. Hassan Ngeze*, Case No. ICTR-97-27-I, Decision on the Defence's Motion for Bill of Particulars, 16 March 2000.

[926] Ngeze Appellant's Brief, paras. 77-78, referring to *The Prosecutor v. Hassan Ngeze*, Case No. ICTR-97-27-I, Motion for Bill of Particulars, 19 January 2000. See also Ngeze Brief in Reply, para. 67, in which the Appellant Ngeze calls into question the impartiality of the Trial Chamber.

Trial Chamber should have itself examined the Amended Indictment. He further argues that the Trial Chamber's decision to consider the Indictment together with the supporting material was also an error of law.[927] Lastly, he contends that the rejection of all of his preliminary objections on the form of the Indictment caused him prejudice.[928]

395. The Appeals Chamber notes that at no time did Appellant Ngeze attempt to show that the errors he alleges affected the findings in the Judgement. A simple dismissal of his objections cannot amount to proof of an error invalidating the Trial Chamber's decision or of prejudice affecting the preparation of the Appellant's defence. The Appeals Chamber would also recall that an appellant cannot hope to see his appeal succeed by simply repeating or referring to arguments that did not succeed at trial.[929] By not supporting his claims with clear arguments, the Appellant has failed to show any need for intervention by the Appeals Chamber. The appeal on these points is dismissed as clearly lacking merit.

### 3. The competition of March 1994

396. Appellant Ngeze criticizes the Trial Chamber for relying on a competition jointly organized by RTLM and *Kangura* in March 1994 in order to convict him, whereas this material fact was not pleaded in his Indictment.[930] He submits that he was informed of said material fact only on 14 May 2002 through the testimony of Expert Witness Kabanda, that is, more than one and half years after the trial opened, and without there being any reference to the competition in the Expert's report.[931] According to the Appellant, the Prosecutor moreover admitted at the hearing of 11 September 2000 that he had no knowledge of the report's content or of the testimony expected from the expert witness, thus showing that the Prosecutor had no intention of relying on the competition in order to support the charges against the Appellant.[932] According to the Appellant, this defect in the Indictment substantially affected his ability to prepare his defence and undermined the fairness of the trial.[933]

397. The Prosecutor contends that Appellant Ngeze had been duly informed of the Prosecutor's intention to rely on the competition as an operation aiming to bring back into circulation all of *Kangura*'s earlier articles.[934] In support of his assertion, the Prosecutor refers (i) to the Expert Report of Messrs Chrétien, Dupaquier, Kabanda and Ngarambe,[935] and (ii) to the fact that the list of "Extracts of *Kangura* Publications to be used at trial," attached to his Pre-Trial Brief, referred to issues Nos. 58 and 59, which mentioned the competition.[936] The

[927] Ngeze Appellant's Brief, paras. 78-81, referring to the Oral Decision of 26 September 2000. See also Ngeze Brief in Reply, para. 66.
[928] *Ibid.*, paras. 85-86.
[929] See *Kajelijeli* Appeal Judgement, para. 6.
[930] Ngeze Appellant's Brief, paras. 89, 95-99. In reply, the Appellant maintains that, even though he raised no specific objection in this respect, "the material issue of the competition goes to the root of the case and could not be considered in the same manner as minor defect" (Ngeze Brief in Reply, para. 6).
[931] *Ibid.*, paras. 96, 101, 103-104.
[932] *Ibid.*, para. 102.
[933] *Ibid.*, paras. 89-95, 104-105. See also Ngeze Brief in Reply, paras. 10, 12-16.
[934] Respondent's Brief, para. 64.
[935] *Ibid.*, para. 62, referring to Chapter 14, p. 5 of the Expert Report of Chrétien, Dupaquier, Kabanda and Ngarambe.
[936] Respondent's Brief, para. 63, referring to items 30 and 31 of the list of "Extracts of Kangura Publication to be used at trial," p. 17163*bis* (Registry numbering), p. 3249J for the English original. During the appeal

Prosecutor argues that the Appellant – who is raising this matter for the first time on appeal – has failed to establish that the preparation of his defence suffered. On the contrary, according to the Prosecutor, it is clear from the case documents as a whole,[937] and particularly from Ngeze's Closing Brief,[938] that the Appellant was prepared on the issue of the competition, and that he even tried to use it in order to dissociate himself from RTLM. At the appeal hearings, the Prosecutor slightly modified his approach, arguing that the competition was not a material fact to the charges against Appellant Ngeze, but simply one item of evidence amongst others, intended to establish direct and public incitement to commit genocide or conspiracy to commit genocide.[939]

398. The Appeals Chamber notes that the Trial Chamber found the Appellant Ngeze guilty:

- Of genocide, *inter alia* "as founder, owner and editor of *Kangura*, a publication that instigated the killing of Tutsi civilians";[940]

- Of direct and public incitement to commit genocide on grounds that "Ngeze used the publication to instill hatred, promote fear, and incite genocide";[941]

- Of conspiracy to commit genocide, "through personal collaboration as well as interaction among institutions within [Nahimana, Ngeze and Barayagwiza's] control, namely RTLM, *Kangura* and CDR";[942]

- Of persecution as a crime against humanity because of the "content of *Kangura* advocating ethnic hatred or inciting violence".[943]

399. Although the Trial Chamber does not indicate the *Kangura* issues which, specifically, underlie these guilty findings, it is apparent that it relies on issues published between 1990 and 1994. The Appeals Chamber understands this in light of (1) the Trial Chamber's persistent emphasis that the March 1994 competition had "brought back" the back issues of *Kangura* into circulation;[944] (2) the fact that, after finding that the crime of direct and public

hearings, the Prosecutor added that Nos. 58 and 59 of *Kangura* had been disclosed to the Appellant in one of the files handed to the Defence on 23 February 2000; T. 18 January 2007, p. 18.

[937] In this regard the Prosecutor cites the fact that Appellant Ngeze made no objection whatever to the presentation of evidence relating to the competition and that Expert Witness Marcel Kabanda was heard at length on the subject of the competition without Ngeze's Defence ever requesting an adjournment in order to prepare. The Prosecutor adds that the cross-examination of Expert Witness Marcel Kabanda was adjourned for two months after the first day and that, if the issue of the competition had troubled the Defence, it could have used the intervening period to conduct any necessary investigations (Respondent's Brief, para. 66). The Prosecutor further recalls that the Appellant failed to cross-examine the expert witness on this point and that, when he himself was examined by the Prosecutor, Appellant Ngeze admitted that the competition had been held at the time in question, and did not deny that it was intended to re-circulate certain messages. (Respondent's Brief, paras. 67-68, referring to T. 3 April 2003, pp. 33-34).

[938] Respondent's Brief, paras. 69-73, referring to Ngeze's Closing Brief, paras. 329, 330, 486-487.

[939] T. 18 January 2007, pp. 17-20.

[940] Judgement, para. 977A.

[941] *Ibid.*, para. 1038.

[942] *Ibid.*, para. 1055.

[943] *Ibid.*, para. 1084.

[944] *Ibid.*, para. 1018, referring to para. 257. See also paras. 247-256.

incitement to commit genocide continued until the completion of the acts contemplated,[945] the Trial Chamber considered that "the publication of *Kangura*, from its first issue in May 1990 through its March 1994 issue [...], falls within the temporal jurisdiction of the Tribunal to the extent that the publication is deemed to constitute direct and public incitement to genocide";[946] and (3) the express references to issues 6, 26 and 40, published in December 1990, November 1991 and February 1993 respectively, as examples of incitement to commit genocide.[947]

400. On the other hand, the competition itself was not held to be one of the constituent elements of the crimes of which Appellant Ngeze was found guilty. Thus, it was not *per se* identified as an incitement to commit genocide. While it may have been used to establish the Appellant's specific intent or the existence of concerted action to commit genocide, that was simply evidence. The competition was nevertheless central to the conviction of the Appellant, on account of *Kangura,* for genocide, persecution as crime against humanity and public and direct incitement to commit genocide.

401. Thus, in regard to the convictions for genocide and persecution, the Appeals Chamber notes that the Trial Chamber felt itself free, despite its circumscribed temporal jurisdiction, to base those convictions on the pre-1994 issues of *Kangura*,[948] apparently on the ground that "the competition was designed to direct participants to any and to all of these issues of the publication and that in this manner in March 1994 *Kangura* effectively and purposely brought these issues back into circulation".[949]

402. Regarding the crime of direct and public incitement to commit genocide, the Trial Chamber relied only incidentally on the competition: for the Chamber, it was above all the continuing nature of the crime which justified taking account of issues published prior to 1 January 1994.[950] The Appeals Chamber will explain later, in the chapter on the crime of direct and public incitement to commit genocide, that the Trial Chamber was wrong in defining the crime as a continuous one.[951] Consequently, the Appeals Chamber is of the view that the issue of the competition, deemed secondary by the Trial Chamber, is also of prime importance to the crime of direct and public incitement to commit genocide.

403. In the Ngeze Indictment, reference was made not only to the 1994 *Kangura* issues, but to all issues of the newspaper: paragraphs 5.4, 5.5, 6.7, 6.8, 6.10, 6.11, 6.12 and 6.15 to which reference is made regarding the counts of genocide, direct and public incitement to commit genocide, and persecution,[952] clearly mention pre-1994 *Kangura* issues.[953]

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[945] *Ibid*, paras. 104 and 1017. The Trial Chamber makes a similar finding on the crime of conspiracy to commit genocide. See Judgement, paras. 104, 1017 and 1044.
[946] *Ibid.*, para. 1017.
[947] *Ibid.*, paras. 950, 1028, 1036. See also para. 1023. Certain passages from issues Nos. 26 and 40 are also mentioned as a demonstration of Appellant Ngeze's genocidal intent: Judgement, paras. 962 and 968, referring to paras. 160-181.
[948] The conviction for the crime of genocide appears to be based in part on articles published prior to 1994: see Judgement, paras. 950, 953 and 977A. The same goes for the conviction for the crime of persecution: see Judgement, para. 1084, referring erroneously to paragraphs 977-978 (the correct reference being to paragraph 977A).
[949] Judgement, para. 257. See also paras. 247-256.
[950] *Ibid.*, paras. 1017 and 1018, referring to paras. 100-104 and 257.
[951] See *infra* XIII. B. 2. (b) .
[952] See Ngeze Indictment, Count 2 (pp. 24-25), Count 4 (pp. 25-26) and Count 6 (pp. 26-27).

404. As explained in the chapter on temporal jurisdiction, the Appeals Chamber is of the view that the provisions on the temporal jurisdiction of the Tribunal require the alleged crime and acts or omissions incurring the responsibility of an accused to have occurred in 1994.[954]

405. Hence, Appellant Ngeze could legitimately understand that statements in the pre-1994 issues of *Kangura* mentioned in the Indictment could not be regarded as material facts supporting his criminal responsibility for the charges against him.[955] If the Prosecutor had intended to rely on these issues as material elements of the Appellant's responsibility, then it was his duty to inform the Accused of the legal basis that would enable the Judges to consider them without contravening the temporal limits on the Tribunal's jurisdiction. However, the Appeals Chamber notes that no reference is made to the competition in Ngeze's Indictment: nowhere does the Prosecutor state the reasons that impelled him to the view that *Kangura* issues published prior to 1 January 1994 could be regarded as material elements of the Appellant's responsibility. The Appeals Chamber accordingly finds that the Prosecutor failed in his duty to state a material fact on which the charges against the Accused were based.

406. The Appeals Chamber is of the opinion that the defect in the Ngeze Indictment is not one that could be cured otherwise than by a formal amendment of the Indictment. The fact that the competition purportedly "brought back into circulation" the pre-1994 issues is, in itself, an element which enabled the Prosecutor significantly to expand the charges against the Appellant by adding, on the basis of the pre-1994 issues of *Kangura*, that Appellant Ngeze was guilty, in 1994, of instigating genocide (within the meaning of Article 6(1) of the Statute), of direct and public incitement to commit genocide (Article 2(3)(c) of the Statute), and of persecution. Thus *Kangura* issues published and distributed well outside the Tribunal's temporal jurisdiction suddenly, during the testimony of a single expert witness, became potential bases for conviction. However, as the Appeals Chamber has emphasized, when the Prosecutor relies on material facts which are not stated in the Indictment and, which on their own, could constitute distinct charges, which is the case here, the Prosecutor must seek leave to amend the Indictment in order to add the new material facts:

> the Appeals Chamber stresses that the possibility of curing the omission of material facts from the indictment is not unlimited. Indeed, the "new material facts" should not lead to a "radical transformation" of the Prosecution's case against the accused. The Trial Chamber should always take into account the risk that the expansion of charges by the addition of new material facts may lead to unfairness and prejudice to the accused. Further, if the new material facts are such that they could, on their own, support separate charges, the Prosecution should seek leave from the Trial Chamber to amend the indictment and the

[953] Paragraphs 5.4 and 6.7 refer to the "Ten Commandments of the Bahutus" published in issue No. 6 of December 1990 as a call to show "hatred for the Tutsi minority" and " persecute Tutsi women"; paragraph 5.5 refers to *Kangura* issues published "Between May 1990 and December 1994"; paragraph 6.8 makes reference to the issue of December 1990; paragraph 6.10 talks of lists published "from the first issues" of *Kangura*; paragraphs 6.11 and 6.12 mention the issues published in December 1990 and February 1993; paragraph 6.15 mentions the activities of *Kangura* "between 1990 and 1994".

[954] See *supra* VIII. B. 2.

[955] The Appeals Chamber notes, moreover, that paragraph 2.1 of Ngeze's Indictment states that "[t]he crimes referred to in this indictment took place in Rwanda between 1 January and 31 December 1994".

> Trial Chamber should only grant leave if it is satisfied that it would not lead to unfairness or prejudice to the Defence.[956]

In failing to mention the competition and its impact, the Ngeze Indictment could only be understood as being confined to criminal acts perpetrated in 1994: references to the back issues of *Kangura* could legitimately be regarded by the Accused as evidence or contextual materials.

407. Having failed to seek leave to amend the Indictment in order to introduce therein the fact that a competition allegedly "brought back into circulation" issues of *Kangura* published prior to 1 January 1994, the Prosecutor could not prosecute Appellant Ngeze on account of those publications. Consequently, the Appeals Chamber is of the view that the Trial Chamber erred in convicting the Appellant on the basis of *Kangura* issues published outside the temporal jurisdiction of the Tribunal. The Appeals Chamber allows the Appellant's appeal on this point and accordingly sets aside his convictions for genocide, direct and public incitement to commit genocide and persecution based on the pre-1994 issues of *Kangura*.

408. The Appeals Chamber is in any event not persuaded that Appellant Ngeze could be convicted of genocide, direct and public incitement to commit genocide and persecution on the basis of pre-1994 issues of *Kangura* "brought back into circulation"[957] by the competition of March 1994.

409. First, the Appeals Chamber is of the opinion that there was not enough evidence to demonstrate that all the pre-1994 issues of *Kangura* had been brought back into circulation or were available in March 1994. The Appeals Chamber notes in the first place the Prosecutor's admission concerning the lack of direct evidence of republication in 1994.[958] Second, even though Expert Witness Kabanda testified that past issues of *Kangura* "were available",[959] the only evidence adduced in this regard is "a reference in the international edition *Kangura* No. 9 to past issues *Kangura* No. 33 [edition in Kinyarwanda] and *Kangura* No. 8 [international edition in French], encouraging readers who missed these issues to contact a magazine seller".[960] As the international edition *Kangura* No. 9 was published at the beginning of 1992,[961] this is not enough to conclude that all the *Kangura* issues were available

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[956] *The Prosecutor* v. *Théoneste Bagosora et al,* Case No. ICTR-98-41-AR 73, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence*,* 18 September 2006, para. 30 (footnotes omitted). See also *Rutaganda* Judgement, para. 303:

> Indeed, the Appeals Chamber is of the opinion that the right of the accused to be informed of the nature of the charge against him and the right to have adequate time for the preparation of his defence imply that an accused must be able to identify the criminal acts and conduct alleged in the indictment in all circumstances. Before holding that an event charged is immaterial or that there are minor discrepancies between the indictment and the evidence presented at trial, a Chamber must normally satisfy itself that no prejudice shall, as a result, be caused to the accused. An example of such prejudice is the existence of inaccuracies likely to mislead the accused as to the nature of the charges against him (footnotes omitted).

[957] Judgement, para. 257. See also paras. 1018 and 1059.
[958] T(A) 18 January 2007, p. 6.
[959] Judgement, para. 249.
[960] *Idem*.
[961] See Prosecution Closing Brief, p. 178.

or had been put back into circulation in March 1994.[962] Finally, while the Trial Chamber states at paragraph 251 of the Judgement that "Kabanda testified that the *Kangura* competition was publicized on RTLM in March 1994, encouraging listeners to participate in the competition and calling on listeners to hurry and buy issues of *Kangura* so they could send their responses", it provides no reference to Expert Witness Kabanda's report or to his testimony, and the transcripts of the RTLM broadcasts which it subsequently quotes do not demonstrate that RTLM encouraged its readers to buy pre-1994 issues of *Kangura*; they were only encouraged to buy Nos. 58, 59 and 60 in order to participate in the *Kangura* competition.[963]

410. It could be that the competition had the effect of repeating in March 1994 criminal statements made in pre-1994 issues of *Kangura*. Nevertheless, the Appeals Chamber considers that the matter need not be decided. Even if this were the case, it could not support a conviction for *direct* and public incitement to commit genocide in 1994. Even if, in attempting to find the answers to the questions asked in the competition, the participants happened to re-read certain extracts from *Kangura* capable of inciting the commission of genocide, this could only constitute an indirect incitement to genocide.[964] Further, concerning the convictions for genocide and crimes against humanity, which require evidence of substantial contribution,[965] the Appeals Chamber is not persuaded that a reasonable trier of fact could find, on the evidence, that, by inviting the participants to read pre-1994 issues of *Kangura*, the competition contributed significantly to acts of genocide or crimes against humanity in 1994. The Appeals Chamber therefore finds that the Trial Chamber erred in basing the convictions of Appellant Ngeze on pre-1994 issues of *Kangura* on the ground that these issues were re-circulated as a result of the competition of March 1994.

## X. APPELLANT NGEZE'S ALIBI AND ASSESSMENT OF EVIDENCE REGARDING THE EVENTS OF 7 AND 8 APRIL 1994 IN GISENYI

411. Appellant Ngeze's third ground of appeal raises errors of law and fact in relation to the dismissal of his alibi as well as to the credibility of Prosecution witnesses having testified on the events of 7 and 8 April 1994 in Gisenyi.[966]

### A. The Trial Chamber's findings

412. At trial, Appellant Ngeze submitted that he could not have committed certain criminal acts on 7 and 8 April 1994 because he was in military custody from 6 April to 9 April 1994.[967] The Trial Chamber considered in this respect that the evidence produced by Appellant Ngeze

[962] At most, a reasonable trier of fact could find that at the time of publication of the international edition No. 9 of *Kangura* (at the beginning of 1992), No. 33 (the Kinyarwanda edition) and No. 8 (the international edition in French) – both of which came out shortly before the international edition No. 9 – were still available at news-stands.
[963] See transcripts of the broadcasts quoted in paragraphs 251 and 252 of the Judgement. See also Expert Report of Chrétien, Dupaquier, Kabanda and Ngarambe, Chapter 14, pp. 5-6.
[964] In particular, no evidence has been introduced to demonstrate that the answers to the questions asked were to be found in articles directly and publicly inciting to commit genocide.
[965] With respect to crimes against humanity, Chapter XV of the present Judgement explains that the publication of *Kangura* could at most have instigated extermination or persecution, and that evidence of a substantial contribution was required.
[966] Ngeze Notice of Appeal; paras. 56-70, Ngeze Appellant's Brief, paras. 182-216; Ngeze Brief in Reply, paras. 69-74.
[967] See Ngeze Appelant's Brief, para. 182.

and the testimonies of Defence witnesses were "riddled with inconsistencies".[968] In particular, the Trial Chamber considered that "[t]he Defence witnesses are also thoroughly inconsistent with regard to dates on which Ngeze was arrested and released in April 1994",[969] that they did not have "evidence other than hearsay that Ngeze was arrested at all [and that] their sources of information were vague, with the exception of three witnesses who learned of the arrest from Ngeze himself".[970] The Trial Chamber concluded that the alibi was not credible and preferred to accept the testimony of Prosecution witnesses, adding that, "even if Ngeze had been arrested on 6 or 7 April, depending on the time of his arrest and the length of his detention, which could have been a few hours, he would not have been precluded from participation in the events described by the Prosecution witnesses".[971] The Trial Chamber finally concluded:

> The Chamber finds that Hassan Ngeze ordered the *Interahamwe* in Gisenyi on the morning of 7 April 1994 to kill Tutsi civilians and prepare for their burial at the *Commune Rouge*. Many were killed in the subsequent attacks that happened immediately thereafter and later on the same day. Among those killed were Witness EB's mother, brother and pregnant sister. Two women, one of whom was Ngeze's mother, inserted the metal rods of an umbrella into her body. The attack that resulted in these and other killings was planned systematically, with weapons distributed in advance, and arrangements made for the transport and burial of those to be killed.
>
> The Chamber finds that Ngeze helped secure and distribute, stored, and transported weapons to be used against the Tutsi population. He set up, manned and supervised roadblocks in Gisenyi in 1994 that identified targeted Tutsi civilians who were subsequently taken to and killed at the *Commune Rouge*. Ngeze often drove around with a megaphone in his vehicle, mobilising the population to come to CDR meetings and spreading the message that the *Inyenzi* would be exterminated, *Inyenzi* meaning, and being understood to mean, the Tutsi ethnic minority. At Bucyana's funeral in February 1994, Ngeze said that if President Habyarimana were to die, the Tutsi would not be spared.[972]

The Trial Chamber declared the Appellant guilty of genocide, direct and public incitement to commit genocide, as well as of extermination and persecution as crimes against humanity, *inter alia* on the basis of these factual findings.[973]

### B. Errors alleged by Appellant Ngeze in relation to the dismissal of his alibi

413. Appellant Ngeze asserts that the Trial Chamber erred in law in rejecting his alibi without having ensured that an investigation had been undertaken to check it.[974] He also invokes several errors of law and of fact affecting the finding in the Judgement regarding his alibi.[975]

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[968] Judgement, para. 826.
[969] *Ibid.*, para. 828.
[970] Judgement, para. 828.
[971] *Ibid.*, para. 829.
[972] *Ibid.*, paras. 836-837.
[973] *Ibid.*, paras. 955, 956, 977A , 1039, 1068 (erroneously referring to para. 954 instead of paras. 955 and 956) and 1084.
[974] Ngeze Appellant's Brief, paras. 186-195.
[975] *Ibid.*, paras. 196-214.

414. Before considering in turn the various errors alleged by the Appellant, the Appeals Chamber notes that the Trial Chamber correctly enunciated the law applicable to alibi in paragraph 99 of the Judgement, which reads as follows:

> With respect to alibi, the Chamber notes that in Musema, it was held that "[i]n raising the defence of alibi, the Accused not only denies that he committed the crimes for which he is charged but also asserts that he was elsewhere than at the scene of these crimes when they were committed. The onus is on the Prosecution to prove beyond a reasonable doubt the guilt of the Accused. In establishing its case, when an alibi defence is introduced, the Prosecution must prove, beyond any reasonable doubt, that the Accused was present and committed the crimes for which he is charged and thereby discredit the alibi defence. The alibi defence does not carry a separate burden of proof. If the defence is reasonably possibly true, it must be successful"[footnote omitted].

1. Should the Trial Chamber have required the alibi to be investigated?

415. Appellant Ngeze first challenges the Trial Chamber's finding that the Defence evidence was not credible without evidence that an investigation of his alibi had been carried out by the Prosecutor.[976] According to the Appellant, as long as he gave particulars of where he was at the relevant time and the reasons for his being away from the place of his residence as required under Rule 67(A)(ii)(a) of the Rules, the onus was on the Prosecutor to enquire into his version of the facts in order to verify his alibi,[977] that is to say, to verify with the military authorities concerned whether or not he had been in their custody and whether it would have been possible for him to have committed the crimes charged. According to the Appellant, the Trial record contains no evidence of such investigation having been made by the Prosecutor, and it was "therefore not possible to conclude that the case of the accused if investigated would not have cast doubt on the reliability of the [P]rosecution's case".[978]

416. In his Brief in Reply, Appellant Ngeze adds that he made every effort to produce evidence of his incarceration, but failed due to his limited resources, explaining that the evidence in question was in the custody of Rwandan authorities, that the military personnel involved were detained at the UNDF-Arusha Detention Centre, and that the Prosecutor was in a better position than the Defence to collect the said evidence.[979] He further points out that the Prosecutor is not simply "an advocate" but also a "minister of justice", who does have the obligation to investigate exonerating circumstances.[980]

417. The Appeals Chamber recalls that, in raising an alibi defence, the defendant is claiming that, objectively, he was not in a position to commit the crime.[981] It is for the accused to decide what line of defence to adopt in order to raise doubt in the mind of the judges as to his responsibility for the offences charged, in this case by producing evidence tending to support or to establish the alleged alibi.[982] The only purpose of an alibi is to cast reasonable doubt on the Prosecutor's allegations, which must be proven beyond reasonable

[976] *Ibid.*, para. 195.
[977] *Ibid.*, para. 186, invoking several judgements from the Supreme Court of Nigeria to support his argument.
[978] *Ibid.*, para. 188.
[979] Ngeze Brief in Reply, paras. 69-70.
[980] *Ibid.*, para. 71.
[981] *Kayishema and Ruzindana* Appeal Judgement, para. 106. See also *Niyitegeka* Appeal Judgement, para. 60; *Musema* Appeal Judgement, para. 200.
[982] *Musema* Appeal Judgement, para. 202; *Kayishema and Ruzindana* Appeal Judgement, paras. 110-111.

doubt. In alleging an alibi, the accused merely obliges the Prosecution to demonstrate that there is no reasonable likelihood that the alibi is true. In other words, the Prosecution must establish beyond a reasonable doubt that, "despite the alibi, the facts alleged are nevertheless true".[983]

418. There is thus no obligation on the Prosecution to investigate the alibi. Therefore, the Trial Chamber did not commit the error alleged by the Appellant in rejecting his alibi without having checked whether the Prosecutor had enquired of the military authorities whether or not the Appellant was in their custody, and whether it would have been possible for him to commit the crimes charged notwithstanding the fact that he was in military custody. This first limb of this ground of appeal is therefore dismissed.

2. Did the Trial Chamber reverse the burden of proof in regard to the alibi ?

419. Appelant Ngeze contends secondly that the Trial Chamber erred in law in paragraph 827 of the Judgement and reversed the burden of proof, requiring him to prove his innocence and establish his alibi beyond a reasonable doubt, thereby failing to apply the principle that any doubt should benefit the accused.[984]

420. The Appeals Chamber notes that Appellant Ngeze does not substantiate his allegation that in paragraph 827 of the Judgement the Trial Chamber reversed the burden of proof and required him to prove his innocence. Paragraph 827 reads as follows:

> Despite a specific request from the Chamber, Ngeze was unable to provide simple information relating to the alibi, namely the dates of and reasons for his arrests. He merely stated that he had been arrested eight times from April to June 1994. This response does not in any way substantiate the alibi. Moreover, it differs significantly from the information on the internet website bearing Ngeze's name, which describes a number of short overnight arrests in April and does not mention his arrest from 6-9 April 1994. The evidence indicates that Ngeze controls this website, as there is information on it that could only have come from him and as he lists the address of the website on all his correspondence. The Chamber notes that Counsel for Ngeze expressed concern in December 2002 that Ngeze was putting confidential information on the internet.

The Trial Chamber thus notes that the Appellant was unable to provide simple information regarding the dates and circumstances of his alleged arrests between April and June 1994,[985] and finds that he had failed to raise any reasonable doubt with respect to his participation in the events of 7 and 8 April 1994 in Gisenyi. The Appeals Chamber considers that, in itself, the Trial Chamber's request for particulars and finding in no way amounted to requiring the Appellant to prove his alibi beyond reasonable doubt. This second limb of this ground of appeal is therefore dismissed.

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[983] *Musema* Appeal Judgement, para. 202. See also *Limaj et al.* Appeal Judgement, para. 63; *Kamuhanda* Appeal Judgement, para. 167; *Kajelijeli* Appeal Judgement, paras. 41-42.

[984] Ngeze Appellant's Brief, paras. 196, 200, 202, 205 and 206. See also paras. 208-210, where the Appellant recalls that, in putting forward an alibi, the only burden on him was to produce evidence capable of raising a reasonable doubt on the Prosecution's case, without having to prove the alibi in question.

[985] See Judgement, para. 806.

### 3. The finding that the alibi was not credible

421. Appellant Ngeze contends thirdly that the Trial Chamber erred in law and in fact in holding in paragraph 829 of the Judgement that the defence of alibi was not credible, since (i) this finding lacks motivation,[986] (ii) he had cast reasonable doubt on the Prosecution evidence,[987] and (iii) in paragraph 875 of the Judgement the Trial Chamber had accepted as a possibility the Prosecutor's claim that he had forged the letter of 10 April 1994.[988]

422. The Prosecutor responds that "Ngeze's overall story is incredible and inconsistent and it is contradicted by the proven facts of this case"[989] and that "Ngeze does not demonstrate that the Trial Chamber manifestly erred or that consideration of the entire evidence would have led a reasonable trier of fact to reach a different conclusion".[990] He asserts that the Trial Chamber rightly considered that the evidence of alibi for 7 April 1994 was riddled with inconsistencies[991] and basically hearsay.[992] He stresses that, to the contrary, credible evidence supports the Prosecution's case.[993] Finally, he submits that the Appellant has not shown any reason why the Trial Chamber should have attached more weight to the letter of 10 April 1994, in light of the serious questions raised regarding its authenticity.[994]

423. The Appeals Chamber notes that, contrary to the Appellant's assertion, the Trial Chamber sets out in paragraphs 826 to 829 of the Judgement the reasons behind its finding that Appellant Ngeze's alibi was not credible. The Trial Chamber evokes inconsistencies in the Appellant's testimony itself and in those of Defence witnesses, as well as "the unreliable nature and source of the information to which they testified".[995] Furthermore, it is clear that the Trial Chamber took account of the Prosecution's evidence in concluding that the Appellant's alibi for 7 April 1994 was not credible.[996]

424. With respect to inconsistencies within the Appellant's testimony itself, the Trial Chamber detailed them in paragraphs 826 and 827 of the Judgement. These paragraphs must be read in conjunction with paragraphs 875 to 878, in which the Trial Chamber explains the reasons why it gives no credit to Appellant Ngeze's testimony. As to the alibi for the period 6 to 9 April 1994, the Trial Chamber explains:

> Ngeze testified that he was arrested on the evening of 6 April and released on 9 April. The letter to Colonel Nsengiyumva, which has language suggesting it was written on 8 April, caused Ngeze to change his testimony to say that he had written it on the evening of 9 April, rather than on 10 April, as the letter states and as he initially testified. In counting

[986] Ngeze Appellant's Brief, para. 204.
[987] *Ibid.*, paras. 196-198, 213-214. See also para. 215, where the Appellant appears to argue that the testimonies of the Defence witnesses all concur.
[988] *Ibid.*, para. 204. See also para. 203, citing para. 826 of the Judgement.
[989] Respondent's Brief, para. 255.
[990] *Ibid.*, para. 261. See also para. 269.
[991] *Ibid.*, para. 262, referring to paras. 808 and 828 of the Judgement.
[992] *Ibid.*, para. 263, referring to para. 828 of the Judgement.
[993] *Ibid.*, paras. 264-265.
[994] *Ibid.*, paras. 266-268.
[995] Judgement, para. 829.
[996] *Ibid.*, para. 825 and 829.

> the two days from 6 April, in an apparent effort to stretch to 9 April, Ngeze also mentioned 7 April as an arrest date.[997]

The Trial Chamber further notes that information on the internet website bearing Appellant Ngeze's name – a website it considers to be controlled by Appellant Ngeze despite his denials –[998] "describes a number of short overnight arrests in April and does not mention his arrest from 6 to 9 April 1994".[999]

425. In the view of the Appeals Chamber, the Appellant has failed to demonstrate that no reasonable trier of fact could have reached such factual findings. In particular, with respect to the letter dated 10 April 1994, it is clear that the Trial Chamber took the view that its authenticity had not been established. The Trial Chamber takes position on this issue both in paragraph 875 of the Judgement, which reads as follows:

> With regard to his alibi for 7 April 1994, Ngeze gave different accounts of his arrest, and of the letter that he wrote to Colonel Nsengiyumva, dated 10 April 1994 but with internally inconsistent references to dates relating to his arrest. The Prosecution maintained that this letter was forged by Ngeze to support his alibi, a possibility accepted by the Chamber.

and in paragraph 826 of the Judgement, which reads in the relevant part:

> In light of the last minute and irregular introduction of this letter into evidence, and the questions it raises, the Chamber notes and shares the suspicion expressed by the Prosecution regarding the authenticity of this document.

The Appellant fails to articulate how the two preceding excerpts demonstrate an error on the part of the Trial Chamber. He does not show how the fact that the Trial Chamber accepted the possibility that he had fabricated that letter and shared the Prosecutor's suspicion in this respect invalidates its finding that the alibi was not credible. The Appeals Chamber notes that the Trial Chamber found *inter alia* that the Appellant was confused in his explanations as to when he wrote the letter in question and that no reliable explanation was given as to the origin of the copy tendered into evidence. The Appellant's further argument, that the finding in paragraph 875 of the Judgement shows that the Trial Chamber reversed the burden of proof, is also without merit. The Trial Chamber had serious doubts as to the authenticity of that letter and therefore decided, within its discretionary power, not to attach any weight to it. This does not amount to requiring the Appellant to prove his alibi beyond reasonable doubt.

426. As to the weaknesses identified in Defence witnesses' testimonies, these are detailed in paragraph 828 of the Judgement:

> The Defence witnesses are also thoroughly inconsistent with regard to dates on which Ngeze was arrested and released in April 1994. While a number of witnesses testified that he was arrested on 6 April, one witness said he was arrested on 5 April, one witness stated he was arrested on 7 April, and one witness testified that he went into hiding on 6 April, not that he was arrested at all. Several witnesses testified that Ngeze was released on 9 April and several testified that it was on 10 April. Most importantly, none of the Defence witnesses had

[997] *Ibid.*, para. 826. See also para. 875.
[998] *Ibid.*, paras. 805 and 827.
[999] *Ibid.*, para. 827. See also para. 806, referring to T. 4 April 2003, pp. 40-44 (cross-examination of Appellant Ngeze, during which he was asked to read certain excerpts from a website bearing his name).

> evidence other than hearsay that Ngeze was arrested at all. Their sources of information were vague, with the exception of three witnesses who learned of the arrest from Ngeze himself.

427. The Trial Chamber summarized the Defence witnesses' testimonies in support of the alibi as follows:

> A number of Defence witnesses testified to the date of Ngeze's arrest in April 1994. Witness BAZ2, Witness RM1, Witness RM5, Witness BAZ6, Witness RM19, Witness BAZ9 and Witness BAZ15 testified that Ngeze was arrested on 6 April 1994. Witnesses RM13 and Witness BAZ3 testified that Ngeze was arrested just after Habyarimana's death. Witness RM2 testified that Ngeze was arrested on 6-7 April 1994. Witness BAZ1 testified that Ngeze was arrested the day before 6 April 1994 and was detained for three days. Witness RM117 testified that Ngeze was arrested on 7 April 1994. Witness RM112 testified that he found out on 7 April 1994 that Ngeze had been arrested. As to the date of Ngeze's release from prison, Witness RM5 and Witness RM2 testified that Ngeze was released on 9 April 1994. Witness BAZ2, Witness RM112 and Witness RM1 testified that Ngeze was released on 10 April 1994. Witness BAZ15 testified that Ngeze was released after about six days in custody. Witness BAZ9 testified that she saw Ngeze on 10 April 1994. Witness BAZ31 testified that Ngeze went into hiding from 6 April 1994. All of these witnesses learned of Ngeze's arrest from other people. Witness RM112, Witness RM19 and Witness BAZ15 testified that they heard about the arrest from Ngeze himself. The other witnesses heard about the arrest from people on the street or other Muslims, or knew of it as a matter of common knowledge.[1000]

428. The Appeals Chamber considers that the Trial Chamber could validly conclude that "none of the Defence witnesses had evidence other than hearsay that Ngeze was arrested at all" and that in most cases their sources of information were vague.[1001] However, the Appeals Chamber is of the view that an analysis of Defence witnesses testimonies relating to the alibi from 6 to 9 April 1994 does not demonstrate that those testimonies are "thoroughly inconsistent" (in the words of the authentic, English, text of the Judgement).[1002] From the outset, the Appeals Chamber is of the view that two testimonies corroborate one another when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or a sequence of linked facts. It is not necessary that both testimonies be identical in all aspects or describe the same fact in the same way. Every witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others. It follows that corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony.

429. Here, the testimonies of Witnesses BAZ-2,[1003] RM-1,[1004] RM-5,[1005] BAZ-6,[1006] RM-19[1007] and BAZ-15[1008] are consistent regarding the allegation that the Appelant Ngeze was

[1000] Judgement, para. 808 (footnotes omitted).
[1001] *Ibid.*, para. 828.
[1002] *Idem*.
[1003] T. 29 January 2003, p. 4.
[1004] T. 14 March 2003, p. 62.
[1005] T. 21 March 2003, p. 4.
[1006] T. 15 March 2003, p. 25.
[1007] T. 3 March 2003, p. 6.
[1008] *Ibid.*, p. 23.

arrested from 6 April 1994 onwards, three of them (Witnesses RM-5,[1009] RM-19[1010] and BAZ-15[1011]) even specifying that the arrest took place during the night of 6 to 7 April. Witnesses RM-13[1012] and BAZ-3[1013] are less precise and locate Ngeze's arrest "just after" or "following" the shooting down of President Habyarimana's plane, but their testimonies are nevertheless consistent with the other testimonies. The same goes for the testimony of Witness BAZ-9, who, although silent as to the time of the Appellant's arrest, explains that he learned on 7 April 1994 (the day following the President's death) that the Appellant had been arrested.[1014] Further, the summary of Witness BAZ-1's testimony by the Trial Chamber "that Ngeze was arrested the day before 6 April 1994 and was detained for three days" [1015] is not accurate. Witness BAZ-1 clearly describes the arrest of Appellant Ngeze as having lasted three days, starting on 6 April.[1016] The assertion by the Trial Chamber that Witness RM117 testified that "Ngeze was arrested on 7 April 1994"[1017] is also inaccurate: RM117 testified that "on the 7 we learned that Hassan Ngeze had been arrested" and then that "following the death of the President, as from the 7th, we were told that he had been thrown in jail",[1018] which does not amount to saying that he was arrested from the seventh. Only Witness RM-112 appears to put the date of the Appellant's arrest in the morning of 7 April 1994: Witness RM-112 explained that he had an appointment with the Appellant on 7 April, but that he was told by the latter's servant that the Appellant had been arrested on that very morning and sent to jail.[1019] In the view of the Appeals Chamber, such inconsistency on the part of a second-hand witness, recounting an old event – if it was inconsistency[1020]– did not suffice to discredit the other concurring testimonies as to when the Appellant was arrested.

430. Regarding the date of Ngeze's release, the Appeals Chamber notes the following:

- Witnesses BAZ-1,[1021] RM-5,[1022] and RM-2[1023] place the Appellant's release on 9 April 1994 (that is three days starting from the 6th), Witnesses RM-5 and RM-2 specifying having only seen Appellant Ngeze the day after his release, namely 10 April;

- Witness BAZ-9[1024] asserts that he saw the Appellant on 10 April in Gisenyi and heard people saying that he had been released. This testimony is certainly less specific with respect to the date of Appellant Ngeze's release but it does not contradict the above-mentioned testimonies. The same goes for the testimonies of (1) Witness BAZ-2, who

[1009] T. 21 March 2003, p. 4.
[1010] T. 3 March 2003, p. 6.
[1011] *Ibid.*, p. 23.
[1012] T. 22 January 2003, pp. 4-5.
[1013] T. 15 March 2003, p. 4.
[1014] T. 28 January 2003, p. 41.
[1015] Judgement, para. 808.
[1016] T. 27 January 2003, pp. 55-56, 67.
[1017] Judgement, para. 808.
[1018] T. 24 March 2003, p. 18.
[1019] T. 13 March 2003, p. 3.
[1020] The assertion that the Appellant was arrested in the morning of 7 April is indeed somewhat vague as to time: the servant and the witness may have meant that he had been arrested in the early hours of 7 April, which would be consistent with the evidence placing the arrest during the night of 6 to 7 April 1994.
[1021] T. 27 January 2003, pp. 55-56.
[1022] T. 21 March 2003, p. 4.
[1023] T. 14 March 2003, pp. 72-73.
[1024] T. 28 January 2003, p. 41.

stated that he saw the Appellant in a crowd of people on 10 April, saying that he had just been freed;[1025] (2) Witness RM-13, according to whom the Appellant spent several days in prison after the assassination of the President;[1026] and (3) Witness RM-112, who stated that he had learned on 10 April at the shopping centre that Appellant Ngeze was out of jail, and then went to see the Appellant, who said that he had been in jail;[1027]

- Contrary to what the Trial Chamber indicates,[1028] Witness BAZ-15 did not state that Appellant Ngeze "was released after about six days in custody", but rather declared: "The night of the 6th. Shortly – immediately after the death of President Habyarimana, I believe that on that date he was immediately arrested. Shortly after that he was released. I don't know the exact date. It was perhaps three days later."[1029] This testimony thus does not contradict the other testimonies, even though it does not fully confirm a release date of 9 April 1994;

- Nor is Witness BAZ-31's testimony contradictory. As summarized by the Trial Chamber, it reads: "Ngeze went into hiding from 6 April 1994",[1030] but the Trial Chamber omits to mention that the witness actually said that he "thought" that Ngeze was in hiding after 6 April since "he did not show himself; he wasn't up and about as was the case previously".[1031] To the question "did you see him after the 6th of April? At least he wasn't hiding from you", Witness BAZ-31 answered "[h]e wasn't hiding from me. Did I tell you that I was searching for him? I remember having seen him just once on board a vehicle".[1032] The Appeals Chamber is of the view that, since the witness was not asked when he saw Ngeze again after the 6 April, his testimony that "he was not seen that much anymore"[1033] cannot be seen as inconsistent with the testimonies of Witnesses BAZ-1, RM-5, BAZ-15 and RM-2;

- In fact, the only testimony that could appear to contradict the testimony of those witnesses is that of Witness RM-1, who said: "…from the 6th of April up to the 10th April, or about that time [Appellant Ngeze] was in jail."[1034] However, the witness himself recognizes that the date of 10 April is approximate. In the view of the Appeals Chamber, that testimony does not discredit the other concurring testimonies.

431. In these circumstances, the Appeals Chamber is of the view that the Trial Chamber erred in describing as "thoroughly inconsistent" Defence witnesses' testimonies in relation to the alleged arrest of the Appellant on 6 April 1994 and his alleged detention until 9 April 1994. The Appeals Chamber will examine below – after having considered the other alleged errors and the impact of the additional evidence admitted on appeal – whether this error invalidates the Trial Chamber's finding on Ngeze's alibi.

[1025] T. 29 January 2003 pp. 4-5.
[1026] T. 22 January 2003, p. 4.
[1027] T. 13 March 2003, pp. 3-4.
[1028] See Judgement, para. 808, footnote 859, referring to T. 3 March 2003, p. 23.
[1029] T. 3 March 2003, p. 23.
[1030] Judgement, para. 808, footnote p. 861, referring to T. 27 January 2003, pp. 36-37 (closed session).
[1031] T. 27 January 2003, p. 36 (closed session).
[1032] *Idem*.
[1033] *Idem*.
[1034] T. 14 March 2003, p. 62.

4. Did the arrest of Ngeze on 6 or 7 April 1994 preclude his participation in the events as recounted by Prosecution witnesses?

432. Appellant Ngeze contends fourthly that the Trial Chamber made an error of fact in concluding at paragraph 829 of the Judgement that, "even if Ngeze had been arrested on 6 or 7 April, depending on the time of his arrest and the length of his detention, which could have been a few hours, he would not have been precluded from participation in the events described by the Prosecution witnesses". According to the Appellant, this conclusion is purely subjective and is not supported by any evidence.[1035]

433. The Appeals Chamber agrees with the Appellant that this statement is pure speculation on the part of the Trial Chamber. However, since the Trial Chamber found that the Appellant's alibi, *i.e.* that he was arrested on 6 or 7 April 1994, was not credible, the above-mentioned additional finding is irrelevant and could not have resulted in a miscarriage of justice.

## C. Alleged errors in relation to the credibility of Defence and Prosecution witnesses

434. Appellant Ngeze contends that the Trial Chamber did not apply the same standards when assessing Prosecution and Defence evidence. According to the Appellant, the Trial Chamber rejected the testimonies of the Defence's witnesses, due to their numerous inconsistencies, but overlooked the numerous inconsistencies and ambiguities in the testimonies of the Prosecution's witnesses.[1036] The Appellant submits that the alibi evidence raises a reasonable doubt, sufficent to conclude, contrary to the testimonies of Prosecution Witnesses Serushago, AHI and EB, that he did not distribute weapons or commit any other criminal act in Gisenyi on 7 April 2004, and in fact was not there.[1037]

435. More specifically, the Appellant challenges the credibility of Prosecution Witness Serushago, not only because he is a self-confessed serial killer, but also because his testimony that no one could have arrested the Appellant or himself during the period from April to June 1994 is contradicted by 11 witnesses present in Gisenyi at the time, who declared that the Appellant had been arrested during the period in question.[1038] According to the Appellant, the charges brought against him rest on the credibility of Serushago. He argues that the Trial Chamber found his testimony credible because it was corroborated by two other Prosecution witnesses, who said they had seen Appellant Ngeze in Gisenyi town on 7 April 1994 at different times of the day. However, according to the Appellant, the evidence of these other two witnesses is only indirect, none of the witnesses in question having been able to confirm the accuracy of Witness Serushago's testimony.[1039]

436. The Prosecutor responds that it is incorrect to imply that the Prosecution case against the Appellant rests on the credibility of Witness Serushago.[1040] He refers in detail to the testimonies of Witnesses AHI, EB and AGX and cites extracts from the Judgement relating to the words and conduct of Appellant Ngeze from 7 April 1994 onwards in order to argue that,

[1035] Ngeze Appellant's Brief, para. 199.
[1036] *Ibid.*, para. 211.
[1037] *Ibid.*, para. 213.
[1038] *Ibid.*, para. 215.
[1039] *Ibid.*, para. 216.
[1040] Respondent's Brief, paras. 264-265.

contrary to the statements of Defence witnesses, these testimonies were credible, and raised no reasonable doubt as to their veracity.[1041] The Prosecutor further submits that the Trial Chamber evaluated and examined the testimony of Witness Serushago with the caution it deemed necessary in the circumstances and only accepted his testimony to the extent that it was sufficiently corroborated by other evidence.[1042]

437. Appellant Ngeze replies that the testimonies of Prosecution Witnesses AHI, EB, AGX, AEU and Serushago regarding his acts on 7 and 8 April 1994 are devoid of probative value in light of the additional evidence presented on appeal.[1043] The Appellant further submits that "the evidence of Prosecution Witness Serushago is of no value, as no amount of corroboration can make unreliable evidence […] reliable".[1044]

1. Alleged differential treatment of Defence and Prosecution witnesses

438. The Appeals Chamber has already found that the Trial Chamber erred in concluding that Defense witnesses' testimonies were "thoroughly inconsistent" in relation to the alleged dates of arrest and detention of the Appellant in April 1994.[1045] The question whether this error invalidates the conclusion that the Appellant committed criminal acts at Gisenyi on 7 and 8 April 1994 will be discussed later. As to the allegation of inconsistency and ambiguity with respect to the Prosecution witnesses (other than Serushago), the Appellant confines himself to general and unsupported assertions, which cannot suffice to demonstrate error on the part of the Trial Chamber. The appeal on this point is dismissed.

439. With respect to the testimony of Witness Serushago, the Appeals Chamber considers that the fact that that Prosecution's witness was "a self-confessed serial killer" does not as such imply that the witness was not credible. It recalls that the jurisprudence of both *ad hoc* Tribunals does not *a priori* exclude the testimony of convicted persons, including those who could be qualified as "accomplices", *stricto sensu*, of the accused. This jurisprudence requires that such testimonies be treated with special caution, the main question being to assess whether the witness concerned might have motives or incentives to implicate the accused.[1046] In the instant case, the Trial Chamber, "[r]ecognizing that Serushago [was] an accomplice and in light of the confusion and inconsistency of his testimony, although the Chamber accept[ed] many of the clarifications and explanations offered by Serushago, […] considered that his testimony [was] not consistently reliable and accept[ed] his evidence with caution, relying on it only to the extent that it [was] corroborated",[1047] which is fully consistent with this jurisprudence. The Appellant has not shown that no reasonable trier of fact could have concluded as the Trial Chamber did.

440. The Appeals Chamber turns now to the argument that Witness Serushago's statement that nobody could have arrested the Appellant or himself during the period between April and June 1994 is contradicted by 11 witnesses who were in Gisenyi at the relevant time and who testified that the Appellant had been arrested during this period. This statement was merely

[1041] *Ibid.*, para. 264.
[1042] Respondent's Brief, para. 265.
[1043] Ngeze Brief in Reply, para. 72.
[1044] *Idem*.
[1045] Judgement, para. 828.
[1046] *Ntagerura et al.* Appeal Judgement, paras. 203-206, recalling both *ad hoc* Tribunals' relevant jurisprudence.
[1047] Judgement, para. 824.

an "opinion" of the witness with no probative value; the Trial Chamber, having moreover treated Serushago's testimony with caution, did not rely on this aspect of his testimony in order to reject the Appellant's alibi.

441. The Appellant further submits that the case against him rests on the credibility of Witness Serushago. However, as noted above, the Trial Chamber stated that it only relied on Serushago's testimony to the extent that it was corroborated by credible evidence. The Appellant has not shown that, contrary to what it had said, the Trial Chamber in fact relied on uncorroborated statements of Witness Serushago. The Appeals Chamber notes that the Trial Chamber considered the following elements from the testimony of Witness Serushago in relation to the events of 7 and 8 April 1994 to be corroborated:

(1) As to the presence of the Appellant in Gisenyi on 7 April 1994, the Trial Chamber considered this portion of the testimony of Witness Serushago to be corroborated by among others Witnesses AHI and AGX;[1048]

(2) The Trial Chamber concluded that the Appellant "helped secure and distribute, stored, and transported weapons to be used against the Tutsi population"[1049] on the basis of the testimony of Witnesses Serushago and AHI.[1050]

442. The Appellant merely asserts generally that "the evidence corroborated [*sic*] the testimony of PW Serushago is indirect evidence since none of the Prosecution witnesses' testimony could corroborated [*sic*] the same event",[1051] without making any reference to the transcripts or showing specifically that, contrary to what the Trial Chamber concluded, the various testimonies did not corroborate the evidence of Witness Serushago. This argument therefore cannot succeeed.

443. For these reasons, the appeal submissions relating to the assessment by the Trial Chamber of the testimony of Witness Serushago are dismissed.

### 2. Credibility of Witness EB

444. Following the admission of additional evidence on appeal, the Appeals Chamber has to address specific arguments regarding the credibility of Witness EB.[1052] The Appeals Chamber will examine each of these arguments in turn, after placing them in context.

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[1048] *Ibid.*, para. 825. The Trial Chamber also accepted the testimony of Witness EB regarding the Appellant's acts on 7 April 1994. However, for the reasons given in the following section, the Appeals Chamber considers that the testimony of Witness EB must be rejected.

[1049] *Ibid.*, para. 837. The finding that Appellant Ngeze aided and abetted the killing of Tutsi civilians, which supports the conviction for genocide, also relies on this factual finding (Judgement, paras. 956, 977A).

[1050] *Ibid.*, para. 831. The Trial Chamber also accepted Witness AFX's testimony on the stocking of weapons but, for the reasons given *infra* XII. C. 3. (b) (ii) , the Appeals Chamber considers that Witness AFX's trial testimony must be rejected.

[1051] Ngeze Appellant's Brief, para. 216.

[1052] Prosecutor's Submissions following the Rule 115 Evidentiary Hearing pertaining to the Alleged Recantation of Witness EB's Trial Testimony, filed confidentially on 30 April 2007 ("Prosecutor's Submissions Following Second Expert Report"); Appellant Hassan Ngeze's Written Submissions in connection with the Conclusion of the Handwriting Expert Report and their [*sic*] Impact on the Verdict, in pursuance of Appeals Chamber's Order dated 16 January 2007, pages 66-68, filed confidentially on 3 May 2007, the title of the document having been corrected by the Appellant on 6 June 2007 ("Appellant Ngeze's Conclusions Following Second Expert

(a) Developments on appeal

445. The Trial Chamber relied in part on the testimony of Witness EB in order to find that Appellant Ngeze had committed certain criminal acts in Gisenyi on 7 and 8 April 1994.[1053] On 25 April 2005, Appellant Ngeze presented a motion seeking the admission of additional evidence on appeal,[1054] to which two typed documents were annexed, one in Kinyarwanda dated 5 April 2005 allegedly written by Witness EB and containing a recantation of his trial testimony of 15, 16 and 17 May 2001 ("First Recantation Statement")[1055] and, the other, presented as its "free translation" into English.[1056]

446. The Appeals Chamber first asked the Prosecutor to investigate further the circumstances of the alleged recantation of Witness EB.[1057] The results of this investigation were filed on 7 July 2005.[1058] These Prosecutor's Additional Conclusions contained *inter alia* as annexes:

- A statement from Witness EB dated 23 May 2005, in which he indicates that he never signed or sent documents to Arusha and denied being the author of the First Recantation Statement;[1059]

- A handwriting expert report from M. Antipas Nyanjwa, dated 20 June 2005 ("First Expert Report"),[1060] concluding *inter alia* that the handwriting and signatures contained in photocopies of the typed and handwriting versions of the First Recantation Statement and those contained in an authentified specimen[1061] are from

Report"); Appellant Jean Bosco-Barayagwiza's Submissions regarding the Handwriting Expert's Report pursuant to the Appeals Chamber's Orders dated 7th February 2007 and the 27th March 2007, filed publicly on 7 May 2007 but sealed on the same day following intervention by the Appeals Chamber ("Appelant Barayagwiza's Conclusions Following Second Expert Report").

[1053] Judgement, paras. 789-790, 812, 825, 836-837.

[1054] Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB, filed confidentially on 25 April 2005 ("Motion of 25 April 2005").

[1055] A photocopy of a typed version of the First Recantation Statement was annexed to the Motion of 25 April 2005, while the handwritten version of the First Recantation Statement (dated not 5, but 27 April 2005) was filed by Appellant Ngeze as an annex to the "CORRIGENDUM – Request to treat the Statement of Witness EB in Kinyarwanda Language as Annex IV to the Appellant Hassan Ngeze's Motion for presenting Additional evidence under Rule 115 of the Rules of Procedure and Evidence of witness [REDACTED] - EB filed on 25 April 2005" dated 5 May 2005, filed publicly but made confidential following the intervention of the Appeals Chamber. A copy of the same handwritten document is also filed as Annex to Annex 4 of "Prosecutor's Additional Submissions in Response to Hassan Ngeze's Motion for Leave to Present Additional Evidence of Witness EB" filed confidentially on 7 July 2005.

[1056] The date of 10 April 2005 indicated on the document containing the "free translation" into English of the document in Kinyarwanda differs from that indicated on the latter document, *i.e.* 5 April 2005.

[1057] (Confidential) Decision on Appellant Hassan Ngeze's Motions for Admission of Additional Evidence on Appeal, 24 May 2005, paras 45 and 48.

[1058] Prosecutor's Additional Submissions in Response to Hassan Ngeze's Motion for Leave to Present Additional Evidence of Witness EB, 7 July 2005 ("Prosecution's Additional Conclusions").

[1059] Annex 2 to Prosecution's Additional Conclusions.

[1060] Annex 4 to Prosecution's Additional Conclusions.

[1061] Document D, Annex 4 of Prosecution's Additional Conclusions.

the same hand (in other words, the expert concludes that Witness EB is indeed the author of the alleged recantation);[1062]

- A statement from Witness EB dated 23 June 2006 where, confronted with the First Expert Report's conclusions, Witness EB reaffirms that he is not the author of the alleged recantation.[1063]

447. By confidential decision of 23 February 2006, the Appeals Chamber admitted as additional evidence on appeal a photocopy of the typed version of the First Recantation Statement (Confidential Exhibit CA-3D1) and the First Expert Report (Exhibit CA-3D2), to which the handwritten version of the First Recantation Statement was annexed.[1064] The Appeals Chamber also ordered the hearing of Witness EB as an Appeals Chamber witness.[1065]

448. By decision of 27 November 2006, the Appeals Chamber admitted as additional evidence a photocopy of a statement dated 15 December 2005,[1066] purportedly written by Witness EB and confirming the First Recantation Statement ("Additional Statement", a photocopy of which was admitted as confidential Exhibit CA-3D3, the original having been admitted by the Appeals Chamber as confidential Exhibit CA-3D4 at the hearing of 16 January 2007).[1067] The Chamber also admitted *proprio motu,* as rebuttal evidence, photocopies of certain envelopes allegedly sent by Witness EB to the Prosecutor (Exhibit CA-P5).[1068]

449. By confidential decision of 13 December 2006, the Appeals Chamber admitted the following documents as rebuttal evidence: (1) Statement from Investigator Moussa Sanogo dated 21 November 2006 (confidential Exhibit CA-P1); (2) End of Mission Report (16-18 October 2006), dated 18 October 2006 (confidential Exhibit CA-P2); (3) Investigation Report of 23 August 2006 with Annexes (confidential Exhibit CA-P3); (4) Statements from

[1062] First Expert Report, p. 2. The expert indicates that the photocopies submitted to him were of sufficiently good quality to allow him to conclude without reservation. The expert also considers the handwriting and signature of Witness EB contained in other documents (including a specimen of his writing and signature taken by the Prosecution's investigators on 23 May 2005), stressing that the quality of photocopies submitted is "not very clear", but noting however strong indications of a possible common authorship between the documents compared.
[1063] Annex 5 to Prosecution's Additional Conclusions.
[1064] (Confidential) Decision on Appelant Hassan Ngeze's Six Motions for Admission of Additional Evidence on Appeal and/or Further Investigation at the Appeal Stage, 23 February 2006 ("Decision of 23 February 2006"), paras. 29 and 41. The originals of the typed and handwritten versions of the First Recantation Statement are not included in the case-file, since the parties claim never to have had them in their possession. These documents were given exhibit numbers by the Registry following the Appeals Chamber's Decision of 27 November 2006 : [Public and Redacted Version] Decision on Motions Relating to the Appellant Hassan Ngeze's and the Prosecution's Request for Leave to Present Additional Evidence of Witnesses ABC1 and EB, 27 November 2006 ("Decision of 27 November 2006"), para. 45.
[1065] Decision of 23 February 2006, paras. 29 and 81; (Confidential) Decision on the Prosecutor's Motion for an Order and Directives in Relation to Evidentiary Hearing on Appeal Pursuant to Rule 115, 14 June 2006.
[1066] Although dated 15 December 2005, it was only in July 2006 that a photocopy of the Additional Statement reached the Prosecutor who, on 3 August 2006, informed Appellant Ngeze and the Appeals Chamber of it (see Request for a Further Extension of the Urgent Restrictive Measures in the Case *Prosecutor v. Hassan Ngeze*, Pursuant to Rule 64 [of the] Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, filed confidentially on 3 August 2006, para. 5).
[1067] Decision of 27 November 2006, paras. 39 and 44.
[1068] *Ibid.*, paras. 42 and 44.

Witness EB dated 22 May and 23 June 2005 (confidential Exhibit CA-P4).[1069] It also ordered that Moussa Sanogo be heard by the Appeals Chamber.[1070]

450. At his hearing by the Appeals Chamber in Arusha on 16 January 2007, Witness EB was first questioned by the President and several Appeals Chamber Judges, before being cross-examined by the Defence for Appellant Ngeze, then by the Prosecutor and the Defence for Appellant Barayagwiza. After a short summary of his testimony at trial against Appellant Ngeze, the witness indicated that he did not intend to recant that testimony.[1071] After being shown confidential Exhibits CA-3D1, CA-3D2 and CA-3D4, Witness EB denied being the author of the typed version of the Kinyarwanda statement of 5 April 2005 (CA-3D1),[1072] as well as of the handwritten version of the First Recantation Statement dated 27 April 2005, annexed to the First Expert Report (CA-3D2) and the original of the Additional Statement (CA-3D4).[1073] On the other hand, the witness confirmed being the author of the statements of 22 May and 23 June 2005 (CA-P4) taken by the Prosecutor's investigators.[1074] Questioned about Witness AFX, Witness EB confirmed that he knew him but denied having handed over a statement to him,[1075] and stated that he suspected him of fabricating false statements.[1076] Finally, Witness EB confirmed having maintained his accusations against Appellant Ngeze at *Gacaca* sessions where he had testified.[1077] Furthermore, when confronted in cross-examination with the fact that confidential Exhibit CA-3D5,[1078] a document supposedly corresponding to his hearing by the *Gacaca* made no mention of any accusations against Appellant Ngeze, the witness claimed that the document was obviously incomplete, since it failed to mention the name of Ngeze – who was at the top of the list of people he testified against – as well as that of another accused, and also failed to list the names of all of the *Gacaca* members present.[1079] During the same hearing, the Appeals Chamber admitted as confidential exhibits a series of additional samples of Witness EB's handwriting.[1080]

451. The Appeals Chamber also heard Mr. Moussa Sanogo, charged by the Prosecutor with two investigation missions in relation to Witness EB in Gisenyi, Rwanda, the first from 19 to 24 May 2005, during which he met with Witness EB on 22 and 23 May 2005,[1081] and the

[1069] Confidential Decision on Prosecution's Motion for Leave to Call Rebuttal Material, 13 December 2006 ("Decision of 13 December 2006"), paras. 8-10, 17.
[1070] *Ibid.*, para. 17.
[1071] T(A) 16 January 2007, p. 7.
[1072] *Idem*.
[1073] *Ibid.*, pp. 10-12 (closed session). Confronted in cross-examination with the fact that the First Expert Report identifies him as the author of the handwritten version of the First Recantation Statement, Witness EB continued to deny being its author (T(A) 16 January 2007, p. 30 (closed session)).
[1074] *Ibid.*, p. 10 (closed session).
[1075] *Idem.*
[1076] *Ibid.*, p. 11 (closed session).
[1077] *Ibid.*, pp. 13-14 and 21 (closed session).
[1078] Admitted during the hearing: T(A) 16 January 2007, p. 18 (closed session).
[1079] T(A) 16 January 2007, pp. 21-22 (closed session).
[1080] Confidential Exhibits CA-3D6 and CA-3D7, which contain two lists of names written by Witness EB as well as Confidential Exhibit CA-1, containing a short specimen of the same handwriting. Finally, at the end of the appeal hearing of 18 January 2007, the Appeals Chamber ordered further that specimens of Witness EB's handrwriting and signature be taken in the presence of the parties: T(A) 18 January 2007, p. 81 The document in question forms Confidential Exhibit CA-2: Report to the Appeals Chamber of the taking of specimen of Witness EB's handwriting and signature, filed on 29 January 2007.
[1081] Report on this contact between Mr. Sanogo and Witness EB, written by the former and dated 21 November 2006, forms Confidential Exhibit CA-P1, and Witness EB's statement taken by the investigators

second from 16 to 18 October 2006, during which Mr. Sanogo met various individuals, including survivors from Gisenyi, one of whom described himself as a very close friend of Witness EB, and a *Gacaca* representative. It appears from the 16-18 October 2006 mission report (CA-P2) that the alleged "friend" of Witness EB,[1082] after indicating that EB had not informed him that he had recanted his testimony against Appellant Ngeze, "agreed" to approach Witness EB, and later confirmed to Mr. Sanogo that Witness EB had admitted having recanted, without explaining why.[1083] This "friend" of Witness EB also indicated to Mr. Sanogo that he was not surprised by Witness EB's recantation, because he was a spendthrift and always in need of money and would do anything for money.[1084] The "friend" was also told by another friend that he had been contacted by Witness AFX and had gone to his home, where he had also met Witness EB. Witness AFX had allegedly proposed to that "other friend" and to Witness EB that they should testify in favour of Appellant Ngeze in return for money. Following some discussion, the "other friend' and Witness EB had allegedly accepted the offer to testify for 150,000 RWF, and Witness AFX had given the "other friend" an advance payment of 30,000 RWF.[1085]

452. The other survivors from Gisenyi heard by Mr. Sanogo had confirmed that Witness EB would do anything for money; one person even alleged that at *Gacaca* hearings he had made false allegations of genocide against refugees who had returned home, and then later ask to be paid in order to withdraw them.[1086] According to the same mission report, a *Gacaca* representative had indicated that he did not regard Witness EB as a credible witness, although he still testified at almost every trial.[1087] The same representative had heard "credible witnesses" who claimed that Witness EB had been hiding with close relatives, had witnessed nothing and had invented.[1088]

453. Finally, Mr. Sanogo reported that, in July 2006, after an informer had proposed introducing him to a potential important source of information, it was Witness AFX, whom Mr. Sanogo knew already, who had shown up at the meeting and, recognizing Mr. Sanogo, had given no information. Mr. Sanogo indicated that he had the impression that Witness AFX, thinking he was dealing with a novice, had come to make up a story and earn himself some money, but had changed his mind when he recognized who it was. Mr. Sanogo believed

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forms Confidential Exhibit CA-P4. Witness EB was heard for the second time by the Prosecution's investigators on 23 June 2005, in the absence of Mr. Sanogo. Confronted with the results of the First Expert Report, Witness EB maintained his denial and indicated that the expert was wrong in attributing the First Recantation Statement to him (Annex 5 to Prosecution Additional Conclusions; the statement in question forms Confidential Exhibit CA-P4).

[1082] During his cross-examination by Appellant Ngeze's Counsel, Witness EB denied even knowing the person in question (T(A) 16 January 2007 (closed session), pp. 14-16). For his part, Mr. Sanogo confirmed that he had not been in a position to check the information in question (T(A) 16 January 2007, pp. 52-53) and explained that he had indicated in his report the identity under which the individual in question had introduced himself, without taking any further steps to check it (T(A) 16 January 2007, pp. 64-65).

[1083] Confidential Exhibit CA-P2, paras. 3-7.

[1084] *Ibid.*, para. 5.

[1085] *Ibid.*, paras. 8-9.

[1086] *Ibid.*, paras. 23-26. During his cross-examination, Witness EB denied having ever accepted money to recant his testimony, but said that he possessed information that Witness AFX had offered money to other witnesses (T(A) 16 January 2007, (closed session) p. 36).

[1087] *Ibid.*, paras. 27-28. Confronted at the hearing with these allegations, Witness EB expressed surprise, and maintained his earlier statement (T(A) 16 January 2007 (closed session), pp. 27-29).

[1088] *Ibid.*, para. 28.

that Witnesses AFX and EB "seemed to have made a business out of the genocide".[1089] During his testimony, Mr. Sanogo confirmed this information, as well as that contained in his mission reports.[1090]

454. Moreover, seized of Appellant Ngeze's oral request to order a comparison of Exhibits CA-3D6 and CA-3D7 with CA-3D4, in order to determine whether the original Additional Statement was written and signed by Witness EB, the Appeals Chamber ordered an expert report, pursuant to Rules 54, 89(D) and 107 of the Rules, calling for (1) a forensic examination of the photocopy of the handwritten version of the First Recantation Statement and of the original Additional Statement, with a view to determining whether the two Statements had been written by the same person; (2) a comparison between these documents and the samples of Witness EB's handwriting taken during the hearings of 16 and 18 January 2007 (CA-3D6, CA-3D7, CA-1 and CA-2), with a view to determining whether Witness EB was indeed the author of the two Statements.[1091]

455. The handwriting expert appointed by the Appeals Chamber, Mr. Stephen Maxwell, filed his report on 19 April 2007.[1092] In this Second Expert Report, Mr. Maxwell notes, after examining the photocopy of the handwritten version of the First Recantation Statement that it consists of a photocopy/fax of poor quality and that, although there are similarities between the disputed writing on this document and that on the specimen material, it is not possible to offer conclusive opinions based on the examination of "photocopied documents".[1093] With regard to the comparison between the Additional Statement and the certified samples of Witness EB's handwriting, Mr. Maxwell notes both similarities but also differences, which might be significant.[1094] Consequently, on the basis of the material submitted, he cannot determine conclusively whether the Additional Statement was written by Witness EB. He adds that it is also possible that the First Recantation Statement and the Additional Statement might have been written by Witness EB, using different handwriting styles, but he offers no conclusive opinion in this respect.[1095] Finally, Mr. Maxwell points out that the short, illegible signature on the Additional Statement is similar in structure and arrangement to the specimen

[1089] *Ibid.*, paras. 36-42 (Quotation taken from para. 42). When this was put to him in cross-examination, Witness EB maintained that he had never associated with Witness AFX in activities of this kind (T(A) 16 January 2007, p. 33 (closed session)).
[1090] T(A) 16 January 2007, pp. 50-60.
[1091] Public Order Appointing a Handwriting Expert with Confidential Annexes, 7 February 2007. See also Order Extending the Scope of the Examination by the Handwriting Expert Appointed by Order of 7 February 2007, 21 February 2007 where, at the expert's request, the Appeals Chamber ordered that additional documents be handed over to the expert for comparison and extended his mission accordingly. See finally Second Order Extending the Scope of the Examination by the Handwriting Expert Appointed by Order of 7 February 2007, 27 March 2007, where the Appeals Chamber further extended the expert's mission to include for comparison with the disputed documents the *original* of a specimen of Witness EB's handwriting taken by the Prosecutor's investigators on 23 May 2005.
[1092] Report of Stephen Maxwell, Case number 1640/07, Examination of Handwriting and Signatures Witness EB, dated 3 April 2007 and filed confidentially on 12 April 2007 ("Second Expert Report").
[1093] Second Expert Report, p. 3.
[1094] In particular, the arrangement of the writing with respect to the edge of the page, the relative sizes of the letters and the structure of some of the letter designs (Second Expert Report, p. 3).
[1095] Mr. Maxwell *inter alia* indicates that further specimen from Witness EB, written not for the purpose of this investigation, might prove to be more suitable for comparison purposes (Second Expert Report, p. 3).

signatures attributed to Witness EB, which would support the proposition that Witness EB is the writer. He does not however exclude the possibility that it is a good quality forgery.[1096]

456. At the invitation of the Appeals Chamber,[1097] the parties filed their submissions relating to the Second Expert Report, to the credibility of Witness EB and to its impact on the verdict.[1098]

(b) Arguments of the Parties

457. Appellant Ngeze raises the following main arguments to demonstrate the lack of credibility of Witness EB: (1) the First Expert Report establishes that the First Recantation Statement is from Witness EB[1099] and the Second Expert Report establishes that the signature on the Additional Statement is also Witness EB's;[1100] (2) the results of Mr. Sanogo's investigation show that Witness EB is not credible;[1101] (3) invited by the President of the Appeals Chamber to summarize the main aspects of the events about which he testified at trial, Witness EB was unable to recall all the details of the events of 7 April 1994.[1102] Appellant Ngeze concludes that the exclusion of Witness EB's testimony would potentially invalidate his conviction, since, in his submission, the testimonies of Witnesses AGX, AHI and AEU are not sufficient to prove beyond reasonable doubt the criminal acts with which he is charged.[1103]

458. Appellant Barayagwiza argues that the two handwriting experts recognized that Witness EB was indeed the author of the two recantation statements, a conclusion confirmed by the evidence gathered by the Prosecutor's investigators.[1104] He adds that the new evidence and testimonies admitted on appeal show that Witness EB is a liar.[1105] He accordingly concludes that Witness EB's trial testimony could not be relied upon as evidence against himself or against Appellant Ngeze.[1106]

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[1096] Second Expert Report, p. 4.
[1097] T(A) 16 January 2007, pp. 55-57.
[1098] Appellant Ngeze's Conclusions Following Second Expert Report; Appellant Barayagwiza's Conclusions Following Second Expert Report; Prosecution's Submissions Following Second Expert Report.
[1099] Appellant Ngeze's Conclusions Following Second Expert Report, pp. 15, 16 and 18. See also pp. 13 and 16, where Appellant Ngeze submits that the conclusion reached by the first expert in this respect satisfies the highest standard of probability that can be expected of a handwriting expert.
[1100] *Ibid.*, p. 17. According to Appellant Ngeze, the second expert concludes that the Additional Declaration is from Witness EB, a conclusion with which he himself agrees, while stressing that the expert's proviso that he cannot exclude the possibility of a good-quality forgery is not otherwise supported.
[1101] *Ibid.*, pp. 12, 13 and 18. To demonstrate the lack of credibility of Witness EB, the Appellant also submits that the *Gacaca* documents show that, contrary to the witness' allegations during the appeal hearing, he did not incriminate Appellant Ngeze before the *Gacaca*: Appellant Ngeze's Conclusions Following Second Expert Report, p. 10.
[1102] *Ibid.*, pp. 8 and 18. The Appeals Chamber is of the view that the testimony of Witness EB during the appeal hearing does not support Appellant's Ngeze's assertion, since the President invited the witness to "briefly recall the main facts upon which [he had testified] on 15, 16 and 17 May 2001", without further precision (T(A) 16 January 2007, p. 7).
[1103] *Ibid.*, pp. 18-20.
[1104] Appellant Barayagwiza's Conclusions Following Second Expert Report, para. 15.
[1105] *Ibid.*, para. 16.
[1106] *Ibid.*, paras. 16-17.

459. The Prosecutor submits that the purported recantation statement from Witness EB has no probative value and is merely a manipulation, designed to exculpate Appellant Ngeze.[1107] In support of this submission, he points out that Witness EB consistently denied being the author of the statements,[1108] that the forensic expertise ordered by the Appeals Chamber does not contradict this,[1109] and that the First Recantation Statement and the Additional Statement are not credible.[1110] He concludes that the assessment of Witness EB's testimony by the Trial Chamber should be maintained.[1111] In the alternative, the Prosecutor argues that, even if the testimony of Witness EB were to be rejected, there would nonetheless remain sufficient evidence to support Appellant Ngeze's conviction and sentence.[1112]

(c) Analysis

460. The Appeals Chamber considers that, since Witness EB denies being the author of the two recantation statements admitted as additional evidence,[1113] it is necessary to begin by examining the effect of the two expert reports. The Appeals Chamber considers that the issue here is not whether it can be established beyond reasonable doubt that Witness EB is the author of one or both of these statements but, rather, whether the expert reports raise doubt as to his credibility, given his denial of authorship.

461. With respect to the handwritten version of the First Recantation Statement, the Appeals Chamber recalls that the original of that document is not in the case-file, and that the two experts who examined copies of this document came to different conclusions as to whether the photocopy submitted to them was of sufficient quality to enable a conclusive opinion to be reached: the first expert states that the photocopies he examined were of a sufficient quality to allow him to reach a conclusion, and he expressly identifies Witness EB as the author of the First Recantation Statement;[1114] the second expert states that it is not in

[1107] Prosecution's Submissions Following Second Expert Report, para. 3.
[1108] *Ibid.*, paras. 5, 16-26.
[1109] *Ibid.*, paras. 5-10.
[1110] *Ibid.*, paras. 18-20, 23-24, 27-44. The Prosecutor submits in particular that (1) the recantation appeared at the same time as a series of similar alleged recantations, sent to the same persons from the same fax machine (paras. 18 and 41); (2) the Additional Statement appeared in suspicious circumstances (paras. 23, 38-40); (3) the recantation may have been made in exchange for payment (para. 24); (4) Witness EB's testimony at trial was supported by other credible evidence (paras. 28-30); (5) the reasons given in the First Recantation Statement for having given false testimony at trial are not credible (paras. 31-32); (6) contrary to what is stated in the Additional Statement, the typed and handwritten versions of the First Recantation Statement do not appear to have been written by the same person, as is shown by differences in spelling as between the two versions (paras. 33-35); (7) it is surprising that Witness EB should have waited until April 2005 (four years after his trial testimony) before recanting it (para. 36); and (8) it is surprising that Witness EB knew the contact details of the Appellant and his newly appointed counsel, as well as those of the ICTR President and Prosecutor (para. 37).
[1111] Prosecution's Submissions Following Second Expert Report, paras. 45-50. The Prosecutor argues in particular that it is not surprising that the *Gacaca* documents do not mention that Witness EB gave evidence against Appellant Ngeze, because the extracts in question contain information given by the witness in relation to individuals who carried out the attacks in Gisenyi and not on those (such as the Appellant) who instigated those attacks (para. 47). The Prosecutor further contends that mere opinions to the effect that Witness EB was not credible are not capable of challenging his trial testimony (para. 49).
[1112] *Ibid.*, paras. 51-54.
[1113] The Appeals Chamber notes incidentally that the position taken by Witness EB makes it unnecessary to consider the Prosecutor's arguments that the recantation as set out in the two statements is not credible (Prosecution's Submissions Following Second Expert Report, paras. 18-20, 23, 24, 27-44).
[1114] First Expert Report, p. 2. The Appeals Chamber notes that in his Additional Conclusions the Prosecutor acknowledges that that report identifies the signatures contained in the disputed documents as originating from

principle possible to reach a conclusive opinion based on photocopies of documents, and he evidently believes that the poor quality of the document submitted to him does not justify making an exception to that principle.[1115]

462. With respect to the Additional Statement, the Appeals Chamber notes that the second expert explains that he is not in a position, based on a comparison of the documents, to determine whether Witness EB wrote this document.[1116] The second expert adds, however, that the handwriting evidence would support the proposition that Witness EB signed the Additional Statement, although the possibility that it is a forgery cannot be excluded.[1117] The Appeals Chamber considers, therefore, that the Second Expert Report is not conclusive as to the author of the Additional Statement.[1118]

463. In the view of the Appeals Chamber, Witness EB's formal identification by the first expert as the author of the First Recantation Statement raises a serious doubt as to Witness EB's credibility in view of his denial that he is the author of that statement. This doubt is not dispelled by the Second Expert Report, even though that report is not conclusive. The Appeals Chamber does not exclude the possibility that the Additional Statement is a forgery, fabricated after Witness EB denied being the author of the First Recantation Statement, but this does not dispel the doubt raised as to Witness EB's credibility by the first expert's identification of him as the author of the First Recantation Statement. Before assessing the impact of such doubt, the Appeals Chamber finds it relevant to consider Appellant Ngeze's argument that the results of Mr. Sanogo's investigation demonstrate Witness EB's lack of credibility.

464. The Appeals Chamber recalls that, following receipt of the Additional Statement by his office, the Prosecutor instructed Mr. Sanogo to carry out a second investigation in Gisenyi in October 2006, in the course of which the latter obtained information suggesting that Witness EB was paid to recant his testimony.[1119] According to the Prosecutor, even if that were proved, the recantation would be of no probative value. However, the Prosecutor appears to take the view that in any event the issue is moot, since the investigation did not obtain reliable evidence of the alleged bribe, and Witness EB ultimately did not recant his testimony.[1120] In the view of the Appeals Chamber, that is to fail to give proper weight to the information obtained during the investigation and to Mr. Sanogo's testimony at the hearing. The fact that the Prosecutor's own chief investigator, sent by the Prosecutor to investigate Witness EB's purported recantation, himself adds to the serious doubt raised as to the witness' credibility is surely disturbing. The Appeals Chamber is well aware of the limits of

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Witness EB, but omits to mention the fact that the report reaches the same conclusion as to the *handwriting* in those documents.

[1115] Second Expert Report, p. 3. The Appeals Chamber notes in this respect that the document submitted to the second expert consists of a print-out of a scanned version of the photocopy annexed to the First Expert Report, which may explain why the two experts differ as to the quality of the photocopy.

[1116] Second Expert Report, p. 3.

[1117] *Ibid.*, p. 4.

[1118] Since the Second Expert Report is not conclusive as to the authorship of the Additional Statement, the Appeals Chamber considers that it need not address the Prosecutor's specific arguments regarding the circumstances of the document's sending and its content, which, in his view, are evidence of a concerted effort to manipulate the appeal proceedings (Prosecution's Submissions Following Second Expert Report, paras. 23, 38-42).

[1119] Prosecution's Submissions Following Second Expert Report, para. 24.

[1120] *Ibid.*, paras. 24-25.

the investigation in question. As Mr. Sanogo admitted, he was unable to check some of the negative information he received on Witness EB.[1121] Furthermore, his impression that "EB and AFX seemed to have made a business out of the genocide" merely represented his "feeling".[1122] Finally, he admitted that he did not check the identity given by one of his informers.[1123] Mr. Sanogo's report and testimony are undeniably insufficient to establish with certainty that the First Recantation Statement, attributed by the first expert to Witness EB, was made by the latter in exchange for payment in the circumstances described by one of the individuals interviewed by Mr. Sanogo. However, the Appeals Chamber cannot ignore this information, which undeniably casts additional doubt on the credibility of Witness EB.

465. Turning now to the impact of the doubts raised both by the First Expert Report and the Prosecutor's investigator, Appellant Ngeze submits that, whether false or true, the recantation statements require that his conviction be set aside, since Witness EB's testimony is not credible.[1124] On the other hand, the Prosecutor submits that, even if the Appeals Chamber disbelieved Witness EB's denial that he had recanted, this would not affect the Trial Chamber's finding regarding the witness' credibility.[1125]

466. The Appeals Chamber does not share the Prosecutor's view that, since Witness EB has not recanted his trial testimony, the additional evidence admitted on appeal could not have constituted a decisive factor capable of affecting the Trial Chamber's findings. It is apparent from paragraph 812 of the Judgement that the Trial Chamber considered the following elements before declaring Witness EB credible: (1) reasonable and adequate responses were given by the witness to questions put to him in cross-examination in relation to the omission (a) of the Appellant's name in two of his three written statements and (b) of certain incidents mentioned in his testimony such as the looting of his parents' house and the torture of his pregnant sister; and (2) the fact that Witness EB was clear in his account of events, and that he was careful to distinguish what he did and saw from what he was reporting. The Appeals Chamber is of the view that if, after hearing Witness EB's testimony at trial, the Trial Chamber had been aware of the facts currently before the Appeals Chamber – namely (1) the fact that Witness EB denies before the Chamber being the author of a recantation statement, but an expert retained by the Prosecutor unhesitatingly attributes to him the handwriting and signature on that statement; and (2) the fact that the Prosecutor's investigator raises serious doubts as to the morality of the witness and reports that several genocide survivors consider him ready to do anything for money – the Trial Chamber would have been bound to find that these matters raised serious doubts as to Witness EB's credibility. As a reasonable trier of fact, it would have rejected Witness EB's testimony, or at least required corroboration of his testimony by other credible evidence. The Appeals Chamber accordingly decides to reject Witness EB's trial testimony to the extent that it is not corroborated by other credible evidence.

[1121] T(A) 16 January 2007, pp. 52-53.
[1122] *Ibid.*, p. 62.
[1123] *Ibid.*, pp. 64-65.
[1124] Appellant Ngeze's Conclusions Following Second Expert Report, para. 18.
[1125] Prosecution's Submissions Following Second Expert Report, para. 46.

## D. Impact on the verdict

467. The Prosecutor submits that, even if Witness EB's testimony were to be rejected, there would still remain sufficient evidence to maintain Appellant Ngeze's conviction and sentence.[1126]

468. On reading the Judgement, the Appeals Chamber finds that the following of the Trial Chamber's conclusions rely exclusively on Witness EB's testimony and will be set aside: "Hassan Ngeze ordered the *Interahamwe* in Gisenyi on the morning of 7 April 1994 to kill Tutsi civilians and prepare for their burial at the *Commune Rouge*";[1127] "[m]any were killed in the subsequent attacks that happened immediately thereafter and later on the same day";[1128] "[a]mong those killed were Witness EB's mother, brother and pregnant sister. Two women, one of whom was Ngeze's mother, inserted the metal rods of an umbrella into her body";[1129] "[t]he attack that resulted in these and other killings was planned systematically, with weapons distributed in advance, and arrangements made for the transport and burial of those to be killed".[1130] The Appeals Chamber notes that these findings form the entire factual findings underlying Appellant Ngeze's conviction for ordering genocide.[1131] That conviction must therefore be set aside. The same goes for the Appellant's conviction for ordering extermination.[1132]

469. The Appeals Chamber will now examine whether the findings in paragraph 837 of the Judgement supporting Appellant Ngeze's conviction for aiding and abetting genocide,[1133] committing direct and public incitement to commit genocide,[1134] aiding and abetting

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[1126] *Ibid.*, paras. 28, 30, 51-54.

[1127] Judgement, para. 836. The Appeals Chamber understands that this finding relies exclusively on the testimony of Witness EB, summarized as follows by the Trial Chamber at paragraph 825 of the Judgement (see also para. 789 and 790):

> Witness EB gave a clear and detailed account of an attack that day against the Tutsi population in Gisenyi by the *Interahamwe*, an attack in which he and his family were targeted as victims […] Although there is no evidence that he was present during these killings, this attack was ordered by Hassan Ngeze, communicated through a loudspeaker from his vehicle. Ngeze ordered the *Interahamwe* to kill the Tutsi and ordered some of them to go to *Commune Rouge* to dig graves.

[1128] Judgement, para. 836. The Appeals Chamber understands that this finding also relies exclusively on the above mentioned summary of Witness EB's testimony.

[1129] *Idem.* The Trial Chamber summarizes as follows the testimony of Witness EB supporting this finding: "[h]e saw his brother killed, the body of his pregnant sister sexually violated, and his mother attacked with a nail studded club and killed. He himself was severely injured" (Judgement, para. 825. See also para. 789).

[1130] Judgement, para. 836. The Appeals Chamber understands that this finding is also based exclusively on Witness EB's testimony as summarized at paragraph 825 of the Judgement:

> [Witness EB's] description of the attack suggests that it was planned systematically. Weapons were distributed from a central location, Samvura's house, where Witness EB saw the *Interahamwe* picking them up. Graves were dug in advance, and vehicles were organized to transport the bodies. The brief dialogue recounted between the *Interahamwe* and Witness EB's mother, before she was clubbed in the head, indicates that the attackers and their victims knew each other. The attackers were wondering why she was still alive, signifying that the *Interahamwe* intended to kill all their Tutsi neighbors.

[1131] Judgement., paras. 836, 955, 977A.

[1132] *Ibid.*, para. 1068, erroneously referring to para. 954 instead of paras. 955-956.

[1133] *Ibid.*, paras. 956 and 977A.

[1134] *Ibid.*, para. 1039.

extermination[1135] and committing persecution[1136] can be maintained on the basis of testimonies other than that of Witness EB.

470. The evidentiary bases of the factual findings set out in paragraph 837 of the Judgement are as follows:

- The finding that "Ngeze helped secure and distribute, stored, and transported weapons to be used against the Tutsi population" essentially relies on Witness AHI's testimony that the Appellant took part in a distribution of weapons on 8 April 1994, and on Witness AFX's testimony that the Appellant had stored weapons at an unspecified date;[1137]

- The finding that the Appellant "set up, manned and supervised roadblocks in Gisenyi in 1994 that identified targeted Tutsi civilians who were subsequently taken to and killed at the *Commune Rouge*" essentially relies on Witness AHI's testimony.[1138] The Trial Chamber also observed that Witness AHI's testimony corroborates Serushago's testimony that Ngeze played an active and supervisory role in the identification and targeting of Tutsi at roadblocks, who were subsequently killed at the *Commune Rouge*;[1139]

- The finding that Appellant Ngeze "often drove around with a megaphone in his vehicle, mobil[iz]ing the population to come to CDR meetings and spreading the message that the *Inyenzi* would be exterminated, *Inyenzi* meaning, and being understood to mean, the Tutsi ethnic minority", which also partly supports the Trial Chamber's finding related to the Appellant's genocidal intent,[1140] also relies on the testimonies of Witnesses Serushago, ABE, AAM and AEU;[1141]

- Finally, the Trial Chamber's finding that "[a]t Bucyana's funeral in February 1994, Ngeze said that if President Habyarimana were to die, the Tutsi would not be spared", which also partly supports the Trial Chamber's finding that the Appellant had a genocidal intent,[1142] is based on the testimony of Witness LAG, who heard and saw Ngeze say at Bucyana's funeral that if Habyarimana were to die "we would not be able to spare the Tutsi".[1143]

471. Admittedly, the findings in paragraph 837 of the Judgement do not directly rely on Witness EB's testimony. However, Witness EB was one of the four witnesses who claimed to have seen the Appellant on 7 and 8 April 1994, and on whom the Trial Chamber partly relied

[1135] *Ibid.*, para. 1068, erroneously referring to para. 954 instead of paras. 955-956.
[1136] *Ibid.*, para. 1084 referring to para. 1039.
[1137] *Ibid.*, para. 831. The Trial Chamber also refers to Witness Serushago's testimony that the Appellant transported weapons on 7 April and between 13 and 20 April 1994. However, it does not appear that the Trial Chamber relied on this statement for anything other than its finding that Witnesses AHI and AFX were corroborated by Witness Serushago's testimony as to the fact that Ngeze transported weapons in his vehicle (dates unspecified): see Judgement, para. 831.
[1138] *Ibid.*, para. 833.
[1139] *Idem*.
[1140] *Ibid.*, para. 968.
[1141] *Ibid.*, para. 834.
[1142] *Ibid.*, para. 968.
[1143] *Ibid.*, para. 835.

in order to reject the Appellant's alibi.[1144] The Appeals Chamber is bound to ask itself whether, in the absence of Witness EB's testimony, the Trial Chamber's rejection of the alibi and resultant finding, in paragraphs 831 and 837 of the Judgement, that the Appellant had taken part in the distribution of weapons on 8 April 1994 can be sustained. The Appeals Chamber turns now to this issue, taking into account the fact that the Trial Chamber erred in finding that the alibi testimonies were "thoroughly inconsistent".[1145]

472. The Appeals Chamber recalls that, over and above the substantial inconsistencies that the Trial Chamber deemed to have noted in the defence testimonies regarding the alibi, it considered even more important the fact that "none of the Defence witnesses had evidence other than hearsay that Ngeze was arrested at all. Their sources of information were vague, with the exception of three witnesses who learned of the arrest from Ngeze himself".[1146] The Appeals Chamber considers that statement to be incorrect: in addition to witnesses having learned of Appellant Ngeze's arrest from Ngeze himself, Witness BAZ-1 stated that he had heard of the arrest from the Appellant's immediate neighbours, whose names he gave.[1147] Similarly, Witness RM-112 stated that it was the Appellant's servant who informed him of the arrest when he went to Ngeze's house in the morning of 7 April 2007.[1148]

473. Thus the reasons relied on by the Trial Chamber in order to conclude that the alibi raised no reasonable doubt as to the Appellant's acts between 6 and 9 April 1994 are erroneous in two respects: (1) the testimonies of Defence witnesses were not "thoroughly inconsistent" and (2) the witnesses' sources of information were only vague in some instances. Furthermore, the fact that the evidence from Defence witnesses regarding Appellant Ngeze's arrest was only hearsay does not in itself suffice to render their testimony not credible. Under these circumstances, the Appeals Chamber considers that there is a risk of a miscarriage of justice if the Trial Chamber's finding on the alibi is upheld, particularly in view of the fact that, with the rejection of Witness EB's testimony, there remain only three witnesses (Witnesses Serushago, AHI and AGX) who allegedly saw the Appellant between 6 and 9 April 1994, the testimony of one of these witnesses (Witness Serushago) being moreover acceptable only to the extent that it is corroborated.[1149]

474. The Appeals Chamber accordingly reverses the Trial Chamber's finding on the alibi and concludes that it has not been established beyond reasonable doubt that the Appellant took part in a distribution of weapons on 8 April 1994. However, the fact that there exists reasonable doubt as to Witness AHI's testimony that Appellant Ngeze participated in a distribution of weapons on 8 April 1994 does not necessarily imply that his testimony must be rejected in its entirety. Thus the existence of reasonable doubt as to the truth of a statement by a witness is not evidence that the witness lied with respect to that aspect of his testimony, nor that the witness is not credible with respect to other aspects. Consequently, the Appeals Chamber considers that the following factual findings in paragraph 837 of the Judgement are not affected by the above findings: that the Appellant stored weapons at his home before

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[1144] *Ibid.*, para. 829:

"Four Prosecution witnesses saw Ngeze on 7 April 1994. Their eyewitness testimony under oath is not shaken by the hearsay of the Defence witnesses or the contradictory testimony of Ngeze himself".

[1145] *Supra* X. B. 3.

[1146] Judgement, para. 828.

[1147] T. 27 January 2003, p. 67.

[1148] T. 13 March 2003, p. 3.

[1149] See Judgement, para. 824.

6 April 1994;[1150] that he "set up, manned and supervised roadblocks in Gisenyi in 1994"; that he identified "targeted Tutsi civilians who were subsequently taken to and killed at the *Commune Rouge*"; that he "often drove around with a megaphone in his vehicle, mobil[iz]ing the population to come to CDR meetings and spreading the message that the *Inyenzi* would be exterminated, *Inyenzi* meaning, and being understood to mean, the Tutsi ethnic minority"[1151] and that "[a]t Bucyana's funeral in February 1994, Ngeze said that if President Habyarimana were to die, the Tutsi would not be spared".[1152]

## XI. MODES OF RESPONSIBILITY

475. Before examining whether the Trial Chamber could find that the crimes charged in the Indictments were committed, and that the Appellants should be held responsible for them, the Appeals Chamber considers it helpful to recall certain principles applicable to modes of responsibility.

476. The relevant provisions are found in Article 6(1) and (3) of the Statute:

> 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.
>
> 3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

### A. Responsibility under Article 6(1) of the Statute

477. The Appeals Chamber notes that, in convicting the Appellants under Article 6(1) of the Statute for various crimes, the Trial Chamber has not always identified the mode of responsibility on which the conviction was based. The Appeals Chamber must therefore identify the relevant mode of responsibility (if any) for each charge on which the Trial Chamber entered a conviction. The Appeals Chamber is of the view that the following modes of responsibility may be relevant in the instant case: committing; planning; instigating; ordering; aiding and abetting.

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[1150] In paragraph 837 of the Judgement, the Trial Chamber finds that the Appellant "helped secure and distribute, stored, and transported weapons to be used against the Tutsi population". This finding relied on the testimony of Witnesses AHI, AFX and Serushago (see Judgement, para. 831). Since Witness AHI's testimony with regard to the distribution of weapons by the Appellant on 8 April 1994 cannot be accepted, only the testimonies of Witnesses AFX and Serushago remain. Witness AFX only asserted that, on an unspecified date before the killings of April 1994, Appellant Ngeze showed him the weapons he was keeping at his home (see Judgement, paras. 796 and 831). Witness Serushago's testimony can only be accepted if it is corroborated by other evidence (Judgement, para. 824). Accordingly, only the finding that the Appellant stored weapons before 6 April 1994 remains. However, this factual finding must also be set aside for the reasons set out below (*Infra* XII. C. 3. (b) (ii) ).

[1151] Judgement, para. 837. The findings that Appellant Ngeze possessed the intent to destroy the Tutsi population and acted with the intent to destroy in whole or in part the Tutsi ethnical group, supporting his conviction for genocide, notably rely on this factual finding (Judgement, paras. 968 and 977A).

[1152] *Idem*. The findings that Appellant Ngeze possessed the intent to destroy the Tutsi population and acted with the intent to destroy in whole of in part the Tutsi ethnical group, supporting his conviction for genocide, notably rely on this factual finding (Judgement, paras. 968 and 977A).

478. The Appeals Chamber recalls that commission covers, primarily, the physical perpetration of a crime (with criminal intent) or a culpable omission of an act that is mandated by a rule of criminal law, but also participation in a joint criminal enterprise.[1153] However, it does not appear that the Prosecutor charged the Appellants at trial with responsibility for their participation in a joint criminal enterprise,[1154] and the Appeals Chamber does not deem it appropriate to discuss this mode of participation here.[1155]

479. The *actus reus* of "planning" requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.[1156] It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.[1157] The *mens rea* for this mode of responsibility entails the intent to plan the commission of a crime or, at a minimum, the awareness of substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.[1158]

480. The *actus reus* of "instigating" implies prompting another person to commit an offence.[1159] It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[1160] The *mens rea* for this mode of responsibility is the intent to instigate another person to commit a crime or at a miminum the awareness of the substantial likelihood that a crime will be committed in the execution of the act or omission instigated.[1161]

481. With respect to ordering, a person in a position of authority[1162] may incur responsibility for ordering another person to commit an offence,[1163] if the person who received the order actually proceeds to commit the offence subsequently. Responsibility is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that

[1153] *Tadić* Appeal Judgement, para. 188.
[1154] Even if such a charge could possibly be inferred from certain paragraphs of the Indictments, for example: *Nahimana* Indictment, para. 6.27; *Barayagwiza* Indictment, para. 7.13; *Ngeze* Indictment, para. 7.15.
[1155] For a more detailed discussion of this form of participation, see *Brđanin* Appeal Judgement, paras. 389-432; *Stakić* Appeal Judgement, paras. 64-65; *Kvočka et al*. Appeal Judgement, paras. 79-119; *Ntakirutimana* Appeal Judgement, paras. 461-468; *Vasiljević* Appeal Judgement, paras. 94-102; *Krnojelac* Appeal Judgement, paras. 28-33, 65 *et seq.*; *Tadić* Appeal Judgement, paras. 185-229.
[1156] *Kordić and Čerkez* Appeal Judgement, para. 26.
[1157] *Kordić and Čerkez* Appeal Judgement, para. 26. Although the French version of the Judgement uses the terms "*un élément determinant*", the English version – which is authoritative – uses the expression "factor substantially contributing to".
[1158] *Kordić and Čerkez* Appeal Judgement, paras. 29 and 31.
[1159] *Ndindabahizi* Appeal Judgement, para. 117; *Kordić and Čerkez* Appeal Judgement, para. 27.
[1160] *Gacumbitsi* Appeal Judgement, para. 129; *Kordić and Čerkez* Appeal Judgement, para. 27. Once again, although the French version of the *Kordić and Čerkez* Judgement reads "*un élément déterminant*", the English version – which is authoritative – reads "factor substantially contributing to".
[1161] *Kordić and Čerkez* Appeal Judgement, paras. 29 and 32.
[1162] It is not necessary to demonstrate the existence of an official relationship of subordination between the accused and the perpetrator of the crime: *Galić* Appeal Judgement, para. 176; *Gacumbitsi* Appeal Judgement, para. 182; *Kamuhanda* Appeal Judgement, para. 75; *Semanza* Appeal Judgement, para. 361; *Kordić and Čerkez* Appeal Judgement, para. 28.
[1163] *Galić* Appeal Judgement, para. 176; *Ntagerura et al.* Appeal Judgement, para. 365; *Kordić and Čerkez* Appeal Judgement, paras. 28-29.

order, and if that crime is effectively committed subsequently by the person who received the order.[1164]

482. The *actus reus* of aiding and abetting[1165] is constituted by acts or omissions[1166] aimed specifically at assisting, furthering or lending moral support to the perpetration of a specific crime, and which substantially contributed to the perpetration of the crime.[1167] Contrary to the three modes of responsibility discussed above (which require that the conduct of the accused precede the perpetration of the crime itself), the *actus reus* of aiding and abetting may occur before, during or after the principal crime.[1168] The *mens rea* for aiding and abetting is knowledge that acts performed by the aider and abettor assist in the commission of the crime by the principal.[1169] It is not necessary for the accused to know the precise crime which was intended and which in the event was committed,[1170] but he must be aware of its essential elements.[1171]

483. The Appeals Chamber concludes by recalling that the modes of responsibility under Article 6(1) of the Statute are not mutually exclusive and that it is possible to charge more than one mode in relation to a crime if this is necessary in order to reflect the totality of the accused's conduct.[1172]

### B. Responsibility under Article 6(3) of the Statute

484. The Appeals Chamber recalls that, for the liability of an accused to be established under Article 6(3) of the Statute, the Prosecutor has to show that: (1) a crime over which the Tribunal has jurisdiction was committed; (2) the accused was a *de jure* or *de facto* superior of the perpetrator of the crime and had effective control over this subordinate (*i.e.*, he had the material ability to prevent or punish commission of the crime by his subordinate); (3) the accused knew or had reason to know that the crime was going to be committed or had been

[1164] *Galić* Appeal Judgement, paras. 152 and 157; *Kordić and Čerkez* Appeal Judgement, para. 30; *Bla{ki}* Appeal Judgement, para. 42.
[1165] The French version of some Appeal and Trial Judgements of this Tribunal and of the ICTY mention the term "*complicité*" ("complicity") rather than "*aide et encouragement*" ("aiding and abetting"). The Appeals Chamber prefers "*aide et encouragement*" because these terms are the ones used in Article 6(1) of the Statute. Furthermore, the Statute uses the word "*complicité*" in a very specific context (see Article 2(3)(e) of the Statute); it should thus be reserved for that context.
[1166] *Ntagerura et al.* Appeal Judgement, para. 370; *Blaškić* Appeal Judgement, para. 47.
[1167] *Blagojević and Jokić* Appeal Judgement, para. 127; *Ndindabahizi* Appeal Judgement, para. 117; *Simić* Appeal Judgement, para. 85; *Ntagerura et al.* Appeal Judgement, para. 370 and footnote 740; *Blaškić* Appeal Judgement, paras. 45 and 48; *Vasiljević* Appeal Judgement, para. 102.
[1168] *Blagojević and Jokić* Appeal Judgement, para. 127; *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, para. 48. See also *Čelebići* Appeal Judgement, para. 352, citing with approval the conclusion of the Trial Chamber in that case that it is not necessary that the assistance in question be given at the time of the commission of the crime.
[1169] *Blagojević and Jokić* Appeal Judgement, para. 127; *Brđanin* Appeal Judgement, para. 484; *Simić* Appeal Judgement, para. 86; *Ntagerura et al.* Appeal Judgement, para. 370; *Blaškić* Appeal Judgement, paras. 45 and 49; *Vasiljević* Appeal Judgement, para. 102; *Aleksovski* Appeal Judgement, para. 162.
[1170] *Simić* Appeal Judgement, para. 86; *Blaškić* Appeal Judgement, para. 50.
[1171] *Brđanin* Appeal Judgement, para. 484; *Simić* Appeal Judgement, para. 86; *Blaškić* Appeal Judgement, para. 50; *Aleksovski* Appeal Judgement, para. 162.
[1172] *Ndindabahizi* Appeal Judgement, para. 122; *Kamuhanda* Appeal Judgement, para. 77.

committed; and (4) the accused did not take necessary and reasonable measures to prevent or punish the commission of the crime by a subordinate.[1173]

485. The Appeals Chamber adds that, for the purposes of Article 6(3) of the Statute, the "commission" of a crime by a subordinate must be understood in a broad sense. In the *Blagojević and Jokić* Appeal Judgement, the ICTY Appeals Chamber confirmed that an accused may be held responsible as a superior not only where a subordinate committed a crime referred to in the Statute of ICTY, but also where a subordinate planned, instigated or otherwise aided and abetted in the planning, preparation or execution of such a crime:

> As a threshold matter, the Appeals Chamber confirms that superior responsibility under Article 7(3) of the Statute encompasses all forms of criminal conduct by subordinates, not only the "committing" of crimes in the restricted sense of the term, but all other modes of participation under Article 7(1). The Appeals Chamber notes that the term "commit" is used throughout the Statute in a broad sense, encompassing all modes of responsibility covered by Article 7(1) and that such a construction is clearly manifest in Article 29 (co-operation and judicial assistance) of the Statute, referring to States' obligation to co-operate with the International Tribunal "in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law."
>
> The Appeals Chamber has previously determined that criminal responsibility under Article 7(3) is based primarily on Article 86(2) of Protocol I. Accordingly, the meaning of "commit", as used in Article 7(3) of the Statute, necessarily tracks the term's broader and more ordinary meaning, as employed in Protocol I. The object and purpose of Protocol I, as reflected in its preamble, is to "reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application". The preamble of Protocol I adds further that "the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments." The purpose of superior responsibility, as evidenced in Articles 86(1) and 87 of Protocol I, is to ensure compliance with international humanitarian law. Furthermore, one of the purposes of establishing the International Tribunal, as reflected in Security Council Resolution 808, is to "put an end to [widespread violations of international humanitarian law] and to take effective measures to bring to justice the persons who are responsible for them". And, more particularly, the purpose of superior responsibility in Article 7(3) is to hold superiors "responsible for failure to prevent a crime or to deter the unlawful behaviour of [their] subordinates."
>
> In this context, the Appeals Chamber cannot accept that the drafters of Protocol I and the Statute intended to limit a superior's obligation to prevent or punish violations of international humanitarian law to only those individuals physically committing the material elements of a crime and to somehow exclude subordinates who as accomplices substantially contributed to the completion of the crime. Accordingly, "commit" as used in Article 7(3) of the Statute must be understood as it is in Protocol I, in its ordinary and broad sense.[1174]

486. The Appeals Chamber endorses this reasoning and holds that an accused may be held responsible as a superior under Article 6(3) of the Statute where a subordinate "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or

[1173] See *Halilovi}* Appeal Judgement, paras. 59 and 210; *Gacumbitsi* Appeal Judgement, para. 143; *Blaškić* Appeal Judgement, paras. 53-85; *Bagilishema* Appeal Judgement, paras. 24-62; *Čelebići* Appeal Judgement, paras. 182-314.
[1174] *Blagojević and Jokić* Appeal Judgement, paras. 280-282 (footnotes omitted).

execution of a crime referred to in Articles 2 to 4 of the present Statute",[1175] provided, of course, that all the other elements of such responsibility have been established.

### C. There can be no cumulative responsibility under Article 6(1) and (3) in respect of the same count

487. The Appeals Chamber recalls that it is inappropriate to convict an accused for a specific count under both Article 6(1) and Article 6(3) of the Statute. When, for the same count and the same set of facts, the accused's responsibility is pleaded pursuant to both Articles and the accused could be found liable under both provisions, the Trial Chamber should rather enter a conviction on the basis of Article 6(1) of the Statute alone and consider the superior position of the accused as an aggravating circumstance.[1176]

488. The Appeals Chamber notes that in the instant case the Trial Chamber convicted the Appellants on several counts under both Article 6(1) and Article 6(3) in respect of the same set of facts, which was an error. The consequences of this error will be examined in the discussion of the Appellants' liability.

## XII. THE CRIME OF GENOCIDE

### A. Introduction

489. The Trial Chamber found Appellant Nahimana guilty of the crime of genocide pursuant to Article 6(1) of the Statute for using RTLM "to instigate the killing of Tutsi civilians".[1177] The Chamber found Appellant Barayagwiza guilty of the crime of genocide pursuant to Article 6(1) of the Statute for "instigating acts of genocide committed by CDR members and *Impuzamugambi*",[1178] and pursuant to Article 6(3) of the Statute "[f]or his active engagement in the management of RTLM prior to 6 April, and his failure to take necessary and reasonable measures to prevent the killing of Tutsi civilians instigated by RTLM"[1179] and "[f]or his active engagement in CDR, and his failure to take necessary and reasonable measures to prevent the killing of Tutsi civilians by CDR members and *Impuzamugambi*".[1180] Lastly, Appellant Ngeze was found guilty of genocide pursuant to Article 6(1) of the Statute "[a]s founder, owner and editor of *Kangura*, a publication that instigated the killing of Tutsi civilians, and for his individual acts in ordering and aiding and abetting the killing of Tutsi civilians".[1181]

490. The Appellants contend that the Trial Chamber committed errors of law and of fact in finding them guilty of genocide,[1182] particularly in regard to the existence of a causal link

[1175] Article 6(1) of the Statute.
[1176] *Galić* Appeal Judgement, para. 186; *Jokić* Appeal Judgement, paras. 23-28; *Kajelijeli* Appeal Judgement, para. 81; *Kvočka et al*. Appeal Judgement, para. 104; *Kordi} and ^erkez* Appeal Judgement, paras. 34-35; *Blaškić* Appeal Judgement, para. 91.
[1177] Judgement, para. 974.
[1178] *Ibid*., para. 975.
[1179] *Ibid*., para. 973.
[1180] *Ibid*., para. 977.
[1181] *Ibid*., para. 977A.
[1182] Nahimana Notice of Appeal, pp. 10-12, 15-17; Nahimana Appellant's Brief, paras. 562-577, also referring to earlier submissions on direct and public incitement to commit genocide; Barayagwiza Notice of Appeal,

between the acts attributed to them and acts of genocide,[1183] as well as to their state of mind.[1184]

## B. The crime of genocide

### 1. Applicable law

491. Article 2 of the Statute provides:

> 1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this Article.
>
> 2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members to the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.
>
> 3. The following acts shall be punishable:
>
> (a) Genocide;
>
> (b) Conspiracy to commit genocide;
>
> (c) Direct and public incitement to commit genocide;
>
> (d) Attempt to commit genocide;
>
> (e) Complicity in genocide.

492. A person commits the crime of genocide (Article 2(3)(a) of the Statute) if he or she commits one of the acts enumerated in Article 2(2) of the Statute (*actus reus*) with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such ("genocidal intent").[1185] Furthermore, even if an accused has not committed genocide himself, his responsibility may be established under one of the modes of responsibility provided for in Article 6(1) and (3) of the Statute. Where a person is accused of having planned, instigated, ordered or aided and abetted the commission of genocide by one or more other persons pursuant to Article 6(1) of the Statute, the Prosecutor must establish that the accused's acts or omissions substantially contributed to the commission of acts of genocide.[1186]

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pp. 1-2 (Grounds 6-29); Barayagwiza Appellant's Brief, paras. 103-240; Ngeze Notice of Appeal, paras. 120-146; Ngeze Appellant's Brief, paras. 333-387.

[1183] Nahimana Appellant's Brief, paras. 233-241, 567-573; Barayagwiza Appellant's Brief, paras. 168, 169, 194 and 195; Ngeze Appellant's Brief, paras. 339-345, 347-351.

[1184] Nahimana Appellant's Brief, para. 574, referring to paras. 242-294; Barayagwiza Appellant's Brief, paras. 108-139; Ngeze Appellant's Brief, para. 353, referring to paras. 273-285.

[1185] Other terms are also used, such as "special intent", "specific intent", "particular intent" or "*dolus specialis*". Genocidal intent is examined *infra* XII. C.

[1186] *Supra* XI. A.

### 2. Submissions of Appellants Nahimana and Ngeze concerning the group protected in the definition of the crime of genocide

#### (a) Arguments of the Parties

493. Appellants Nahimana and Ngeze argue that the Trial Chamber erred in considering as acts of genocide acts committed against Hutu opponents, thus unlawfully broadening the notion of protected group.[1187]

494. The Prosecutor responds that it has not been demonstrated that the Trial Chamber relied solely on the attacks perpetrated against Hutu in order to find the Appellants guilty of genocide.[1188] According to the Prosecutor, the Trial Chamber's approach is in line with established jurisprudence that groups targeted for genocide may be defined subjectively, on the basis of a variety of criteria, including the perception of the perpetrators themselves.[1189] He submits that in the present case the perpetrators, including the Appellants, regarded all Hutu who supported Tutsi as Tutsi, and placed them in the same category: Hutu victims thus fell within the protected group pursuant to the applicable law on genocide.[1190]

#### (b) Analysis

495. In paragraph 948 of the Judgement, the Trial Chamber asserts that "acts committed against Hutu opponents were committed on account of their support of the Tutsi ethnic group and in furtherance of the intent to destroy the Tutsi ethnic group", but gives no further explanation. Subsequently, the Chamber finds that there is a causal connection between RTLM broadcasts and the killing of some Tutsi as well as "Hutu political opponents who supported the Tutsi ethnic group".[1191] It also considers that, by fanning "the flames of ethnic hatred, resentment and fear against the Tutsi population and Hutu political opponents who supported the Tutsi ethnic group, [...] *Kangura* paved the way for genocide in Rwanda, whipping the Hutu population into a killing frenzy".[1192]

496. In the opinion of the Appeals Chamber, the presence of these findings by the Trial Chamber in the section of the Judgement dealing with the crime of genocide poses a problem. Indeed, the acts committed against Hutu political opponents cannot be perceived as acts of genocide, because the victim of an act of genocide must have been targeted by reason of the fact that he or she belonged to a protected group. In the instant case, only the Tutsi ethnic group may be regarded as a protected group under Article 2 of the Statute and Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide,[1193] since the group of "Hutu political opponents" or the group of "Tutsi individuals and Hutu political opponents" does not constitute a "national, ethnical, racial or religious group" under these

[1187] Nahimana Appellant's Brief, paras. 564-566 and Ngeze Appellant's Brief, paras. 337-338; both Appellants refer to paragraph 948 of the Judgement.
[1188] Respondent's Brief, paras. 447-448, referring to paragraph 948 of the Judgement.
[1189] *Ibid*., paras. 447 and 449.
[1190] *Ibid*., para. 450, referring to *Bagilishema* Judgement, para. 65.
[1191] Judgement, para. 949.
[1192] *Ibid*., para. 950.
[1193] UN GA Resolution 260 A (III) of 9 December 1948 ("Genocide Convention").

provisions.[1194] Furthermore, although the jurisprudence of the *ad hoc* Tribunals acknowledges that the perception of the perpetrators of the crimes may in some circumstances be taken into account for purposes of determining membership of a protected group,[1195] in this instance neither the Trial Chamber nor the Prosecutor cited any evidence to suggest that the Appellants or the perpetrators of the crimes perceived Hutu political opponents as Tutsi. In other words, in the present case Hutu political opponents were acknowledged as such and were not "perceived" as Tutsi. Even if the perpetrators of the genocide believed that eliminating Hutu political opponents was necessary for the successful execution of their genocidal project against the Tutsi population, the killing of Hutu political opponents cannot constitute acts of genocide.

497. The Appeals Chamber observes, however, that it is not certain that the Trial Chamber effectively found that the acts committed against Hutu political opponents amounted to acts of genocide. It seems, on the contrary, that the Chamber relied only on the killing of Tutsi in order to find the Appellants guilty of the crime of genocide. Thus the Judgement states that "the killing of Tutsi civilians can be said to have resulted, at least in part, from the message of ethnic targeting for death that was clearly and effectively disseminated through RTLM, *Kangura* and CDR, before and after 6 April 1994";[1196] that the Appellants "acted with intent to destroy, in whole or in part, the Tutsi ethnic group"[1197] and that they should be held responsible for the "killing of Tutsi civilians".[1198] In these circumstances, the Appeals Chamber is not convinced that the Appellants have demonstrated that there was an error, even if, to avoid any ambiguity, the Trial Chamber should have refrained from discussing the killing of Hutu political opponents in the section of the Judgement dealing with genocide. In any case, even if it were considered that the Trial Chamber effectively found that the killing of Hutu political opponents amounted to acts of genocide, such error would not be sufficient to invalidate the verdict on the count of genocide, which can be upheld on the basis of acts committed against the Tutsi ethnic group.

### 3. Instigation of acts of genocide by RTLM, *Kangura* and the CDR

#### (a) Arguments of the Parties

498. The Appellants argue that the Trial Chamber erred in finding that RTLM broadcasts, *Kangura* publications and CDR activities instigated the commission of acts of genocide within the meaning of Article 6(1) of the Statute, because the required causal link between these broadcasts, publications and activities and the acts of genocide had not been adequately established.[1199]

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[1194] In this regard, see *Stakić* Appeal Judgement, para. 22, which recalls that the drafters of the Genocide Convention declined to include destruction of political groups within the definition of genocide.
[1195] See *Staki}* Appeal Judgement., para. 25; *Muhimana* Trial Judgement, para. 500; *Ndindabahizi* Trial Judgement, para. 468; *Gacumbitsi* Trial Judgement, para. 255; *Kajelijeli* Trial Judgement, para. 813; *Bagilishema* Trial Judgement, para. 65; *Musema* Trial Judgement, para. 161; *Rutaganda* Trial Judgement, para. 56.
[1196] Judgement, para. 953.
[1197] *Ibid*., para. 969.
[1198] *Ibid*., paras. 973-975, 977 and 977A.
[1199] Nahimana Appellant's Brief, paras. 233-241, 568-573; Barayagwiza Appellant's Brief, paras. 168-169, 194-195; Ngeze Appellant's Brief, paras. 339-345, 347-351.

499. Appellant Nahimana argues specifically that the Trial Chamber committed an error of fact in finding that there was a causal link between RTLM broadcasts prior to 6 April 1994 and the acts of genocide and extermination committed after that date.[1200] He submits that the causal link between three broadcasts prior to 6 April 1994 and killings after 6 April 1994 rests on testimonies that clearly have no probative value,[1201] and that the existence of a causal link between these murders and RTLM broadcasts is therefore purely hypothetical.[1202]

500. Appellant Ngeze submits that the Trial Chamber has not established the existence of a causal link between the issues of *Kangura* before 6 April 1994 and the crimes of genocide and extermination committed after that date.[1203] He asserts that an in-depth analysis of the evidence shows that no causal link can be established between the articles published in *Kangura* and the anti-Tutsi attacks committed from May 1990 to April 1994.[1204] With regard to the articles, "The Appeal to the Conscience of the Hutu" and "The Ten Commandments", Appellant Ngeze recalls that these were published before 1994 and are thus excluded from the temporal jurisdiction of the Tribunal.[1205] As for the other articles and editorials, Appellant Ngeze takes issue with the imprecise approach adopted by the Trial Chamber, which merely asserts that "other editorials and articles published in *Kangura* echoed the contempt and hatred for Tutsi found in The *Ten Commandments*".[1206]

501. The Prosecutor does not respond to Appellant Ngeze's submissions. By contrast, he responds to Appellant Nahimana by submitting in the first place that it is not necessary that the acts charged against an accused constitute a necessary condition to the commission of the crime; it is sufficient that the accused's conduct "substantially and directly contributed to the crime".[1207] He points out that several factual findings in the Judgement examine in detail the context in which RTLM was able to exert an influence on the public and address Nahimana's submissions on the alleged lack of causal link between RTLM and the acts of genocide. The Prosecutor concludes that the Trial Chamber examined RTLM activities in their globality and could find that its broadcasts played a primordial role in the perpetration of the genocide and other acts of violence targeting Tutsi, thereby directly and substantially contributing to the killings and other acts of violence for which Appellant Nahimana was held responsible.[1208]

(b) Analysis

502. The Appeals Chamber recalls that it suffices for *Kangura* publications, RTLM broadcasts and CDR activities to have substantially contributed to the commission of acts of genocide in order to find that those publications, broadcasts and activities instigated the commission of acts of genocide; they need not have been a pre-condition for those acts.[1209]

[1200] Nahimana Notice of Appeal, p. 16; Nahimana Appellant's Brief, para. 572.
[1201] Nahimana Appellant's Brief, paras. 237-240.
[1202] *Ibid*., para. 241.
[1203] *Ibid*., paras. 347 and 350.
[1204] *Ibid*., para. 348.
[1205] *Ibid*., para. 342.
[1206] *Ibid*., para. 343, see also para. 351.
[1207] Respondent's Brief, paras. 453-455 (quotation taken from para. 455; italics in original version), referring to *Kayishema and Ruzindana* Appeal Judgement, para. 198.
[1208] *Ibid*., para. 456.
[1209] See *supra* XI. A.

(i) Causal link between RTLM broadcasts and the acts of genocide

503. Paragraph 949 of the Trial Judgement reads as follows:

> The Chamber found, as set forth in paragraph 486, that RTLM broadcasts engaged in ethnic stereotyping in a manner that promoted contempt and hatred for the Tutsi population and called on listeners to seek out and take up arms against the enemy. The enemy was defined to be the Tutsi ethnic group. These broadcasts called explicitly for the extermination of the Tutsi ethnic group. In 1994, both before and after 6 April, RTLM broadcast the names of Tutsi individuals and their families, as well as Hutu political opponents who supported the Tutsi ethnic group. In some cases these persons were subsequently killed. A specific causal connection between the RTLM broadcasts and the killing of these individuals - either by publicly naming them or by manipulating their movements and directing that they, as a group, be killed - has been established (see paragraph 487).

504. The Appeals Chamber notes that the first part of paragraph 949 of the Judgement, in an attempt to summarise the factual findings contained in paragraph 486, seems to have altered their meaning so that statements inciting contempt and hatred are characterised, without further explanation, as explicit calls for the extermination of Tutsi. Paragraph 486 of the Judgement thus states that, initially, RTLM promoted contempt and hatred for the Tutsi population, the Tutsi group being constantly perceived as the "enemy"; but that it was only after 6 April 1994 that the virulence and intensity of RTLM broadcasts increased and the broadcasts explicitly called for the extermination of the Tutsi.

505. The Appeals Chamber also notes the last sentence of paragraph 949 of the Judgement, which appears to conclude that the causal link between the acts of genocide and RTLM broadcasts had been established only for the killings of certain Tutsi announced on the airwaves, or whose movements had been manipulated.[1210] Nevertheless, the paragraphs which follow paragraph 949 conclude more generally that RTLM broadcasts contributed to the massacre of Tutsi civilians. In this regard, it should be noted that the Trial Chamber finds at paragraph 953 of the Judgement that "the killing of Tutsi civilians can be said to have resulted, at least in part, from the message of ethnic targeting for death that was clearly and effectively disseminated through RTLM [...] before and after 6 April 1994" and subsequently finds Appellants Nahimana and Barayagwiza responsible for the "killing of Tutsi civilians".[1211] Thus it appears that the conclusion contained in the paragraphs following paragraph 949 is not entirely consistent with that provided in the last sentence of that paragraph. In these circumstances, the Appeals Chamber believes that it should be presumed that the requisite causal link between RTLM broadcasts and the acts of genocide was established only for the cases described in the last sentence of paragraph 949 of the

[1210] The last sentence of paragraph 949 refers to paragraph 487 of the Judgement, which reads:

> Both before and after 6 April 1994, RTLM broadcast the names of Tutsi individuals and their families, as well as Hutu political opponents. In some cases, these people were subsequently killed, and the Chamber finds that to varying degrees their deaths were causally linked to the broadcast of their names. RTLM also broadcast messages encouraging Tutsi civilians to come out of hiding and to return home or to go to the roadblocks, where they were subsequently killed in accordance with the direction of subsequent RTLM broadcasts tracking their movement.

[1211] Judgement, paras. 973-974.

Judgement.[1212] Thus, contrary to what Appellant Nahimana avers,[1213] the Appeals Chamber believes that the Trial Chamber did indeed identify the RTLM broadcasts, and the acts of genocide to which those broadcasts contributed.

506. The Appeals Chamber will examine in the following sections whether the Trial Chamber erred in finding that certain RTLM broadcasts substantially contributed to killings, and thus instigated the commission of acts of genocide. For this purpose, it will distinguish between broadcasts before 6 April 1994 and those after that date, this distinction being relevant in connection with the criminal responsibility of Appellants Nahimana and Barayagwiza, which will be analysed in the last section of this chapter.

a. Broadcasts before 6 April 1994

507. In light of the Trial Chamber's factual findings, the Appeals Chamber can identify in the Judgement four cases in which persons of Tutsi origin were killed after their names were mentioned in RTLM broadcasts made before 6 April 1994: Charles Shamukiga, killed on 7 April 1994, whose name was mentioned on RTLM from December 1993 and "in the first few months of 1994"[1214] and who voiced his concern following these threats;[1215] the children of Manzi Sudi Fahdi – Espérance, Clarisse and Cintré – who were identified by name in an RTLM broadcast of 14 March 1994, which reported that their father was a member of the RPF;[1216] Daniel Kabaka, whose name was mentioned in RTLM broadcasts in the second half of March and after 6 April 1994 and who was killed a few days after 7 April 1994;[1217] the Medical Director of Cyangugu, denounced in a broadcast of 3 April 1994 for having organised a meeting of a small group of Tutsi, and burnt alive in front of his house a few days later.[1218]

508. Appellant Nahimana argues that there is no probative value in the three testimonies on which the Trial Chamber based its findings. He submits in the first place that evidence of the death of Manzi Sudi Fahdi's children rests exclusively on the single testimony of Expert Witness Chrétien, and that his testimony to this effect amounts to third-degree hearsay evidence.[1219] The Appeals Chamber notes that the Trial Chamber appears to have relied exclusively on the testimony of Expert Witness Chrétien to make its finding on the death of

[1212] In this regard, the Appeals Chamber recalls that it has already found that only murders of Tutsi could constitute acts of genocide (see *supra* XII. B. 2. (b) ). Hence, only denunciations of persons of Tutsi origin could have substantially contributed to the commission of acts of genocide.
[1213] Nahimana Appellant's Brief, paras. 568-570.
[1214] Judgement, para. 366
[1215] *Ibid*., para. 478 relying on the statement by Witness Nsanzuwera; see also *ibid*., paras. 119, 364-366, 444 and 470.
[1216] *Ibid*., para. 477.
[1217] *Ibid*., paras. 478-479; see also *ibid*., paras. 119, 446-448. The Appeals Chamber notes that in paragraph 119, the Trial Chamber affirms that Daniel Kabaka died on 7 April 1994, while paragraph 447 indicates that Kabaka's house was attacked with grenades on 7 April 1994, that Kabaka was wounded and that gendarmes came to kill him a few days later. It is this last version that comes closest to the testimony of Witness FY: T. 9 July 2001, pp. 31-37.
[1218] *Ibid*., paras. 384-385 and 476.
[1219] Nahimana Appellant's Brief, paras. 237-238.

Manzi Sudi Fahdi's children, and this part of his testimony was itself apparently based on information obtained from Manzi Sudi Fahdi by a Prosecutor investigator.[1220]

509. The Appeals Chamber recalls first that it is settled jurisprudence that hearsay evidence is admissible as long as it is of probative value,[1221] and that it is for Appellant Nahimana to demonstrate that no reasonable trier of fact would have taken this evidence into account because it was second-degree hearsay evidence,[1222] which he has failed to do. Nevertheless, the Appeals Chambers agrees with the Appellant that the fact that evidence of the death of Manzi Sudi Fahdi's children was given by Expert Witness Chrétien does pose a problem. The Appeals Chamber recalls that the role of expert witnesses is to assist the Trial Chamber in its assessment of the evidence before it, and not to testify on disputed facts as would ordinary witnesses.[1223] The Appeals Chamber notes that the Appellant had raised objections about this part of Expert Witness Chrétien's testimony at the hearing, but that the Trial Chamber had closed the discussion by deciding that the issue would be resolved when the Prosecutor investigators filed their report.[1224] However, the Judgement does not mention any such report as a source of information on the death of Manzi Sudi Fahdi's children, the only source mentioned being the testimony of Expert Witness Chrétien.[1225] In these circumstances and in the absence of any indication that the investigators' report was indeed filed, the Appeals Chamber cannot conclude that the murder of Manzi Sudi Fahdi's children was sufficiently proved, and the discussion which follows will make no mention of it.

510. Appellant Nahimana further submits that Dr. Blam's account, taken from a book by Expert Witness Chrétien, and not supported by testimony from its author, has no probative value.[1226] The Appeals Chamber notes that Dr. Blam's account was translated in full by Expert Witness Chrétien in his work "*Le défi de l'ethnisme*" [*The Challenge of Ethnicism*], and that this translation was admitted into evidence.[1227] The Appeals Chamber notes that this account briefly refers to the circumstances surrounding the death of the Medical Director of Cyangugu a few days after RTLM broadcasts on 3 April 1994,[1228] which – wrongly, according to Dr. Blam – linked the doctor to the RPF. [1229] The Appeals Chamber is of the

[1220] Judgement, para. 477. The broadcast is referred to in paragraphs 377 and 378 of the Judgement; T. 1 July 2002, pp. 165-166.
[1221] *See* references mentioned *supra,* footnote 521.
[1222] Appellant Nahimana claimed that it was third-degree hearsay. The Appeals Chamber disagrees. If Manzi Sudi Fahdi had appeared to confirm the death of his children before the Tribunal, his testimony would not have constituted hearsay. Since the information was given by Manzi Sudi Fahdi to the Prosecution investigators, who then reported it to Expert Witness Chrétien, it is only second-degree hearsay.
[1223] See *supra* IV. B. 2. (b) .
[1224] T. 1 July 2002, pp. 165-173.
[1225] See Judgement, para. 477.
[1226] Nahimana Appellant's Brief, para. 239.
[1227] Exhibit P164. The Appeals Chamber notes that the reference to the "book by Wolfgang Blam" at paragraph 385 of the Judgement seems to be wrong, since the Exhibit in fact cites a collective work in German, entitled *Ein Volk verlässt sein Land, Krieg und Völkermord in Rwanda* [A Land Forsaken by its People: War and Genocide in Rwanda], edited by H. Schürings and published in 1994 in Cologne.
[1228] The Appeals Chamber notes that Dr. Blam's account makes reference to a broadcast of 4 April 1994 (see Exhibit P164, p. 106 of the book, p. 28925 in the Registry numbering), whereas Exhibit P103/192E containing the French translation of this broadcast indicates that the broadcast was made on 2 April 1994. The transcript of the broadcast in Kinyarwanda (P103/192A) and the English translation of the transcript (P103/192D) give a date of 3 April 1994).
[1229] Exhibit P164, p. 106 of the book, p. 28925 in the Registry numbering:

opinion that the Trial Chamber could admit this evidence, even if Dr. Blam himself did not testify at the hearing.[1230] However, the Appeals Chamber is of the view that a reasonable trier of fact could not rely solely on the short account by Doctor Blam in order to establish beyond reasonable doubt proof of the murder of the Medical Director of Cyangugu, of the circumstances surrounding it and of its date. In the absence of other evidence corroborating Doctor Blam's account, the Trial Chamber consequently erred in finding that the murder of the Medical Director of Cyangugu was proved. The paragraphs which follow will therefore not refer to this incident.

511. With regard, lastly, to Appellant Nahimana's argument that Witness FY's testimony did not prove the existence of a causal link between RTLM broadcasts and the murder of Daniel Kabaka,[1231] the Appeals Chamber considers that the fact that Daniel Kabaka was allegedly arrested as a suspect in 1990 and that soldiers linked to a "crisis committee" were allegedly responsible for his murder, which was committed after 6 April 1994, does not suffice to demonstrate that it was unreasonable to find that the mention of this person on RTLM had substantially contributed to his murder. Moreover, the Appellant omits to indicate the specific references to the transcripts which mention these acts, and hence has not complied with the requirements for making submissions at the appeal stage. The appeal on this point is dismissed.

512. The Appeals Chamber will now determine whether it was reasonable for the Trial Chamber to find that the RTLM broadcasts prior to 6 April 1994 which mentioned Charles Shamukiga and Daniel Kabaka substantially contributed to the commission of acts of genocide.

513. In the opinion of the Appeals Chamber, evidence of a link between the broadcasts aired on RTLM before 6 April 1994 and the acts of genocide committed against the individuals so named seems, at the very least, tenuous, especially when the date of the broadcast in question is not provided or when the period between the broadcast denouncing a person and the killing of that person is relatively long. This applies notably to the killing of

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> *Par téléphone on avait déjà été mis au courant des massacres de Kamembe-Cyangugu, au cours desquels par exemple le médecin régional de Cyangugu que nous connaissons avait été brûlé vif devant sa maison. Sur la radio incendiaire RTLM du parti extrémiste CDR, juste trois jours plus tôt, le lundi (4 avril), il avait été insulté comme complice des rebelles, organisateur de réunions de rebelles à Cyangugu. Lors d'un entretien le mardi avant l'attentat, donc le 5 avril, je ne lui avais pas parlé de ces diffamations, parce que je connaissais son honnêteté et que je tenais ces accusations pour totalement absurdes*.
>
> [I'd already heard on the phone about the Kamembe-Cyangugu massacres, during which the Medical Director for Cyangugu Region, whom we knew, had been burned alive in front of his house. Just three days earlier, on the Monday (4 April), on RTLM, the inflammatory radio station of the extremist CDR party, he had been vilified as an accomplice of the rebels, accused of organising rebel meetings in Cyangugu. When I met him on the Tuesday before the murder, I didn't mention these libels, because I knew him as an honest man, and regarded the accusations as totally absurd.]

[1230] Dr. Blam's account could be admitted under Rule 89(C) of the Rules. This would also be the case today: since the account was not specifically written for proceedings in the instant case, it could be admitted without necessarily complying with the standards of Rule 92 *bis* of the Rules, which was added to the Rules on 6 July 2002: see *Naletilić and Martinović* Appeal Judgement, paras. 222-223; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C) of the Rules, 7 June 2002, paras. 28-31.

[1231] Nahimana Appellant's Brief, paras. 240-241.

Charles Shamukiga[1232] and Daniel Kabaka.[1233] Thus the longer the lapse of time between a broadcast and the killing of a person, the greater the possibility that other events might be the real cause of such killing and that the broadcast might not have substantially contributed to it. Moreover, even though RTLM was widely listened to in Rwanda, there is no evidence that the unidentified persons responsible for killing Charles Shamukiga and Daniel Kabaka heard the RTLM broadcasts denouncing them. The Appeals Chamber is therefore of the opinion that it has not been sufficiently demonstrated that RTLM broadcasts before 6 April 1994 substantially contributed to the killing of these individuals. Therefore, the Trial Chamber committed an error which partially invalidates the verdict in finding in paragraph 949 of the Judgement that RTLM broadcasts prior to 6 April 1994 substantially contributed to the commission of acts of genocide.

b. Broadcasts after 6 April 1994

514. The Appeals Chamber observes that Appellant Nahimana does not appear to dispute that the broadcasts after 6 April 1994 contributed to the commission of acts of genocide.[1234] For his part, Appellant Barayagwiza contends, without elaborating, that no link was established between the RTLM broadcasts and the killings.[1235] In the absence of any arguments in support of this contention, it cannot suffice to demonstrate that the Trial Chamber erred in finding that the RTLM broadcasts after 6 April 1994 substantially contributed to the commission of acts of genocide.

515. The Appeals Chamber notes that the Trial Chamber found that in several instances after 6 April 1994 the naming of persons of Tutsi origin on the airwaves contributed to the commission of acts of genocide. Such persons included the brother of Witness FS, who was named on RTLM on 7 April 1994 and was later killed with his wife and his seven children,[1236] and Désiré Nsunguyinka, who was killed at a roadblock with his wife, his sister and his brother-in-law after RTLM broadcast the licence number of the car they were travelling in, announcing that a vehicle with these plates was carrying *Inkotanyi*.[1237] The Appeals Chamber also notes the case of Father Muvaro, Father Ngoga and Father Ntagara, whose names were mentioned in a broadcast of 20 May 1994;[1238] the three of them were subsequently killed.[1239]

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[1232] Charles Shamukiga "had been mentioned often on RTLM in the first few months of 1994" (Judgement, para. 366); he was killed on 7 April 1994 by Presidential Guard soldiers (Judgement, paras. 366 and 478).
[1233] Daniel Kabaka was named on RTLM "beginning in mid-March", and also after 7 April 1994 (Judgement, paras. 446, 447 and 467); he was killed a few days after the beginning of the genocide.
[1234] See Nahimana Appellant's Brief, paras. 233-241, 572-573. The Appellant only disputes that broadcasts before 6 April 1994 could have contributed to the commission of acts of genocide.
[1235] Barayagwiza Appellant's Brief, para. 169.
[1236] Judgement, para. 482; see also paras. 445 and 895. The witness' Tutsi origin is mentioned in paragraph 890 of the Judgement.
[1237] *Idem*; see also para. 444.
[1238] *Idem*; see also paras. 410-411. The Appeals Chamber notes that only Father Muvaro's Tutsi origin is specifically confirmed by the Trial Chamber on the basis of Appellant Nahimana's testimony: Judgement, paras. 411 and 482. The Appeals Chamber notes however that the remarks made in the broadcast – in particular the sentence "We could not imagine that a priest would ever dare take up a gun, begin to shoot or even distribute guns to people taking refuge in the church, the latter then begin launching sporadic attacks in order to eliminate the Hutus, and then retreat into the church … daring to desecrate God's house" – seems to indicate that the three priests were Tutsi: Judgement, para. 410, referring to Exhibit P103/132E.
[1239] Father Ngoga, who had earlier managed to escape, was killed in Butare 11 days after the broadcast: Judgement, para. 411.

The Trial Chamber also referred to instances of RTLM broadcasting information designed to facilitate the killing of Tutsi. Thus Charles Kalinjabo was killed at a roadblock after RTLM called on all Tutsi who were not *Inkotanyi* to join their Hutu comrades at the roadblocks.[1240] The neighbours of Witness FW, including "Rubayiza Abdallar" and "Sultan", were killed on 11 April 1994, when they returned home after an RTLM broadcast aired on the same day telling all the Tutsi who had fled their homes to return because a search for guns was to be conducted and the houses of all those who were not home would be destroyed.[1241] The Appeals Chamber is of the opinion that it has not been demonstrated that it was unreasonable for the Trial Chamber to find that the RTLM broadcasts after 6 April 1994 substantially contributed to the killing of these individuals.[1242]

(ii) Link between articles in *Kangura* and the commission of acts of genocide

516. Paragraph 950 of the Trial Judgement reads as follows:

> 950. The Chamber found, as set forth in paragraphs 245 and 246, that *The Appeal to the Conscience of the Hutu* and *The Ten Commandments*, published in *Kangura* No. 6 in December 1990, conveyed contempt and hatred for the Tutsi ethnic group, and for Tutsi women in particular as enemy agents, and called on readers to take all necessary measures to stop the enemy, defined to be the Tutsi population. Other editorials and articles published in *Kangura* echoed the contempt and hatred for Tutsi found in The *Ten Commandments* and were clearly intended to fan the flames of ethnic hatred, resentment and fear against the Tutsi population and Hutu political opponents who supported the Tutsi ethnic group. The cover of *Kangura* No. 26 promoted violence by conveying the message that the machete should be used to eliminate the Tutsi, once and for all. This was a call for the destruction of the Tutsi ethnic group as such. Through fear-mongering and hate propaganda, *Kangura* paved the way for genocide in Rwanda, whipping the Hutu population into a killing frenzy.

The Trial Chamber thus found that *Kangura* contributed, at least in part, to the killing of Tutsi civilians,[1243] and that Appellant Ngeze must be held responsible on this account.[1244]

517. The Appeals Chamber is of the view that these findings are problematic in several respects. First, the Appeals Chamber recalls that the provisions on the temporal jurisdiction of the Tribunal precluded the Trial Chamber from relying on acts of instigation dating from before 1 January 1994 in convicting Appellant Ngeze.[1245] The Appeals Chamber has also held that the Appellant could not be convicted on the basis of publications of *Kangura* prior to 1 January 1994, allegedly re-circulated or repeated as a result of the competition organized in 1994.[1246] Thus the question which should have been addressed by the Trial Chamber was whether the *Kangura* articles published in 1994 (and not all of the articles published in *Kangura*) did in effect substantially contribute to the commission of acts of genocide in 1994.

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[1240] Judgement, para. 482; see also para. 449.
[1241] *Ibid*., paras. 449 and 482.
[1242] As held above (*supra* IV. A. 2. (c) (iii) ), the testimony of Witness FS has been excluded with respect to Appellant Barayagwiza. The Appeals Chamber is however of the view that the finding that the RTLM broadcasts after 6 April 1994 substantially contributed to the commission of acts of genocide should be upheld on the basis of other evidence mentioned here.
[1243] Judgement, para. 953.
[1244] *Ibid*., para. 977A.
[1245] See *supra* VIII. B. 2.
[1246] See *supra* IX. E. 3.

518. Further, the Trial Chamber considered that, even though "the evidence does not establish a specific link between the publication and subsequent events, [...] a link was clearly perceived by many witnesses such as Witness AHI, Witness ABE and Nsanzuwera, suggesting that *Kangura* greatly contributed to the climate leading to these events, if not causing them directly".[1247] The Trial Chamber then adds that "[a]t times *Kangura* called explicitly on its readers to take action. More generally, its message of prejudice and fear paved the way for massacres of the Tutsi population".[1248] The Appeals Chamber emphasizes, however, that the specific examples given by Witness Nsanzuwera and Witness ABE of attacks on individuals following the publication of *Kangura* articles date back to 1990 and 1991 and do not fall within the temporal jurisdiction of the Tribunal. Moreover, none of the testimonies makes explicit reference to the impact of *Kangura* issues published after 1 January 1994.

519. While there is probably a link between the Appellant's acts, because of his role in *Kangura*, and the genocide, owing to the climate of violence to which the publication contributed and the incendiary discourse it contained,[1249] the Appeals Chamber considers that there was not enough evidence for a reasonable trier of fact to find beyond reasonable doubt that the *Kangura* publications in the first months of 1994 susbstantially contributed to the commission of acts of genocide between April and July 1994. Therefore, the Appeals Chamber is of the opinion that the Trial Chamber erred in finding Appellant Ngeze guilty of the crime of genocide under Article 6(1) of the Statute for having "instigated" the killing of Tutsi civilians as founder, owner and editor of *Kangura*.[1250]

(iii) Link between CDR activities and the acts of genocide

520. Appellant Barayagwiza contends that no causal link was established between the activities of the CDR and the acts of genocide.[1251]

521. The Trial Chamber explained in paragraph 951 of the Judgement that:

> [t]he Hutu Power movement, spearheaded by CDR, created a political framework for the killing of Tutsi and Hutu political opponents. The CDR and its youth wing, the *Impuzamugambi*, convened meetings and demonstrations, established roadblocks, distributed weapons, and systematically organized and carried out the killing of Tutsi civilians. The genocidal cry of "*tubatsembatsembe*" or "let's exterminate them", referring to the Tutsi population, was chanted consistently at CDR meetings and demonstrations. As well as orchestrating particular acts of killing, the CDR promoted a Hutu mindset in which ethnic hatred was normalized as a political ideology. The division of Hutu and Tutsi entrenched fear and suspicion of the Tutsi and fabricated the perception that the Tutsi population had to be destroyed in order to safeguard the political gains that had been made by the Hutu majority.

[1247] Judgement, para. 242.
[1248] *Ibid*., para. 243.
[1249] See *Kangura* publications mentioned in paragraphs 136-243 of the Judgement. See also the Trial Chamber's findings in paragraphs 245, 246, 950 and 1036 of the Judgement, which make specific reference to "The Appeal to the Conscience of the Hutu" and "The Ten Commandments", and to *Kangura* No. 26.
[1250] Judgement, para. 977A.
[1251] Barayagwiza Appellant's Brief, paras. 194-195.

It then found that the massacre of Tutsi civilians resulted, at least in part, from the message of ethnic targeting for death disseminated through the CDR before and after 6 April 1994.[1252] However, the Appeals Chamber understands that the Trial Chamber found Appellant Barayagwiza guilty of genocide only on the basis of acts of genocide committed by CDR militants and *Impuzamugambi* (and not on account of alleged acts of instigation to genocide by the CDR which would have substantially contributed to the commission of genocidal acts).[1253] In the circumstances, the question whether the extermination discourse of the CDR substantially contributed to the massacre of Tutsi civilians is not relevant. The important point is that the Trial Chamber concluded that militants of the CDR and *Impuzamugambi* themselves committed acts of genocide. As explained below,[1254] the Appellant has failed to show that this conclusion was unreasonable.

## C. Genocidal intent of the Appellants

522. The Trial Chamber found that the Appellants "acted with intent to destroy, in whole or in part, the Tutsi ethnic group".[1255] The Appellants appeal against this finding. Before examining their respective grounds of appeal, the Appeals Chamber considers it helpful to set out the jurisprudence of the *ad hoc* Tribunals on genocidal intent.

### 1. Applicable law

523. Article 2(2) of the Statute defines genocidal intent as the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".[1256] It is the person who physically commits one of the enumerated acts in Article 2(2) of the Statute who must have such intent. However, an accused can be held responsible not only for committing the offence, but also under other modes of liability, and the *mens rea* will vary accordingly.[1257]

524. The jurisprudence accepts that in most cases genocidal intent will be proved by circumstantial evidence.[1258] In such cases, it is necessary that the finding that the accused had genocidal intent be the only reasonable inference from the totality of the evidence.[1259]

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[1252] Judgement, para. 953.

[1253] *Ibid*., paras. 975 ("the Chamber finds Jean-Bosco Barayagwiza guilty of instigating acts of genocide committed by CDR members and *Impuzamugambi*, pursuant to Article 6(1) of its Statute") and 977 ("For his active engagement in CDR, and his failure to take necessary and reasonable measures to prevent the killing of Tutsi civilians by CDR members and *Impuzamugambi*, the Chamber finds Barayagwiza guilty of genocide pursuant to Article 6(3) of its Statute").

[1254] See *infra* XII. D. 2. (b) (vii) .

[1255] Judgement, para. 969.

[1256] The Appeals Chamber recalls that genocidal intent must be distinguished from motive:

> The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide. In the *Tadić* appeal judgement the Appeals Chamber stressed the irrelevance and "inscrutability of motives in criminal law".

*Jelisić* Appeal Judgement, para. 49 (footnote omitted). See also *Stakić* Appeal Judgement, para. 45; *Kayishema and Ruzindana* Appeal Judgement, para. 161; *Tadić* Appeal Judgement, para. 269.

[1257] *Supra* XI.

[1258] *Gacumbitsi* Appeal Judgement, paras. 40-41; *Krstić* Appeal Judgement, para. 34; *Rutaganda* Appeal Judgement, para. 525; *Jelisić* Appeal Judgement, para. 47; *Kayishema and Ruzindana* Appeal Judgement, para. 159.

525. Furthermore, the Appeals Chamber recalls that it will defer to the findings of the Trial Chamber unless a party shows that no reasonable trier of fact could have found that genocidal intent was proved beyond reasonable doubt.[1260]

### 2. Appellant Nahimana

526. The Appeals Chamber concludes below that Appellant Nahimana's conviction for genocide based on Article 6(1) of the Statute must be set aside.[1261] Consequently, there is no need to examine whether the Trial Chamber could conclude that the Appellant had the intent to destroy, in whole or in part, the Tutsi ethnic group.

### 3. Appellant Barayagwiza

527. The Trial Chamber found that Appellant Barayagwiza had genocidal intent[1262] based on the following elements: he said "let's exterminate them" at public meetings, "them" being understood by those who heard it as a reference to the Tutsi population;[1263] his threats and intimidations towards the Bagogwe Tutsi;[1264] and more generally, his involvement in RTLM and the CDR, which both conveyed an explicitly genocidal discourse.[1265]

528. Appellant Barayagwiza contends that the finding of the Trial Chamber is erroneous.[1266] First, he submits that the following facts have not been established: (1) the use of the expression "*tubatsembatsembe*" or "let's exterminate them";[1267] and (2) his acts and utterances against the Bagogwe Tutsi.[1268] He further contends that the Trial Chamber erred in assessing exculpatory evidence, which allegedly shows that he did not have genocidal intent,[1269] and in considering evidence prior to 1 January 1994.[1270]

#### (a) Use of the terms "*tubatsembatsembe*", "*gutsembatsemba*" and "*tuzitsembatsembe*"

##### (i) Appellant Barayagwiza's submissions

[1259] *Gacumbitsi* Appeal Judgement, para. 41; *Ntagerura et al.* Appeal Judgement, paras. 306 and 399; *Stakić* Appeal Judgement, para. 219; *Krstić* Appeal Judgement, para. 41; *Vasiljević* Appeal Judgement, paras. 120, 128 and 131; *Čelebići* Appeal Judgement, para. 458. For examples of elements which may be taken into account, see, *inter alia*, *Gacumbitsi* Appeal Judgement, paras. 40-41 and 44; *Stakić* Appeal Judgement, para. 52; *Krstić* Appeal Judgement, paras. 20, 33-34; *Rutaganda* Appeal Judgement, para. 525; *Jelisić* Appeal Judgement, paras. 47-48; *Kayishema and Ruzindana* Appeal Judgement, paras. 159-160.
[1260] *Stakić* Appeal Judgement, paras. 52, 56 and 219; *Vasiljević* Appeal Judgement, para. 131.
[1261] See *infra* XII. D. 1.
[1262] Judgement, para. 969.
[1263] *Ibid*., para. 967. See also *ibid*., para. 719 ("Barayagwiza himself said '*tubatsembatsembe'* or 'let's exterminate them' at CDR meetings").
[1264] *Idem.* See also *ibid*., para. 719.
[1265] *Ibid*., paras. 963-965.
[1266] Barayagwiza Notice of Appeal, pp. 1-2 (Grounds 6-11); Barayagwiza Appellant's Brief, paras. 108-139; Barayagwiza Brief in Reply, paras. 80-89. Appellant Barayagwiza's Ground 10 is examined in the chapter on direct and public incitement to commit genocide.
[1267] Barayagwiza Appellant's Brief, Ground 7, paras. 111-124; Barayagwiza Brief in Reply, paras. 80-82.
[1268] *Ibid*., Grounds 8-9, paras. 125-131; Barayagwiza Brief in Reply, paras. 83-86.
[1269] *Ibid*., Ground 11, paras. 134-138.
[1270] *Ibid*., Ground 11, para. 139.

529. Appellant Barayagwiza submits that the Trial Chamber erred in finding that he had used the term "*tubatsembatsembe*" ("let's exterminate them"),[1271] since the evidence adduced at trial does not support such a conclusion:[1272]

- Contrary to what is stated at paragraph 308 of the Judgement, the only inference from Witness AFB's testimony is that the Appellant used the term "*tuzabatsembatsemba*" and not "*tubatsembatsembe*", which, in the Appellant's view, makes an important difference, since "*tuzabatsembatsemba*" means "*nous vous exterminerons*" or "we shall exterminate them", a wording using the future tense and "conditional on other events".[1273] Witness AFB's testimony merely establishes that the Appellant said that the *Inyenzi* would be exterminated if they did not change, which does not constitute a clear extermination threat.[1274] Moreover, these utterances did not call for the extermination of Tutsis but rather the *Inyenzi* and their accomplices, thus including Hutu;[1275]

- While Witness X testified that the Appellant had used the term "*gutsembatsemba"* at a CDR meeting in February or March 1992, the Trial Chamber erred in holding that this meant "kill the Tutsis", since this word is simply the infinitive of the verb "to exterminate";[1276]

- Even if some CDR members did use the term "*tuzazitsembatsemba*" or "*tuzitsembatsembe*", the President of the CDR explained at a meeting held in Butare on 5 and 6 December 1992 that these terms targeted the *Inyenzi* and not the Tutsi.[1277]

530. The Appellant further contends that it would have been impossible to call for the extermination of Tutsi, since the Ministry of Justice was at the time controlled by the PL [Liberal Party], the majority of whom were Tutsis and allied to the RPF.[1278]

(ii) Analysis

531. The Appeals Chamber observes that minor linguistic discrepancies or typographical errors may occur in the process of translating and transcribing witnesses' testimonies and other judicial documents into the two working languages of the Tribunal.[1279] It is nevertheless important to assess whether the purported linguistic discrepancies between the English and French versions of the transcripts on the one hand, and between the transcripts and the Judgement on the other, led the Trial Chamber to make erroneous findings occasioning a miscarriage of justice.

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[1271] *Ibid*., para. 111.
[1272] *Ibid*., paras. 111 and 122.
[1273] *Ibid*., paras. 112-115 and 119; see also Barayagwiza Brief in Reply, para. 80. The Appellant further submits that the English version of the transcripts of Witness AFB's testimony cites the term "*tulabatembatemba*", which does not exist in Kinyarwanda; see Barayagwiza Appellant's Brief, para. 112.
[1274] *Ibid*., paras. 116-118. The Appeals Chamber notes that Appellant Barayagwiza does not give any specific reference to the relevant transcripts.
[1275] *Ibid*., paras. 120 and 123.
[1276] *Ibid*., para. 121, citing paragraph 310 of the Judgement; see also Barayagwiza Brief in Reply, para. 80.
[1277] *Ibid*., para. 123, referring to "*Cassettes* KV00-0024".
[1278] *Ibid*., para. 124; Barayagwiza Brief in Reply, para. 82.
[1279] The ICTY Appeals Chamber has considered such issues in many cases; see for instance *Kupre{kić et al.* Appeal Judgement, para. 209, footnote 343, and *Krnojelac* Appeal Judgement, para. 227, footnote 364.

532. At the outset, the Appeals Chamber dismisses Appellant Barayagwiza's argument that the President of the CDR, Martin Bucyana, explained at a meeting held in Butare in December 1992 that the terms "*tuzazitsembatsemba*" or "*tuzitsembatsembe*" did not target the Tutsi but only the *Inyenzi*.[1280] The evidence relied on by the Appellant is not part of the record on appeal and has not been admitted as additional evidence pursuant to Rule 115 of the Rules.[1281]

533. The Appeals Chamber observes that the Trial Chamber expressly relied on the fact that Appellant Barayagwiza had uttered slogans calling for the extermination of Tutsi in order to find that he had genocidal intent.[1282] To reach that finding, the Trial Chamber appears to have based itself on the testimonies of Witnesses AFB, X and AAM.[1283]

534. The Appeals Chamber specifically notes that the Trial Chamber relied on the testimonies of Witnesses AFB and X to find that the Appellant used the Kinyarwanda expression "*tubatsembatsembe*" ("let's exterminate them")[1284]. The Trial Chamber also mentions on various occasions in its findings that the Appellant used the term "*tubatsembatsembe*", without referring to a particular testimony.[1285] The Appeals Chamber observes, however, that the transcripts of the testimonies of Witnesses AFB and X do not explicitly state that Appellant Barayagwiza used the term "*tubatsembatsembe*".[1286] The Appeals Chamber also detected other discrepancies in the translations while examining this ground of appeal.[1287]

535. Following requests for re-certification by the Pre-Appeal Judge,[1288] the translation services confirmed that:

- Witness AFB did not use the term "*tubatsembatsembe*", as stated in paragraph 308 of the Judgement, but used the term "*tuzabatsembatsemba*", which was correctly translated as "*nous les exterminerons*" and "we shall exterminate them";[1289]

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[1280] Barayagwiza Appellant's Brief, para. 123.
[1281] The Appellant had requested that new evidence relating to that meeting be admitted on appeal (The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115), filed confidentially on 28 December 2005, paras. 71-73). His motion was dismissed because the Appellant had failed to show good cause for its late filing: Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006, paras. 25-28.
[1282] Judgement, para. 967, see also paras. 340, 719 and 964.
[1283] *Ibid*., paras. 308, 319 and 708 concerning Witness AFB; paras. 310, 336 and 708 concerning Witness X; paras. 702, 718 and 797 concerning Witness AAM.
[1284] *Ibid*., para. 336.
[1285] *Ibid*., paras. 340, 697, 719, 975 and 1035. Some paragraphs mention the term "*tubatsembasembe*"; see paras. 708 and 964, probably due to a typographical error (see Respondent's Brief, para. 480, footnote 467).
[1286] Although the expressions "*nous les exterminerons*" or "we shall exterminate them", as cited in the French and English versions of the transcripts of Witness AFB's testimony, appear to correspond to the translation of "*tubatsembatsembe*", this term is not specifically mentioned in the transcripts, while other Kinyarwanda terms are; see T. 6 March 2001, pp. 21, 51-52. The transcript of Witness X's testimony does not appear to contain the Kinyarwanda term "*tubatsembatsembe*" or its translation, but refers to the expression "*gutsembatsemba*": T. 18 February 2002, pp. 72-73, 75-76. See also T. 19 February 2002, p. 120 (closed session); T. 21 February 2002, p. 48.
[1287] Compare for instance *CRA du 12 février 2001, p. 106*, with T. 12 February 2001, p. 103 (Witness AAM's testimony); *CRA du 21 juin 2001, p. 104, 106 et 107*, with T. 21 June 2001, pp. 96-97, 99 (Witness AGK's testimony).
[1288] Order of 6 December 2006, pp. 2-3.

- Witness X, who testified by video-link and spoke in French with simultaneous interpretation into English, used the terms "*gutsembatsemba"* and "*tuzabatsembatsemba"*, not the expression "*tubatsembatsembe*", as stated in paragraph 336 of the Judgement;[1290]

- Witness AAM used the term "*tuzitsembatsembe*" as indicated in the French version of the transcripts, and not "*tuzatsembatsembe*", as indicated at paragraph 702 of the Judgement and in the English version of the transcripts; the witness also used "they", which shows that he was not solely referring to Appellant Barayagwiza, but also to the *Impuzamugambi*;[1291]

- Witness AGK used the terms "*tuzitsembatsembe*" and "*tubatsembatsembe*", as indicated in the English version of the transcripts; the term "*tuzitsembambe*" is simply a mistake by the interpreter.[1292]

536. The translation services also confirmed that "*tubatsembatsembe*" and "*tuzitsembatsembe*" mean "let's exterminate them"; "*tuzabatsembatsemba*" and "*tuzazitsembatsemba*" mean "we shall exterminate them"; "*gutsembatsemba*" means "to exterminate"; and "*tuzatsembatsembe*" means "let's exterminate" [in the future]. They also confirmed that the expressions "*tulabatembatemba*", "*tabatsembatsembe*" and "*tuzitsembambe*" do not exist in Kinyarwanda.[1293]

537. While recognizing that the Trial Chamber erred in finding that Appellant Barayagwiza had used the term "*tubatsembatsembe*" on the basis of the testimonies of Witnesses AFB and X, the Appeals Chamber is not satisfied that this error occasioned a miscarriage of justice for the Appellant. As confirmed by the translation services, the expressions cited above have in common that they all relate to the notion of extermination, whether future or conditional, whether imperative or not. The Appeals Chamber is of the opinion that a reasonable trier of fact could consider that the aforementioned terms called for the extermination of Tutsi and not just the extermination of members and accomplices of the RPF. Thus Witnesses X and AAM confirmed that the Appellant talked about exterminating the Tutsi.[1294] The Appeals Chamber also notes that the Appellant's speech during the CDR meeting at Umuganda stadium in 1993, as reported by Witness AFB, is particularly revealing in this respect:

> [Barayagwiza] continued with his speech; he started off by explaining from where the Tutsis came, he said that the latter came from Ethiopia and that the Hutu were the inhabitants of Rwanda before the arrival of the Tutsis. He explained that the Tutsis were bad people and that it was difficult to know what they thought and he said that if the *Inyenzi* and their accomplices did not change their ways they were going to be crushed.[1295]

[1289] *Supports Audio pour confirmation des témoignages* [Audio Confirmation of Testimony], 4 January 2007, p. 2.
[1290] *Ibid.*, 4 January 2007, pp. 4-5.
[1291] *Ibid*., pp. 1-2.
[1292] *Ibid*., pp. 3-4.
[1293] *Ibid*., pp. 5-6.
[1294] T. 18 February 2002, pp. 72-73, 75-76 (Witness X) ; T. 12 February 2001, p. 103 (Witness AAM).
[1295] T. 6 March 2001, p. 20; *see also* pp. 51-53.

538. Turning to the argument that it was impossible to say these words in public at the time, the Appeals Chamber is not convinced that the fact that the Ministry of Justice was controlled by the PL party and that prosecutions had been initiated by the Rwandan authorities against Léon Mugesera following his inflammatory speech of 22 November 1992 show that it was impossible to publicly utter threats against the Tutsi.[1296] In any event, the Appeals Chamber considers that the Appellant's argument is manifestly unfounded in view of its vagueness and the absence of any reference in the Appeal Brief to one or more parts of the appeal file.

539. The Appeals Chamber finds that the Trial Chamber could reasonably conclude from the totality of the evidence relied on by it that, at CDR meetings, Appellant Barayagwiza had himself used slogans calling for the extermination of Tutsi, such as "*gutsembatsemba*", "*tuzabatsembatsemba*" and "*tuzitsembatsembe*" and that the use of these expressions was a determining fact for the purpose of proving his genocidal intent. This ground of appeal is dismissed.

(b) Humiliation and death threats against the Bagogwe Tutsi

(i) Appellant Barayagwiza's submissions

540. In his eighth ground of appeal, Appellant Barayagwiza submits that the Trial Chamber erred in finding in paragraph 967 of the Judgement that he had humiliated the Tutsi by forcing them to perform the *Ikinyemera,* their traditional dance, since the evidence on file merely shows that he had asked them to do so (and not that he had forced them), as the Trial Chamber acknowledged in paragraph 719 of the Judgement.[1297]

541. In his ninth ground of appeal, Appellant Barayagwiza argues that the Trial Chamber further erred when it stated that the Appellant had intimidated and threatened the Bagogwe Tutsi at several public meetings.[1298] He contends that only Witness AAM alleged that he had threatened the Bagogwe Tutsi during a meeting in 1991, but this meeting could not have been held, because the CDR did not exist at the time.[1299] Further, the Appellant contends that, when it considered Witness AAM's testimony, the Trial Chamber wrongly reversed the burden of proof, and, since Witness AAM's testimony was not corroborated, the Trial Chamber could not have found that he had intimidated and threatened the Bagogwe Tutsi.[1300]

(ii) Witness AFX's credibility

542. In his eighth and ninth grounds of appeal, Appellant Barayagwiza disputes the Trial Chamber's findings based in part on Witness AFX's testimony. It is thus for the Appeals Chamber to consider whether the Witness AFX's credibility has been impugned by the additional evidence admitted on appeal pursuant to Rule 115 of the Rules. In this respect, Appellant Barayagwiza submits that both Witness EB and the Prosecutor's investigator, Mr.

[1296] See Barayagwiza Appellant's Brief, para. 124.
[1297] *Ibid.*, paras. 125-128; Barayagwiza Brief in Reply, paras. 83-84.
[1298] *Ibid.*, para. 129.
[1299] *Ibid.*, para. 130.
[1300] *Ibid.*, para. 131; Barayagwiza Brief in Reply, para. 86, referring to his fortieth ground of appeal.

Sanogo, challenged Witness AFX's integrity, and he asks that the totality of this witness' testimony be dismissed.[1301]

543. The Appeals Chamber observes that Witness EB's accusations against Witness AFX do not concern the reliability of Witness AFX's testimony regarding Appellant Barayagwiza. Rather, Witness EB alleges that Witness AFX was involved in attempts to suborn witnesses,[1302] and that he had stated – falsely, according to Witness EB – that he had received a letter from Witness EB.[1303] Similarly, according to information obtained by Mr. Sanogo, Witness AFX allegedly asked Witness EB and another person to come and testify in favour of Appellant Ngeze in return for money, and both of them accepted.[1304] Moreover, Mr. Sanogo saw Witness AFX again in July 2006, after an informant had offered to introduce him to meet someone who had information. Mr. Sanogo states that he had the impression that Witness AFX hoped to make money by "inventing a story", but that the witness changed his mind after recognizing him. Mr. Sanogo got the impression that both Witness EB and Witness AFX appeared to have made a business out of the genocide.[1305] All of this was confirmed by Mr. Sanogo when he testified before the Appeals Chamber.[1306]

544. Having already found that Witness EB lacked credibility, the Appeals Chamber considers that the fact that Witness EB put forward a number of matters potentially casting doubt on Witness AFX's testimony[1307] is irrelevant. However, Mr. Sanogo's statements are problematic, although the Appeals Chamber has conceded that Mr. Sanogo's feeling that "Witnesses EB and AFX seem to have made a business out of the genocide" was a mere "impression".[1308]

545. The Trial Chamber found that, despite some inconsistencies, Witness AFX had given reasonable responses to the questions put to him in cross-examination, and held that his testimony was credible.[1309] In the view of the Appeals Chamber, even if the investigation report and Mr. Sanogo's testimony are insufficient to establish with certainty that Witness AFX was paid for his testimony against Appellant Barayagwiza, it is nonetheless difficult to ignore this possibility, which undeniably casts doubt on the credibility of this witness. The Appeals Chamber considers that if the Trial Chamber had been aware of the fact that the Prosecutor's investigator questioned the witness' moral character, suspecting him of having been involved in the subornation of other witnesses and of being prepared to testify in return for money – the Trial Chamber would have been bound to find that these matters cast serious doubt on Witness AFX's credibility. Hence, like any reasonable trier of fact, it would have disregarded his testimony, or at least would have required that it be corroborated by other credible evidence. The Appeals Chamber accordingly decides to dismiss Witness AFX's testimony insofar as it is not corroborated by other credible evidence.

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[1301] Appellant Barayagwiza's Conclusions Following Second Expert Report, paras. 19-22.
[1302] T(A) 16 January 2007, p. 45 (closed session). The Appeals Chamber further notes that the recantation letters allegedly signed by Witness EB, as well as some of his statements, mention Witness AFX and the fact that he had also recanted his testimony at trial (see Confidential Exhibits CA-3D3 and CA-3D4).
[1303] *Ibid.*, pp. 9, 11 and 45 (closed session).
[1304] Confidential Exhibit CA-P2, paras. 8-9. See *supra* X. C. 2. (a) .
[1305] *Ibid.*, paras. 36-42 (Quotation taken from para. 42).
[1306] T(A) 16 January 2007, pp. 50-65.
[1307] *Ibid.*, p. 11 (closed session).
[1308] *Ibid.*, p. 62.
[1309] Judgement, para. 712.

(iii) Examination of the alleged errors of fact

546. On the basis of the testimonies of Witnesses AAM and AFX,[1310] the Trial Chamber found, in paragraph 719 of the Judgement, that Appellant Barayagwiza "order[ed] the separation of Hutu and Tutsi present at a meeting in Mutura commune in 1991, and asking Bagogwe Tutsi to do their traditional dance at this meeting and at another meeting in Mutura commune in 1993, publicly humiliating and intimidating them and threatening to kill them". This factual finding is repeated at paragraph 967 of the Judgement in the following terms, in order to demonstrate the Appellant's genocidal intent: "[a]fter separating the Tutsi from the Hutu and humiliating the Tutsi by forcing them to perform the *Ikinyemera,* their traditional dance, at several public meetings, Barayagwiza threatened to kill them and said it would not be difficult."

547. The Appeals Chamber concluded in the previous section that it would only accept Witness AFX's testimony insofar as it is corroborated by other evidence. The Appeals Chamber recalls in this respect that two testimonies corroborate each other when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or sequence of linked facts.[1311] In the present case, the Appeals Chamber notes that, although the Appellant's statements as reported by Witness AFX and Witness AAM are in similar terms, the two witnesses did not attend the same meetings. Witness AAM gave evidence on a meeting held in 1991, while Witness AFX referred to a meeting held in 1993. Since the two testimonies refer to different events, which took place two years apart, it is difficult to conclude that Witness AAM corroborates Witness AFX. Accordingly, the Appeals Chamber will not consider further submissions based on Witness AFX's testimony. It will rely solely on Witness AAM's testimony in the analysis which follows.[1312]

548. In the part of his testimony concerning the statements about the Bagogwe Tutsi,[1313] Witness AAM explained that, after the killings of Tutsi in Mutura commune in 1991, Appellant Barayagwiza arrived with the *sous-préfet* and the two of them convened a meeting with the entire population. At this meeting, the Appellant "said that all the Hutus should stay on one side and the Tutsis on the other side" and "then requested the Tutsis to dance for him and they danced a lot, a dance that is called Ikinyemera".[1314] According to Witness AAM, the Appellant allegedly threatened the Tutsi:

> He then told – said that you are saying that you are dead – a lot of people have been killed from among you but I can see that you are many. There are many of you, where as you are saying that a lot of people are being killed from among you, we heard that on radio but if

[1310] *Ibid.*, paras. 701, 704, 711-712, 716.
[1311] See *supra* X. B. 3.
[1312] The Appeals Chamber has also recalled several times that the jurisprudence of the Tribunal does not in principle require corroboration of a single testimony: *Muhimana* Appeal Judgement, para. 101; *Gacumbitsi* Appeal Judgement, para. 72; *Semanza* Appeal Judgement, para. 153; *Ntakirutimana* Appeal Judgement, para. 132; *Niyitegeka* Appeal Judgement, para. 92; *Rutaganda* Appeal Judgement, para. 29; *Musema* Appeal Judgement, para. 36; *Kayishema and Ruzindana* Appeal Judgement, para. 154. *See* also *Limaj et al.* Appeal Judgement, para. 203; *Kvočka et al.* Appeal Judgement, para. 576; *Kordić and Čerkez* Appeal Judgement, paras. 274-275; *Kunarac et al.* Appeal Judgement, para. 268; *Kupre{kić et al.* Appeal Judgement, para. 33; *Čelibići* Appeal Judgement, paras. 492 and 506; *Aleksovski* Appeal Judgement, para. 62; *Tadić* Appeal Judgement, para. 65.
[1313] See Judgement, paras. 701 and 716.
[1314] T. 12 February 2001, p. 94.

> we hear that once again, we are going to kill you, because killing you is not a difficult task for us.[1315]

549. The Appeals Chamber considers that, even if the transcripts of Witness AAM's testimony do not explicitly mention that Appellant Barayagwiza forced the Bagogwe Tutsi to dance, the Trial Chamber could reasonably conclude, on the basis of that testimony, that the Appellant's request was not just aimed at humiliating the Tutsi but also at intimidating them, thus giving it a compulsory character.

550. Turning to the argument that the aforementioned meeting could not have taken place in 1991 because the CDR did not exist at the time, the Appeals Chamber observes that Witness AAM never said that this was a CDR meeting.[1316] Nor does Paragraph 716 of the Judgement state that the meeting referred to by Witness AAM was a CDR meeting. Thus, even if the language of paragraph 719 of the Judgement seems to imply that the meeting held in 1991 was a CDR meeting, that interpretation must be rejected.

551. Finally, the Appeals Chamber has already dismissed the contention that the Trial Chamber reversed the burden of proof when it assessed Witness AAM's credibility.[1317]

552. Accordingly, the Appeals Chamber is not satisfied that the Appellant has shown that the Trial Chamber erred when it accepted Witness AAM's testimony. The finding that, at a meeting in 1991, the Appellant humiliated and threatened the Bagogwe Tutsi is therefore upheld. Moreover, the Appeals Chamber is of the view that this finding is evidence of the Appellant's genocidal intent.

(c) Exculpatory evidence

553. In his eleventh ground of appeal, Appellant Barayagwiza contends that, in order to determine whether he had genocidal intent, the Trial Chamber should have taken the following exculpatory evidence into account:[1318] (1) the Appellant's previous writings, in particular his book, "*Le sang hutu est-il rouge* ?" [*Is Hutu Blood Red?*];[1319] (2) various documents attributed to him, including annotations to a speech by the President of the CDR, Martin Bucyana;[1320] (3) statements by the Appellant at the constituent assembly of the CDR;[1321] (4) statements by the Appellant in an RTLM broadcast of 12 December 1993.[1322]

554. The Appeals Chamber recalls that the Trial Chamber is not required to refer to all the evidence considered in reaching its findings. Moreover, only evidence that might suggest the

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[1315] *Idem*.
[1316] *Ibid.*, pp. 94-95. See also Judgement, para. 701.
[1317] See *supra* IV. B. 1.
[1318] Barayagwiza Appellant's Brief, paras. 134-138; Barayagwiza Brief in Reply, paras. 88-89.
[1319] *Ibid.*, paras. 134-135.
[1320] *Ibid.*, para. 136, referring to T. 21 May 2002, pp. 64-65 (mentioning Exhibit P136, a letter dated 11 July1992 to a Belgian newspaper), 101-124 (mentioning Exhibit P141, a speech drafted by Martin Bucyana and allegedly annotated by Appellant Barayagwiza), 154-162 (Appellant Barayagwiza's speech). The Appeals Chamber notes that the document discussed at pp.154-162 was not admitted to the case-file, and will not therefore refer to it in subsequent discussions.
[1321] Barayagwiza Appellant's Brief, para. 137.
[1322] *Idem.*

innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence may be considered exculpatory evidence.[1323]

555. As regards the first item of exculpatory evidence, the Appeals Chamber notes that the content of Appellant Barayagwiza's book, "*Le sang hutu est-il rouge?*", is analysed in detail in the Judgement,[1324] and observes that the Appellant does not explain how this book shows that the Trial Chamber erred in finding that he had the intent to destroy the Tutsi ethnic group in whole or in part. In the view of the Appeals Chamber, the Trial Chamber could reasonably conclude that the views expressed in this book did not conflict with its finding that Appellant Barayagwiza had genocidal intent.

556. The same applies to the annotated speech of the President of the CDR (P141) and to the letter sent to the Belgian newspaper, *La Libre Belgique* (P136), both of which are mentioned in the Judgement;[1325] the Appellant does not explain how this evidence adduced at trial by the Prosecutor demonstrates an absence of genocidal intent.[1326]

557. The Appeals Chamber finds itself bound to reach a similar conclusion with respect to the statements made by Appellant Barayagwiza during the constituent assembly of the CDR[1327] – also referred to by the Trial Chamber[1328] – since the Appellant similarly fails to substantiate his argument concerning the alleged evidence of lack of genocidal intent.

558. Finally, regarding the tapes of the RTLM broadcast of 12 December 1993,[1329] the Appeals Chamber notes that the Trial Chamber accepted that what Appellant Barayagwiza said did not, as such, constitute incitement to commit genocide,[1330] but conveyed the Appellant's personal experience and aimed at raising awareness about the discrimination suffered by the Hutu.[1331] There was thus nothing in the Appellant's statements inherently

[1323] See Article 68(A) of the Rules.
[1324] Judgement, paras. 736-742. See paragraph 280 of the Judgement, which summarizes Expert Witness Des Forges' analysis of the ethnic dimension of the conflict through Appellant Barayagwiza's writings and statements and cites an extract from the book, "*Le sang hutu est-il rouge* ?", and paragraph 289 of the Judgement, also summarizing Expert Witness Des Forges'analysis concerning similarities between this book and other documents attributed to Appellant Barayagwiza.
[1325] See Judgement, paras. 278-280, concerning the letter to *La Libre Belgique*, and para. 260, concerning Martin Bucyana's speech annotated by Appellant Barayagwiza.
[1326] The Appeals Chamber notes that the speech annotated by Appellant Barayagwiza mainly shows the real power of the Appellant within the CDR hierarchy and in the formulation of CDR ideology. In his letter to the editor of *La Libre Belgique*, the Appellant expresses his views on the goals and true nature of the RPF and clearly indicates that, "although the party [CDR] will use peaceful methods for its political action, it will defend by all means the interests of the majority, the popular majority, the Hutu popular majority against the hegemonic and violent objectives of the Tutsi minority" (P136, p. 3. See also T. 21 May 2002, p. 66).
[1327] The Appeals Chamber notes that the correct reference is Exhibit 1D66B, "*Annotations de la vidéo cassette KV00 – 0199*", submitted by the Defence and admitted on 12 September 2001, and not Exhibit 2D12 as indicated by Appellant Barayagwiza in his Appellant's Brief at footnote 138. This document sets out the Appellant's view of the objectives of the CDR and *inter alia* restates his position as to the impossibility of unity between Hutu and Tutsi and the need to root out all trouble-makers and to create a party to address the problems of the Hutu, finally reiterating his categorical refusal to accept the integration of *Inkotanyi* into the national armed forces.
[1328] Judgement, para. 259.
[1329] Exhibit P103/101B.
[1330] Judgement, paras. 1019-1020; see also paragraphs 345, 468 of the Judgement for the factual analysis.
[1331] *Ibid.*, para. 468.

incompatible with an intent to destroy the Tutsi ethnic group in whole or in part, and capable of refuting the Trial Chamber's findings with respect to his genocidal intent.

559. The Appeals Chamber concludes that the Trial Chamber was entitled to find that none of this evidence contradicted its finding that Appellant Barayagwiza had, beyond reasonable doubt, genocidal intent. This ground of appeal must fail.

(d) Temporal jurisdiction of the Tribunal

560. Appellant Barayagwiza contends that the findings from which the Trial Chamber inferred his genocidal intent are based on facts outside the Tribunal's temporal jurisdiction, and that the Trial Chamber's findings that he had genocidal intent must be quashed.[1332]

561. The Appeals Chamber recalls that it has already considered the Trial Chamber's interpretation of the Tribunal's temporal jurisdiction and reaffirmed that Article 7 of the Statute does not prevent the admission of evidence of events prior to 1 January 1994, insofar as the Trial Chamber deemed such evidence relevant and of probative value, and there was no compelling reason to exclude it.[1333] This applies *inter alia* to evidence of criminal intent.[1334] The Appeals Chamber accordingly takes the view that consideration of evidence of events prior to 1 January 1994 in order to establish Appellant Barayagwiza's criminal intent in 1994 is not a breach of Article 7 of the Statute. This ground of appeal is dismissed.

(e) Conclusion regarding Appellant Barayagwiza's genocidal intent

562. Appellant Barayagwiza has not shown that the Trial Chamber erred when it found that he had the intent to destroy, in whole or in part, the Tutsi ethnic group.

4. Appellant Ngeze

563. The Trial Chamber found that Appellant Ngeze acted with the intent to destroy, in whole or in part, the Tutsi ethnic group, on the basis of the following elements: articles and editorials published in *Kangura,* of which the Appellant was the owner, founder and editor-in-chief, in particular the articles and editorials he himself wrote; the Radio Rwanda interview of 12 June 1994; the statements made at Martin Bucyana's funeral and on other occasions in Gisenyi; and the fact that he ordered an attack on Tutsi civilians in Gisenyi.[1335] Appellant Ngeze challenges this finding.[1336]

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[1332] Barayagwiza Appellant's Brief, para. 139.
[1333] See *supra* VIII. B. 3.
[1334] *Idem*, citing *Aloys Simba v. the Prosecutor*, Case No. ICTR-01-76-AR72.2, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, 29 July 2004, p. 3; *Emmanuel Rukundo v. the Prosecutor*, Case No. ICTR-2001-70-AR72, *Décision (Acte d'appel relatif à la Décision du 26 février 2003 relative aux exceptions préjudicielles)* [Decision (Notice of Appeal from the Decision of 26 February 2003 on the Preliminary Objections)], 17 October 2003, p. 5; *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-T [*sic*], Appeal Judgement (*Appel de la Décision du 13 mars 2001 rejetant la* "Defence Motion Objecting to the Jurisdiction of the Tribunal" [Appeal from the Decision of 13 March 2001 dismissing the "Defence Motion Objecting to the Jurisdiction of the Tribunal"]), 16 November 2001, p. 4; Separate Opinion of Judge Shahabuddeen to the Decision of 5 September 2000, paras. 9-17.
[1335] Judgement, paras. 965, 968-969.
[1336] Ngeze Notice of Appeal, paras. 89-93; Ngeze Appellant's Brief, paras. 275-285.

(a) Writings in *Kangura*

564. Appellant Ngeze contends that the Trial Chamber could not rely on articles published in *Kangura* in order to infer his genocidal intent, since: (1) it was not entitled to rely on articles written by others;[1337] (2) the articles published before 1994 are outside the temporal jurisdiction of the Tribunal, and the Trial Chamber accepted that the articles published in 1994 did not instigate the commission of genocide;[1338] and (3) the articles did not target the Tutsi but only RPF members and sympathisers.[1339]

565. With respect to the first argument, the Appeals Chamber is of the view that any reasonable trier of fact would have considered the articles written by others in *Kangura* in order to determine whether Appellant Ngeze had genocidal intent. As owner, founder and editor-in-chief of *Kangura*, Appellant Ngeze exercised control over all the articles and editorials published in *Kangura*. Accordingly, all of these articles and editorials could legitimately be ascribed to him personally and directly.[1340] As for the argument relating to temporal jurisdiction, the Appeals Chamber recalls that it has already concluded that the Trial Chamber committed no error in accepting evidence prior to 1 January 1994 in order to establish the Appellant's genocidal intent.[1341] As for the assertion that the *Kangura* articles did not target the Tutsi population as a whole, it has not been substantiated and can be dismissed summarily. The fact is that the Trial Chamber identified the writings in *Kangura*, which, in its view, targeted the Tutsi population as a whole;[1342] it referred in particular to one such article in which Appellant Ngeze wrote that the Tutsi "no longer conceal the fact that this war pits the Hutus against the Tutsis".[1343] The Appellant has failed to demonstrate that the Trial Chamber's conclusions were unreasonable. This ground of appeal is dismissed.

(b) Appellant's statements

566. Appellant Ngeze contends that statements made by him at Martin Bucyana's funeral "were isolated and do not demonstrate any genocidal intent".[1344] He further submits that the broadcast of 12 June 1994 on Radio Rwanda does not constitute a call to kill, and therefore cannot be evidence that he had genocidal intent.[1345]

567. The Trial Chamber found on the basis of Witness LAG's testimony that the Appellant stated at Bucyana's funeral that "if Habyarimana were also to die, we would not be able to spare the Tutsi".[1346] Appellant Ngeze does not explain how these remarks were taken out of context and could not be relied upon in determining his genocidal intent. The appeal on this point is dismissed.

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[1337] Ngeze Appellant's Brief, para. 276(a), read in conjunction with para. 275(b).
[1338] *Ibid.*, para. 280(a).
[1339] *Ibid.*, para. 282.
[1340] See Judgement, paras. 135, 977A and 1038.
[1341] See *supra* VIII. B. 3.
[1342] Judgement, paras. 961-963.
[1343] *Ibid.*, para. 968, referring specifically to *Kangura* No. 40, which is analysed in paragraph 181 of the Judgement.
[1344] Ngeze Appellant's Brief, para. 280(c).
[1345] *Ibid.*, para. 280(b).
[1346] Judgement, paras. 800, 835, 837 and 968. Paragraph 800 of the Judgement refers to the cross-examination of Witness LAG, T. 3 September 2001, pp. 24-25; see also examination-in-chief of Witness LAG, T. 30 August 2001, pp. 50-57, which confirms these statements.

568. As for Appellant Ngeze's interview on Radio Rwanda, to which reference is made in paragraph 968 of the Judgement, the Trial Chamber considered that:

> […] through the Radio Rwanda and RTLM broadcasts, Ngeze was trying to send a message, or several messages, to those at the roadblocks. One clear message was: do not kill the wrong people, meaning innocent Hutu who might be mistaken for Tutsi because they had Tutsi features, or because they did not have identification, or because they had identification marked "RPF". In the broadcasts is also the message that there were enemies among the Hutu as well, even some at the roadblocks. In mentioning Kanyarengwe, the Hutu RPF leader, Ngeze reminded listeners that the enemy could be Hutu as well as Tutsi. This is not the same as saying that the Tutsi is not the enemy and should not be killed. In the broadcasts, Ngeze did not tell those at the roadblocks not to kill the Tutsi. The message was to be careful and bring suspects to the authorities, as much to ensure that the enemy does not mistakenly get through the roadblock as to ensure that the wrong people, meaning innocent Hutu, are not killed. In his testimony, Ngeze provided many explanations for what he said, describing various scenarios, including one to suggest he was trying to trick those at the roadblock into letting him pass with Tutsi refugees carrying false Hutu identity cards. Nevertheless, in the Chamber's view, Ngeze also made it clear in his testimony that his message was not to kill Hutu by mistake.
>
> The Chamber is of the view that in telling those at the roadblock not to kill Hutu by mistake, Ngeze was also sending a message that there was no problem with the killing of Tutsi at the roadblock. Such a message was implicit in the broadcasts, which repeatedly urged that suspects not be killed but rather be brought to the authorities. In these convoluted circumstances, the Chamber does not find that these broadcasts constituted a call to kill as alleged.[1347]

569. The Appeals Chamber considers that this last paragraph is unclear, since the Trial Chamber concluded, first, that there was an implicit message in the broadcasts, namely that "in telling those at the roadblock not to kill Hutu by mistake, Ngeze was also sending a message that there was no problem with the killing of Tutsi at the roadblock", but then declined to conclude that these "broadcasts constituted a call to kill". The Trial Chamber thus seems to have implicitly excluded the notion that these statements could amount to evidence of Appellant Ngeze's genocidal intent. The Trial Chamber therefore erred in citing in its legal findings on genocidal intent the fact that the Appellant called on listeners not to mistakenly kill Hutu instead of Tutsi.[1348] The Appeals Chamber considers, nonetheless, that this error does not affect the Appellant's conviction for the crime of genocide, having regard to the entire body of evidence accepted by the Trial Chamber in establishing his genocidal intent.[1349]

(c) Exculpatory evidence

570. Appellant Ngeze contends that the Trial Chamber erred in law and in fact in refusing to consider the acts and words proving the absence of a genocidal intent on his part.[1350] He argues in particular that he personally saved the lives of thousands of Tutsi and publicly went on record many times to say that not all Tutsi were bad.[1351]

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[1347] *Ibid.*, paras. 754-755.
[1348] *Ibid.*, para. 968.
[1349] *Idem*.
[1350] Ngeze Appellant's Brief, para. 276(b).
[1351] *Ibid.*, para. 285, no reference provided.

571. The Appeals Chamber considers that Appellant Ngeze fails to substantiate his vague submission in relation to the Trial Chamber's purported error in its assessment of the weight to be afforded to the exculpatory evidence. The Appeals Chamber further notes that the Trial Chamber considered the allegation that the Appellant saved thousands of Tutsi, but concluded that "a small circle of individuals were saved by his intervention, in particular Tutsi of the Muslim faith and Tutsi close relatives […], the Chamber considers it highly improbable that Ngeze saved over 1,000 Tutsi individuals, as he claimed".[1352] The Trial Chamber added:

> The Chamber also notes that in saving Witness AEU and her children, Ngeze extorted her employer, extracting the price of $1,000 for their lives. Moreover, Witness AEU testified that those who joined in another initiative of Ngeze, presented to them as a humanitarian intervention, were in the end lured to their death by Ngeze rather than saved by him. The Chamber notes that Ngeze's innovative method of saving Tutsi through transport by barrel also involved lucrative trading in much needed fuel that he brought back to Rwanda in the barrels. At the time of his arrest, by his own admission Ngeze had a bank balance in the region of $ 900,000.[1353]

The Trial Chamber then concluded that the Appellant's "role in saving Tutsi individuals whom he knew does not, in the Chamber's view, negate his intent to destroy the ethnic group as such".[1354] The Appellant has failed to demonstrate that these findings were unreasonable. In the opinion of the Appeals Chamber, it was reasonable for the Trial Chamber to find that the Appellant had a genocidal intent while also recognizing that he had saved Tutsi.[1355]

572. Lastly, the Appellant cites no evidence in support of his claim that he went on record many times to say that not all Tutsi were bad. In any event, the Appeals Chamber is of the opinion that, even if this were true, it would not be sufficient to raise a reasonable doubt in regard to the Appellant's genocidal intent as established by the Prosecution evidence. This ground of appeal cannot succeed.

[1352] Judgement, para. 850.
[1353] *Idem*.
[1354] *Ibid.*, para. 968.
[1355] In this respect, see *Muhimana* Appeal Judgement, para. 32; *Rutaganda* Appeal Judgement, para. 537.

(d) Conclusion

573. The Appeals Chamber recalls that it has already quashed the finding that the Appellant ordered an attack on Tutsi civilians in Gisenyi on 7 April 1994.[1356] That finding cannot therefore constitute proof of the Appellant's genocidal intent. However, the Appeals Chamber is of the opinion that there is sufficient evidence to conclude that the Appellant had genocidal intent in 1994, and affirms the Trial Chamber's findings in this regard.

## D. Criminal liability of the Appellants for genocide

### 1. Individual Criminal Responsibility of Appellant Nahimana under Article 6(1) of the Statute

(a) Findings on the involvement of Appellant Nahimana based on facts prior to 1 January 1994

574. Appellant Nahimana alleges that the Trial Chamber committed errors of law and fact that invalidate the Judgement by holding him responsible for RTLM on the basis of facts prior to 1 January 1994, which are outside the temporal jurisdiction of the Tribunal.[1357] The Appellant argues that these facts are not relevant and lack probative value for purposes of assessing his responsibility from 1 January 1994,[1358] and that the Trial Chamber's factual findings confirm that he played an active role in RTLM "only when it was created and technically put in place, that is, well before 1 January 1994".[1359]

575. The Appeals Chamber reiterates that Appellant Nahimana's responsibility could not be based on criminal conduct prior to 1 January 1994, but that evidence of pre-1994 facts could nonetheless have probative value.[1360] With regard to the Appellant's arguments, the Appeals Chamber considers that a mere reference to a series of paragraphs in the Judgement does not meet the requirements for the presentation of arguments on appeal, and that the broad allegation that the Trial Chamber erred in law and in fact by taking into consideration pre-1994 facts in order to find him responsible cannot succeed, since the Appellant fails to demonstrate that his conviction for genocide was based on pre-1994 facts, or that the evidence of pre-1994 facts had no probative value for purposes of finding him responsible for RTLM broadcasts.

576. The Appeals Chamber notes moreover that the Trial Chamber relied on post-1994 facts in assessing Appellant Nahimana's control over RTLM, such as: his participation in the Steering Committee and his role as President of the Technical and Program Committee;[1361] his alleged role as Director of RTLM;[1362] his intervention in order to halt the attacks on UNAMIR and General Dallaire;[1363] the interview with the Appellant broadcast on Radio Rwanda on

[1356] See *supra* IX. D.
[1357] Nahimana Appelant's Brief, paras. 79-82. Paragraph 79 refers to paragraph 52 of the same brief, which lists the following paragraphs of the Judgement that cite facts falling outside the Tribunal's temporal jurisdiction: paras. 490-492, 495-499, 506-507, 509-511, 514, 554-556, 567, 572-583, 609-611, 617, 619, 970-971 and 974.
[1358] *Ibid.*, para. 81.
[1359] *Ibid.*, para. 80.
[1360] See *supra* VIII. B. 3.
[1361] Judgement, paras. 561-562 and 567.
[1362] *Ibid.*, paras. 553, 565 and 567.
[1363] *Ibid.*, paras. 563 and 565.

25 April 1994; and his conversation with Witness Dahinden in June 1994.[1364] For the same reasons, the assertion by the Appellant that the factual findings of the Trial Chamber confirm that he played an active role in RTLM "only when it was created and technically put in place, that is, well before 1 January 1994",[1365] must be rejected. The Appeals Chamber is therefore not persuaded that it has been demonstrated that the Trial Chamber exceeded its temporal jurisdiction by taking account of the Appellant's role in the setting up of RTLM in 1993 and in its management from the time of its creation, in order to assess the criminal responsibility of the Appellant after 1 January 1994. This ground of appeal is dismissed.

(b) Conviction for the crime of genocide

577. In various sections of his Appellant's Brief, Appellant Nahimana presents several arguments related to paragraph 974 of the Judgement, which are grouped and analyzed together below. Although the Appellant submits most of these arguments in relation to the crime of direct and public incitement to commit genocide, the Appeals Chamber has decided to analyze all of them in relation to the conviction for the crime of genocide, since they all relate to paragraph 974 of the Judgement, which is included in the section devoted to the responsibility of the Appellants for that crime. The effect of this analysis on the convictions on the other counts will be examined in the chapters dealing with these.

(i) Arguments of the parties

578. Appellant Nahimana argues first that, on the count of genocide, he was indicted only under Article 6(1) of the Statute, and he claims that the Trial Chamber committed serious errors of law and fact in its legal findings, since there is no fact supporting the finding of his "direct and personal participation in acts of genocide".[1366]

579. The Appellant alleges the following legal errors:

- The Trial Chamber holds him responsible under Article 6(1) of the Statute not by virtue of his personal and direct intervention in the commission by RTLM of the crime of instigation, but rather because he was "responsible of RTLM's programming"; the Trial Chamber thus confuses responsibility under Article 6(1) with superior responsibility under Article 6(3) of the Statute;[1367]

- The Judges did not find that the Appellant had himself made statements directly and publicly inciting the commission of genocide, or that he had ordered that such declarations be broadcast or had participated in any other way in their broadcasting.[1368] The only allegation of direct intervention on his part – that, in March 1994, he had ordered an RTLM journalist to read on air a telegram which accused the Prosecutor-

[1364] *Ibid.*, para. 564.
[1365] Nahimana Appellant's Brief, para. 80.
[1366] *Ibid.*, paras. 575-577 (quotation drawn from para. 577). The Appellant refers back to his arguments relating to his responsibility for direct and public incitement to commit genocide (paras. 296-336 with regard to his responsibility under Article 6(1) of the Statute). The argument developed at paragraph 297 deals only with the responsibility of the Appellant for direct and public incitement to commit genocide.
[1367] *Ibid.*, paras. 298-299. See also T(A) 17 January 2007, pp. 15-16.
[1368] *Ibid.*, paras. 300-301.

General of Rwanda of plotting against the President[1369] – does not refer to broadcasts of statements instigating the commission of genocide, but to "comments [which] concern a political controversy involving a high judicial authority from the Hutu community".[1370] In these circumstances, the assertion that "RTLM was Nahimana's weapon of choice, which he used to instigate the killing of Tutsi civilians", cannot be linked to any specific act of the Appellant;[1371]

- In the absence of direct participation, the Trial Chamber bases the Appellant's responsibility on the fact that he was "satisfied" with RTLM broadcasts and that "RTLM did what Nahimana wanted it to do".[1372] Even if this fact were established, "[i]t is not possible to establish that the Appellant personally participated in the criminal act by alleging that he was 'satisfied' with the crime committed",[1373] and the fact that he might have expressed in such manner an opinion or intent cannot constitute "the *actus reus* of participation in the crime"[1374] because "opinion and intention are never punishable as long as they do not materialize into a specifically identified criminal act";[1375]

- The Trial Chamber erred in finding him responsible for RTLM broadcasts after 6 April 1994[1376] without providing any particulars of his involvement in such broadcasts[1377] and in finding him responsible for acts committed by others, solely on the ground that such acts were a continuation of similar acts which he had allegedly committed earlier.[1378] Such responsibility for the acts of others is not provided under the Statute, and conflicts with the principles laid down by international and domestic law.[1379]

580. With regard to factual errors, the Appellant Nahimana contends that:

- The finding that he was satisfied with the RTLM broadcasts is erroneous, because he personally condemned RTLM for becoming a "tool for killing" during the genocide;[1380]

- The Trial Chamber wrongly found that he exercised control over RTLM s.a. and the RTLM radio station in his role as founder of RTLM, in asserting that the "RTLM was a creation that sprang from Nahimana's vision more than anyone else" and that "it was his initiative and his design",[1381] whereas the only evidence related to the genesis

[1369] See Judgement, paras. 517 and 557.
[1370] Nahimana Appellant's Brief, para. 302. The Appellant also argues that this finding was erroneous in fact because it resulted from a "single hearsay testimony without any probative value": *infra* XIII. D. 1. (b) (ii) a. , and Nahimana Appellant's Brief, paras. 303, 441-442.
[1371] *Ibid.*, para. 304, citing paragraph 974 of the Judgement. See also Nahimana Appellant's Brief, para. 334.
[1372] *Ibid.*, para. 305, citing paragraph 974 of the Judgement.
[1373] *Ibid.*, para. 308.
[1374] *Ibid.*, para. 309.
[1375] *Ibid.*, para. 307.
[1376] *Ibid.*, para. 313.
[1377] *Ibid.*, paras. 311-312.
[1378] *Ibid.*, p. 38, sub-title 2.4 and para. 313.
[1379] *Ibid.*, paras. 314-316. See also T (A), 17 January 2007, p. 7.
[1380] *Ibid.*, para. 306.
[1381] *Ibid.*, para. 319 and sub-heading preceding this paragraph.

of RTLM is his testimony at trial, and he challenges this analysis.[1382] Furthermore, the mere fact that he was "one of the key founding members of a radio station which was subsequently used as an instrument of hatred and violence does not suffice to establish criminal responsibility of any sort";[1383]

- The finding that he was the principal ideologist of RTLM is too vague, thus preventing the Appeals Chamber from exercising its power of review.[1384] Furthermore, the evidence adduced at trial did not support such a finding by the Trial Chamber: Witness Kamilindi simply expressed an opinion, which was not supported by any evidence and, on the contrary, confirmed that the Appellant had only a limited role in RTLM before 6 April 1994;[1385] Witness Strizek conceded that his opinion on this point did not result from his own research, but that he had merely lifted it from other publications.[1386] In any event, the Appellant did not express his views on air and his political activities and scientific analyses were neither commented on nor supported by the journalists;[1387]

- There was no justification for the Trial Chamber's finding that "RTLM was Nahimana's weapon of choice, which he used to instigate the killing of Tutsi civilians",[1388] since it was established that the Appellant (1) spoke only once on RTLM, "on 20 November 1993 when he made statements that have been endorsed by the Judges"; (2) never intervened on air between 1 January and 31 December 1994; and (3) stopped all contacts with the radio station after 8 April 1994, that is, before it became a weapon "in the war, the civil war and genocide";[1389]

- There is no evidence suggesting any type of involvement on his part in RTLM after 6 April 1994.[1390] To the contrary, it has been demonstrated that he had severed relations with RTLM and had no contact with the journalists after 8 April 1994.[1391] This severance of contact refutes the argument of the Prosecutor, endorsed in paragraph 974 of the Judgement, that the Appellant had used RTLM as a weapon to instigate the killing of Tutsi, since, if this had been the case, the Appellant would not have severed contact with the radio station at the very moment when this alleged project was being implemented.[1392]

581. Appellant Nahimana thus submits that there was no positive, personal act, substantially linked to the instigation of genocide by RTLM, which could be attributed to him.[1393]

[1382] *Ibid.*, para. 320.
[1383] *Ibid.*, para. 321.
[1384] *Ibid.*, paras. 322 and 328, referring to paragraph 974 of the Judgement.
[1385] *Ibid.*, paras. 324-326.
[1386] *Ibid.*, para. 327.
[1387] *Ibid.*, para. 328.
[1388] *Ibid.*, para. 304 and sub-title 3.4 preceding paragraph 334.
[1389] *Ibid.*, para. 335.
[1390] *Ibid.*, paras. 329-330, which refers to paragraph 974 of the Judgement in its translation of 5 April 2004.
[1391] *Ibid.*, para. 331.
[1392] *Ibid.*, paras. 332-333.
[1393] *Ibid.*, para. 336.

582. The Prosecutor responds that the arguments of Appellant Nahimana are unfounded.[1394] He refers to his arguments on the responsibility of the Appellant for direct and public incitement to commit genocide and for persecution as a crime against humanity.[1395] A general reference of this kind presents problems, since the Prosecutor fails to make it clear whether all of those arguments apply also to the Appellant's responsibility for instigation to commit genocide pursuant to Article 6(1) of the Statute. However, it is the Appeals Chamber's understanding that the Prosecutor's position is as follows.

583. The Prosecutor submits that Appellant Nahimana was rightly found guilty of having instigated the commission of genocide, since he used RTLM and its journalists to accomplish his criminal purpose.[1396] In this respect, the Prosecutor argues that the Appellant participated in the creation of RTLM; that he was a member of its Steering Committee; that he played a role in its financial management; that he presided over the Technical and Program Committee; that he represented RTLM at meetings with the Minister of Information; and that he had the last word over all of the activities of RTLM, including its broadcasts and its editorial policy, even after 6 April 1994.[1397] The Prosecutor adds that the Appellant "unambiguously supported RTLM's activities of directly and publicly inciting the killings of Tutsis both in meetings with the Minister of Information, as well in his public statement on Radio Rwanda at the height of massacres", and that he "acquiesced to the incitement perpetrated by journalists".[1398] The Prosecutor maintains that, contrary to what the Appellant appears to argue, the Trial Chamber did not rely on purely intentional elements in order to convict him: it considered the statements made by the Appellant in the interview of 25 April 1994 as an admission of guilt, not as an element of the offence.[1399]

584. The Prosecutor further argues, in the alternative, that, on the basis of the acts discussed above, the Appellant could have been found guilty of having instigated others to instigate genocide, of having aided and abetted others in instigating genocide, or having planned the instigation of genocide.[1400] The Prosecutor recalls in this regard that several

[1394] Respondent's Brief, paras. 458-459.
[1395] *Ibid.*, para. 459.
[1396] *Ibid.,* para. 352. See also para. 336, where the Prosecution submits that the Appellant "both intended and facilitated" the broadcasting of genocidal messages before and after 6 April 1994 (although the certified French translation reads: "*Il [l'Appelant] a bel et bien* ***planifié et encouragé*** *la diffusion de messages génocidaires par la RTLM avant et après le 6 avril 1994*", the English version – being the authoritative one – states: "The genocidal messages in the broadcasts of RTLM both prior to and after 6 April 1994 were something that he [the Appellant] both **intended and facilitated**"), and para. 423, in which the Prosecution submits that the Appellant "used the RTLM as communication weaponry" in order to instigate the commission of crimes against the Tutsi. See also T(A) 18 January 2007, p. 12.
[1397] *Ibid.*, paras. 337-338, 351-352, 361 and 423.
[1398] *Ibid.*, para. 423.
[1399] *Ibid.*, para. 366.
[1400] *Ibid.*, paras. 351, 353-354, 424-430. Paragraphs 351, 353 and 354 suggest that the Appellant could be convicted not only of having "committed" direct and public incitement to commit genocide, but also of having instigated or aided and abetted the commission of the crime of direct and public incitement to commit genocide. (The Appeals Chamber notes in this respect that the French translation of paragraph 353 of the Respondent's Brief is inaccurate in that it refers to "*incitation directe et publique à commettre le génocide*" while it should have referred to "*l'incitation à l'incitation directe et publique à commettre le génocide*": see original English version of para. 353 of the Respondent's Brief). Paragraphs 424 to 430 suggest that the Appellant could be found responsible for having planned or aided and abetted persecution as a crime against humanity. Since the Prosecutor refers to his arguments concerning direct and public incitement to commit genocide and persecution in relation to the Appellant's responsibility for genocide (see Respondent's Brief, para. 459), the Appeals

modes of liability may be supported by the same set of facts and that the Appeals Chamber may substitute one form of responsibility for another.[1401]

585. Appellant Nahimana replies that the Prosecutor himself acknowledges the Judgement's deficiencies, and seeks to address them by invoking for the first time in his Respondent's Brief modes of responsibility which are mentioned neither in the Indictment nor in the Judgement.[1402] The Appellant submits that the Indictment pleads only one mode of liability, namely the mode of commission, thereby implicitly excluding any other type of criminal participation,[1403] and that any attempt at invoking other forms of responsibility would adversely affect his defence rights.[1404]

586. The Appellant argues in this respect that he cannot be held liable of having instigated the commission of genocide through "indirect participation", because the Statute does not provide for such a mode of liability and the Prosecutor did not plead it as such at trial.[1405] He further submits that the *Akayesu* Appeal Judgement, as well as the *travaux préparatoires* of the Genocide Convention, show that an act of instigation to genocide which does not meet the criteria of direct and public incitement to commit genocide cannot entail criminal responsibility;[1406] the Prosecutor's thesis that the Appellant had, through indirect participation in RTLM, "instigated" the journalists to commit genocide must therefore be rejected.[1407]

587. With regard to the compounded modes of liability proposed in the alternative by the Prosecutor, the Appellant maintains that:[1408]

- He could not be found guilty of having, by omission, aided and abetted direct and public incitement to commit genocide.[1409] Liability for an omission can exist only in two exceptional cases: where there has been a failure to discharge a legal duty to act

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Chamber understands that the arguments presented at paragraphs 351, 353, 354 and 424 to 430 of the Respondent's Brief must also be applied to the criminal conduct of RTLM staff in instigating to commit genocide.

[1401] Respondent's Brief, para. 425.

[1402] Nahimana Brief in Reply, paras. 90-91.

[1403] *Ibid.*, para. 94.

[1404] *Ibid.*, para. 95.

[1405] *Ibid.*, paras. 96 to 101. In these paragraphs, the Appellant replies to the Prosecution argument that the Appellant used RTLM journalists to *commit* the crime of direct and public incitement to genocide. Since the Appeals Chamber has transposed this argument to the question of the Appellant's responsibility for instigation to commit genocide under Article 6(1) of the Statute, the Reply must likewise be transposed.

[1406] *Ibid.*, paras. 108-109, referring to para. 480 of the *Akayesu* Appeal Judgement.

[1407] *Ibid.*, para. 110. See also paras. 96-101, where the Appellant argues that his "indirect participation" cannot be assimilated to the crime of direct and public incitement to commit genocide.

[1408] The Appellant further submits that there cannot be any criminal liability for having instigated others to commit direct and public incitement to genocide, or for having aided and abetted others in directly and publicly inciting the commission of genocide: Nahimana Brief in Reply, paras. 102-107 and 115-117. The arguments presented by the Appellant in these paragraphs relate exclusively to the modes of liability applicable to the crime of public and direct incitement to commit genocide (Article 2(3)(c) of the Statute) and cannot be transposed to the question of instigation to instigate genocide (Article 6(1) of the Statute), or of aiding and abetting the instigation of genocide (Article 6(1) of the Statute). It might nonetheless be thought appropriate to consider whether a defendant can be found guilty of having instigated others to instigate genocide under Article 6(1) of the Statute, or of having aided and abetted others in instigating genocide under Article 6(1) of the Statute. However, for the reasons set out below, the Appeals Chamber finds that it is unnecessary to rule on this issue in the present case.

[1409] Nahimana Brief in Reply, paras. 118-123.

under criminal law,[1410] or in the case of the "approving spectator", where, by virtue of his superior position, "the accused's mere presence on the scene of the crime constitutes a positive act of aiding and abetting, which had a direct and significant effect on the commission of the crime".[1411] However, these situations are not relevant here: in the first case, there was no legal rule, under either Rwandan or international law, which imposed a duty to act upon the Appellant;[1412] in the second case, the jurisprudence requires that the accused be present at the scene of the crime, in close proximity to the principal perpetrator,[1413] which was not the case here, since the Appellant had no contact with RTLM after 8 April 1994; [1414]

- He could not be found responsible for having planned direct and public incitement to commit genocide, because this form of responsibility in the third degree is not recognized under international criminal law and, in any event, there could be no such form of responsibility in the present case, since he "never gave orders or directives to staff of the radio [station]".[1415]

(ii) Analysis

588. The Appeals Chamber recalls that it has already concluded that some of the RTLM broadcasts after 6 April 1994 instigated the commission of acts of genocide.[1416] The question which must be addressed now is whether Appellant Nahimana can be held responsible for these acts of instigation under Article 6(1) of the Statute.

589. At the outset, the Appeals Chamber notes that there is no evidence on file suggesting that Appellant Nahimana played an active part in broadcasts after 6 April 1994 which instigated the killing of Tutsi.[1417] However, in paragraph 974 of the Judgement, the Trial Chamber cites the following facts in order to convict Appellant Nahimana under Article 6(1) of the Statute on account of all RTLM broadcasts which instigated the killing of Tutsi:

- The fact that he was one of the founders of RTLM;

- His role as principal ideologist of RTLM;

- The fact that the Appellant was "satisfied with his work", according to the view expressed in his interview of 25 April 1994 with Radio Rwanda, at a time when the massacre of the Tutsi population was ongoing;

[1410] *Ibid.*, paras. 118-119, referring to paragraph 188 of the *Tadić* Appeal Judgement, to paragraph 334 of the *Čelibići* Appeal Jugement, to paragraph 601 of the *Krstić* Trial Judgement and to paragraph 663 of the *Blaškić* Appeal Judgement.
[1411] *Ibid.*, para. 121.
[1412] *Ibid.*, para. 120.
[1413] *Ibid.*, para. 122, referring to paragraph 35 of the *Bagilishema* Trial Judgement, to paragraphs 452, 689 and 693 of the *Akayesu* Trial Judgement, and to paragraph 657 of the *Blaškić* Appeal Judgement.
[1414] *Ibid.*, para. 123.
[1415] *Ibid.*, para. 127.
[1416] See *supra* XII. B. 3.
[1417] The only example of intervention by the Appellant with RTLM after 6 April 1994 is his action to put an end to the attacks on UNAMIR and General Dallaire. As explained below (XIII. D.1. (b) (ii) a. (iii.)), this intervention confirms the Appellant's effective control of RTLM after 6 April 1994, but it does not prove that the Appellant played an active role in the broadcasts instigating the killing of Tutsi.

- The fact that the RTLM "did what Nahimana wanted it to do", playing a key role in the "awakening of the majority people" and in "mobilizing the population to stand up against the Tutsi enemy".

The Trial Chamber concluded that "RTLM was Nahimana's weapon of choice, which he used to instigate the killing of Tutsi civilians" and that Nahimana was "guilty of genocide pursuant to Article 6(1) of [the] [S]tatute".[1418] The Appeals Chamber understands that the Trial Chamber found that the Appellant had himself instigated the commission of genocide, by using RTLM as a tool for this purpose.

590. The Appeals Chamber will examine first whether the Trial Chamber's factual findings were reasonable, and will then determine whether Appellant Nahimana's conviction can be upheld.

a. The Appellant's "satisfaction".

591. In paragraph 564 of the Judgement, the Trial Chamber held as follows:

> Nahimana testified that when he met Phocas Habimana in July in Gisenyi, he asked him how he could do what he was doing at RTLM. According to Nahimana's testimony, RTLM was hijacked and turned into a "tool for killing". This testimony stands in sharp contrast to the other evidence of what Nahimana said at the time. Not a single witness other than Nahimana himself testified that Nahimana had concerns about RTLM broadcasting between April and July 1994, or expressed such concerns. On 25 April 1994, in a public broadcast on Radio Rwanda, Nahimana associated himself with RTLM as one of its founders and said he was happy that RTLM had been instrumental in raising awareness. He indicated that he had been listening to the radio. He was clearly aware of the concern others had, as he quoted the former Burundian Ambassador as having expressed this concern. The Chamber notes that RTLM broadcasts were particularly vehement in the weeks immediately following 6 April and that Nahimana made reference in the broadcast to information on the radio about the population having "worked" with the armed forces, "work" being a code word that was used by the radio to refer to killing.

592. The Appeals Chamber is of the view that Appellant Nahimana's alleged condemnation of RTLM for having become a "tool for killing" does not suffice to demonstrate that the Trial Chamber's factual finding was unreasonable, particularly as the Trial Chamber had specifically addressed this part of the Appellant's testimony.

593. The Appeals Chamber agrees, however, that the sole fact that the Appellant expressed his satisfaction over broadcasts having allegedly instigated the killing of Tutsi could not support the finding that he was responsible under Article 6(1) of the Statute. This fact cannot in itself represent an act or omission capable of constituting the *actus reus* of one of the modes of liability provided under Article 6(1) of the Statute.

b. The Appellant's Role in the creation of RTLM

594. For the reasons set out below,[1419] the Appeals Chamber is of the view that Appellant Nahimana has failed to demonstrate that the Trial Chamber could not reasonably have

[1418] Judgement, para. 974.
[1419] See *infra* XIII. D. 1. (b) (ii) a. ii.

concluded that he had played a key role in the creation and the setting up of RTLM. However, even though the role of founder of RTLM could be taken into consideration by the Trial Chamber in order to show that the Appellant had certain powers within RTLM, the Appeals Chamber finds that this fact is not sufficient to support the Appellant's conviction under Article 6(1) of the Statute. This was not an act or omission capable of constituting the *actus reus* of one of the modes of liability provided under that provision, and the role of founder of RTLM does not in itself sufficiently establish that the Appellant substantially contributed to the commission of the crime of genocide.

c. The Appellant was the ideologist of RTLM and used it as his weapon of choice

595. As noted above, the Trial Chamber found that Appellant Nahimana was the principal ideologist of RTLM, that RTLM did what Nahimana wanted it to do and that RTLM was his weapon of choice to instigate the killing of Tutsi civilians.[1420] The Appeals Chamber notes that the Judgement does not indicate clearly which facts support these legal findings. The Appeals Chamber recalls that, for the Appellant to be convicted under Article 6(1) of the Statute, it must have been established that specific acts or omissions of the Appellant themselves constituted an instigation to the commission of genocide. An alternative would be that specific acts or omissions of the Appellant may have substantially contributed to instigation by others.

596. The Appeals Chamber observes that the Trial Chamber concludes in paragraph 567 of the Judgement that, in addition to his executive functions at RTLM, "Nahimana also played an active role in determining the content of RTLM broadcasts, writing editorials and giving journalists texts to read". The Appeals Chamber understands that it is on this basis that the Trial Chamber found that the RTLM did what Nahimana wanted it to do and that RTLM was his weapon of choice to instigate the killing of Tutsi civilians. However, the Appeals Chamber is of the opinion that these two conclusions can only be upheld if the fact that the Appellant played an active role in the broadcasts instigating the commission of genocide was established beyond reasonable doubt.

597. On this point, the Appeals Chamber recalls that there is no evidence that Appellant Nahimana played an active part in the broadcasts after 6 April 1994 which instigated the commission of genocide. Furthermore, the appeal record contains no evidence that Appellant Nahimana had, before 6 April 1994, given instructions to RTLM journalists to instigate the killing of Tutsi. The Appeals Chamber observes that, although Witness Kamilindi affirmed in general terms that the Appellant was the real boss and that he was the one who gave orders,[1421] he did not specifically state that the Appellant had ordered journalists to instigate the killing of Tutsi.

598. With regard to the factual finding, based on the testimony of Witness Nsanzuwera, that the Appellant had written editorials and given texts to journalists to be read out on air,[1422] it is not sufficient to demonstrate that the Appellant played an active role in broadcasts which

[1420] Judgement, para. 974.
[1421] *Ibid.*, paras. 510 and 554.
[1422] *Ibid.*, paras. 516-517, 557 and 567. In this respect, the Appeals Chamber concludes below that this finding must be maintained: see *infra* XIII. D. 1. (b) (ii) a. ii.

instigated the killing of Tutsi. The statements by Kantano Habimana reported by Witness Nsanzuwera related to the fact that the Appellant had written certain editorials read out by RTLM journalists or had given them texts to read, but in the absence of any further precision on the content of these editorials, the Appeals Chamber has difficulty in finding that there is sufficient evidence to show that such editorials or texts instigated killings of Tutsi. The only concrete example given in the testimony of Witness Nsanzuwera is the telegram accusing the Prosecutor-General of Rwanda of plotting against the President. The Appeals Chamber notes, however, that the Trial Chamber made no finding that the text of the telegram had instigated the killing of Tutsi, which is reasonable, since the ethnicity of Prosecutor-General Nkubito is not specified in the Judgement.[1423] The Appeals Chamber must therefore conclude that there is no proof that the editorials and other texts that the Appellant allegedly asked to be read out on air instigated the killing of Tutsi.

599. In the view of the Appeals Chamber, the present analysis shows that no reasonable trier of fact could have concluded, on the basis of the evidence before it, that the Appellant had played an active role in broadcasts instigating the killing of Tutsi, or that he had used RTLM for such purpose. There is therefore no need to determine whether, in law, the Appellant could be found guilty of instigation to commit genocide because he used the radio – and in particular its journalists – to instigate the killing of Tutsi, just as if he had instigated the killings himself.

### d. Appellant Nahimana "set the course" for RTLM

600. The Trial Chamber nonetheless appears to take the view that Appellant Nahimana was responsible under Article 6(1) of the Statute for the broadcasts after 6 April 1994 because they did not "deviate from the course" that he had set before 6 April 1994.[1424] Since the Appeals Chamber has already concluded that it has not been established beyond reasonable doubt that the Appellant had, before 6 April 1994, "set" such a "course" in order to instigate the killing of Tutsi, it follows that the finding that the broadcasts after 6 April 1994 had not deviated from that course must likewise be set aside. Consequently, there is no need to determine whether, in law, the Appellant could be held responsible under Article 6(1) of the Statute for broadcasts which had not deviated from the course set before, or which were "built on the foundations created for it before 6 April".[1425]

### e. Conclusion

601. The Appeals Chamber reverses the finding of the Trial Chamber that, through RTLM, Appellant Nahimana instigated the commission of genocide pursuant to Article 6(1) of the Statute. The Appeals Chamber does not deem it necessary to address the Prosecutor's arguments that the Appellant could also be found responsible for having planned, instigated, or aided and abetted instigation to genocide by RTLM journalists, since the facts of the case

[1423] The Appeals Chamber notes that the Appellant alleges that Mr. Nkubito was a Hutu: Nahimana Appellant's Brief, para. 302.
[1424] Judgement, para. 974.
[1425] *Idem*.

cannot in any event support a conviction based on these other modes of liability.[1426] The above analysis shows that it has not been sufficiently established that the Appellant had carried out acts of planning, instigation or aiding and abetting with a view to instigating the commission of genocide.

602. The Appeals Chamber accordingly reverses the conviction of Appellant Nahimana on the count of genocide. In light of these conclusions, there is no need to address his other grounds of appeal.

### 2. Appellant Barayagwiza

#### (a) Individual criminal responsibility for RTLM broadcasts under Article 6(3) of the Statute

603. Appellant Barayagwiza submits that the Trial Chamber committed several errors in finding that he incurred superior responsibility for the crimes committed by the employees and journalists of RTLM.[1427]

##### (i) The law

604. Appellant Barayagwiza submits that the Trial Chamber incorrectly applied the test for superior responsibility.[1428] The Prosecutor responds that the Appellant does not demonstrate how the Trial Chamber erred and that, in any event, the facts as found by the Trial Chamber satisfy the test for superior responsibility.[1429] In reply, the Appellant argues that the Trial Chamber failed to apply the superior-subordinate relationship test, since it identified no specific facts showing his effective control over RTLM and its journalists.[1430]

605. The Appeals Chamber has previously recalled the requirements for convicting a defendant under Article 6(3) of the Statute.[1431] In his twelfth ground of appeal, Appellant Barayagwiza outlines his interpretation of the effective control test without explaining the nature of the Trial Chamber's alleged error. This ground of appeal therefore cannot succeed. Moreover, the Appeals Chamber recalls that, contrary to what the Appellant seems to assert,[1432] the case-law of the *ad hoc* Tribunals affirms that there is no requirement that the *de jure* or *de facto* control exercised by a civilian superior must be of the same nature as that exercised by a military commander in order to incur superior responsibility: every civilian superior exercising effective control over his subordinates, that is, having the material ability to prevent or punish the subordinates' criminal conduct, can be held responsible under Article 6(3) of the Statute.[1433] The Appeals Chamber further considers it worth recalling that "it is appropriate to assess on a case-by-case basis the power of authority actually devolved

[1426] For this reason, the Appeals Chamber does not deem it necessary to examine whether the modes of liability invoked by the Prosecution are recognized under Article 6(1) of the Statute, or under international customary law.
[1427] Barayagwiza Notice of Appeal, p. 2 (Grounds 12-14); Barayagwiza Appellant's Brief, paras. 140-167; Barayagwiza Brief in Reply, paras. 3-4, 90-108.
[1428] Barayagwiza Appellant's Brief, paras. 140-149 (Ground 12).
[1429] Respondent's Brief, paras. 507-516.
[1430] See in particular Barayagwiza Brief in Reply, paras. 94-95.
[1431] See *supra* XI. B.
[1432] See Barayagwiza Appellant's Brief, paras. 146 and 149.
[1433] *Kajelijeli* Appeal Judgement, paras. 85-87; *Bagilishema* Appeal Judgement, paras. 50-55. See also *Čelebići* Appeal Judgement, paras. 193-197.

upon the Accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof".[1434]

606. As to the argument raised in reply, the Appeals Chamber is of the opinion that the Trial Chamber systematically identified the facts permitting it to find that the Appellant had superior responsibility over the employees and journalists of RTLM. With regard to the Appellant's superior status and effective control, paragraph 970 of the Judgement cites the following facts:

- Appellant Barayagwiza was "No. 2" at RTLM;
- The Appellant represented the radio at the highest level in meetings with the Ministry of Information;
- The Appellant controlled the finances of the company;
- The Appellant was a member of the Steering Committee, which functioned as a board of directors for RTLM, to which RTLM announcers and journalists were accountable;
- The Appellant chaired the Legal Committee.

607. Paragraph 971 of the Judgement deals with the criminal nature of the RTLM broadcasts – also described in greater detail in paragraph 949 of the Judgement – and relies on the facts below as establishing that the Appellant knew or had reason to know that his subordinates had committed or were about to commit criminal acts, and that he failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators:

- Appellant Barayagwiza was fully aware, as early as October 1993, of the fact that the message conveyed by RTLM was causing concern;
- He nonetheless defended RTLM's editorial policy at meetings with the Ministry of Information in 1993 and 1994;
- He acknowledged that there was a problem and tried to address it, thereby demonstrating his own sense of responsibility for RTLM programming;
- Ultimately, the concern was not addressed and RTLM programming followed its trajectory, steadily increasing in vehemence and reaching a pitched frenzy after 6 April.

608. Similarly, in paragraph 972 of the Judgement the Trial Chamber held that, even after 6 April 1994, Appellants Nahimana and Barayagwiza (1) still had the powers vested in them as office-holding members of the governing body of RTLM and the *de facto* authority to give orders to RTLM employees and journalists, as evidenced by Appellant Nahimana's

[1434] *Bagilishema* Appeal Judgement, para. 51, referring to *Musema* Trial Judgement, para. 135.

intervention to halt RTLM attacks on UNAMIR and General Dallaire; (2) "knew what was happening at RTLM"; and (3) failed to exercise the authority vested in them "to prevent the genocidal harm that was caused by RTLM programming".[1435]

609. Appellant Barayagwiza's twelfth ground of appeal cannot therefore succeed.

(ii) Responsibility of Appellant Barayagwiza for RTLM broadcasts

a. Arguments of the Parties

610. Appellant Barayagwiza contends that the Trial Chamber erred in law and fact in concluding, in paragraph 973 of the Judgement, that he had superior responsibility at RTLM.[1436]

611. The Appellant challenges the finding that he was "No. 2" at RTLM, and argues that the Trial Chamber failed to analyse correctly his role and responsibilities as a member of the Steering Committee of RTLM.[1437] In this respect, he contends that, by virtue of Article 20 of the Statutes of RTLM,[1438] responsibility for the administration, management and supervision of the company lay with the Director-General, under delegation from the Board of Directors,[1439] and that only "specific limited authority to implement decisions taken by the Steering Committee was delegated to Kabuga, Nahimana and Appellant on 24 May 1993 for emergency matters necessary for the setting up of the company".[1440] The Appellant states that it was for that reason that he was authorized to sign documents and cheques, and that he had been given no decision-making power.[1441] The Appellant acknowledges that he was in charge of the rules committee that had been set up within the Steering Committee, but claims that there was no evidence that he gave legal advice to the company or that he was in charge of its Legal Committee. He denies having had anything to do with the management of RTLM or its programming and claims that he had nothing to do with the administrative affairs of RTLM outside the Steering Committee.[1442]

612. Appellant Barayagwiza further submits that the finding that he was the "No. 2" at RTLM is based solely on the hearsay evidence of Witness Dahinden, following an interview with Gaspard Gahigi in August 1993, and that it is clear that, in the interview, Gaspard

[1435] See also Judgement, paras. 561-565 and 568, which support the findings in paragraph 972.
[1436] Barayagwiza Appellant's Brief, paras. 150-167 (Grounds 13 and 14). These two grounds are examined together: both the argument developed under Ground 13, that the Appellant was not "No. 2" at RTLM, and the arguments in Ground 14 seek to show that the Trial Chamber erred in finding that he was a superior with effective control over RTLM employees and journalists.
[1437] Barayagwiza Appellant's Brief, paras. 150-156.
[1438] Exhibit 1D11. In paragraph 151 of his Appellant's Brief, Appellant Barayagwiza erroneously refers to Exhibit P53, entitled "*Organisation et structure du comité d'initiative élargi*" [Organization and Structure of the Expanded Steering Committee].
[1439] Barayagwiza Appellant's Brief, para. 151. In this respect, Appellant Barayagwiza contends that Phocas Habimana was appointed as Director-General at the RTLM General Assembly held on 11 July 1993, which was presided over by Félicien Kabuga: Barayagwiza Appellant's Brief, para. 154, referring to the testimony of Appellant Nahimana (T. 23 September 2002, pp. 164-166).
[1440] Barayagwiza Appellant's Brief, para. 152.
[1441] *Idem*; Barayagwiza Brief in Reply, para. 106; T(A) 17 January 2007, p. 73.
[1442] *Ibid.*, para. 153; T(A) 17 January 2007, p. 73.

Gahigi was speaking of the period prior to the setting up of the company.[1443] He contends that Witnesses GO, Nsanzuwera, X and Kamilindi did not state that he was No. 2 at RTLM, but simply testified to his functions as founding-member of RTLM (Witness GO), in charge of public relations (Witness X) and advisor (Witness Kamilindi).[1444]

613. The Appellant argues further that the evidence presented in paragraph 970 of the Judgement was not sufficient to establish that he was a superior exercising effective control over RTLM employees and journalists. He submits in this respect that:

- The mere fact that he participated in meetings with the Minister of Information only indicates his influence and was not sufficient to establish that he had superior responsibility;[1445]

- If RTLM journalists were ultimately accountable to the Steering Committee (as found in paragraph 970 of the Judgement), this Committee acted as a collective organ and by consensus;[1446]

- As noted in paragraph 556 of the Judgement, of the four committees working under the Steering Committee, only the Technical and Program Committee – which was chaired by Appellant Nahimana – had any responsibilities for RTLM programming.[1447] Appellant Barayagwiza was not a member of this Committee and no evidence was adduced that he was involved in determining the content of RTLM broadcasts.[1448]

614. Appellant Barayagwiza further alleges that the Trial Chamber failed to distinguish between the periods before and after 6 April 1994, arguing that it accepted that the Steering Committee did not meet after 6 April 1994.[1449] In the Appellant's view, the Trial Chamber found that he exercised effective control over RTLM after 6 April 1994 on the basis of his alleged remark, at a meeting in Geneva with Witness Dahinden on 15 June 1994, that RTLM was to be transferred to Gisenyi.[1450] The Appellant contends that it was not possible for the Trial Chamber to conclude that the Appellant had said this, since Witness Dahinden had stated in cross-examination that it was Appellant Nahimana who made this remark.[1451] Appellant Barayagwiza adds that, in any event, this testimony was inconsistent with Witness Dahinden's written statement.[1452] The Appellant further alleges that the Trial Chamber wrongly inferred from a statement by Witness Dahinden – to the effect that Appellant Barayagwiza suggested that the radio station that Dahinden wanted to set up would be in competition with RTLM – his "identification with, rather than dissociation from, RTLM",[1453]

[1443] *Ibid.*, paras. 155-156.
[1444] *Ibid.*, para. 155, referring to paragraphs 573, 608, 617 of the Judgement; see also Barayagwiza Brief in Reply, paras. 103-105.
[1445] *Ibid.*, para. 158.
[1446] *Ibid.*, para. 159.
[1447] *Ibid.*, para. 160; Barayagwiza Brief in Reply, para. 100.
[1448] *Ibid.*, para. 161.
[1449] *Ibid.*, para. 162; referring to Judgement, para. 561.
[1450] Barayagwiza Appellant's Brief, para. 162.
[1451] *Ibid.*, paras. 163-165.
[1452] *Ibid.*, para. 165; see also Barayagwiza Brief in Reply, para. 108.
[1453] *Ibid.*, para. 166, referring to Judgement, para. 564; Barayagwiza Brief in Reply, paras. 107-108.

since this statement was uncorroborated, and the witness had not been cross-examined on it.[1454]

615. Appellant Barayagwiza submits, finally, that the Trial Chamber merely concluded that, if Appellant Nahimana "exercised *de jure* power over RTLM, then the appellant must also have done so",[1455] which amounts to guilt by association and to an error of law and fact.[1456]

616. The Prosecutor responds that the Appellant's authority as a high level manager of RTLM gave him powers of a superior over those who worked under him and the material ability to control the nature of RTLM broadcasts.[1457] He submits in this regard that the Appellant was an active member of the Committee, which functioned as a board of directors, that he controlled the finances of the company, that he was one of three representatives of RTLM at meetings with the Government and that as such, "he had the material ability to affect a change of the programming, to sanction reporters who did not abide by the Steering Committee's policies or to recommend disciplinary action for such reporters".[1458]

617. The Prosecutor further submits that the evidence supports the finding that Appellant Barayagwiza was No. 2 at RTLM.[1459] He argues that, in challenging this finding, the Appellant extrapolates many inferences and conclusions that have no basis in the Statutes of RTLM or in any of the evidence produced at trial, and even attempts to introduce new evidence without complying with the Rule 115 procedure, concerning the reason he was authorized to sign cheques and his responsibilities as head of the Legal Committee.[1460] The Prosecutor therefore moves that the substance of paragraphs 152 and 153 of Barayagwiza Appellant's Brief be entirely disregarded.[1461] The Prosecutor further argues that, even though not all the witnesses described the Appellant as having been No. 2 at RTLM, the important point is that these witnesses presented evidence of the Appellant holding an extremely high position within RTLM.[1462] Additionally, he maintains that Gaspard Gahigi's testimony that the Appellant was No. 2 at RTLM also applies to the period after 6 April 1994, in the absence of any evidence that the Appellant's position had changed after this date.[1463]

618. The Prosecutor further submits that the Trial Chamber's finding that Appellant Barayagwiza was "No. 2" at RTLM cannot be divorced from the totality of the factual

[1454] Barayagwiza Appellant's Brief, para. 166.
[1455] *Ibid.*, para. 167.
[1456] *Idem*.
[1457] Respondent's Brief, para. 512.
[1458] *Ibid.*, para. 513.
[1459] *Ibid.*, paras. 517-523.
[1460] *Ibid.*, paras. 518-519.
[1461] *Ibid.*, para. 519.
[1462] *Ibid.*, paras. 520-521, arguing (1) that Witness GO testified that the Appellant was one of the top three persons of the management team of RTLM attending very important meetings with the Minister of Information on the very topic of the content of the RTLM broadcasts (see also Respondent's Brief, para. 528) and (2) that Witness X described a meeting of RTLM, attended by 1,000 people, where Barayagwiza was one of the small group of people who presided over the meeting.
[1463] Respondent's Brief, para. 522.

findings regarding the Appellant's superior responsibility at RTLM[1464] and that "it is not decisive, nor is it treated as such by the Trial Chamber, in the ultimate finding of guilt".[1465]

619. The Prosecutor maintains that it was reasonable for the Trial Chamber to find that Appellant Barayagwiza continued to exercise control over RTLM after 6 April 1994. He argues, first, that, contrary to the Appellant's assertion, the Trial Chamber simply observed that it was not established that the Steering Committee met after 6 April 1994, without however, excluding the possibility that it might have done so.[1466] The Prosecutor submits that, in any event, the crucial part of this finding is that there was no evidence that the Steering Committee was disbanded, on the basis of which the Trial Chamber found that both the Committee and the Appellant continued to have *de jure* governing authority over RTLM's operations.[1467] As for Witness Dahinden's testimony, the Prosecutor submits that "[a]t no time was the witness asked to distinguish what was said by Nahimana or Barayagwiza, nor did the witness provide such distinctions", but simply confirmed a proposition put to him by Defence Counsel.[1468] Further, even though Witness Dahinden's oral testimony differed from his written statement, the Trial Chamber could accept his testimony and "the fact that the Trial Chamber may not have specifically mentioned an alleged inconsistency does not render the finding of the Trial Chamber regarding the witness' credibility an error".[1469] Finally, as for the Appellant's joke about the competition that a new radio station would represent for RTLM, the Prosecutor argues that "it was reasonable to conclude that only someone with an interest and connection to RTLM would be thinking about competitive issues", and that "Barayagwiza was identifying himself with RTLM through this comment".[1470]

620. Appellant Barayagwiza replies that the assertion that he exercised control at the highest level at RTLM is based on an erroneous interpretation of the functions of the Steering Committee and the respective roles of each of its members.[1471] He challenges the Prosecutor's suggestion that the Steering Committee was an executive committee[1472] or a board of directors.[1473] The Appellant also rejects the allegation that he attempted to introduce new evidence in violation of Rule 115 of the Rules, since he was simply explaining the errors committed by the Trial Chamber.[1474] As to whether he had effective control after 6 April 1994, Appellant Barayagwiza replies that the Prosecutor failed to prove that the Steering Committee continued to exist after this date.[1475]

b. Analysis

[1464] *Ibid.*, para. 517.
[1465] *Ibid.*, para. 523.
[1466] *Ibid.*, para. 527.
[1467] *Idem*, referring to the Judgement, para. 561. See also Respondent's Brief, para. 522, where the Prosecutor submits that "[i]n the absence of evidence that their positions [meaning those of Barayagwiza and Nahimana] in the company had changed, the Trial Chamber made a reasonable finding, based on the record before it, that their roles continued after 6 April 1994".
[1468] Respondent's Brief., para. 529, referring to T. 24 October 2000, pp. 144 and 147.
[1469] *Ibid.*, para. 530.
[1470] *Idem*, referring to the Judgement, para. 564.
[1471] Barayagwiza Brief in Reply, para. 100.
[1472] *Ibid.*, para. 101.
[1473] *Ibid.*, para. 106.
[1474] *Ibid.*, para. 102.
[1475] *Ibid.*, para. 107.

621. The Appeals Chamber will first consider whether Appellant Barayagwiza has demonstrated that the Trial Chamber erred in finding that he was a superior exercising effective control over RTLM employees and journalists before 6 April 1994. It will then turn to situation which prevailed after that date.

i. Superior responsibility before 6 April 1994

622. As noted *supra*,[1476] the Trial Chamber finding that Appellant Barayagwiza was a superior exercising effective control over RTLM employees and journalists before 6 April 1994 is based on the factual findings set out in paragraph 970 of the Judgement.

623. Appellant Barayagwiza submits first that the Trial Chamber erred in concluding that he was No. 2 at RTLM.[1477] In the opinion of the Appeals Chamber, the Judgement does not clearly indicate if this finding is based solely on Gaspard Gahigi's interview with Witness Dahinden in August 1993, as is asserted by Appellant Barayagwiza,[1478] or also on the Appellant's role as a member of the Steering Committee of RTLM, on the fact that he represented RTLM to outsiders in an official capacity, or on the fact that he exercised control over the company's finances and oversaw the activities of RTLM, taking remedial action when necessary to do so.[1479] In any event, the Appeals Chamber is not satisfied that the Appellant has demonstrated that the Trial Chamber erred in relying on Gahigi's interview with Witness Dahinden. First, the mere fact that the matter may have been hearsay cannot be sufficient ground for excluding this evidence.[1480] Secondly, the Appeals Chamber is of the opinion that a reasonable trier of fact could find such evidence to be credible and relevant: (1) Gaspard Gahigi was the editor-in-chief of RTLM; (2) a video recording of Witness Dahinden's interview with Gaspard Gahigi was tendered into evidence;[1481] (3) even though the interview took place in August 1993, it demonstrated at the very least that Appellant Barayagwiza was considered to be one of the main leaders when RTLM first started. The Appeals Chamber observes further that the fact that Witnesses GO, X and Kamilindi referred to Appellant Barayagwiza, respectively, as "founding-member" of RTLM, "in charge of public relations" and "adviser" to RTLM is not necessarily irreconcilable with the fact that he was "No. 2" at RTLM.

624. In any event, the Appeals Chamber agrees with the Prosecutor that this question is not "decisive", and that, as noted by the Trial Chamber, the "question of title" is somewhat artificial.[1482] First, it does not seem that the Trial Chamber meant to say that Appellant held *de jure* a position which made him No. 2 at RTLM; rather, it seemed to be concerned about the *de facto* position, which was the correct approach. Also, the key issue is whether the Appellant was a superior exercising effective control over RTLM employees and journalists. In the opinion of the Appeals Chamber, the Appellant's core argument in his thirteenth and fourteenth grounds of appeal is that the Trial Chamber failed to analyse correctly his role and responsibilities as a member of the Steering Committee, and that hence the finding that he was No. 2 at RTLM and exercised effective control is erroneous. He adds that the real power

[1476] See *supra* XII. D. 2 (a) (i).
[1477] This factual finding was first made in paragraph 567 of the Judgement and then repeated in paragraph 970.
[1478] Barayagwiza Appellant's Brief, para. 155.
[1479] Judgement, para. 567. See also paras. 552, 554, 555, 558-560.
[1480] See the references provided *supra*, footnote 521.
[1481] Exhibit P3.
[1482] Judgement, para. 554.

was held by the Director-General or by the Steering Committee acting collectively, and that the powers delegated to him were not sufficient to support the conclusion that he exercised effective control over the employees and journalists of RTLM. The Appeals Chamber will now examine these arguments.

625. The Appeals Chamber notes first of all that, athough the Statutes of RTLM provided that "[t]he Board of Directors vests the power of management in the Director-General",[1483] this does not demonstrate that the Trial Chamber erred in concluding that the Appellant exercised *de facto* control over the staff of the RTLM. The test for effective control is not the possession of *de jure* authority, but rather the material ability to prevent or punish the proven offences. Possession of *de jure* authority may obviously imply such material ability, but it is neither necessary nor sufficient to prove effective control. Furthermore, it is clear from the Statutes of RTLM that powers of management were not exclusively vested in the Director-General, and that the Director-General was accountable to the Board of Directors.[1484] In effect, the Steering Committee, of which Appellant Barayagwiza was a member, acted *de facto* as the Board of Directors[1485] and exercised overall control over RTLM,[1486] a fact that the Appellant does not dispute.

626. The Appellant, however, contends that he could not exercise effective control simply as a member of the Steering Committee and that effective control was vested in the Steering Committee as a collegiate body. Here again, the Appeals Chamber is of the opinion that, while it has been established that the Steering Committee had power to intervene collectively in order to control RTLM, this did not relieve the Appellant of his responsibility to approach the Committee, and if necessary object to the editorial policy of the editor-in-chief and the journalists; nor did it exclude the possibility that the Appellant himself had sufficient *de facto* authority to exercise effective control over the staff of RTLM.

627. The Appellant argues that his powers and attributions in practice were limited, as he had no decision-making power and was only authorised to sign cheques in order to implement decisions taken by the Steering Committee.[1487] However, he does not explain how the only evidence he cited in this regard – Exhibit P107/1 – invalidates the Trial Chamber's finding that he controlled RTLM's finances together with Appellant Nahimana. This Exhibit in fact confirms that the Steering Committee had authorized Appellants Nahimana and Barayagwiza, as well as Félicien Kabuga, to manage RTLM's finances.[1488] Moreover, even though the authorization was initially given "until the next General Assembly", the Prosecutor produced numerous documents to prove that Appellants Nahimana and Barayagwiza continued to manage the finances long after the General Assembly of

[1483] Exhibit 1D11, Article 20 (excerpt).
[1484] *Idem*, which further provides that the Director-General "shall be responsible for executing the decisions taken by the Board of Directors" and that "[t]he Board of Directors or the General Assembly can remove him at any time".
[1485] See Judgement, paras. 552 and 567. In fact the Appellant acknowledges that the Steering Committee acted as an interim board of directors (see Barayagwiza Appellant's Brief, para. 152).
[1486] *Ibid.*, paras. 558-559 and 567.
[1487] Barayagwiza Appellant's Brief, para. 152; Barayagwiza Brief in Reply, para. 106, referring to Exhibit P107/1.
[1488] Exhibit P107/1, p. 9 (numbered "8"). In any case, even if, as the Appellant claims, he only had the power to sign cheques to put into effect the decisions of the Steering Committee of the RTLM, the fact would remain that, as a member of that same Steering Committee, he had a say in these financial decisions.

11 July 1993,[1489] and Appellant Nahimana acknowledged that, even after the General Assembly, at which an interim administrator was named, Appellant Barayagwiza, Félicien Kabuga and he himself continued to sign cheques.[1490] The Appeals Chamber is of the opinion that it was reasonable for the Trial Chamber to find that Appellants Nahimana and Barayagwiza "controlled the financial operations" of RTLM at least until 6 April 1994.[1491]

628. Appellant Barayagwiza further asserts that, even though he was in charge of the committee responsible for drafting the rules and regulations, that committee was not a legal committee as such and had no responsibility over RTLM programming, unlike the Technical and Program Committee, which was chaired by Appellant Nahimana. The Appeals Chamber notes that Appellant Barayagwiza provides no evidence to prove that the committee he headed was not a legal committee. Moreover, the Appeals Chamber notes that the term Legal Committee was used by Appellant Nahimana.[1492] In any event, regardless of the name or responsibilites of the committee chaired by Appellant Barayagwiza, the Trial Chamber found that, together with Appellant Nahimana, he supervised all the activities of RTLM, including programming, and that they took remedial action when they considered it necessary to do so.[1493] This finding was based not only on the exercise by the Steering Committee of its power over RTLM programming,[1494] but also on the fact that Appellants Nahimana and Barayagwiza represented RTLM at meetings with the Minister of Information, "defending RTLM programming and undertaking to correct mistakes that journalists had made".[1495]

629. The Appellant argues that his participation in meetings with the Minister of Information merely showed that he had influence. The Appeals Chamber considers, on the contrary, that the Trial Chamber could reasonably find that the Appellant's participation in meetings with the Minister of Information on 26 November 1993[1496] and 10 February 1994[1497]

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[1489] See Judgement, para. 506 and the exhibits cited there. In particular, the Prosecutor produced RTLM cheques signed by Appellants Nahimana and Barayagwiza in January and February 1994, and a letter to RTLM's bank, dated 7 February 1994, signed by both Appellants (Exhibit P107/1, pp. 7, 22-24 (pp. 6, 21-23, according to the actual pagination)).

[1490] T. 23 September 2002, pp. 183-187; Judgement, paras. 499 and 555.

[1491] Judgement, para. 567.

[1492] In his testimony, Appellant Nahimana stated that Appellant Barayagwiza was given the chairmanship of the Legal Committee not only because he was a well-known lawyer, but also because of his contacts, notably within the Government, which could be helpful "in bringing in shareholders to the company": Judgement, para. 494, referring to T. 23 September 2002, p. 120. As to the reliability of Appellant Nahimana's testimony, the Appeals Chamber is mindful of the Trial Chamber's reservations in its assessment of this Appellant's credibility. There is, however, little doubt that the Trial Chamber considered the portions of Nahimana's testimony concerning the structure and duties of RTLM's decision-making organs to be generally reliable.

[1493] Judgement, para. 567.

[1494] While taking account of Appellant Nahimana's testimony that discipline was exercised first and foremost by the head of section, then by the editor-in-chief, and lastly by Phocas Habimana, the Trial Chamber nonetheless quoted concrete examples, reported by Nahimana, of the exercise by the Steering Committee of effective control over RTLM programming (Judgement, para. 558). It notably referred to one incident where the Steering Committee took action following a broadcast in February or March 1994 reporting that a man who had left Kigali for Cyangugu had *Inkotanyi* in his vehicle. The Steering Committee decided that this kind of broadcast was unacceptable and instructed Kantano Habimana to ensure that the person mentioned in the broadcast be found (Judgement, para. 501).

[1495] Judgement, para. 558.

[1496] *Idem*; see also paras. 573-583, 617-619, specifically paragraphs 574 and 578, which mention the remarks made by Appellant Barayagwiza at the meeting held on 26 November 1993, and paragraphs 591, 597 and 618, reporting Appellant Barayagwiza's vehement reaction to the criticism from the Minister of Information at the meeting of 10 February 1994.

demonstrated his superior responsibility and effective control over RTLM , as well as his knowledge of the concern caused by RTLM programming.

630. The Appeals Chamber considers that the Appellant has failed to show that it was unreasonable for the Trial Chamber to find that he was a superior exercising effective control over employees and journalists of RTLM before 6 April 1994.

ii. Appellant Barayagwiza's responsibility for RTLM broadcasts after 6 April 1994

631. The Trial Chamber found in paragraph 972 of the Judgement that:

> [a]fter 6 April 1994, although the evidence does not establish the same level of active support, it is nevertheless clear that Nahimana and Barayagwiza knew what was happening at RTLM and failed to exercise the authority vested in them as office-holding members of the governing body of RTLM, to prevent the genocidal harm that was caused by RTLM programming. That they had the de facto authority to prevent this harm is evidenced by the one documented and successful intervention of Nahimana to stop RTLM attacks on UNAMIR and General Dallaire. Nahimana and Barayagwiza informed Dahinden when they met him in June 1994 that RTLM was being moved to Gisenyi. Together with Barayagwiza's jovially competitive remark about Dahinden's radio initiative, this conversation indicates the sense of continuing connection with RTLM that Nahimana and Barayagwiza maintained at that time.[1498]

Finally, the Trial Chamber found that Appellant Barayagwiza incurred superior responsibility "[f]or his active engagement in the management of RTLM prior to 6 April, and his failure to take necessary and reasonable measures to prevent the killing of Tutsi civilians instigated by RTLM".[1499] This finding is somewhat ambiguous in that it is unclear if the Trial Chamber found that Appellant Barayagwiza was only responsible for the broadcasts prior to 6 April or if it simply wanted to make it clear that it was only until 6 April that the Appellant was "*actively* involved in the daily affairs of RTLM",[1500] but that he nonetheless incurred responsibility for the broadcasts after 6 April 1994. In view of the analysis in paragraph 972 of the Judgement, the Appeals Chamber considers that it was this latter view that the Trial Chamber took. The Appeals Chamber will now examine the Appellant's submissions on this point.

632. The Appellant submits, first, that he could not be held responsible for the broadcasts after 6 April 1994, since the Trial Chamber accepted that the Steering Committee did not meet after that date.[1501] The Appeals Chamber notes that, in its factual analysis, the Trial Chamber held that the corporate and management structure of RTLM did not change after 6 April 1994, that, "[a]lthough there is no evidence that the Steering Committee met, nor is there evidence that it was disbanded", and that, "as RTLM continued to operate, the Steering Committee as a corporate entity continued to have *de jure* governing authority over these

[1497] Judgement, para. 558; see also paras. 584-607, 617-619.
[1498] *Ibid.*, paras. 561-565 and 568.
[1499] *Ibid.*, para. 973. The Appeals Chamber notes that the term "instigated" as used in the English original of paragraph 973 of the Judgement should have been translated as *"incité à commettre"* (the French translation of "instigated" in Article 6(1) of the Statute) and not as "*encouragé*".
[1500] Emphasis added.
[1501] Barayagwiza Appellant's Brief, para. 162, referring to Judgement, para. 561.

operations",[1502] such that Appellant Barayagwiza "had particular responsibility to take action" as a member of the Steering Committee and Chairman of the Legal Committee.[1503] In the opinion of the Appeals Chamber, the mere fact that there was no evidence that the Steering Committee met after 6 April 1994 does not invalidate the findings of the Trial Chamber. In any event, the Appeals Chamber recalls that the key question is whether the Appellant had effective control; even if the Steering Committee did not meet after 6 April 1994, this would not be sufficient to demonstrate that the Appellant could not exercise effective control over RTLM after 6 April 1994.

633. As to the Trial Chamber's findings arising out of Witness Dahinden's testimony, the Appeals Chamber recalls first that it is settled case-law that, save in particular circumstances, a witness' testimony need not be corroborated in order to have probative value; a fact can be established by a single testimony.[1504] The Appeals Chamber further notes that the fact that this witness was not cross-examined by Counsel for Appellant Barayagwiza does not affect the validity of his testimony. The Appeals Chamber refers to its analysis of Appellant Barayagwiza's appeal submissions regarding his representation from 23 October 2000 to 6 February 2001 and recalls that the Appellant himself instructed his Counsel not to cross-examine the witnesses heard during this period.[1505]

634. As to the argument that it was unreasonable for the Trial Chamber to find that Appellant Barayagwiza had spoken to Witness Dahinden about the relocation of RTLM, the Appeals Chamber notes first that, in examination-in-chief, Witness Dahinden stated that he was informed of the transfer by Appellants Nahimana and Barayagwiza.[1506] In cross-examination, Counsel for Appellant Nahimana asked him to confirm that, in his written statement and in examination-in-chief, he had stated that Appellant Nahimana had told him of the transfer, to which Witness Dahinden answered in the affirmative.[1507] In the opinion of the Appeals Chamber, the apparent inconsistency between the witness' examination-in-chief and cross-examination is due to the way the question of Counsel for Appellant Nahimana was phrased, as it referred exclusively to his client. As to the alleged inconsistency between Witness Dahinden's testimony and his written statement on this subject, the Appellant does not even provide the reference to the witness' written statement.[1508] The appeal on this point is dismissed.

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[1502] Judgement, para. 561.
[1503] *Ibid.*, para. 562.
[1504] In this connection, see the case-law cited in footnote 1312.
[1505] See *supra* IV. A. 2. (b) . Witness Dahinden testified from 24 October to 1 November 2000.
[1506] T. 24 October 2000, p. 143:

> Ferdinand Nahimana and Jean-Bosco Barayagwiza confirmed that it was about to be transferred. I cannot remember exactly, but I think they said it was going to be transferred from Kigali to Gisenyi.

[1507] T. 1 November 2000, p. 90:

> Q: You said in your written testimony that *"Ferdinand Nahimana confirmed to me that RTLM had* withdrawn *and moved from Kigali to Gitarama because of the bombing"* and you also testified that Nahimana had told you that RTLM was in the process of being transferred, is that correct, being moved?
>
> A: Yes […].

[1508] See Barayagwiza Appellant's Brief, para. 164, referring to a question by Nahimana's defence, cited in the previous footnote; T. 1 November 2000, p. 90.

635. That said, the Appeals Chamber agrees with Appellant Barayagwiza that the statements made during the conversation with Witness Dahinden regarding the relocation of RTLM, and the joke about competition between RTLM and the witness' planned radio station, were not sufficient to demonstrate that the Appellant continued to exercise effective control over RTLM after 6 April 1994. Further, the fact that Appellant Nahimana was able to intervene to halt the broadcast of attacks on UNAMIR and General Dallaire, even if it were considered sufficient to demonstrate effective control on the part of Appellant Nahimana, does not necessarily imply that Appellant Barayagwiza too could exercise effective control over RTLM after 6 April 1994. In this respect, the Appeals Chamber recalls that Appellant Barayagwiza occupied *de facto* the second position after Appellant Nahimana within the structure of RTLM, and could not therefore be regarded as having as much authority as Appellant Nahimana. Lastly, even though the Trial Chamber held that the Steering Committee had continued to have *de jure* authority to manage the activities of RTLM, no evidence was led at trial regarding the existence of effective control by the Steering Committee or regarding interventions by Appellant Barayagwiza's on behalf of the Steering Committee after 6 April 1994. In these circumstances, the Appeals Chamber finds that the Trial Chamber erred in finding that Appellant Barayagwiza was able to exercise effective control over the journalists and employees of RTLM after 6 April 1994.

iii. Conclusion

636. The Appeals Chamber recalls that it has previously found that only the RTLM broadcasts after 6 April 1994 instigated acts of genocide.[1509] The Appeals Chamber has also found that Appellant Barayagwiza could only be held liable on the basis of superior responsibility for RTLM broadcasts before 6 April 1994. It follows that Appellant Barayagwiza's convictions on account of the RTLM broadcasts must be reversed.

(b) Appellant Barayagwiza's individual criminal responsibility resulting from CDR activities

637. Appellant Barayagwiza takes issue with several findings of the Trial Chamber underlying the overall finding relating to his conviction on account of CDR activities.

(i) The CDR was not a party exclusively reserved for Hutu

638. In his sixteenth ground of appeal, Appellant Barayagwiza argues that the Trial Chamber erred in finding at paragraph 339 of the Judgement that the CDR was a party reserved exclusively for Hutu and that recruitment of Tutsi was not allowed.[1510] The Appellant alleges that this finding rested on testimonies that were confused and often contradictory, and based on "individual opinions and rumour rather than solid fact".[1511] He further contends that the Trial Chamber itself admitted that there may have been some members of CDR who were Tutsi,[1512] as testified by several witnesses.[1513] In reply, the

[1509] See *supra* XII. B. 3.
[1510] Barayagwiza Notice of Appeal, p. 2; Barayagwiza Appellant's Brief, paras. 171-172; Barayagwiza Brief in Reply, paras. 111-113.
[1511] Barayagwiza Appellant's Brief, para. 171. See also Barayagwiza Brief in Reply, para. 113.
[1512] Barayagwiza Appellant's Brief, para. 171, and Barayagwiza Brief in Reply, para. 112, both referring to Judgement, para. 335.
[1513] Barayagwiza Appellant's Brief, para. 171, and Barayagwiza Brief in Reply, para. 113.

Appellant adds that this supposed policy of exclusion was not reflected in the speech of 23 March 1993 by the CDR President, nor in the CDR Constitution, or in the CDR Manifesto.[1514]

639. The Appeals Chamber notes that Appellant Barayagwiza does not support his allegation that the Trial Chamber based its finding on testimonies that were confused and contradictory.[1515] The Appellant merely – very often without giving any specific references – mentions evidence which, in his opinion, establishes that the CDR was open to Tutsi. This does not, however, suffice to demonstrate that the Trial Chamber's finding that the general policy of the CDR was that party membership was not open to Tutsi was unreasonable,[1516] especially since the Trial Chamber itself noted that "there may have been a few Tutsi individuals who attended CDR meetings or were even referred to as CDR members", adding that, "based on the evidence, […] such number would be negligible and would not render the characterization of the CDR as a Hutu party inaccurate".[1517] The appeal on this point is dismissed.

(ii) The CDR had no militia

640. In his seventeenth ground of appeal,[1518] Appellant Barayagwiza alleges that the Trial Chamber erred in finding that the CDR had a "youth wing" called *Impuzamugambi*, which became the CDR militia,[1519] and that "the Appellant had any involvement in it".[1520] According to the Appellant, the Constitution of the CDR indeed shows that the word *Impuzamugambi* was used in the party's very name and means "coalition", and that, in such circumstances, all CDR members could properly be referred to as *Impuzamugambi*.[1521] The Appellant submits that the CDR did not have an organized youth wing at the end of 1993, or even on 6 April 1994.[1522] He asserts that "[t]here was no evidence produced to explain how the CDR youth could have spontaneously transformed themselves into an organized militia"; that the allegations by Expert Witness Des Forges in this regard are not supported by any evidence and there was never any mention of the existence of a CDR militia in his book, "*Le sang hutu est-il rouge?*"[1523] In conclusion, the Appellant states that he was contesting the credibility of other testimonies supporting this finding in his fortieth ground of appeal.[1524]

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[1514] Barayagwiza Brief in Reply, para. 111. The Appellant does not provide any precise reference concerning the alleged speech of the CDR President.
[1515] Barayagwiza Appellant's Brief, para. 171. In paragraph 113 of his Brief in Reply, the Appellant explains that he "contests the credibility given to the testimonies of the Prosecution's witnesses in the Ground 40". The Appeals Chamber has already dismissed Ground 40 of appeal: see *supra* IV. B. 1.
[1516] Judgement, para. 339.
[1517] *Ibid.*, para. 335.
[1518] Barayagwiza Notice of Appeal, p. 2; Barayagwiza Appellant's Brief, paras. 173-177; Barayagwiza Brief in Reply, paras. 114-117.
[1519] Barayagwiza Appellant's Brief, para. 173.
[1520] *Ibid.*, para. 177.
[1521] *Ibid.*, para. 174.
[1522] *Ibid.*, paras. 175-176; see also Barayagwiza Brief in Reply, para. 116.
[1523] Barayagwiza Appellant's Brief, para. 176; see also Barayagwiza Brief in Reply, para. 115.
[1524] Barayagwiza Brief in Reply, para. 117. The Appeals Chamber notes that the Appellant states in this same paragraph that "none of the witnesses gave any precise evidence on any specifically identified member of the CDR party or of its youth in relation to massacres which occurred after 6 April 1994 with precise information on the involvement of the CDR party or the Appellant himself". The Appeals Chamber refers in this regard to its analysis of Ground 28 of Appellant Barayagwiza's appeal; see *infra* XII. D. 2. (b) (vii) .

641. The Appeals Chamber recalls, first, that it has already dismissed the Appellant's arguments raised under his fortieth ground.[1525] With regard to the meaning of the word *Impuzamugambi*, the Appeals Chamber considers that the Trial Chamber specifically addressed this issue in paragraph 337 of the Judgement, noting that the word was also included in the party's name proper, but also finding, on the basis of the testimonies of several witnesses[1526] – including Expert Witness Des Forges[1527] – and the Appellant's views in his book entitled "*Le sang hutu est-il rouge*?",[1528] that "*Impuzamugambi* referred to the youth wing of the CDR and was generally understood as such".[1529] The Appellant has not shown that this finding was unreasonable.

642. Concerning the issue of the formal organization of this "youth wing", the Appeals Chamber observes that the Trial Chamber admitted that "the formal structure of the CDR youth wing does not emerge from the evidence".[1530] The Appellant does not show how this should have impelled the Trial Chamber to different conclusions.

643. Lastly, regarding the finding by the Trial Chamber that the *Impuzamugambi* had become the CDR militia,[1531] the Appeals Chamber considers that Appellant Barayagwiza has not demonstrated the unreasonable nature of this finding, which is based on testimony from Witnesses B3, AHI, BI, AAM, ABC, AHI, LAG and Serushago.[1532] The Appeals Chamber remarks further that Witnesses BI, AAM, ABC, AHI, LAG and Serushago specifically indicated that the attacks led by the *Impuzamugambi* clearly targeted the Tutsi civilian population and were attributed to the CDR,[1533] thus confirming that the *Impuzamugambi* played in actual fact, if not formally, the role of an armed militia of the CDR. This ground is dismissed.

(iii) The Appellant had no authority to organise public meetings and rallies

644. In his twenty-third ground of appeal, Appellant Barayagwiza contends that the Trial Chamber committed errors of fact and of law in convicting him on account of CDR meetings and demonstrations on the basis of unsafe inferences, and without establishing the specific role that he had played.[1534] According to the Appellant, the witnesses' testimonies on which

[1525] See *supra* IV. B. 1.
[1526] Judgement, para. 319, relying on the testimonies of Prosecution Witnesses AHI, AFB, AGX and Serushago and of Defence Witness ASI.
[1527] *Ibid.*, para. 320.
[1528] *Ibid.*, paras. 320 and 337. The Appelant Barayagwiza stated in his book, "*Le sang hutu est-il rouge?*" (Exhibit P148, p. 99), that the *Impuzamugambi* were the youth wing of the CDR party, even though he denied that this youth wing had been organised as a militia.
[1529] Judgement, para. 337.
[1530] *Idem*; see also para. 320, summarising the relevant points of the testimony of Expert Witness Des Forges concerning the steps taken to restructure the youth wing of the party.
[1531] *Ibid.*, para. 341.
[1532] *Ibid.*, para. 337; see also *ibid*, para. 317, summarising the testimony of Witness B3; para. 319, summarising the testimony of Witness AHI; para. 325 summarising the testimony of Witness BI; para. 324 summarising the testimony of Witness AAM; paras. 316 and 324 summarising the testimony of Witness ABC; para. 326 summarising the testimony of Witness LAG; para. 327 summarising the testimony of Witness Serushago.
[1533] Judgement, paras. 319 and 337.
[1534] Barayagwiza Appellant's Brief, para. 197, referring to the testimonies of Witnesses AGK, AHI, AAM, AAJ, Serushago, X, ABE, AFX, AAJ, and AFB.

these findings are based are vague, contradictory and imprecise; the meetings referred to were in general outside the temporal jurisdiction of the Tribunal; the evidence adduced was not probative of the allegations in the Indictment; and the witness testimonies "have […] been distorted and wrongly relied on […] in finding that the Appellant's presence and/or participation was consistent with genocidal intent".[1535] Furthermore, the Appellant argues that no evidence was produced to show that he had authority to organise CDR meetings, and that he had no official position in the CDR prior to his election as President of CDR in Gisenyi on 6 February 1994.[1536] The Appellant also disputes the finding in paragraph 714 of the Judgement that he participated in the planning of a CDR demonstration in May 1993, acted in unison with the demonstrators and was in a position of control over them.[1537] For the Appellant, this finding does not rest on direct evidence; it is pure speculation, and was not established beyond reasonable doubt.[1538]

645. In paragraph 714 of the Judgement, the Trial Chamber uses the fact that Appellant Barayagwiza walked freely out of the Ministry of Foreign Affairs during a demonstration organized by the CDR in May 1993 – at a time when no one else was able to leave for several hours – to infer that "he was nevertheless in a position of coordination with or control over the demonstrators". The Trial Chamber adds in the same paragraph "[t]hat he was a participant in the planning of the demonstration could be inferred from the evidence of his leadership role in the CDR". The Trial Chamber finds, moreover, in paragraph 719 of the Judgement that "Jean Bosco Barayagwiza convened CDR meetings and spoke at these meetings"; that he intimidated and threatened Tutsi during some meetings in Mutura in 1991 and 1993; that he was present at and participated in demonstrations where CDR demonstrators armed with cudgels chanted "*Tubatsembatsembe*" or "let's exterminate them", and that he supervised roadblocks manned by the *Impuzamugambi*, set up to stop and kill Tutsi.

646. The Appeals Chamber further notes that, in its legal findings on the individual criminal responsibility of Appellant Barayagwiza on account of his involvement in the CDR, the Trial Chamber relies on the fact that "the killing of Tutsi civilians was promoted by the CDR, as evidenced by the chanting of "*tubatsembatsembe*" or "let's exterminate them" by Barayagwiza himself and by CDR members in his presence at public meetings and demonstrations. The reference to "them" was understood to mean the Tutsi population."[1539] It continues its reasoning by emphasizing "the direct involvement of Barayagwiza in the expression of genocidal intent"; that he "was at the organizational helm"; and that "he was on site at the meetings, demonstrations and roadblocks that created an infrastructure for and caused the killing of Tutsi civilians." Finally, it finds "Jean-Bosco Barayagwiza guilty of instigating acts of genocide committed by CDR members and *Impuzamugambi*, pursuant to Article 6(1) of its Statute".[1540]

647. The Appeals Chamber points out, however, that the events described in paragraphs 714 to 719 refer to meetings and rallies that took place before 1 January 1994. The Appeals

[1535] *Ibid.*, para. 198.
[1536] *Ibid.*, para. 199.
[1537] *Ibid.*, paras. 200-201.
[1538] *Idem*.
[1539] Judgement, para. 975.
[1540] *Idem*.

Chamber considers that paragraph 975 of the Judgement is ambiguous because it does not clearly explain whether the Appellant's participation in CDR meetings prior to 1 January 1994 is cited as a material element of instigation for which the Appellant incurs individual responsibility pursuant to Article 6(1) of the Statute – which would be *ultra vires* – or whether this fact is simply mentioned as a contextual fact, or as evidence demonstrating the Appellant's criminal intent in 1994 – which is permissible.[1541] The Appeals Chamber holds that the Trial Chamber erred in failing to be specific in its legal findings. However, such error is not sufficient to invalidate the Appellant's conviction for genocide, since the Trial Chamber also based its finding on this count on the fact that the Appellant supervised "roadblocks manned by the *Impuzamugambi*, established to stop and kill Tutsi".[1542]

(iv) The Appellant's role in the distribution of weapons and participation in the planning of massacres

648. In his twenty-fourth ground of appeal, Appellant Barayagwiza alleges that the Trial Chamber erred in paragraph 730 of the Judgement in relying on the uncorroborated testimony of Witness AHB to find that he had distributed weapons in Gisenyi, because this testimony was not credible.[1543] In his twenty-fifth ground of appeal, Appelant Barayagwiza alleges that the Trial Chamber committed an error of fact in finding in paragraph 954 of the Judgement that the role he played in the distribution of weapons proved that he "was involved in the planning of the killings which took place in Gisenyi".[1544]

649. The Appeals Chamber notes that paragraph 954 of the Judgement endorses the finding in paragraph 730 of the Judgement that Appelant Barayagwiza orchestrated a distribution of weapons which were then used to kill Tutsi. However, the Trial Chamber does not rely on this finding in order to convict the Appellant of the crime of genocide in paragraph 975 of the Judgement. Accordingly, the Appeals Chamber consider that it is not necessary to address here the submissions put forward by the Appellant in this regard.[1545]

(v) Supervision of roadblocks

650. In his twenty-sixth ground of appeal, Appellant Barayagwiza submits that the Trial Chamber committed an error of fact in relying on the testimony of Witness ABC in order to find in paragraph 719 of the Judgement that the Appellant "supervised roadblocks manned by the *Impuzamugambi* established to stop and kill Tutsi."[1546] He submits that the testimony of Witness ABC was uncorroborated, that the witness was unable to give the precise date when this was alleged to have occurred, or any particulars of those manning the barricades, and that his testimony therefore lacked probative value.[1547] The Appellant further argues that neither Witness X, Witness Ruggiu nor Witness Bemeriki reported his presence at roadblocks in Kigali, even though they were well informed of what was happening at these roadblocks

[1541] See *supra* VIII. B.
[1542] Judgement, para. 975.
[1543] Barayagwiza Appellant's Brief, paras. 208-217.
[1544] *Ibid.*, paras. 208-219.
[1545] The Appeals Chamber notes, however, that the conviction of Appellant Barayagwiza for extermination rests on this distribution of weapons: Judgement, para. 1067, which refers to paragraph 954. The arguments advanced by the Appellant in regard to this distribution of weapons are therefore reviewed *infra* XV. B. 2.
[1546] Barayagwiza Appellant's Brief, paras. 220-227.
[1547] *Ibid.*, paras. 220-221.

between April and June 1994.[1548] He further argues that, if he had actually supervised the roadblocks in Kigali, it would have been mentioned by Witness Nsanzuwera who, as Kigali Prosecutor, conducted investigations into "what had occurred during the war".[1549] The Appellant also claims that it was impossible for a civilian organization such as *Impuzamugambi* to erect barricades in the area indicated by Witness ABC, because of the heavy Rwandan, Belgian and French military presence around the various international institutions.[1550] "Further or in the alternative", the Appellant submits that the burden of proof has been incorrectly applied in assessing the credibility of this witness, since the Trial Chamber ignored the fact that the witness dissociated himself from his previous statement and that he (the Appellant) was either out of Kigali or abroad during the relevant period.[1551]

651. The summary of the relevant section of the testimony of Witness ABC is found in paragraph 707 of the Judgement, which reads as follows:

> Witness ABC, a Hutu from Kigali, testified that sometime in the middle of April 1994 he saw Barayagwiza at the road below Kiyovu hotel leading to the French school, where there was a roadblock that was manned by *Impuzamugambi*. Barayagwiza was in a white Pajero vehicle with a soldier from the Presidential Guard, who was his bodyguard, and he was speaking to the *Impuzamugambi*. Witness ABC was about 2 to 3 metres away from Barayagwiza and heard him tell them not to allow Tutsi or persons from Nduga to pass the roadblock unless these individuals showed that they had CDR and MDR party cards; otherwise, they were to be killed. The witness explained that Nduga referred to the region of Gitarama and Butare. He said there were about 15 people manning the roadblock, carrying machetes, grenades and firearms, with a radio set tuned to RTLM, which was encouraging them to pursue Tutsi. The witness was at the roadblock because his employer was in hiding and had sent him to buy a drink. He was there for about five minutes. Barayagwiza was there before the witness arrived and left before the witness left. Witness ABC was allowed through the roadblock because his identity card stated he was a Hutu, and because the witness was employed and was a refugee. He said that there were three roadblocks on that road at estimated intervals of one kilometre. The witness said that the roadblocks were manned by the *Impuzamugambi* and members of CDR, and Barayagwiza supervised the roadblocks in that location. After this incident, Witness ABC would see Barayagwiza passing by in his vehicle, supervising the roadblocks. He deduced that he was supervising the roadblocks as they were manned by CDR members and Barayagwiza was the CDR boss in that district. He said his observation that Barayagwiza monitored the work being done, to see if Tutsi were being killed, was confirmed by the *Impuzamugambi*.[1552]

The Appeals Chamber notes that the Trial Chamber concluded in paragraph 331 of the Judgement that the testimony of Witness ABC was credible.

652. The Appeals Chamber is of the view that many of the arguments raised by Appellant Barayagwiza can be dismissed without further consideration. First, it is established case-law that, barring special circumstances, the testimony of a witness does not need to be corroborated for it to have probative value.[1553] Furthermore, even if certain witnesses did not say that the Appellant supervised roadblocks in Kigali, this would not be sufficient to show

[1548] *Ibid.*, para. 222.
[1549] *Ibid.*, para. 223.
[1550] *Ibid.*, para. 225.
[1551] *Ibid.*, para. 227.
[1552] Footnotes omitted.
[1553] In this regard, see case-law quoted in footnote 1312.

that the testimony of Witness ABC was not reliable.[1554] The Appeals Chamber further notes that the Appellant cites no evidence to support the assertion that roadblocks were unlikely to have been set up at the locations mentioned by Witness ABC; this argument cannot therefore succeed. The Appeals Chamber also rejects the argument that the Trial Chamber ignored the fact that Witness ABC had dissociated himself from his previous statement, noting that paragraph 331 of the Judgement discusses inconsistencies between this statement and his testimony at trial and then concludes "none of the issues raised on cross-examination effectively challenged the credibility of the witness". Lastly, the Appeals Chamber will not consider the contention that the testimony of Witness ABC was not credible because the Appellant "was either out of Kigali or abroad during the relevant period", since no evidence has been provided to support this assertion.

653. Regarding the vagueness of the dates on which Witness ABC is alleged to have seen Appellant Barayagwiza, the Appeals Chamber observes that the witness stated in his testimony that he saw the Appellant in the middle of the month of April 1994[1555] and, subsequently, in May and June 1994, close to a roadblock where he used to go.[1556] The Appeals Chamber further notes that this witness was also cross-examined in relation to the dates on which he allegedly saw the Appellant.[1557] The Appeals Chamber is of the opinion that the relative imprecision of Witness ABC as to these dates may be explained by the prevailing circumstances and the passage of time between the acts and his testimony. The Appeals Chamber is not satisfied that a reasonable trier of fact would not have found this witness credible solely because he failed to give specific dates on which certain events occurred. The Appeals Chamber also rejects the argument that the witness failed to give particulars of the individuals manning the roadblocks, noting that the witness described them as *Impuzamugambi*, CDR members and *Interahamwe,*[1558] armed with machetes, grenades and firearms[1559] and that, generally, they were about 15 in number.[1560] Clearly, the Trial Chamber found this description adequate and the Appellant has failed to show that such an assessment was unreasonable.[1561] This ground is rejected.

(vi) "Shouting Match" with the US Ambassador

654. In his twenty-seventh ground of appeal, Appellant Barayagwiza accuses the Trial Chamber of having committed an error of fact in inferring, in paragraph 336 of the Judgement, that he sought to justify the violence attributed to CDR members, on the basis of Alison Des Forges's evidence that the Appellant had had a conversation with US Ambassador Rawson that was virtually a "shouting match".[1562] The Appellant argues that such inference is unreasonable, because it relies only on a single hearsay report, and the

[1554] It should furthermore be recalled that the testimonies of Witnesses Ruggiu and Bemeriki were rejected in their entirety (Judgement, paras. 549 and 551), and that the Appellant has not shown on appeal that it was unreasonable for the Trial Chamber to have done so.
[1555] T. 28 August 2001, p. 21.
[1556] *Ibid.*, pp. 30-31.
[1557] *Ibid.*, pp. 56-58.
[1558] *Ibid.*, pp. 22, 24-26 and 30.
[1559] *Ibid.*, p. 23.
[1560] *Idem*; T. 29 August 2001, pp. 43-44.
[1561] The Appellant moreover fails to cite any evidence to show that the witness was allegedly pressed to provide particulars of the identity of the militiamen manning the roadblocks, but was unable to do so.
[1562] Barayagwiza Appellant's Brief, para. 228.

witness refused to produce her notes.[1563] The Appellant contends that, in any event, the Trial Chamber could not reasonably rely on this evidence to find that he had defended the acts of violence attributed to CDR members.[1564]

655. The Appeals Chamber has already rejected Appellant Barayagwiza's submissions relating to this conversation in its consideration of his forty-first ground.[1565] It will therefore confine itself to considering whether the Trial Chamber could reasonably find, on the basis of this conversation, that the Appellant had defended the acts of violence attributed to CDR members.[1566]

656. In the opinion of the Appeals Chamber, the language used by the Trial Chamber in paragraph 336 of the Judgement is ambiguous, and it is difficult to determine with certainty whether the Judges found beyond all reasonable doubt that Appellant Barayagwiza, in his conversation with Ambassador Rawson, defended the acts of violence perpetrated by some CDR members, or whether they were simply putting forward a hypothesis which had no impact on their subsequent findings. The Appeals Chamber observes, in any event, that the factual findings in paragraphs 339 to 341 of the Judgement do not rely on the impugned finding and are based, as concerns the Appellant's involvement in the acts of violence perpetrated by CDR members, on other more precise factual findings relating to the Appellant's calls for the murder of Tutsi, his direct supervision of the *Impuzamugambi* at roadblocks and his supplying of weapons to the *Impuzamugambi*. Thus the conversation in question does not go to the root of any factual or legal finding that led to the conviction of the Appellant. The appeal on this point is dismissed.

(vii) Causal link between the Appellant's acts of instigation and the killing of Tutsi

657. In his twenty-eighth ground of appeal, Appellant Barayagwiza contends that the Trial Chamber made an error of law in "finding the Appellant guilty of genocide pursuant to Article 6(1) in respect of CDR", without first having found that the acts of instigation attributed to him actually caused the killing of Tutsi[1567] and without identifying the specific acts of instigation attributable to him.[1568] The Appellant stresses that, although the Trial Chamber found — wrongly, in the Appellant's view — that he supervised roadblocks established to stop and kill Tutsi, the Trial Chamber could not point to any evidence that he was actually present when any Tutsi was killed, and it was not established that he ordered the killing of any person, or that any person actually killed anyone because of what he allegedly said.[1569] The Appellant also criticizes the vague language used by the Trial Judges and contends that "what is required is proof that the Appellant instigated a particular killing or series of killings".[1570]

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[1563] *Ibid.*, para. 229. The Appellant also appears to criticise the Appeals Chamber for refusing any further investigation into this matter in its Decision of 4 October 2005 (Decision on Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Appoint an Investigator), but does not explain in what way this decision was wrong.
[1564] *Ibid.*, para. 230.
[1565] *Ibid.*, para. 336. See *supra* IV. B. 2. (b) .
[1566] Judgement, para. 336.
[1567] Barayagwiza Appellant's Brief, para. 231.
[1568] *Ibid.*, para. 233.
[1569] *Ibid.*, para. 232.
[1570] *Ibid.*, para. 234.

658. The Trial Chamber found the Appellant guilty of genocide for "instigating acts of genocide committed by CDR members and *Impuzamugambi*, pursuant to Article 6(1) of its Statute".[1571] This finding results from an analysis set out in paragraphs 951, 953, 954 and 975 of the Judgement. Certain of these paragraphs have been cited above, but it is worth reproducing them here for greater convenience:

> 951. The Hutu Power movement, spearheaded by CDR, created a political framework for the killing of Tutsi and Hutu political opponents. The CDR and its youth wing, the *Impuzamugambi*, convened meetings and demonstrations, established roadblocks, distributed weapons, and systematically organized and carried out the killing of Tutsi civilians. The genocidal cry of "*tubatsembatsembe*" or "let's exterminate them", referring to the Tutsi population, was chanted consistently at CDR meetings and demonstrations. As well as orchestrating particular acts of killing, the CDR promoted a Hutu mindset in which ethnic hatred was normalized as a political ideology. The division of Hutu and Tutsi entrenched fear and suspicion of the Tutsi and fabricated the perception that the Tutsi population had to be destroyed in order to safeguard the political gains that had been made by the Hutu majority.
>
> 953. The Defence contends that the downing of the President's plane and the death of President Habyarimana precipitated the killing of innocent Tutsi civilians. The Chamber accepts that this moment in time served as a trigger for the events that followed. *Cela est évident*. But if the downing of the plane was the trigger, then RTLM, Kangura and CDR were the bullets in the gun. The trigger had such a deadly impact because the gun was loaded. The Chamber therefore considers the killing of Tutsi civilians can be said to have resulted, at least in part, from the message of ethnic targeting for death that was clearly and effectively disseminated through RTLM, Kangura and CDR, before and after 6 April 1994.
>
> 954. As found in paragraph 730, Barayagwiza came to Gisenyi, one week after 6 April, with a truckload of weapons that were distributed to the local population and used to kill individuals of Tutsi ethnicity. Barayagwiza played a leadership role in the distribution of these weapons, which formed part of a predefined and structured plan to kill Tutsi civilians. From Barayagwiza's critical role in this plan, orchestrating the delivery of the weapons to be used for destruction, the Chamber finds that Barayagwiza was involved in planning this killing. As set forth in paragraph 719, Barayagwiza supervised roadblocks manned by the *Impuzamugambi*, established to stop and kill Tutsi.
>
> 975. As found in paragraphs 276, 301, 339-341, Jean Bosco Barayagwiza was one of the principal founders of CDR and played a leading role in its formation and development. He was a decision-maker for the party. The CDR had a youth wing, called the *Impuzamugambi*, which undertook acts of violence, often together with the *Interahamwe*, the MRND youth wing, against the Tutsi population. The killing of Tutsi civilians was promoted by the CDR, as evidenced by the chanting of "*tubatsembatsembe*" or "let's exterminate them" by Barayagwiza himself and by CDR members in his presence at public meetings and demonstrations. The reference to "them" was understood to mean the Tutsi population. Barayagwiza supervised roadblocks manned by the *Impuzamugambi*, established to stop and kill Tutsi. The Chamber notes the direct involvement of Barayagwiza in the expression of genocidal intent and in genocidal acts undertaken by members of the CDR and its *Impuzamugambi*. Barayagwiza was at the organizational helm. He was also on site at the meetings, demonstrations and roadblocks that created an infrastructure for and caused the killing of Tutsi civilians. For this reason, the Chamber finds Jean-Bosco Barayagwiza guilty of instigating acts of genocide committed.

[1571] Judgement, para. 975.

659. The Appeals Chamber notes that paragraph 975 refers back to paragraphs 276, 301 and 339 to 341 of the Judgement. Paragraphs 276 and 301 contain factual findings relating to Appellant Barayagwiza's career within CDR as founder, leader and, as of February 1994, CDR Chairman, and to CDR opposition to the Arusha Accords and its assimilation of Tutsi to the RPF and enemies of the Hutu, thereby defending the recourse to violence against them. The following are the factual findings contained in paragraphs 339 to 341 of the Judgement:

- The Appellant publicly expressed that CDR membership was open only to Hutu;[1572]
- During the year 1994, and in particular the period 6 April to 17 July 1994, Barayagwiza exercised effective leadership over the CDR and its members;[1573]
- The CDR and the Appellant promoted the killing of Tutsi, using slogans at mass rallies which openly called for their extermination;[1574]
- The Appellant supervised CDR militants and the party's youth wing, the *Impuzamugambi*, which became a militia;[1575]
- The *Impuzamugambi*, together with CDR militants, acted under the Appellant's orders when they perpetrated killings and acts of violence;[1576]
- The Appellant ordered the *Impuzamugambi* at roadblocks not to allow the Tutsi to pass and to kill them unless they had CDR or MRND cards;[1577]
- The Appellant supplied weapons to the *Impuzamugambi* to kill the Tutsi;[1578]
- The *Impuzamugambi*, together with the *Interahamwe*, killed large numbers of Tutsi civilians in Gisenyi *préfecture*.[1579]

660. The Appeals Chamber recalls that, for a defendant to be convicted of instigation to commit a crime under Article 6(1) of the Statute, it must be established that the acts charged contributed substantially to the commission of the crime, but they need not be a *sine qua non* condition for its commission. The Appeals Chamber further recalls that, contrary to what the Appellant appears to contend,[1580] the accused does not need to be actually present when the instigated crime is committed.

661. The Appeals Chamber notes that paragraph 975 of the Judgement relied on the following acts to find the Appellant guilty of instigation to commit genocide : (1) "the chanting of '*tubatsembatsembe'* or 'let's exterminate them' by Barayagwiza himself and by

[1572] *Ibid.*, para. 339.
[1573] *Ibid.*, para. 340.
[1574] *Idem*.
[1575] *Ibid.*, para. 341.
[1576] *Idem*.
[1577] *Idem*.
[1578] *Idem*.
[1579] *Idem*.
[1580] See Barayagwiza Appellant's Brief, para. 232.

CDR members in his presence at public meetings and demonstrations"; (2) the Appellant supervised roadblocks manned by the *Impuzamugambi*, set up to stop and kill Tutsi.

662. The Appeals Chamber notes that it has already found that there was no proof that the chant "*tubatsembatsembe*" or "let's exterminate them" was sung by the Appellant, or by CDR members in his presence, at CDR public rallies in 1994;[1581] the Appellant could not therefore be convicted of instigation to commit genocide on that basis. The Appeals Chamber adds that it has, however, rejected the Appellant's arguments relating to his supervision of roadblocks in Kigali. It remains to be determined whether the Trial Chamber could reasonably find that such supervision contributed substantially to the commission of acts of genocide.

663. The Appeals Chamber notes that the Trial Chamber did not expressly find that the *Impuzamugambi* at the roadblocks supervised by Appellant Barayagwiza in Kigali actually killed large numbers of Tutsi.[1582] However, it is of the opinion that such a finding was implicit and it could reasonably be based on the testimony of Witness ABC. This witness specifically described a number of murders of Tutsi by the *Impuzamugambi* at roadblocks supervised by the Appellant,[1583] and it has not been shown that his testimony lacked probative value. Consequently, the Appeals Chamber is of the view that the Trial Chamber could reasonably find that, because of his involvement in the supervision of roadblocks erected during the genocide, and of the instructions given to the *Impuzamugambi* manning those roadblocks to stop and kill the Tutsi who came there – instructions that were in fact followed – the Appellant instigated the commission of genocide. The Appeals Chamber adds *obiter* that it would in all probability have been open to the Trial Chamber to rely also on other modes of responsibility, such as planning, ordering or aiding and abetting. This ground of appeal is dismissed.

(viii) Conclusion on Appellant Barayagwiza's responsibility under Article 6(1) of the Statute

664. The Appeals Chamber finds that it has not been shown that the Trial Chamber was in error when it found that certain of Appellant Barayagwiza's acts in the context of his CDR activities instigated the commission of genocide. However, as explained earlier, the Appellant can only be convicted on this head if he can also be shown to have intended to instigate others to commit acts of genocide.[1584]

665. The Trial Chamber did not state expressly that the Appellant had been shown to have such intent, confining itself to holding that it had been shown that the Appellants "acted with intent to destroy, in whole or in part, the Tutsi ethnic group".[1585] The Appeals Chamber has already rejected the Appellant's arguments against this finding.[1586] On this basis and of the acts proved against Appellant Barayagwiza, the Appeals Chamber is of the view that there can be no doubt that the Appellant had the intent to instigate others to commit genocide. The

[1581] See *supra* XII. D. 2. (b) (iii) . See also *infra* XIII. D. 2. (b) (i) .
[1582] *Cf.* Judgement, para. 341, which states that the *Impuzamugambi*, together with the *Interahamwe*, killed large numbers of Tutsi civilians in Gisenyi *préfecture*.
[1583] Judgement., para. 316; see also T. 28 August 2001, pp. 31-33.
[1584] See *supra* XI. A.
[1585] Judgement, para. 969.
[1586] See *supra* XII. C. 3. (e) .

Appellant's conviction for instigating the commission of genocidal acts by members of the CDR and its *Impuzamugambi* is therefore upheld.

(ix) The Trial Chamber could not convict the Appellant under both paragraphs (1) and (3) of Article 6 of the Statute

666. In his twenty-ninth ground of appeal, Appellant Barayagwiza contends that the Trial Chamber erred in law in convicting him of genocide both under Article 6(1) of the Statute for instigating acts of genocide committed by CDR members and under Article 6(3) on account of his alleged superior responsibility.[1587]

667. The Appeals Chamber recalls that a defendant cannot be convicted under Article 6(1) and (3) of the Statute for one and the same conduct under one and the same count.[1588] In convicting Appellant Barayagwiza under Article 6(1) and (3) of the Statute on account of acts of genocide by CDR members and *Impuzamugambi*, the Trial Chamber committed an error. It should have convicted him solely under Article 6(1) of the Statute, and treated the Appellant's abuse of his superior position as an aggravating circumstance to be considered during sentencing.[1589] Since the Appeals Chamber has found that Appellant Barayagwiza was properly convicted under Article 6(1) of the Statute, it will not consider in this chapter Appellant Barayagwiza's responsibility based on his superior position.

3. Individual criminal responsibility of Appellant Ngeze on account of his personal acts in Gisenyi

668. The Appeals Chamber has already set aside the conviction of Appellant Ngeze for having ordered the commission of acts of genocide,[1590] and there is therefore no need to consider the Appellant's arguments against this conviction.[1591] However, the Appeals Chamber recalls that its findings on the Appellant's alibi do not affect the following factual findings, which are set out in paragraph 837 of the Trial Judgment and which, in certain instances, form the basis for the Appellant's conviction for aiding and abetting genocide:[1592]

- The Appellant stored weapons at his home before 6 April 1994;[1593]

[1587] Barayagwiza Appellant's Brief, paras. 237-239.
[1588] See *supra* XI. C.
[1589] *Stakić* Appeal Judgement, para. 411; *Kamuhanda* Appeal Judgement, para. 347; *Jokić* Appeal Judgement, paras. 23-28; *Kajelijeli* Appeal Judgement, paras. 81-82; *Kvočka et al.* Appeal Judgement, para. 104; *Kordić and Čerkez* Appeal Judgement, paras. 34-35; *Blaškić* Appeal Judgement, para. 91.
[1590] See *supra* X. D.
[1591] See Ngeze Appellant's Brief, paras. 356-362, 372-387; Ngeze Brief in Reply, paras. 85-89.
[1592] See Judgement, paras. 956 and 977A.
[1593] As explained in footnote 1150, the Trial Chamber concluded in paragraph 837 of the Judgement that the Appellant "helped secure and distribute, stored, and transported weapons to be used against the Tutsi population". This conclusion is based on the testimonies of Witnesses AHI, AFX and Serushago (see Judgement, para. 831). Since the Appeals Chamber has concluded that the testimony of Witness AHI cannot be relied upon with respect to the distribution of weapons by the Appellant on 8 April 1994, only the testimonies of Witnesses AFX and Serushago remain. Witness AFX only stated that, at an unspecified date before the killings in April 1994, Appellant Ngeze showed him the weapons which he was storing (see Judgement, paras. 796 and 831). The testimony of Witness Serushago can be accepted only insofar as it is corroborated by other evidence (Judgement, para. 824). Hence the only remaining finding is that the Appellant stored weapons before 6 April 1994.

- The Appellant "set up, manned and supervised roadblocks in Gisenyi in 1994 that identified targeted Tutsi civilians who were subsequently taken to and killed at the *Commune Rouge*";

- The Appellant "often drove around with a megaphone in his vehicle, mobilizing the Hutu population to come to CDR meetings and spreading the message that the *Inyenzi* would be exterminated, *Inyenzi* meaning, and being understood to mean, the Tutsi ethnic minority";

- "At Bucyana's funeral in February 1994, Ngeze said that if President Habyarimana were to die, the Tutsi would not be spared."

669. The first of these factual findings is based on the testimony of Witnesses AFX and Serushago. However, the Appeals Chamber has already concluded that, because of the new evidence admitted on appeal, the testimony of Witness AFX cannot be relied on in the absence of corroboration by other credible evidence.[1594] The same applies with respect to the testimony of Witness Serushago.[1595] These two testimonies are not capable of corroborating one another, and the Appeals Chamber accordingly reverses the finding that the Appellant stored weapons at his home before 6 April 1994.

670. Appellant Ngeze does not raise any specific arguments concerning the last two factual findings, and those are therefore upheld. However, the Trial Chamber did not base its conclusion that the Appellant aided and abetted the massacre of Tutsi civilians on these findings, but rather on the fact that the Appellant had "helped secure and distribute, stored, and transported weapons to be used against the Tutsi population" and that he had "set up, manned and supervised roadblocks in Gisenyi in 1994 that identified targeted Tutsi civilians who were subsequently taken to and killed at the *Commune Rouge*".[1596] The Appeals Chamber has already reversed the finding that the Appellant "helped secure and distribute, stored, and transported weapons to be used against the Tutsi population"; therefore, the only remaining issue is whether the Appellant could be convicted for aiding and abetting genocide for having "set up, manned and supervised roadblocks in Gisenyi in 1994 that identified targeted Tutsi civilians who were subsequently taken to and killed at the *Commune Rouge*".

671. This finding is based on the testimonies of Witnesses AHI and Serushago, which are summarized as follows by the Trial Chamber:

> Witness AHI saw Ngeze at roadblocks in Gisenyi in 1994 and named him as among those who had set up additional roadblocks in 1994. He testified that Ngeze manned or monitored a roadblock and gave instructions to others at the roadblocks: to stop and search vehicles, to check identity cards, and to "set aside" persons of Tutsi ethnicity. These Tutsi were transported to and killed at the *Commune Rouge*. Omar Serushago testified that Ngeze was moving around Gisenyi town selecting Tutsi at roadblocks and directing them to the *Commune Rouge* to kill them. He said he personally saw Ngeze selecting Tutsi at roadblocks several times. The Chamber notes that the testimony of Witness AHI corroborates the testimony of Serushago that Ngeze played an active and supervisory role

[1594] See *supra* XII. C. 3. (b) (ii) .
[1595] Judgement, para. 824.
[1596] *Ibid.*, para. 956.

> in the identification and targeting of Tutsi at roadblocks, who were subsequently killed at the *Commune Rouge*.[1597]

672. The only specific argument raised by the Appellant in this respect is that it has not been shown that he exercised authority over the persons present at the roadblocks.[1598] The Appeals Chamber would begin by recalling that, in order to convict a defendant of aiding and abetting another in the commission of a crime, it is unnecessary to prove that he had authority over that other person;[1599] it is sufficient to prove that the defendant's acts or omissions substantially contributed to the commission of the crime by the principal perpetrator.[1600] In the instant case, the Appellant himself identified and selected Tutsi at the roadblocks; he also gave instructions to those manning the roadblocks to stop and search every vehicle which passed, to ask for identity cards from those in the vehicles, and to set aside those whose identity cards indicated that they were Tutsi, who were then taken to *Commune Rouge* and killed.[1601] The Appellant has failed to show that it was unreasonable to conclude that his acts substantially contributed to the massacres of Tutsi civilians at the *Commune Rouge*. In particular, the Appeals Chamber rejects Appellant Ngeze's argument that the fact that he gave instructions at the roadblocks does not imply that these instructions were followed, noting that it is clear from the testimony of Witness AHI that the Appellant's instructions were indeed followed,[1602] and that the Appellant has cited no evidence suggesting the contrary. The Appeals Chamber is of the view that the Trial Chamber was entitled to conclude on the basis of these factual findings that the Appellant aided and abetted the commission of genocide. Furthermore, there is no doubt that the Appellant was aware that his acts were contributing to the commission of genocide by others. This conviction is upheld.

## XIII. CRIME OF DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE

673. The Trial Chamber considered that RTLM was systematically engaged in incitement to commit genocide.[1603] On this basis, it found Appellants Nahimana and Barayagwiza guilty of direct and public incitement to commit genocide under Article 2(3)(c) of the Statute,

[1597] *Ibid.*, para. 833. See also para. 792, referring to T. 4 September 2001, pp. 69-74 (testimony of Witness AHI), and para. 786, referring to T. 16 November 2001, pp. 53-60 (testimony of Witness Serushago).
[1598] See Ngeze Appellant's Brief, paras. 356, 376-387; Ngeze Brief in Reply, paras. 87-89. In particular, the Appellant asserts that the fact that he was "seen at roadblocks monitoring and giving instructions to others does not mean that the orders were followed by the people to whom they were addressed, if at all" (Ngeze Appellant's Brief, para. 377).
[1599] *Muhimana* Appeal Judgement, para. 189; *Blagojević and Jokić* Appeal Judgement, para. 195. However, it could be necessary to establish an accused's authority over another person in some particular circumstances, for example if it is alleged that the accused had authority over the principal perpetrator of the crime and that, through his failure to act, he aided and abetted the commission of the crime; see *Br|anin* Appeal Judgement, para. 273, and *Kayishema and Ruzindana* Appeal Judgement, paras. 201-202.
[1600] See *supra* XI. A.
[1601] See Judgement, paras. 786, 792, 833 and 837.
[1602] T. 4 September 2001, pp. 79-86. Witness AHI explains that the persons manning the roadblocks effectively identified Tutsi, who were then taken to the *Commune Rouge* and killed.
[1603] Judgement, para. 1031.

pursuant to Article 6(1) and (3) of the Statute in the case of Appellant Nahimana and to Article 6(3) of the Statute in the case of Appellant Barayagwiza.[1604]

674. Appellant Barayagwiza was also convicted of direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute on account of his personal participation in calls for genocide made by the CDR, and under Article 6(3) of the Statute for his "failure to take necessary and reasonable measures to prevent the acts of direct and public incitement to commit genocide caused by CDR members".[1605]

675. The Trial Chamber further found that *Kangura* had directly incited the commission of genocide and found Appellant Ngeze guilty of direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute.[1606] The Chamber also found Appellant Ngeze guilty of direct and public incitement to commit genocide under Article 6(1) on account of his personal acts, "which called for the extermination of the Tutsi population".[1607]

676. The Appellants contend that the Trial Chamber committed errors of law and of fact in finding them guilty of direct and public incitement to commit genocide,[1608] and consequently request that their convictions on this count be overturned.[1609]

### A. Constituent elements of the crime of direct and public incitement to commit genocide

677. A person may be found guilty of the crime specified in Article 2(3)(c) of the Statute if he or she directly and publicly incited the commission of genocide (the material element or *actus reus*) and had the intent directly and publicly to incite others to commit genocide (the intentional element or *mens rea*). Such intent in itself presupposes a genocidal intent.[1610]

678. The Appeals Chamber considers that a distinction must be made between instigation[1611] under Article 6(1) of the Statute and public and direct incitement to commit genocide under Article 2(3)(c) of the Statute. In the first place, instigation under Article 6(1) of the Statute is a mode of responsibility; an accused will incur criminal responsibility only if the instigation in fact substantially contributed to the commission of one of the crimes under Articles 2 to 4 of the Statute.[1612] By contrast, direct and public incitement to commit genocide under Article 2(3)(c) is itself a crime, and it is not necessary to demonstrate that it in fact

[1604] *Ibid.*, paras. 1033-1034. The French translation of paragraph 1034 of the Judgement refers to Appellant Barayagwiza's responsibility under Articles 6(1) and 6(3) of the Statute, but this is a translation error; the original English version mentions only Article 6(3) of the Statute.
[1605] *Ibid.*, para. 1035.
[1606] *Ibid.*, para. 1038.
[1607] *Ibid.*, para. 1039.
[1608] Nahimana Notice of Appeal, pp. 12-13, 15-17; Nahimana Appellant's Brief, paras. 55-60, 71-73, 186-536; Nahimana Brief in Reply, paras. 96-107, 115-117; Barayagwiza Notice of Appeal, p. 3 (Grounds 32-33); Barayagwiza Appellant's Brief, paras. 257-270; Ngeze Notice of Appeal, paras. 9, 71-87; Ngeze Appellant's Brief, paras. 14, 24-33, 217-272, 227 and 278; Ngeze Brief in Reply, paras. 26, 29-38, 80-83.
[1609] Nahimana Appellant's Brief, para. 115; Barayagwiza Appellant's Brief, para. 270; Ngeze Appellant's Brief, para. 10.
[1610] In this respect, see *Akayesu* Trial Judgement, para. 560, quoted and approved in the Judgement, para. 1012.
[1611] "*Incit[ation]*" in the French version of Article 6(1) of the Statute.
[1612] See *supra* XI. A.

substantially contributed to the commission of acts of genocide.[1613] In other words, the crime of direct and public incitement to commit genocide is an inchoate offence, punishable even if no act of genocide has resulted therefrom. This is confirmed by the *travaux préparatoires* to the Genocide Convention, from which it can be concluded that the drafters of the Convention intended to punish direct and public incitement to commit genocide, even if no act of genocide was committed, the aim being to forestall the occurrence of such acts.[1614] The Appeals Chamber further observes — even if this is not decisive for the determination of the state of customary international law in 1994 — that the Statute of the International Criminal Court also appears to provide that an accused incurs criminal responsibility for direct and public incitement to commit genocide, even if this is not followed by acts of genocide.[1615]

679. The second difference is that Article 2(3)(c) of the Statute requires that the incitement to commit genocide must have been direct and public, while Article 6(1) does not so require.

### 1. Arguments of the Parties

680. Appellants Nahimana and Ngeze contend that the Trial Chamber erred in referring to the international jurisprudence on incitement to discrimination and violence in order to analyse and define the elements of the crime of direct and public incitement to commit genocide.[1616] They argue that "international criminal law does not consider as international

[1613] *Kajelijeli* Trial Judgement, para. 855; *Niyitegeka* Trial Judgement, para. 431; *Musema* Trial Judgement, para. 120; *Rutaganda* Trial Judgement, para 38; *Akayesu* Trial Judgement, para. 562. The Trial Chamber endorsed this jurisprudence (Judgement, paras. 1013 and 1015) and the Appellants do not challenge this finding: see Nahimana Appellant's Brief, para. 189; Barayagwiza Appellant's Brief, para. 259; Ngeze Appellant's Brief, paras. 255-256; Ngeze Brief in Reply, para. 31.

[1614] The United States proposed amendment to remove incitement from the list of punishable acts (see UN ORGA, Sixth Committee, Third Session, 84th meeting, UN Doc. A/C.6/3/SR. 84, 26 October 1948, pp. 213-214) was rejected by 27 votes to 16, with 5 abstentions: UN ORGA, Sixth Committee, Third Session, 85th meeting, UN Doc. A/C.6/3/SR. 85, 27 October 1948, p. 229. Many delegations which voted to reject this amendment explained that it was important to make direct and public incitement to commit genocide punishable even when it was not followed by acts, so that the Convention should be an effective instrument for the prevention of genocide: see UN ORGA, Sixth Committee, Third Session, 84th and 85th meetings, UN Doc. A/C.6/3/SR. 84 and UN Doc. A/C.6/3/SR. 85, 27 and 27 October 1948, p. 208 (Venezuela), 215 and 226 (Poland), 216 (Yugoslavia), 219 (Cuba), 219, 227 and 230 (USSR), 222 (Uruguay), 223 (Egypt).
The Appeals Chamber notes that the Draft Code of Crimes against the Peace and Security of Mankind by the International Law Commission in 1996 provides that direct and public incitement to commit genocide is punishable only if the act in fact occurs: see Articles 2(f) and 17 of the Draft Code of Crimes against the Peace and Security of Mankind and the comments relating thereto, 1996, Report of the International Law Commission on the deliberations of its 48th meeting, 51 UN ORGA Supp. (No. 10), reproduced in the Yearbook of the International Law Commission, 1996, vol. II (Part Two) (hereinafter "Draft Code of Crimes against the Peace and Security of Mankind"). However, the Appeals Chamber considers that this position does not reflect customary international law on the matter. Indeed, the International Law Commission itself specified that this limitation "does not in any way affect the application of the general principles independently of the Code or of similar provisions contained in other instruments, notably article III of the Convention on the Prevention and Punishment of the Crime of Genocide": Draft Code of Crimes against the Peace and Security of Mankind, footnote 45 (para. 6, p. 20).

[1615] Indeed, Article 25(3)(b) of the Statute of the International Criminal Court provides that any person who "orders, solicits or induces" the commission of a crime falling under the jurisdiction of the Court shall be individually responsible for such a crime "which in fact occurs or is attempted". However, Article 25(3)(e) of the Statute of the International Criminal Court provides that a person may incur criminal responsibility for direct and public incitement to commit genocide and it does not require the "commission or attempted commission of such a crime".

[1616] Nahimana Appellant's Brief, paras. 191-198; Ngeze Appellant's Brief, paras. 233-234.

crimes hate speeches or appeals for violence which do not constitute a direct and public call for genocide".[1617] In this regard, Appellant Nahimana submits that:

- The International Military Tribunal ("IMT") made a clear distinction, on the one hand, between the virulent anti-Semitic propaganda of Hans Fritzsche ("Fritzsche") which incited fighting against the "*Judaeo-Bolshevik enemy*", but did not appeal directly to extermination, and, on the other hand, the direct appeals for extermination of Julius Streicher ("Streicher"), broadcast, with knowledge, at the very time of the actual extermination;[1618]

- The suggested amendments to the Genocide Convention criminalizing hate speeches aimed at instigating the commission of genocide were rejected by a very large majority, and only direct and public incitement to commit genocide was retained as a crime;[1619]

- The *Akayesu* Trial and Appeal Judgements have punished only direct appeals to exterminate;[1620]

- The Statute of the International Criminal Court makes incitement a crime only insofar as it is direct and public, and is aimed at the commission of the crime of genocide alone, and not simply one of the other crimes within its jurisdiction.[1621]

681. Appellant Ngeze further argues that the Trial Chamber erred in holding that the crime of direct and public incitement to commit genocide required a different approach when the media were involved.[1622]

682. Furthermore, Appellants Nahimana and Ngeze submit that the Trial Chamber erred in accepting that language that is equivocal or ambiguous, and consequently open to differing interpretations, can constitute the crime of direct and public incitement to commit genocide.[1623] They assert that "[t]he requirement that the incitement be direct, which further

[1617] *Ibid.*, para. 192. See also Ngeze Appellant's Brief, para. 233. Appellant Nahimana adds that, below this exceptional level of gravity, international law leaves it to States to prosecute and punish hate propaganda and calls for violence (Nahimana Appellant's Brief, para. 193) and that, although this type of propaganda may form part of a process leading to genocide, that does not suffice to make it a crime punishable under Article 2 of the Statute (Nahimana Appellant's Brief, para. 197). He submits that, even if the factual findings of the Trial Chamber were accepted (findings which he disputes), the Prosecution evidence relied on by the Judges (the broadcast of ethnic stereotypes inciting disdain and hatred against the Tutsi population; broadcasts equating the Tutsi population to the enemy; broadcasts generating concern, heightening a sense of fear and danger "giving rise to the need for action by listeners"; broadcasts denigrating the Tutsi ethnic group and describing its members as accomplices of the enemy; and broadcasts denouncing individuals by name as being members of the rebellion) cannot constitute a direct appeal to exterminate the Tutsi population, which the crime of direct and public incitement to commit genocide would presuppose (Nahimana Appellant's Brief, paras. 194-196).
[1618] Nahimana Appellant's Brief, paras. 192 and 199.
[1619] *Ibid.*, para. 192.
[1620] *Idem*.
[1621] *Idem*.
[1622] Ngeze Appellant's Brief, para. 236, referring to paragraphs 978-980 and 1000 of the Judgement.
[1623] Nahimana Appellant's Brief, paras. 199-207; Nahimana's Response to the *Amicus Curiae* Brief, p. 3; Ngeze Appellant's Brief, paras. 222-232; Ngeze Brief in Reply, paras. 38 and 83. Appellant Nahimana alleges that "the Judges base their argument on equivocation: according to the Chamber, RTLM broadcasts prior to 6 April 1994 were criminal because the expressions '*Inyenzi*' or '*Inkotanyi*' used by Radio RTLM journalists to describe the

requires that attention be paid to the immediate and unequivocal meaning of the speech, aims at avoiding risks of interpretation of an equivocal pronouncement that is necessarily subject to controversy".[1624] Appellants Nahimana and Ngeze submit that the Nuremberg Judgement demonstrates that only unequivocal calls for genocidal extermination fall under direct incitement to commit genocide.[1625] Appellant Nahimana also notes that a Canadian Court decided in the *Mugesera* case that an equivocal speech which was open to differing interpretations could not constitute direct and public incitement to commit genocide.[1626]

683. Lastly, Appellants Nahimana and Ngeze submit that the Trial Chamber erred in holding that the intention of the perpetrator is critical in assessing the criminal nature of the speech itself.[1627] In this regard, they argue that "a speech which does not contain, as such, any direct appeal to extermination cannot be considered to be the *actus reus* of the crime of incitement simply because its author was alleged to have a criminal intent",[1628] because this position would clearly run counter to the general principle of criminal law that intent alone is not punishable.[1629] Appellant Nahimana adds that the Trial Chamber erred, when deciding whether a speech constituted direct incitement to commit genocide, in referring to the notion of potentially dangerous acts[1630] and to the political or community affiliation of the author of the speech.[1631]

684. In response, the Prosecutor submits that the distinction between "hate speech" and language which incites to genocide is a false one: the real question is whether the statement in question, "given its ordinary meaning and considered in context", incites to genocide.[1632]

685. In the Prosecutor's view, the Appellants are effectively arguing that incitement has to be explicit, that is, each statement must incite genocide, with no need for it to be interpreted or considered in context.[1633] However, according to the Prosecutor, the meaning of any speech or pronouncement must be gauged by its own style within its particular context.[1634] For the Prosecutor, "the directness of speech is confirmed by the fact that its meaning is immediately

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RPF armed rebellion might, in some cases, be interpreted as targeting the entire Tutsi population in an equivocal and undifferentiated manner" (Nahimana Appellant's Brief, para. 203, emphasis in original). Similarly, Appellant Ngeze submits that the speeches cited by the Trial Chamber were equivocal, and that the Chamber erred in considering that *Inyenzi* and *Inkotanyi* designated one and the same thing, namely the Tutsi (Ngeze Appellant's Brief, para. 228).

[1624] Nahimana Appellant's Brief, para. 202.

[1625] *Ibid.*, paras. 199-201; Ngeze Appellant's Brief, para. 223.

[1626] *Ibid.*, paras. 206-207, referring to the Judgement of the Canadian Federal Court of Appeal, 8 September 2003, in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2004] 1 F.C.R. 3, 2003 FCA 325.

[1627] *Ibid.*, paras. 208-210; Ngeze Appellant's Brief, paras. 238-239.

[1628] *Ibid.*, para. 209.

[1629] *Ibid.*, para. 210; Ngeze Appellant's Brief, para. 239.

[1630] *Ibid.*, paras. 211-213.

[1631] *Ibid.*, paras. 214-216. Appellant Nahimana submits that the Judges were proposing a discriminatory and political approach to the *actus reus* of the offence of direct and public incitement to commit genocide when they stated that the rules of international law protecting freedom of expression needed to be applied more restrictively where the speech in question emanates from a majority group enjoying government support.

[1632] Respondent's Brief, para. 306.

[1633] *Ibid.*, para. 301.

[1634] *Ibid.*, para. 300.

appreciated by its intended audience and must be gauged by reference to the way speech is used in its society and country of origin".[1635]

686. The Prosecutor submits that the Trial Chamber made a correct analysis of the *Streicher* and *Fritzsche* cases by showing that the conviction of the former and the acquittal of the latter was not, as claimed by the Appellants, based on the distinction between direct speech on the one hand and implied or ambiguous speech on the other, but that Hans Fritzsche was acquitted because he was considered a "conduit" of propaganda, not a legally responsible participant, and because it was not proven that Fritzsche had genocidal intent and there was no proof that Fritzsche knew that his news reports were false.[1636] Concerning the *Mugesera* case, the Prosecutor points out that the Supreme Court of Canada has overruled the Federal Court of Appeal and held that Mugesera's speech did constitute direct incitement to commit genocide.[1637] The Prosecutor notes that the Supreme Court of Canada held that the direct element of incitement should be viewed in the light of its historical, cultural and linguistic context.[1638]

687. The Prosecutor submits that the assertion that the Trial Chamber found no direct appeal to extermination but assumed the *actus reus* of the crime on the basis of the supposed intent of the Appellants is "bald and badly referenced and oversimplified".[1639] He submits that the Chamber correctly found that not only was genocidal language used but that the Appellants possessed the necessary specific intent for the existence of the crime of incitement.[1640] He also submits that the Trial Chamber correctly considered the potential danger of a speech, as the crime in Article 2(3)(c) is an inchoate offence.[1641]

688. Appellant Nahimana replies that the position of Fritzsche in the hierarchy of the Propaganda Ministry played no role in the International Military Tribunal's decision as to whether or not his speeches were of a criminal nature.[1642] He contends that the Tribunal considered separately the anti-semitic propaganda broadcast by the radio station for which Fritzsche was responsible and the speeches made by the accused himself.[1643] Appellant Nahimana emphasises that, in relying on the fact that Fritzsche had not been shown to have been aware that the extermination was in progress, the Tribunal's judges had clearly indicated that the incitement must be of a direct nature.[1644] Appellant Nahimana submits that Streicher was convicted only on account of his direct calls for extermination broadcast at the time of the extermination and not because of his prior publications.[1645] Lastly, Appellant Nahimana

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[1635] *Ibid.*, para. 305.
[1636] *Ibid.*, paras. 311-314.
[1637] *Ibid.*, paras. 308 and 317.
[1638] *Ibid.*, paras. 318 and 319.
[1639] *Ibid.*, para. 320, footnote 288. The French translation of the first sentence of paragraph 320 of the Respondent's Brief contains an error and should have read: "*Nahimana affirme que la Chambre de première instance n'a relevé aucun appel direct à l'extermination mais a présumé l'existence de l'élément* ***matériel*** [not "moral"] *sur la base de l'intention supposée des appellants*" ("Nahimana asserts that the Trial Chamber found no direct appeal to extermination but assumed the *actus reus* of the crime on the basis of the supposed intent of the appellants").
[1640] Respondent's Brief, para. 320.
[1641] *Ibid.*, para. 311.
[1642] Nahimana Brief in Reply, para. 72.
[1643] *Idem*.
[1644] Nahimana Brief in Reply., para. 74.
[1645] *Ibid.*, para. 75.

maintains that the decision of the Supreme Court of Canada in the *Mugesera* case strengthens his argument, because, in his opinion, the differing views expressed by the various judges demonstrate the uncertainties and dangers of any attempt at interpreting speech.[1646]

2. The *Amicus Curiae* Brief and the responses of the Parties

689. *Amicus Curiae* submits that the Judgement could be interpreted to subsume hate speech that does not contain a call to action of violence under the rubric of direct and public incitement to commit genocide.[1647] *Amicus Curiae* further submits that, for the interpretation of Article 2(3)(c) of the Statute, the Trial Chamber should first have turned to the Genocide Convention and to the relevant *travaux préparatoires*, rather than to certain international treaties that allow or require States parties to proscribe hate speech in their domestic law.[1648] *Amicus Curiae* submits on this subject that the drafters of the Genocide Convention explicitly considered and repeatedly rejected the notion that hate speech that did not call for genocide should be criminalized.[1649] *Amicus Curiae* concedes that, in examining the specific charges against the Appellants, the Trial Chamber seems to have drawn a distinction between simple hate speeches that do not call for violence and actual incitement to commit genocide; however, *Amicus Curiae* calls on the Appeals Chamber to clarify this distinction and to reaffirm that speech that does not incite its audience to commit genocide does not constitute the crime of direct and public incitement to commit genocide.[1650]

690. The Appellants mark their agreement with the position and arguments raised by *Amicus Curiae* in this regard.[1651] For his part, the Prosecutor responds that the Trial Chamber did not confuse speech which amounted to an incitement to commit genocide and speech which did not.[1652] The Prosecutor observes that *Amicus Curiae* did not identify any instance where the Trial Chamber misidentified speech which was merely discriminatory and wrongly suggested that it amounted to an incitement to commit genocide.[1653] The Prosecutor submits that reference to international covenants such as the ICCPR and CERD does not cause any confusion, uncertainty or ambiguity.[1654] He posits that hate speech and incitement to commit genocide are not mutually exclusive categories; in particular, an incitement to commit genocide must inevitably amount to hate speech, and therefore jurisprudence concerning hate

[1646] *Ibid.*, para. 77.
[1647] *Amicus Curiae* Brief, pp. 2, 3, 9-18. In this regard, the *Amicus Curiae* submits that an ambiguous definition of the crime of direct and public incitement to commit genocide could be exploited by some authoritites (particularly in Africa) to suppress overly critical speech (*Amicus Curiae* Brief, pp. 2-8). The Appeals Chamber is not convinced by this argument, and it notes that Article 20(2) of the ICCPR and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") already obliges States parties to these treaties (at least those that have not filed reservations to these provisions) to prohibit or even criminalize hate speech.
[1648] *Amicus Curiae* Brief, pp. 9, 10, 13 and 14. See also pp. 17-18, where the *Amicus Curiae* emphasises the fundamental difference between the Genocide Convention (which defines a crime in international law and represents customary international law) and covenants like the ICCPR or the ICERD, whose provisions on hate speech do not represent customary international law according to the *Amicus Curiae*.
[1649] *Amicus Curiae* Brief, pp. 10-13.
[1650] *Ibid.*, pp. 15-17.
[1651] Nahimana's Response to *Amicus Curiae* Brief (FV), p. 4; Barayagwiza Reply to *Amicus Curiae* Brief, paras. 7-14 and 20; Ngeze's Response to *Amicus Curiae* Brief, pp. 2-5 (paras. 2-3).
[1652] Prosecutor's Response to *Amicus Curiae* Brief, paras. 5, 13-20.
[1653] *Ibid.*, paras. 8 and 13.
[1654] *Ibid.*, paras. 14 and 20.

speech may be useful in analyzing the crime of incitement to commit genocide.[1655] The Prosecutor also believes that the Trial Chamber did not err in its interpretation of the Genocide Convention debates, in that, while the proscription of hate speech was rejected, there was a genuine concern that hate speech could lay the foundation for genocide.[1656]

### 3. Analysis

691. Since the Appellants do not allege that the Trial Chamber erred with regard to the meaning of "public" incitement, the Appeals Chamber will focus on the meaning of "direct" incitement to commit genocide.

#### (a) Hate speech and direct incitement to commit genocide

692. The Appeals Chamber considers that there is a difference between hate speech in general (or inciting discrimination or violence) and direct and public incitement to commit genocide. Direct incitement to commit genocide assumes that the speech is a direct appeal to commit an act referred to in Article 2(2) of the Statute; it has to be more than a mere vague or indirect suggestion.[1657] In most cases, direct and public incitement to commit genocide can be preceded or accompanied by hate speech, but only direct and public incitement to commit genocide is prohibited under Article 2(3)(c) of the Statute. This conclusion is corroborated by the *travaux préparatoires* to the Genocide Convention.[1658]

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[1655] *Ibid.*, paras. 14-16. See also para. 19:

> In the end, the use made by the Trial Chamber of the "hate speech" jurisprudence is both logical and uncontroversial. It was simply used to assist in determining the limits of free speech, a universally recognized human right, when considering criminal liability. The question of the limits of freedom of speech was a live issue in the trial. This is particularly so where the speech being examined may not explicitly call for genocide, but is capable of being interpreted that way when examined in context.

[1656] *Ibid.*, para. 17.

[1657] *Kajelijeli* Trial Judgement, para. 852; *Akayesu* Trial Judgement, para. 557; *Mugesera* v. *Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, 2005 SCC 40, para. 87. See also Comments of the International Law Commission on the Draft Code of Crimes Against the Peace and Security of Mankind, p. 22: "The element of direct incitement requires specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion."

[1658] Articles 2(2) and (3) of the Statute reproduce Articles 2 and 3 of the Genocide Convention. The *travaux préparatoires* of the Genocide Convention can therefore shed light on the interpretation of Articles 2(2) and (3) of the Statute. In particular, the *travaux préparatoires* demonstrate that Article 3(c) (Article 2(3)(c) of the Statute of the Tribunal) is intended to criminalize only direct appeals to commit acts of genocide and not all forms of incitement to hatred. Indeed, the first draft of the Convention, which was prepared by a group of experts on behalf of the United Nations Secretary General (UN Doc. E/447), contained provisions criminalizing not only direct and public incitement to commit genocide (Article II(II)(2.)), but also all forms of public propaganda tending by their systematic and hateful character to promote genocide, or tending to make it appear as necessary, legitimate or excusable (Article III). The second draft of the Convention (prepared by the *Ad Hoc* Committee of the Economic and Social Council, UN Doc. E/794), contained only one provision criminalizing direct and public incitement to commit genocide, regardless of whether it was made in public or in private, and of whether it was successful or not (Article IV(c)). The Soviet delegate had suggested the inclusion of a provision criminalizing hate propaganda and propaganda tending to incite acts of genocide, but the suggestion was rejected by the majority of the *Ad Hoc* Committee (UN Doc. E/794, p. 23). Later, the Soviet delegate again suggested to the 6th Committee of the General Assembly an amendment of Article III (UN Doc. A/C.6/215/Rev. 1) criminalizing "all forms of public propaganda (press, radio, cinema, etc.) that tend to incite racial, national or religious hatred" and "all forms of propaganda that are aimed at provoking the commission of acts of genocide". The amendment was rejected (UN ORGA, 6th Committee, 3rd Session, 87th meeting, p. 253).

693. The Appeals Chamber therefore concludes that when a defendant is indicted pursuant to Article 2(3)(c) of Statute, he cannot be held accountable for hate speech that does not directly call for the commission of genocide. The Appeals Chamber is also of the opinion that, to the extent that not all hate speeches constitute direct incitement to commit genocide, the jurisprudence on incitement to hatred, discrimination and violence is not directly applicable in determining what constitutes direct incitement to commit genocide. However, it is not entirely clear if the Trial Chamber relied on this jurisprudence in defining direct incitement to commit genocide. The Trial Chamber held:

> The present case squarely addresses the role of the media in the genocide that took place in Rwanda in 1994 and the related legal question of what constitutes individual criminal responsibility for direct and public incitement to commit genocide. Unlike Akayesu and others found by the Tribunal to have engaged in incitement through their own speech, the Accused in this case used the print and radio media systematically, not only for their own words but for the words of many others, for the collective communication of ideas and for the mobilization of the population on a grand scale. In considering the role of mass media, the Chamber must consider not only the contents of particular broadcasts and articles, but also the broader application of these principles to media programming, as well as the responsibilities inherent in ownership and institutional control over the media.
>
> To this end, a review of international law and jurisprudence on incitement to discrimination and violence is helpful as a guide to the assessment of criminal accountability for direct and public incitement to genocide, in light of the fundamental right of freedom of expression.[1659]

694. After recalling the jurisprudence of the IMT, the United Nations Human Rights Committee and the European Court of Human Rights, the Trial Chamber held that:

- Editors and publishers have generally been held responsible for the media they control;[1660]

- It is necessary to review whether the aim of the discourse is a lawful one, having regard, for example, to the language used and to the content of the text (in particular, whether it is intended to establish a critical distance from the words of others);[1661]
- The speech must be considered in its context when reviewing its potential impact;[1662]

- It is not necessary to prove that the speech at issue produced a direct effect.[1663]

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The reasons for rejecting the two parts of the amendment seem to have been the same as those for rejecting the Soviet amendment presented to the *Ad Hoc* Committee: the first part of the amendment fell outside the framework of the Genocide Convention (see addresses of the delegates of Greece, France, Cuba, Iran, Uruguay and India) while the second part was a duplication of the provision prohibiting incitement of direct and public incitement to commit genocide (see addresses of the delegates of Greece, Cuba, Iran, Uruguay, Egypt, the United States of America). See UN ORGA, 6 th Committee, 3rd Session, 86th meeting, UN Doc. A/C.6/3/CR. 86, 28 October 1948, pp. 244-248, and UN ORGA, 6th Committee, 3rd Session, 87th meeting, UN Doc. A/C.6/3/CR. 87, 29 October 1948, pp. 248-254.

[1659] Judgement, paras. 979-980.

[1660] *Ibid.*, paras. 1001 and 1003.

[1661] *Ibid.*, paras. 1001-1003.

[1662] *Ibid.*, paras. 1004-1006.

[1663] *Ibid.*, para. 1007.

695. Although the Trial Chamber then characterised these elements as "a number of central principles [...] that serve as a useful guide to the factors to be considered in defining elements of 'direct and public incitement to genocide' as applied to mass media",[1664] it did in fact articulate certain broad guidelines for interpreting and characterizing media discourse. The Appeals Chamber considers that the Trial Chamber did not alter the constituent elements of the crime of direct and public incitement to commit genocide in the media context (which would have constituted an error).

696. Furthermore, the Appeals Chamber notes that several extracts from the Judgement demonstrate that the Trial Chamber drew a distinction between hate speech and direct and public incitement to commit genocide, for example:

- The Trial Chamber held that one RTLM broadcast constituted hate speech, but that "this broadcast, which does not call on listeners to take action of any kind, does not constitute direct incitement";[1665]

- After holding that the RTLM broadcasts as a whole denigrated the Tutsi,[1666] the Trial Chamber cited a broadcast which, in its view, did constitute public and direct incitement to commit genocide;[1667]

- The Trial Chamber concluded that "[m]any of the writings published in *Kangura* combined ethnic hatred and fear-mongering with a call to violence to be directed against the Tutsi population, who were characterized as the enemy or enemy accomplices".[1668] It then noted that "not all of the writings published in *Kangura* and highlighted by the Prosecutor constitute direct incitement", citing the example of an article "brimming with ethnic hatred but [that] did not call on readers to take action against the Tutsi population".[1669]

697. The Appeals Chamber will now turn to the Appellants' submissions that the Trial Chamber erred (1) in considering that a speech in ambiguous terms, open to a variety of interpretations, can constitute direct incitement to commit genocide, and (2) in relying on the presumed intent of the author of the speech, on its potential dangers, and on the author's political and community affiliation, in order to determine whether it was of a criminal nature. The Appellants' position is in effect that incitement to commit genocide is direct only when it is explicit and that under no circumstances can the Chamber consider contextual elements in determining whether a speech constitutes direct incitement to commit genocide. For the reasons given below, the Appeals Chamber considers this approach overly restrictive.

(b) Speeches that are open to several interpretations

[1664] *Ibid.*, para. 1000.
[1665] *Ibid.*, para. 1021.
[1666] *Ibid.*, para. 1031.
[1667] *Ibid.*, para. 1032. See also, for example, Judgement, para. 483, which identifies broadcasts that explicitly called for extermination.
[1668] *Ibid.*, para. 1036.
[1669] *Ibid.*, para. 1037.

698. In conformity with the *Akayesu* Trial Judgement, the Trial Chamber considered that it was necessary to take account of Rwanda's culture and language in determining whether a speech constituted direct incitement to commit genocide.[1670] In this respect, the Trial Chamber quotes the following excerpts from the *Akayesu* Trial Judgement:

> However, the Chamber is of the opinion that the direct element of incitement should be viewed in the light of its cultural and linguistic content. Indeed, a particular speech may be perceived as "direct" in one country, and not so in another, depending on the audience. The Chamber further recalls that incitement may be direct, and nonetheless implicit. […]
>
> The Chamber will therefore consider on a case-by-case basis whether, in light of the culture of Rwanda and the specific circumstances of the instant case, acts of incitement can be viewed as direct or not, by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof.[1671]

699. The Appeals Chamber notes that this approach has been adopted in several other judgements[1672] and by the Supreme Court of Canada in *Mugesera*.[1673]

700. The Appeals Chamber agrees that the culture, including the nuances of the Kinyarwanda language, should be considered in determining what constitutes direct and public incitement to commit genocide in Rwanda. For this reason, it may be helpful to examine how a speech was understood by its intended audience in order to determine its true message.[1674]

701. The principal consideration is thus the meaning of the words used in the specific context: it does not matter that the message may appear ambiguous to another audience or in another context. On the other hand, if the discourse is still ambiguous even when considered in its context, it cannot be found beyond reasonable doubt to constitute direct and public incitement to commit genocide.

702. The Appeals Chamber is not persuaded that the *Streicher* and *Fritzsche* cases demonstrate that only discourse explicitly calling for extermination, or discourse that is entirely unambiguous for all types of audiences, can justify a conviction for direct and public incitement to commit genocide. First, it should be recalled that Streicher and Fritzsche were not charged with direct and public incitement to commit genocide, as there was no such crime under international law at the time. Second, it should be noted that the reason Fritzsche was acquitted is not because his pronouncements were not explicit enough, but rather because

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[1670] *Ibid.*, para. 1011.
[1671] *Akayesu* Trial Judgement, paras. 557-558 (footnote omitted).
[1672] *Muvunyi* Trial Judgement, para. 502; *Kajelijeli* Trial Judgement, para. 853; *Niyitegeka* Trial Judgement, para. 431.
[1673] *Mugesera* v. *Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, 2005 SCC 40, paras. 87 and 94. The Appeals Chamber summarily dismisses Appellant Nahimana's submission that the contrary conclusions of the Federal Court of Appeal and the Supreme Court of Canada demonstrate the uncertainties and dangers of seeking to interpret speech, the Judgement of the Supreme Court of Canada having reversed that of the Federal Court of Appeal.
[1674] In this respect, while it is not necessary to prove that the pronouncements in question had actual effects, the fact that they did have such effects can be an indication that the receivers of the message understood them as direct incitement to commit genocide. *Cf. infra* XIII. A. 3. (c) (i) .

they did not, implicitly or explicitly, "[intend] to incite the German people to commit atrocities on conquered peoples".[1675]

703. The Appeals Chamber therefore concludes that it was open to the Trial Chamber to hold that a speech containing no explicit appeal to commit genocide, or which appeared ambiguous, still constituted direct incitement to commit genocide in a particular context. The Appeals Chamber will examine below if it was reasonable to conclude that the speeches in the present case constituted direct and public incitement to commit genocide of the Tutsi.[1676]

(c) Reliance on the intent of the speech's author, its potential dangers and the author's political and community affiliation

(i) Intent

704. Referring to paragraphs 1000 to 1002 of the Judgement, Appellants Nahimana and Ngeze contend that the Trial Chamber erred in holding that speech containing no direct appeal to extermination could nevertheless constitute the *actus reus* of the crime of incitement simply because its author had a criminal intent.[1677]

705. The Appeals Chamber is not satisfied that the Trial Chamber held that speech containing no direct appeal to commit genocide constituted direct and public incitement to commit genocide simply because its author supposedly had a criminal intent. The relevant paragraphs of the Trial Judgement read as follows:

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[1675] Nuremberg Judgement, pp. 161-163:

> War crimes and crimes against humanity
> The prosecution has asserted that Fritzsche incited and encouraged the commission of war crimes, by deliberately falsifying news to arouse in the German people those passions which led them to the commission of atrocities under Counts Three and Four. His position and official duties were not sufficiently important, however, to infer that he took part in originating or formulating propaganda campaigns.
> Excerpts in evidence from his speeches show definite anti-Semitism on his part. He broadcast, for example, that the war had been caused by Jews and said their fate had turned out "as unpleasant as the Fuehrer predicted". But these speeches did not urge persecution or extermination of Jews. There is no evidence that he was aware of their extermination in the East. The evidence moreover shows that he twice attempted to have publication of the anti-Semitic "Der Sturmer" suppressed, though unsuccessfully.
> In these broadcasts Fritzsche sometimes spread false news, but it was not proved he knew it to be false. For example, he reported that no German U-boat was in the vicinity of the "Athenia" when it was sunk. This information was untrue; but Fritzsche, having received it from the German Navy, had no reason to believe it was untrue.
> It appears that Fritzsche sometimes made strong statements of a propagandistic nature in his broadcasts. But the Tribunal is not prepared to hold that they were intended to incite the German people to commit atrocities on conquered peoples, and he cannot be held to have been a participant in the crimes charged. His aim was rather to arouse popular sentiment in support of Hitler and the German war effort.

[1676] In particular, the Appeals Chamber will examine whether it was reasonable for the Trial Chamber to find that the words *Inkotanyi* and *Inyenzi* as used in certain RTLM broadcasts referred to the Tutsi population as a whole.

[1677] Nahimana Appellant's Brief, paras. 208-210; Ngeze Appellant's Brief, paras. 238-239. The Appeals Chamber notes that Appellant Nahimana also makes references to paragraph 1029 of the Judgement, but considers that this paragraph raises a different issue, which is addressed below.

> 1001. Editors and publishers have generally been held responsible for the media they control. In determining the scope of this responsibility, the importance of intent, that is the purpose of the communications they channel, emerges from the jurisprudence – whether or not the purpose in publicly transmitting the material was of a *bona fide* nature (e.g. historical research, the dissemination of news and information, the public accountability of government authorities). The actual language used in the media has often been cited as an indicator of intent. For example, in the *Faurisson* case, the term "magic gas chamber" was seen by the UN Human Rights Committee as suggesting that the author was motivated by anti-Semitism rather than pursuit of historical truth. In the *Jersild* case, the comments of the interviewer distancing himself from the racist remarks made by his subject were a critical factor for the European Court of Human Rights in determining that the purpose of the television program was the dissemination of news rather than propagation of racist views.
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> 1002. In the Turkish cases on national security concerns, the European Court of Human Rights carefully distinguishes between language that explains the motivation for terrorist activities and language that promotes terrorist activities. Again, the actual language used is critical to this determination. In *Sürek (No.1),* the Court held a weekly review responsible for the publication of letters from readers critical of the Government, citing the strong language in these letters, which led the Court to view the letters as "an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices…" In contrast, in *Sürek and Özdemir* the European Court upheld the right of the same weekly review to publish an interview with a PKK leader, in which he affirmed his determination to pursue his objective by violent means on the grounds that the text as a whole should be considered newsworthy rather than as "hate speech and the glorification of violence". The sensitivity of the Court to volatile language goes to the determination of intent, as evidenced by one of the questions put forward in a concurring opinion in this case: "Was the language intended to inflame or incite to violence?"

706. It is apparent from Paragraph 1001 of the Trial Judgement that the Trial Chamber employed the term "intent" with reference to the purpose of the speech, as evidenced, *inter alia*, by the language used, and not to the intent of its author.[1678] The Appeals Chamber is of the opinion that the purpose of the speech is indisputably a factor in determining whether there is direct and public incitement to commit genocide, and it can see no error in this respect on the part of the Trial Chamber. It is plain that the Trial Chamber did not find that a speech constitutes direct and public incitement to commit genocide simply because its author had criminal intent.

707. Appellants Barayagwiza and Ngeze further submit that the Trial Chamber erred in finding in paragraph 1029 of the Judgement that the media's intention to cause genocide was evidenced in part by the fact that genocide did occur.[1679] The Prosecutor responds that the Trial Chamber committed no error and submits that the fact that genocide was perpetrated can be one of many indices of *mens rea*.[1680]

708. Paragraph 1029 of the Trial Judgement reads as follows:

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[1678] See also Judgement, para. 1003 ("A critical distance was identified as the key factor in evaluating the purpose of the publication").
[1679] Barayagwiza Appellant's Brief, paras. 132-133; Barayagwiza Brief in Reply, para. 87; Ngeze Appellant's Brief, paras. 277-278.
[1680] Respondent's Brief, para. 499. At paragraph 500, the Prosecutor cites several elements which, in his view, demonstrate that it was reasonable for the Trial Chamber to find that Appellant Barayagwiza had the requisite criminal intent.

> With regard to causation, the Chamber recalls that incitement is a crime regardless of whether it has the effect it intends to have. In determining whether communications represent an intent to cause genocide and thereby constitute incitement, the Chamber considers it significant that in fact genocide occurred. That the media intended to have this effect is evidenced in part by the fact that it did have this effect.

709. The Appeals Chamber is not persuaded that the mere fact that genocide occurred demonstrates that the journalists and individuals in control of the media intended to incite the commission of genocide. It is, of course, possible that these individuals had the intent to incite others to commit genocide and that their encouragement contributed significantly to the occurrence of genocide (as found by the Trial Chamber), but it would be wrong to hold that, since genocide took place, these individuals necessarily had the intent to incite genocide, as the genocide could have been the result of other factors.[1681] However, the Appeals Chamber notes that paragraph 1029 of the Judgement concludes that the fact that "the media intended to [cause genocide] is evidenced *in part* by the fact that it did have this effect". The Appeals Chamber cannot conclude that this reasoning was erroneous: in some circumstances, the fact that a speech leads to acts of genocide could be an indication that in that particular context the speech was understood to be an incitement to commit genocide and that this was indeed the intent of the author of the speech. The Appeals Chamber, notes, however, that this cannot be the only evidence adduced to conclude that the purpose of the speech (and of its author) was to incite the commission of genocide.

(ii) Potential dangers

710. As noted above, Appellant Nahimana contends that the Trial Chamber erred in relying on the potential dangers of a speech in determining whether it constitutes direct incitement to commit genocide.[1682] He argues that, even though some speeches inciting hatred may contain inherent dangers, they do not necessarily qualify as direct and public incitement to commit genocide, which, he contends, presupposes an unequivocal call for extermination.[1683]

711. The Appeals Chamber is not persuaded that the Trial Chamber took the view that any potentially dangerous hate speech constitutes direct incitement to commit genocide. The Trial Chamber referred to the possible impact of certain remarks in its analysis of the context in which such remarks were made. As explained above, the meaning of a message can be intrinsically linked to the context it which it is formulated. In the opinion of the Appeals Chamber, the Trial Chamber was correct in concluding that it was appropriate to consider the potential impact in context – notably, how the message would be understood by its intended audience – in determining whether it constituted direct and public incitement to commit genocide.[1684] The appeal on this point is dismissed.

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[1681] For example: the fact that many civilians were killed in the course of a military offensive does not necessarily mean that the attackers intended to target civilians, as civilians could have been killed as a result of misdirected fire.

[1682] Nahimana Appellant's Brief, paras. 211-213, referring to the Judgement, paras. 1004, 1006, 1007, 1015, 1022.

[1683] *Ibid.*, para. 212.

[1684] In this respect, the Appeals Chamber points out that the crime of direct and public incitement to commit genocide is punishable as such precisely because of the potential dangers inherent in discourse directly and publicly inciting the commission of genocide.

(iii) Political or community affiliation

712. Appellant Nahimana submits that the Trial Chamber erred in evaluating the criminal character of a speech on the basis of the political or community affiliation of its author.[1685] He bases his submission on paragraphs 1008 and 1009 of the Judgement:

> 1008. The Chamber notes that international standards restricting hate speech and the protection of freedom of expression have evolved largely in the context of national initiatives to control the danger and harm represented by various forms of prejudiced communication. The protection of free expression of political views has historically been balanced in the jurisprudence against the interest in national security. The dangers of censorship have often been associated in particular with the suppression of political or other minorities, or opposition to the government. The special protections developed by the jurisprudence for speech of this kind, in international law and more particularly in the American legal tradition of free speech, recognize the power dynamic inherent in the circumstances that make minority groups and political opposition vulnerable to the exercise of power by the majority or by the government. These circumstances do not arise in the present case, where at issue is the speech of the so-called "majority population", in support of the government. The special protections for this kind of speech should accordingly be adapted, in the Chamber's view, so that ethnically specific expression would be more rather than less carefully scrutinized to ensure that minorities without equal means of defence are not endangered.
>
> 1009. Similarly, the Chamber considers that the "wider margin of appreciation" given in European Court cases to government discretion in its restriction of expression that constitutes incitement to violence should be adapted to the circumstance of this case. At issue is not a challenged restriction of expression but the expression itself. Moreover, the expression charged as incitement to violence was situated, in fact and at the time by its speakers, not as a threat to national security but rather in defence of national security, aligning it with state power rather than in opposition to it. Thus there is justification for adaptation of the application of international standards, which have evolved to protect the right of the government to defend itself from incitement to violence by others against it, rather than incitement to violence on its behalf against others, particularly as in this case when the others are members of a minority group.

713. The Appeals Chamber has a certain difficulty with these paragraphs. It notes, on the one hand, that the relevant issue is not whether the author of the speech is from the majority ethnic group or supports the government's agenda (and by implication, whether it is necessary to apply a stricter standard), but rather whether the speech in question constitutes direct incitement to commit genocide. On the other hand, it recognises that the political or community affiliation of the author of a speech may be regarded as a contextual element which can assist in its interpretation.

714. In the final analysis, the Appeals Chamber is not persuaded that the Trial Chamber was in effect more inclined to conclude that certain speeches constituted direct incitement to commit genocide because they were made by Hutu or by individuals speaking in support of the Government at the time. In this respect, the Appeals Chamber notes that, in its analysis of the charges against the Appellants, the Trial Chamber made no reference to their political or community affiliation.[1686] The Appeals Chamber concludes that no error has been shown.

[1685] Nahimana Appellant's Brief, paras. 214-216.
[1686] Judgement, paras. 1016-1039.

(iv) Conclusion

715. The Appeals Chamber is of the opinion that the Trial Chamber did not confuse mere hate speech with direct incitement to commit genocide. Moreover, it was correct in holding that the context is a factor to consider in deciding whether discourse constitutes direct incitement to commit genocide. For these reasons, the Appeals Chamber concludes that the Trial Chamber committed no error with respect to the notion of direct incitement to commit genocide.

## B. Is incitement a continuing crime?

716. The Trial Chamber held that the crime of direct and public incitement to commit genocide "is an inchoate offence that continues in time until the completion of the acts contemplated",[1687] and that "the entirety of RTLM broadcasting, from July 1993 through July 1994, [...] falls within the temporal jurisdiction of the Tribunal to the extent that the broadcasts are deemed to constitute direct and public incitement to genocide".[1688] The Appellants contend that these findings amount to errors of law.[1689]

### 1. Submissions of the Parties and of *Amicus Curiae*

717. The Appellants submit that the Trial Chamber confused the notion of an inchoate crime and that of a continuing crime; that the crime of direct and public incitement exists independently of whether or not genocide is committed; that it is consummated in all its elements through the public dissemination of a speech and is hence precisely situated in time, even if it can be repeated and its effects may continue over a period; that it cannot be compared to the crime of conspiracy to commit genocide; and that the commission of genocide in 1994 thus cannot justify the inclusion within the jurisdiction of the Tribunal of crimes of incitement committed before 1 January 1994.[1690] The position adopted in the *Amicus Curiae* Brief is to the same effect.[1691]

718. Appellant Nahimana further submits that the Trial Chamber criminalized RTLM "programming" in general without specifying the speeches constituting the crime of direct and public incitement to commit genocide.[1692] He submits that the Trial Chamber improperly extended criminalization to "the collective and continuing programming of speeches, which in themselves were not criminal and were by different authors", thereby implying a form of

[1687] *Ibid.*, para. 1017. See also para. 104 (the crime of incitement "continues to the time of the commission of the acts incited").
[1688] Judgement, para. 1017.
[1689] Nahimana Appellant's Brief, paras. 55-60, 71-73; Nahimana's Response to the *Amicus Curiae* Brief, p. 4; Barayagwiza Appellant's Brief, paras. 258-261; Barayagwiza Brief in Reply, paras. 21-22; Barayagwiza's Response to the *Amicus Curiae* Brief, para. 15; Ngeze Appellant's Brief, paras. 14, 15, 24-33, 43, 255-257; Ngeze Brief in Reply, paras. 26, 29-38; Ngeze's Response to the *Amicus Curiae* Brief, p. 6.
[1690] Nahimana Appellant's Brief, paras. 55-60, 71-73; Barayagwiza Appellant's Brief, paras. 259 and 261; Barayagwiza's Response to the *Amicus Curiae* Brief, para. 15; Ngeze Appellant's Brief, paras. 14, 24-33, 256; Ngeze Brief in Reply, paras. 26, 29-38; Ngeze's Response to the *Amicus Curiae* Brief, p. 6.
[1691] *Amicus Curiae* Brief, pp. 19-24. The A*micus Curiae* submits that the crime is consummated as soon as an individual publicly encourages his audience to commit genocide with the intent to incite; it maintains that the Trial Chamber did not have jurisdiction to convict the Appellants on the basis of incitement prior to 1994.
[1692] Nahimana Appellant's Brief, paras. 189-190. Nahimana's Response to the *Amicus Curiae* Brief, pp. 2-3.

collective responsibility that is impermissible in international law and setting "no clear-cut criteria whereby a journalist can be aware, at the time when he is speaking, of the extent of his right to free speech".[1693]

719. The Prosecutor responds that the Trial Chamber did not err, since direct and public incitement to commit genocide can be characterized as a continuing crime.[1694] In this respect, he argues that there is a continuing offence when "an accused commits a number of acts separated in time and place but connected by his *mens rea*; the acts form the constituent parts of a larger design".[1695] He contends that the definition of genocide and that of direct and public incitement to commit genocide can encompass a persistent or ongoing course of conduct.[1696] The Prosecutor accordingly submits that the Trial Chamber was correct in relying on acts occurring before 1994 in order to conclude that a violation of international humanitarian law took place in 1994.[1697] He contends that, with respect to the continuing crime of direct and public incitement to commit genocide, it would be difficult to distinguish between events prior to 1994 and those in 1994, since, when an accused "embarks upon a course directed towards inciting, or instigating genocide, every discrete act which is done in the pursuit of that goal necessarily builds upon and renews the preceding acts done for the same purpose".[1698] Hence, for the Prosecutor, the publications of *Kangura* and the broadcasts of RTLM formed part of a continuous transaction calculated to incite genocide.[1699]

## 2. Analysis

### (a) Inchoate and continuing crimes

720. The Appeals Chamber considers that the notions "inchoate" and "continuing" are independent of one another. An inchoate offence ("*crime formel*" in civil law) is consummated simply by the use of a means or process calculated to produce a harmful effect, irrespective of whether that effect is produced.[1700] In other words, an inchoate crime penalizes the commission of certain acts capable of constituting a step in the commission of another crime, even if that crime is not in fact committed.[1701] As stated at the beginning of this chapter, the crime of direct and public incitement to commit genocide is an inchoate offence, like conspiracy to commit genocide (Article 2(3)(b) of the Statute) and attempt to commit genocide (Article 2(3)(d) of the Statute).

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[1693] Nahimana's Response to the *Amicus Curiae* Brief, p. 3. See also T(A) 18 January 2007, pp. 37-38.
[1694] Respondent's Brief, paras. 127-140; Prosecutor's Response to the *Amicus Curiae* Brief, paras. 22-24.
[1695] *Ibid.*, para. 130.
[1696] *Ibid.*, paras. 134-135 ("In the present case, if an accused publishes or broadcasts a number of messages on the same theme, why cannot they be considered to be the one act of incitement?"). In paragraph 136, the Prosecutor submits that this approach is consistent with that in the case of Streicher, who was convicted of incitement to murder and extermination for the dozens of articles he published demanding the annihilation and extermination of the Jews.
[1697] Respondent's Brief., para. 137.
[1698] *Idem*. In paragraph 138, the Prosecutor adds that incitement to commit genocide is "a substantial task".
[1699] Respondent's Brief, paras. 138-140; Prosecutor's Response to the *Amicus Curiae* Brief, para. 22.
[1700] See Roger Merle et André Vitu, *Traité de droit criminel*, 7ème *édition, Tome* 1, Paris, 1997, No.° 514. See also *Musema* Trial Judgement, para. 193, and *Akayesu* Trial Judgement, para. 562.
[1701] In this respect, see Black's Law Dictionary (8th ed., 2004), definition of "inchoate offense" ("A step toward the commission of another crime, the step in itself being serious enough to merit punishment").

721. A continuing crime implies an ongoing criminal activity. According to Black's Law Dictionary, a continuing crime is:

> 1. A crime that continues after an initial illegal act has been consummated; a crime that involves ongoing elements […] 2. A crime (such as driving a stolen vehicle) that continues over an extended period.[1702]

(b) Is direct and public incitement to commit genocide a continuing crime?

722. The Appeals Chamber considers that the IMT decision in *Streicher* sheds no light on this question, as the IMT did not rule on the question of continuity. Nor does the jurisprudence of the Tribunal appear to have addressed this issue. In particular, the Trial Chamber in the *Akayesu* case stated that the crime of direct and public incitement to commit genocide is an inchoate offence, but did not consider whether it was a continuing crime.[1703]

723. The Appeals Chamber is of the opinion that the Trial Chamber erred in considering that incitement to commit genocide continues in time "until the completion of the acts contemplated".[1704] The Appeals Chamber considers that the crime of direct and public incitement to commit genocide is completed as soon as the discourse in question is uttered or published, even though the effects of incitement may extend in time. The Appeals Chamber accordingly holds that the Trial Chamber could not have jurisdiction over acts of incitement having occurred before 1994 on the grounds that such incitement continued in time until the commission of the genocide in 1994.

724. The Prosecutor submits, however, that the *Kangura* articles and the RTLM broadcasts constituted one continuing incitement to commit genocide, and that the Trial Chamber could therefore convict the Appellants on the basis of the totality of the articles published in *Kangura*, and of the RTLM broadcasts, even those prior to 1994. The Appeals Chamber is not convinced by this argument. It recalls that, even where offences may have commenced before 1994 and continued in 1994, the provisions of the Statute on the temporal jurisdiction of the Tribunal mean that a conviction may be based only on criminal conduct having occurred during 1994.[1705] Thus, even if it could be concluded that the totality of the articles published in *Kangura* and of the RTLM broadcasts constituted one continuing incitement to commit genocide (a question that the Appeals Chamber does not consider necessary to decide here), the fact would remain that the Appellants could be convicted only for acts of direct and public incitement to commit genocide carried out in 1994.

725. The Appeals Chamber would, however, add that, even if a conviction for incitement could not be based on any of the 1993 RTLM broadcasts, the Trial Chamber could have considered them, for example as contextual elements of the 1994 broadcasts.[1706] Thus the Appeals Chamber is of the opinion that the 1993 broadcasts could explain how the RTLM listeners perceived the 1994 broadcasts and the impact these broadcasts may have had.

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[1702] Bryan A. Garner (ed.), Black's Law Dictionary, 8th ed. (Saint Paul, Minnesota: Thomson West Publishing Company, 2004), p. 399.
[1703] *Akayesu* Trial Judgement, paras. 549-562.
[1704] Judgement, para. 1017.
[1705] See *supra* VIII. B. 4.
[1706] See *supra* VIII. B. 3.

Similarly, the pre-1994 *Kangura* issues were not necessarily inadmissible, since they could be relevant and have probative value in certain respects.

(c) The acts constituting direct and public incitement to commit genocide must be specified

726. The Appeals Chamber agrees with Appellant Nahimana that an accused cannot be convicted simply on the basis of "programming". As noted *supra*, it appears from the *travaux préparatoires* of the Genocide Convention that only specific acts of direct and public incitement to commit genocide were sought to be criminalized and not hate propaganda or propaganda tending to provoke genocide.[1707] Thus the Appeals Chamber is of the opinion that the acts constituting direct and public incitement to commit genocide must be clearly identified.

727. In the present case, it is not certain that the Trial Chamber convicted Appellant Nahimana on the basis of "programming". The Trial Chamber does not appear to have considered that the entirety of RTLM broadcasting constituted direct and public incitement to commit genocide, but rather that certain broadcasts did.[1708] However, the Appeals Chamber agrees with the Appellant that the Trial Chamber should have identified more clearly all of the broadcasts which, in its opinion, constituted direct and public incitement to commit genocide. Thus the Trial Chamber erred in this respect.

## C. Application of the legal principles to the facts of the case

728. The Appellants contend that the Trial Chamber erred in convicting them of direct and public incitement to commit genocide.[1709] The Appeals Chamber will now consider whether the Trial Chamber could find that certain RTLM broadcasts in 1994, statements made by some CDR members and *Kangura* articles published in 1994 constituted direct and public incitement to commit genocide. The issue of each Appellant's responsibility is addressed in the following section.

### 1. The RTLM broadcasts

(a) Submissions of the Parties

729. Appellants Nahimana and Barayagwiza contend that RTLM broadcasts prior to 6 April 1994 did not constitute direct and public incitement to commit genocide.[1710]

730. Appellant Nahimana first argues that the historical and political context precludes considering the broadcasts made prior to 6 April 1994 as calls for the extermination of the Tutsi population: the editorial policy prior to 6 April 1994 was not to target Tutsi civilians for

[1707] See *supra*, footnote 1658.
[1708] See Judgement, para. 1032 (referring to the broadcast of 4 June 1994 as "illustrative of the incitement engaged in by RTLM"). See also para. 483 (referring to the broadcast of 13 May 1994 and the one of 5 June 1994 as explicitly calling for extermination).
[1709] Nahimana Appellant's Brief, paras. 186-536; Barayagwiza Appellant's Brief, paras. 262-270; Ngeze Appellant's Brief, paras. 217-285, Ngeze's Brief in Reply, paras. 81-82.
[1710] Nahimana Appellant's Brief, paras. 217-232; Barayagwiza Appellant's Brief, para. 263.

extermination but to denounce in a time of war the actions and intentions of the RPF.[1711] He further argues that an unbiased analysis of the 18 excerpts from broadcasts made before 6 April 1994, which were admitted by the Judges as evidence against the Accused, does not reveal any utterance amounting to incitement to hatred and violence against the Tutsi population and much less direct and public incitement to commit genocide.[1712] He further contends that RTLM journalists' statements were ambiguous (in particular in the use of the terms *Inyenzi* and *Inkotanyi*) and could not therefore constitute direct incitement to commit genocide against the Tutsi.[1713]

731. Appellant Nahimana argues that the recordings of RTLM broadcasts constitute the "best evidence" to assess the existence of the crime of incitement, that their huge volume, covering the entire period of activity of Radio RTLM, reinforces their probative value and that the testimonies of Prosecution witnesses are not sufficiently reliable and precise for making an assessment of the actual content of the broadcasts, let alone overturning the conclusions emerging from the recordings themselves.[1714] That said, Appellant Nahimana contends that a significant number of Prosecution witnesses, including Witnesses Nsanzuwera and GO, confirmed that up to 6 April 1994 there was no call for killings,[1715] and that Witnesses AGR and Ruggiu also confirmed that prior to 6 April 1994 the terms *Inyenzi* and *Inkotanyi* referred only to RPF combatants and not to the Tutsi population as a whole.[1716] Appellant Nahimana further contends that Expert Witness Des Forges had no competence in media issues, particularly for linguistic reasons; her evidence on the meaning and scope of the broadcasts is simply "hearsay", the source of which is not specified.[1717] He also argues that Expert Witness Ruzindana did not have the requisite independence for his testimony to be deemed credible, since he had been employed by the Prosecutor to select, transcribe and translate broadcasts intended to bolster the Prosecution case.[1718]

732. Appellant Barayagwiza adds that the Trial Chamber erred in concluding that, after 6 April 1994, RTLM entered systematically into a process of incitement "to take action against the enemy and enemy accomplices, equated with the Tutsi population",[1719] since no evidence was adduced that RTLM journalists directly and specifically equated the Tutsi with the enemy and that the terms *Inyenzi* and *Inkotanyi* varied according to the context.[1720] In particular, Appellant Barayagwiza argues that the broadcast of 4 June 1994 (cited by the Trial

[1711] *Ibid.*, paras. 217-220. In paragraph 198, the Appellant adds that "the fact of targeting individuals by name and identifying them by name on the basis of perceived membership of a rebellion is insufficient to establish the crime, even though the ethnic identity of the individual in question would constitute a determining factor in disclosure of his identity".
[1712] Nahimana Appellant's Brief, paras. 222-224. See also paras. 194-196. Appellant Nahimana further submits that it has not been established that RTLM broadcasts prior to 6 April 1994 resulted in attacks against Tutsi (Nahimana Appellant's Brief, paras. 233-241). However, as explained above (*supra* XIII. A.), direct and public incitement to commit genocide is punishable as such, and it is not necessary to show that the speech in question substantially contributed to the commission of genocidal acts.
[1713] Nahimana Appellant's Brief, paras. 203-205. See also Barayagwiza Appellant's Brief, para. 264, and Ngeze Appellant's Brief, para. 228.
[1714] *Ibid.*, paras. 225-227.
[1715] *Ibid.*, paras. 229-230.
[1716] *Ibid.*, para. 228.
[1717] *Ibid.*, para. 231.
[1718] *Ibid.*, para. 232.
[1719] Barayagwiza Appellant's Brief, para. 265.
[1720] *Ibid.*, paras. 265-267.

Chamber as an example of direct and public incitement to commit genocide) did not call on people to kill the Tutsi, but rather to take action against those whom RTLM perceived as enemies.[1721] Appellant Barayagwiza further contends that the Trial Chamber failed to take into account the fact that "these broadcasts were made at a time when the country was under attack, and [that] it could therefore be expected that their virulence would increase in response to fear of what the consequence would be if the RPF invasion were successful".[1722]

733. The Prosecutor responds that the testimonies of Witnesses Nsanzuwera and GO as well as others show that genocidal discourse was the substance of broadcasts made by RTLM from its inception.[1723] He argues that it was within the Trial Chamber's discretion to admit Expert Witness Des Forges' evidence and give it such probative weight as it deemed appropriate, recalling that the Trial Chamber has a wide discretion in admitting hearsay evidence.[1724] He argues that Alison Des Forges had proven expertise in the study of the Rwandan conflict and knew from her personal experience that the "RTLM had an enormous impact in encouraging the killing of the Tutsis and of others who might support and protect the Tutsis during this genocide".[1725] The Prosecutor further submits that Appellant Nahimana failed to adduce any evidence to show that Expert Witness Ruzindana's testimony lacked credibility and was unreliable.[1726]

734. The Prosecutor does not respond directly to Appellant Barayagwiza's contention that RTLM broadcasts after 6 April 1994 were not direct and public incitement to commit genocide, but submits elsewhere in his Respondent's Brief that RTLM broadcasts both before and after 6 April 1994 incited the population to take action against the Tutsi.[1727]

(b) Broadcasts prior to 6 April 1994

735. As stated above, the Trial Chamber did not clearly identify all broadcasts which it deemed constituted direct and public incitement to commit genocide, but merely mentioned one broadcast after 6 April 1994 as an example of this crime.[1728] Paragraph 486 of the Judgement – in which the Trial Chamber found that: "After 6 April 1994, the virulence and the intensity of RTLM broadcasts propagating ethnic hatred and calling for violence increased" – could give the impression that the Trial Chamber found that it was only from 6 April 1994 that RTLM incited the population directly and publicly to commit genocide. On the other hand, this same excerpt – notably read in the light of paragraphs 473 to 480, 487 and 949 of the Judgement – clearly suggests that RTLM was already calling for violence against the Tutsi prior to 6 April 1994, which could constitute direct and public incitement to commit genocide.

[1721] *Ibid.*, para. 265.
[1722] *Ibid.*, para. 267.
[1723] Respondent's Brief, para. 326. See also *ibid.*, para. 397 ("Both the pre and the post 6 April 1994 RTLM broadcasts, explicitly identified the enemy as the Tutsi, or equated the RPF (*Inkotanyi* or *Inyenzi*) with all Tutsis, and called upon the public to take action").
[1724] Respondent's Brief, para. 328.
[1725] *Ibid.*, para. 329.
[1726] *Ibid.*, para. 330.
[1727] See, for example, Respondent's Brief, para. 397.
[1728] Judgement, paras. 1031-1032, referring to the broadcast of 4 June 1994.

736. The vagueness of the Judgement, in itself an error on the part of the Trial Chamber,[1729] compels the Appeals Chamber to examine the broadcasts between 1 January and 6 April 1994 referred to in the Judgement in order to determine whether one or more of them directly incited the commission of genocide. As recalled in the Introduction,[1730] when the Trial Chamber errs in law, the Appeals Chamber must determine whether it is itself satisfied beyond reasonable doubt in regard to the disputed finding before it can affirm it on appeal.

(i) Historical context and editorial policy up to 6 April 1994

737. The Appeals Chamber will begin by considering Appellant Nahimana's submission that the historical and political context shows that the broadcasts prior to 6 April 1994 did not call for the extermination of the Tutsi population but rather denounced the RPF's actions and intentions. To this end, the Appellant refers back to the arguments in his Closing Brief at trial.[1731] The Appeals Chamber first recalls that an appellant's brief must contain all his submissions.[1732] However, even if the submissions in Nahimana's Closing Brief at trial were to be considered, they would not suffice to show that the Trial Chamber erred: an appellant may not merely reiterate arguments that were not accepted by the Trial Chamber; he must demonstrate the error committed by the Trial Chamber. In any event, the Appeals Chamber notes that the Trial Chamber did take into account the historical and political context and accepted that certain RTLM broadcasts expressed a legitimate fear in the face of the armed insurrection by the RPF.[1733]

(ii) The broadcasts

738. The Appeals Chamber notes that Appellant Nahimana's arguments as to the content and meaning of the broadcasts prior to 6 April 1994 are only developed in Annex 5 of his Appellant's Brief.[1734] As already explained, those arguments should have been made in the body of the Brief.[1735] The Appeals Chamber will therefore disregard them.

739. The Appeals Chamber would begin by pointing out that the broadcasts must be considered as a whole and placed in their particular context. Thus, even though the terms *Inyenzi* and *Inkotanyi* may have various meanings in various contexts (as with many words in every language), the Appeals Chamber is of the opinion that it was reasonable for the Trial

[1729] As recalled in the *Naletilić and Martinović* Appeal Judgement, paragraph 603, and in the *Limaj et al.* Appeal Judgement, paragraph 81, a trial judgement must be sufficiently reasoned to allow the parties to exercise their right of appeal and the Appeals Chamber to assess the Trial Chamber's conclusions.
[1730] See *supra* I. E.
[1731] See Nahimana Appellant's Brief, para. 220, referring to pp. 239-244 and 380-388 of Nahimana's Closing Brief.
[1732] See Practice Directions on Formal Requirements for Appeals from Judgement, para. 4. An appellant may not circumvent the provisions regarding the length of briefs on appeal by incorporating arguments made in other documents (Practice Direction on the Length of Briefs and Motions on Appeal, para. 4 by analogy).
[1733] See, for example, Judgement, para. 468.
[1734] Nahimana Appellant's Brief, para. 224, referring to Annex 5 of the same brief. The Appellant refers also to pp. 231-244, 380-388 of his Closing Brief before the Trial Chamber.
[1735] The Appeals Chamber recalls that annexes to an appeal brief cannot contain submissions, but only "references, source materials, items from the record, exhibits, and other relevant, non-argumentative material": Practice Direction on the Length of Briefs and Motions on Appeal, para. 4. See Order Expunging from the Record Annexures "A" Through "G" of Appendix "A" to the Consolidated Respondent's Brief Filed on 22 November 2005, 30 November 2005. See also *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Decision on the Motion to Strike Defence Brief in Reply and Annexes A-D, 7 June 2007, paras. 6, 8-11.

Chamber to conclude that these expressions could in certain cases be taken to refer to the Tutsi population as a whole.[1736] The Appeals Chamber further considers that it was reasonable to conclude that certain RTLM broadcasts had directly equated the Tutsi with the enemy.[1737]

740. The Judgement specifically considers the following broadcasts made between 1 January and 6 April 1994:

- The broadcast of 1 January 1994[1738]

741. This broadcast is referred to in paragraphs 369 and 370 of the Judgement. The Trial Chamber found that this RTLM broadcast "heated up heads".[1739] The Appeals Chamber agrees with the Trial Chamber: the broadcast of 1 January 1994 encouraged ethnic hatred. The Appeals Chamber notes that the broadcast also wanted to "warn" the Hutu majority against an impending "threat". The implicit message was perhaps that the Hutu had to take action to counter that "threat". However, in the absence of other evidence to show that the message was actually a call to commit acts of genocide against the Tutsi, the Appeals Chamber cannot conclude beyond reasonable doubt that the broadcast was a direct and public incitement to commit genocide.

- The broadcast of 5 January 1994[1740]

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[1736] For example, the broadcast of 5 January 1994, extracts from which are cited below in footnote 1740 (see also Judgement, paras. 351, 355 and 471) and those of 30 November 1993 (Exhibit C7, CD 104, K0159514, cited in paragraph 358 of the Judgement: "Earlier you heard an *Inkotanyi* woman who telephoned to insult me. You heard how she warned me, but I cannot stand the atrocities committed by the *Inkotanyi*. They are people like everyone else. We know that most of them are Tutsi and that not all Tutsis are bad. And yet, the latter rather than help us condemn them, support them.") and 1 December 1993 (Exhibit C7, CD 104, C5/K95, RTLM 0142, K0159515, cited in paragraph 359 of the Judgement: "*Inkotanyi* is an organization of refugees who left in 1959 and others even following that. But it is mainly an ethnic organization") clearly equated the Tutsi with *Inkotanyi*.

[1737] See Judgement, para. 362 (broadcast of 1 February 1994, extracts from which are cited below in footnote 1742, where Kantano Habimana stated that "Tutsis and the RPF are the same"), paras. 369-370 (broadcast of 1 January 1994, extracts from which are cited below in footnote 1738, where Kantano Habimana presented the Tutsi as enemies of the majority people, *i.e.* the Hutu).

[1738] The Judgement cites the following excerpt from Exhibit P36/38D, pp. 12 -13:

> Very small children, Tutsi small children came and said: "Good morning Kantano. We like you but do not heat up our heads." I split my sides with laughter and said: "You kids, how do I heat up your heads?" They said: "You see, we are few and when you talk of Tutsis, we feel afraid. We see that CDR people are going to pounce on us. Leave that and do not heat up our heads."
>
> You are really very young… That is not what I mean. However, in this war, in this hard turn that Hutus and Tutsis are turning together, some colliding on others, some cheating others in order to make them fall fighting… I have to explain and say: "This and that...The cheaters are so-and-so…" You understand… If Tutsis want to seize back the power by tricks… Everybody has to say: "Mass, be vigilant… Your property is being taken away. What you fought for in '59 is being taken away."… So kids, do not condemn me. I have nothing against Tutsis, or Twas, or Hutus. I am a Hutu but I have nothing against Tutsis. But in this political situation I have to explain: "Beware, Tutsis want to take things from Hutus by force or tricks." So, there is not any connection in saying that and hating the Tutsis. When a situation prevails, it is talked of.

[1739] Judgement, para. 370.

[1740] The Judgement cites the following excerpt from Exhibit 1D9, pp. 3354 *bis*-3352 *bis*, p. 3347 *bis*

> The *Inkotanyi* said, "Kantano hates the *Inkotanyi* so much; he hates the Tutsi. We really want him. We must get that Kantano of RTLM. We must argue with him and make him

742. This broadcast is referred to in paragraphs 351 to 356, 471 and 472 of the Judgement. The Trial Chamber found that the broadcast was an "example of inflammatory speech", that the journalist's obvious intention "was to mobilize anger against the Tutsis" and to make fun of them.[1741] However, the broadcast contains no direct and public incitement to commit genocide against the Tutsi.

- The broadcast of 1 February 1994[1742]

743. This broadcast is referred to in paragraph 362 of the Judgement. Even if the broadcast equated the Tutsi with the RPF, it was not a direct and public incitement to commit genocide against the Tutsi.

- The broadcast of 14 March 1994[1743]

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> change his mind. He has to become a partisan of the *Inkotanyi* ideology." All the *Inkotanyi* wanted to see that Hutu who "hates the Tutsi." I do not hate the Tutsi! I do not think it is their real opinion. It is not. Why should I hate the Tutsi? Why should I hate the *Inkotanyi*? The only object of misunderstanding was that the *Inkotanyi* bomb shelled us. They chased us out of our property and compelled us to live at a loss on wastelands like Nyacyonga. That was the only reason for the misunderstanding. There is no reason for hating them anymore. They have now understood that dialogue is capital. They have given up their wickedness and handed in their weapons. . .
>
> Then I met Dr. Rutaremara Tito.. . That tall Tutsi, from those species commonly called "prototypes", that man from Murambi is one of those haughty men who would say: "Shehe yewe sha!" [Hey, small Sheikh!]. . . Then he [Rutaremara] asked me to share a glass of beer with him. I briefed him on the situation here on our side. Their hotel was full of *Inkotanyi* [males] and *Inkotanyikazi* [females]. . . It was a big coming and going crowd of drinking people. Most of the people were drinking milk... [inaudible] Some drank milk because they simply had some nostalgia of it. It is surprising to see someone drinking 2 or 3 liters of Nyabisindu or Rubilizi dairy and so forth. There should have been a shortage of milk in the dairies. Someone wrote to me: "Please, help! They are taking all the milk out of the dairy!" I saw this myself. They hold a very big stock of milk.
>
> You can really feel that they want also to get to power. They want it […]
>
> He (Rutaremara) thought that his ideas could not be transmitted on RTLM. I want to prove him the contrary. An individual's ideas or an *Inkotanyi's* ideas can be transmitted on RTLM. Yes. They are also Rwandans. Their ideas would at least be known by other people. If we do not know their ideas, we will not know them either […]
>
> I hope that he now understood that even the *Inkotanyi* can speak on our radio. We do not want anybody to be silenced. Even the *Inkotanyi* can speak on our radio...
>
> So, those who think that our radio station sets people at odds with others will be amazed. You will find out that you were wrong. At the end, it will prove to be the mediator of people. It is that kind of radio that does not keep any rancor. Even its journalists do not have any ill feelings. So, the truth is said in jokes. It is not a radio to create tension as it is believed to. Those who believe [sic] that it "heats up heads" are those who lost their heads. They cannot keep on telling lies.

[1741] Judgement, para. 471.

[1742] The Judgement cites the following excerpt from Exhibit P36/44C:

> You cannot depend on PL party Lando. PL Lando is Tutsi and Tutsis and the RPF are the same.

[1743] The Judgement cites the following extracts from Exhibit P36/54B: (The French translation of the full text of this broadcast (Exhibit P36/54E) was admitted into evidence by Trial Chamber Decision of 3 June 2003.)

744. This broadcast is discussed in paragraphs 377 to 379 and 477 of the Judgement. The broadcast named a person said to be an RPF member and his family members. The broadcast did not directly call on anyone to kill the children, although it was perhaps an implicit call to do so. However, in the absence of other evidence to that effect, the Appeals Chamber cannot conclude beyond reasonable doubt that the broadcast directly and publicly incited the commission of genocide.

- The broadcast of 15 March 1994[1744]

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> At RTLM, we have decided to remain vigilant. I urge you, people of Biryogo, who are listening to us, to remain vigilant. Be advised that a weevil has crept into your midst. Be advised that you have been infiltrated, that you must be extra vigilant in order to defend and protect yourself. You may say: "Gahigi, aren't you trying to scare us?" This is not meant to scare you. I say that people must be told the truth. That is useful, a lot better than lying to them. I would like to tell you, inhabitants of Biryogo, that one of your neighbors, named Manzi Sudi Fadi, alias Bucumi, is no longer among you. He now works as a technician for Radio Muhabura. We have seized a letter he wrote to Ismael Hitimana, alias Safari,. . . heads a brigade of *Inkotanyi* there the [sic] in Biryogo area, a brigade called *Abatiganda*. He is their coordinator. It's a brigade composed of *Inkotanyi* over there in Biryogo.
>
> Our investigations indicate that brigades like this one exist in other parts of Kigali. Those living in the other areas of Kigali must also be vigilant. But, for those who may be inclined to think that this is not true - normally, I'm not supposed to read this letter on RTLM airwaves, because we respect the confidentiality of those documents – but let me tell you that in his letter - I'll read you a few excerpts just to prove that the letter is not something I made up – Manzi Sudi Fadi, alias Bicumi Higo, wrote: "The young people within *Abatiganda* brigade, I, once again, salute you, … you the young people who aspire for change in our country, and who have come together in the *Inkotanyi* RPF family, I say to you: "Love one another, be ambitious and courageous.'" He asks: "How are you doing in Biryogo?"… Such is the greeting of Manzi Sudi Fadi, alias Bicumbi to the young members of the brigade in Biryogo. As you can see, the brigade does exist in the Biryogo area. You must know that the man Manzi Sudi is no longer among you, that the brigade is headed by a man named Hitimana Ismaël, coordinator of the *Abatiganda* brigade in Biryogo. The Manzi Sud also wrote: "Be strong. I think of you a great deal. Keep your faith in the war of liberation, even though there is not much time left. Greetings to Juma, and Papa Juma. Greetings also to Espérance, Clarisse, Cintré and her younger sister, … Umutoni".

[1744] The Judgement cites the following excerpt from Exhibit C7, CD 126, K0146968-69, translation from French:

> But in Bilyogo I carried out an investigation, there are some people allied with the *Inkotanyi*, the last time, we caught Lt Eric there, I say to him that if he wants, that he comes to see where his beret is because there is even his registration, we caught him at Nyiranuma's house in Kinyambo. There are others who have become *Inkotanyi*, Marc Zuberi, good day Marc Zuberi (he laughs ironically), Marc Zuberi was a banana hauler in Kibungo. With money from the *Inkotanyi* he has just built himself a huge house there, therefore he will not be able to pretend, only several times he lies that he is *Interahamwe*; to lie that you are *Interahamwe* and when the people come to check you, they discover that you are *Inkotanyi*. This is a problem, it will be like at Ruhengeri when they (*Inkotanyi*) came down the volcanoes taking the names of the CDR as their own, the population welcomed them with joy believing that it was the CDR who had come down and they exterminated them. He also lies that he is *Interahamwe* and yet he is *Inkotanyi*, it's well-known. How does he manage when we catch his colleague *Nkotanyi* Tutsi? Let him express his grief.

745. This broadcast is discussed in paragraphs 375, 376 and 474 of the Judgement. The Trial Chamber found that this broadcast named Tutsi civilians not because they were RPF members or because there were reasons to believe so, but simply on the basis of their ethnicity.[1745] The Appeals Chamber notes the following statements from the broadcast: "How does he manage when we catch his colleague *Nkotanyi* Tutsi? Let him express his grief". Those statements were perhaps intended as an incitement to violence against the Tutsi. However, in the absence of more precise evidence to show that that was the case, the Appeals Chamber cannot conclude beyond reasonable doubt that this was a direct and public incitement to commit genocide.

- The broadcast of 16 March 1994[1746]

746. This broadcast is discussed in paragraphs 371, 372 and 473 of the Judgement. The Trial Chamber, after initially finding that there was nothing to support the view that the term *Inkotanyi* as cited in the broadcast referred to the Tutsi as a whole, even though that might be the case in other broadcasts,[1747] later stated the following:

> Although some of the broadcasts referred to the *Inkotanyi* or *Inyenzi* as distinct from the Tutsi, the repeated identification of the enemy as being the Tutsi was effectively conveyed to listeners, as is evidenced by the testimony of witnesses. Against this backdrop, calls to the public to take up arms against the *Inkotanyi* or *Inyenzi* were interpreted as calls to take up arms against the Tutsi. Even before 6 April 1994, such calls were made on the air, not only in general terms, such as the broadcast by Valerie Bemeriki on 16 March 1994, saying "we shall take up any weapon, spears, bows" […]

At first sight, the Trial Chamber's findings may appear contradictory. However, the Appeals Chamber understands that what the Trial Chamber meant was that, if the broadcast of 16 March 1994 were to be taken in isolation, it could not be concluded that the term *Inkotanyi* referred to the Tutsi as a whole; when other broadcasts were taken into account as contextual background (those naming the enemy as the Tutsi or equating the *Inkotanyi* and *Inyenzi* with the Tutsi population), the broadcast of 16 March 1994 could in fact be understood as a call to

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> Let's go to Gitega, I salute the council, let them continue to keep watch over the people because at Gitega there are many people and even Inkotanyi. There is even an old man who often goes to the CND, he lives very close to the people from MDR, near Mustafa, not one day passes without him going to the CND, he wears a robe, he has an eye nearly out of its socket, I do not want to say his name but the people of Gitega know him. He goes there everyday and when he comes from there he brings news to Bilyogo to his colleague's house, shall I name them? Gatarayiha Seleman's house, at the house of the man who limps "Ndayitabi".

[1745] Judgement, paras. 376 and 474.

[1746] The Judgement cites the following excerpt from Exhibit P36/60B:

> We know the wisdom of our armed forces. They are careful. They are prudent. What we can do is to help them whole-heartedly. A short while ago, some listeners called to confirm it to me saying: 'We shall be behind our army and, if need be, we shall take up any weapon, spears, bows'. …Traditionally, every man has one at home, however, we shall also rise up. Our thinking is that the Inkotanyi must know that whatever they do, destruction of infrastructure, killing of innocent people, they will not be able to seize power in Rwanda. Let them know that it is impossible.They should know, however, that they are doing harm to their children and grand-children because they might one day have to account for those actions.

[1747] Judgement, para. 372.

take up arms against the Tutsi. However, the Appeals Chamber is not satisfied that this was the only reasonable interpretation of the broadcast: it is possible the journalist was calling for arms to be taken up only against the RPF. The Appeals Chamber cannot therefore conclude beyond reasonable doubt that the broadcast represented a direct and public incitement to commit genocide.

- The broadcast of 23 March 1994[1748]

747. This broadcast is referred to in paragraphs 361 and 362 of the Judgement. The Trial Chamber noted that this broadcast warned RTLM listeners about a long-standing plan in process of execution by the RPF. The Appeals Chamber cannot conclude beyond reasonable doubt that this broadcast was a direct and public incitement to commit genocide.

- The broadcast of 1 April 1994[1749]

[1748] The Judgement cites the following excerpt from Exhibit P36/73B:

> All this is part of an existing plan, as Kagame himself said, even if the armies are merged, the *Inkotanyi* still have the single objective: to take back the power that the Hutus seized from them the Tutsis in 1959; take back power and keep it for as long as they want. They tell you that the transitional period should serve as a lesson to us.

[1749] The Judgement cites the following excerpt from Exhibit P103/189B, K0165912-13:

> Let us now talk about the death of Katumba, which has sparked off a lot of concern… It is being reported that yesterday, Kigali town came to a stand-still because of his death… Apart from misleading public opinion, was it only Katumba who died in this town Kigali? Or wasn't it, on the other hand, because of the death of a Tutsi called Maurice? Surely, was it the death of Katumba, a Hutu, which caused the stoppage of all activities in Kigali? Can't such a situation be brought about by the death of a Tutsi? Let them not deceive anybody. Are Katumba's assassins not the same people who killed Maurice to cause confusion, that is to say, in order to give the impression that a Tutsi and a Hutu lost their lives in the same circumstances? We are not stupid. Let them not spread confusion, because from the rumours I have just received, Dr. André Nyirasanyiginya (*sic*), a radiologist at King Fayçal Hospital, the most modern hospital in the country, …he also works at the CHK on part-time basis,…huh…people are saying: "From what we know about him, ha!, he has never stopped saying,… even when he was still in Brussels, that he would support the *Inkotanyi*. Let us assume that those are rumours, but if it is true, let his neighbours telephone us again and tell us that the doctor and his family are no longer in his house. Huh…Dr. Pierre Iyamuremye is a native of Cyangugu… huh…his mother is a Hutu and the father is a Tutsi, not so? But then (laughter)… he works at the ENT (Ear, Nose & Throat) Department of CHK (laughter)... As a result, the flight of people who were in the habit of talking about Katumba, could serve as a clue in the investigation to find the real assassin. The same inquiry could help reveal whether the doctors, in case some people can confirm that Katumba used to disturb the doctors in their duties – for Katumba was a driver…huh… in the Ministry of Health. If it is revealed that the doctors used to talk of him saying: "this CDR bastard who is disturbing us." Therefore, if they indeed ran away because of Katumba's death, then they are the ones who know the cause of the man's death and who did it, huh…(laughter).
>
> So, my dear André, if you are within the CND and are listening to RTLM, you should know that you are to be held responsible for Katumba's death, because you were not on good terms with each other and everyone at your work place is aware of that. If, as a result of that, you fled,…but if at all you are at home, ring us or come here and ask us to allow you use our radio to clear your name by saying that you and Katumba were on good terms and declare personally that you, Doctor André Iyamuremye, are physically present.

748. This broadcast is referred to in paragraphs 381 to 383 and 474 of the Judgement. The Trial Chamber found that the broadcast falsely accused certain doctors (one of whom was clearly a Tutsi[1750]) of the murder of a Hutu called Katumba and added that it "note[d] the request that if rumours of Dr. Ngirabanyiginya's support for the *Inkotanyi* were true, 'let his neighbours telephone us again and tell us that the doctor and his family are no longer in his house', a request, in the Chamber's view, that action be taken against the doctor and his family".[1751] In the Appeals Chamber's view, the Trial Chamber failed to show the evidence on which it based its assessment, and its findings thus appear speculative. In the absence of other evidence that this broadcast was indeed an incitement to kill designated individuals principally because they were of Tutsi ethnicity, the Appeals Chamber cannot conclude beyond reasonable doubt that this broadcast was a direct and public incitement to commit genocide**.**

- The broadcast made between 1 and 3 April 1994[1752]

749. This broadcast is discussed in paragraphs 380 and 381 of the Judgement. It is possible that the persons accused in the broadcast of being *Inkotanyi* accomplices were so accused simply because of their Tutsi ethnicity and that the broadcast's real message was to call for their murder (which would amount to direct and public incitement to commit genocide). However, in the absence of evidence that these individuals had been falsely accused, and that the real reason for their being singled out was their ethnicity, the Appeals Chamber cannot conclude beyond reasonable doubt that this broadcast was a direct and public incitement to commit genocide.

- The broadcast of 3 April 1994[1753]

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> I meant Dr. Ngirabanyiginya. As for Iyamuremye, his first name is Pierre. Hum! Both of them had personal problems with Katumba and it seems they are both on the run. Therefore, if they have left, then they have automatically betrayed themselves. They have betrayed themselves and as a result, the circumstances surrounding Katumba's death seem to be getting clearer.

[1750] Dr. Pierre Iyamuremye. Dr. André Nyirasanyiginya's (*sic*) ethnicity was not explicitly mentioned but the RTLM journalist appears to suggest his Tutsi ethnicity through a number of references (for example, the suggestion that he had always called himself "an *Inkotanyi* supporter" and the suggestion that he was at the "CND").

[1751] See Judgement, para. 383.

[1752] The Judgement cites the following excerpt from Exhibit C7, CD91, K0198752, translation from French:

> There are the people that we see collaborating with the *Inkotanyi*, we have made a note of them, here are the people that we see collaborating with the *Inkotanyi*: Sebucinganda from Butete in Kidaho, Laurence the woman from Gakenyeri, the named Kura from Butete. The councillor from Butete also collaborates with the *Inkotanyi*, and Haguma an *Inkotanyi* who has an inn in the Kidaho commune in the house of the woman from Gakenyeri and she who speaks English with the people from UNAMIR to disconcert the population, it's Haguma who speaks English. And the young people of Gitare sector, known as Rusizi, and the young people of Burambi, it seems that they know each other.

[1753] The Judgement cites the following excerpt from Exhibit P103/192D:

> There is a small group in Cyangugu, a small group of Tutsis who came from all over, some came from Bujumbura. Yesterday, 2 April 1994, beginning at 10:00 a.m., at the Izuba hotel, I said Izuba. I meant the Ituze hotel, an important meeting took place at the Ituze hotel, it was the venue of an important meeting of Tutsis – some of whom had come from Bujumbura – under the chairmanship of the Medical Director of the Cyangugu regional

750. This broadcast is discussed in paragraphs 384 to 387 and 476 of the Judgement. The Trial Chamber noted that reference was made in this broadcast to a "meeting of Tutsis", but that "other than the ethnic references, no indication is given in the broadcast as to the basis for concluding that the meeting was an RPF meeting".[1754] As stated above,[1755] it does not appear that there was any basis for accusing the named persons of meeting to support the RPF's objectives. The broadcast perhaps implicitly called for the murder of the named persons. However, in the absence of any other evidence to show that this was the true message, the Appeals Chamber cannot conclude beyond reasonable doubt that the broadcast was a direct and public incitement to commit genocide.

- The broadcast of 3 April 1994[1756]

751. This broadcast is discussed in paragraphs 388 and 389 of the Judgement. Even if this broadcast was calculated to cause fear among the population by predicting an imminent

health district. He was the one who chaired the meeting, something he does not deny… in the company of Emilien, hmm, yes, he was with Emilien, Emilien came secretly from Bujumbura. ... The people of Cyangugu came to know about him recently before he fled to Burundi. He is now back, and is in Cyangugu.

He should deny that he was not with Venuste, Kongo, Kongo, son of Kamuzinzi, and some people claim that he is a Hutu. He should come out and say that he was not with them.

These people were gathered to lend their support to the RPF's objective, hmm. They were with other people, many of them, and I can name them: Karangwa, the financial comptrollers and tax inspectors. Hum!

These natives of Cyangugu tell me, "Tell those people not to tarnish our region. They continue to tarnish our region by organizing meetings. They should look for another venue for their meetings, they should go to Bujumbura or elsewhere, but not Cyangugu….. ».

If I name the people who informed me about that, there is a danger of setting Cyangugu ablaze. That's not good, it's not good but the people are vigilant.

[1754] Judgement, para. 387.

[1755] See *supra* XII. B. 3. (b) (i) a.

[1756] The Judgement cites the following excerpt from Exhibit P103/192B:

They want to carry out a little something during the Easter period. In fact, they're saying: "We have the dates hammered out." They have the dates, we know them too.

They should be careful, we have accomplices among the RPF. . . who provide us with information. They tell us, "On the 3rd, the 4th and the 5th, something will happen in Kigali city." As from today, Easter Sunday, tomorrow, the day after tomorrow, a little something is expected to happen in Kigali city; in fact also on the 7th and 8th. You will therefore hear gunshots or grenade explosions.

Nonetheless, I hope that the Rwandan armed forces are vigilant. There are Inzirabwoba [fearless], yes, they are divided into several units!. The *Inkotanyi* who were confronted with them know who they are...

As concerns the protection of Kigali, yes, indeed, we know, we know, on the 3rd, the 4th and the 5th, a little something was supposed to happen in Kigali. And in fact, they were expected to once again take a rest on the 6th in order to carry out a little something on the 7th and the 8th … with bullets and grenades. However, they had planned a major grenade attack and were thinking: "After wrecking havoc in the city, we shall launch a large-scale attack, then…"

attack by the RPF, the Appeals Chamber cannot conclude beyond reasonable doubt that it was a direct and public incitement to commit genocide.

(iii) The witness evidence

752. The Appeals Chamber notes Appellant Nahimana's argument that the recordings constitute the "best evidence" and that testimonies cannot be deemed to be sufficiently reliable and precise for making an assessment of the actual content of the broadcasts.[1757] Appellant Nahimana further argues that some Prosecution witnesses confirm that RTLM did not call for killings of Tutsi before 6 April 1994[1758] and that others confirmed that before 6 April 1994, the terms "*Inyenzi*" and "*Inkotanyi*" referred to RPF combatants and not to the Tutsi population as a whole.[1759]

753. The Appeals Chamber has already found that the broadcasts between 1 January and 6 April 1994 examined in the Trial Judgement did not directly incite the commission of genocide against the Tutsi. After examining the evidence discussed in paragraphs 434 to 485 of the Trial Judgement, the Appeals Chamber is not satisfied that the testimonies discussed are capable of showing beyond reasonable doubt that the broadcasts made between 1 January and 6 April 1994 represented a direct incitement to commit genocide against the Tutsi. Thus:

- Witness GO, whose testimony is summarized at paragraphs 435 to 438 and 455 of the Trial Judgement, asserted that "at one stage" – seemingly around the month of October 1993[1760]– "RTLM then continued to incite Rwandans",[1761] but the incitement consisted, in the witness' view, in "call[ing] the Hutus to be vigilant"[1762] and in "incit[ing] division within the population based upon ethnic differences".[1763] Moreover, the Trial Chamber did not cite from her testimony any specific example of one or more direct incitements to commit genocide broadcast by RTLM between 1 January and 6 April 1994;

- Witness FW, of whom the Trial Chamber noted at paragraph 438 of the Trial Judgement that he said that he had heard an RTLM broadcast mention "The Ten Commandments", could not date this broadcast[1764] and he did not report any other example of direct incitement to commit genocide;

- As the Trial Chamber noted at paragraph 439 of the Trial Judgement, Witness AGX indicated that RTLM "ma[de] [people] aware or, rather, to raise discord between the

[1757] Nahimana Appellant's Brief, paras. 225-227.
[1758] *Ibid.*, paras. 229 (referring to the testimony of Witness Nsanzuwera, T. 24 April 1994 (*sic*) [2001], pp. 40-41) and 230 (referring to the testimony of Witness GO, T. 6 June 2001, pp. 35-37).
[1759] *Ibid.*, para. 228 (referring to the testimony of Witness AGR (T. 22 February 2001, pp. 119-120) and of Witness Ruggiu (T. 27 February 2002, pp. 87-88 and T. 4 March 2002, pp. 124-125)).
[1760] T. 5 April 2001, p.81, see also pp. 106-108 and p. 111.
[1761] *Ibid.*, p. 81.
[1762] *Ibid.*, p. 90, 107-109.
[1763] *Ibid.*, p. 129; see also T. 5 April 2001, p. 85, 103,159-160, 162; T. 9 April 2001, pp. 23-24, 27-28; T. 10 April 2001, pp. 118-120; T. 24 May 2001, pp. 70-72; T. 6 June 2001, p. 36. The Appeals Chamber notes that Witness GO clearly mentioned that, after 7 April 1994, RTLM broadcasts were "constantly asking people to kill other people, to look for those who were in hiding, and to describe the hiding places of those who were described as being accomplices" (T. 10 April 2001, pp. 58-61; see also T. 4 June 2001**,** pp. 30-31).
[1764] Judgement, para. 438; T. 1 March 2001, pp. 122-124.

Hutus and the Tutsi",[1765] but there is nothing in his testimony to indicate that RTLM directly incited the commission of genocide against Tutsi between 1 January and 6 April 1994;

- Witness BI, whose testimony is discussed at paragraphs 441 to 443 of the Judgement, referred to RTLM broadcasting and stressed how the Tutsi were being identified with *Inkotanyi*.[1766] She testified that RTLM had on several occasions (in December 1993, January or February and March 1994) pointed to her as an accomplice, a "member" or "instrument" of the *Inkotanyi* and that, following this, she had been assaulted several times.[1767] However, in the absence of details regarding these broadcasts, the Appeals Chamber is unable to conclude beyond reasonable doubt that they constituted direct incitement to commit genocide. Furthermore, since Witness BI is a Hutu, calls for violence against her could not be regarded as acts of incitement to commit genocide;

- In the view of Witness Nsanzuwera, whose testimony is discussed at paragraphs 440, 444, 449 and 455 of the Trial Judgement, direct calls for killing by RTLM only started after 7 April 1994, and the previous broadcasts rather contained "messages of hatred and incitement to violence";[1768]

- The Trial Chamber noted, in paragraphs 446 to 448 of the Trial Judgement, that Witness FY had said that he "first started hearing the names of […] persons being mentioned towards the end of March, and [he] also heard their names mentioned during April 1994".[1769] RTLM had named people suspected to be *Inkotanyi* or their accomplices, including Daniel Kabaka, a builder, a physician and a woman who worked at the Belgian Embassy. Once again, since there were no detailed particulars of what was said during these broadcasts, the Appeals Chamber cannot find beyond reasonable doubt that they constituted direct incitement to commit genocide;

- A review of the trial transcripts shows that the facts reported by Witness Kamilindi and summarized at paragraph 452 of the Judgement occurred after 6 April 1994;[1770]

- As to the remaining evidence referred to by the Trial Chamber in paragraphs 434 to 485 of the Trial Judgement (namely the testimonies of Witnesses ABE, ABC, X,

[1765] *Ibid.*, para. 439; T. 11 June 2001, p. 54 and 57; T. 14 June 2001, pp. 70-71.
[1766] T. 8 May 2001, pp. 63-65; T. 14 May 2001, pp. 126-127.
[1767] T. 8 May 2001, p. 105, see also pp. 90-95; T. 14 May 2001, pp. 151-162, 163-169. Witness BI also said that women had been assaulted in a neighborhood of Kigali *préfecture* following an RTLM broadcast which had mentioned that "they were disturbing the Hutu men" living in this neighborhood. However, the witness could not specify the date of this event (T. 14 May 2001, pp. 147-152).
[1768] T. 24 April 2001, p. 40-41. See also T. 23 April 2001, pp. 39-40, 43, 50-51; T. 24 April 2001, pp. 162-164:

> Q. : Mr. Nsanzuwera [...] would you be able to give us even one broadcast where an RTLM journalist would have asked Hutus to massacre the Tutsis before 7 April 1994?
>
> A. : I spoke of incitement to hatred, and possibly to killing, and later I made a distinction between the time before April 7 and the period after April 7, which to me is a distinct period or the period before April, where there was incitement and preparations, was the period after April 7, the programs are true broadcasts in which there was call for people to be killed.

[1769] T. 9 July 2001, pp. 23; see also pp.16-18, pp. 21-23.
[1770] T. 21 May 2001, pp. 87-103.

Braeckman, Dahinden and Des Forges), there is no report of any direct incitement to commit genocide by RTLM against Tutsi between 1 January and 6 April 1994.

(iv) Conclusion

754. The Appeals Chamber thus finds that, although it is clear that RTLM broadcasts between 1 January and 6 April 1994 incited ethnic hatred, it has not been established that they directly and publicly incited the commission of genocide.

(c) Broadcasts after 6 April 1994

755. Appellant Barayagwiza submits that the RTLM broadcasts made from 7 April 1994 did not amount to direct and public incitement to commit genocide against the Tutsi. The only specific argument that Appellant Barayagwiza raises is that the broadcast of 4 June 1994 could not be interpreted as a call to kill the Tutsi, because this broadcast used the term *Inkotanyi,* and that was not synonymous with Tutsi. For the reasons cited earlier,[1771] the Appeals Chamber considers that it was reasonable to find that, in certain contexts, the term *Inkotanyi* was used to refer to the Tutsi. In particular, the Appeals Chamber considers that it was reasonable to find that the broadcast of 4 June 1994, which described the *Inkotanyi* as having the physical features popularly associated with the Tutsi, equated the *Inkotanyi* with the Tutsi, and that it amounted to direct and public incitement to commit genocide against the Tutsi.[1772]

756. The Appeals Chamber further notes that, although paragraph 1032 of the Judgement only mentions the broadcast of 4 June 1994 to illustrate the incitement engaged in by RTLM, the Trial Chamber also considered that other broadcasts made after 6 April 1994 explicitly called for the extermination of the Tutsi:

> Many of the RTLM broadcasts explicitly called for extermination. In the 13 May 1994 RTLM broadcast, Kantano Habimana spoke of exterminating the *Inkotanyi* so as "to wipe them from human memory", and exterminating the Tutsi "from the surface of the earth… to make them disappear for good". In the 4 June 1994 RTLM broadcast, Habimana again talked of exterminating the *Inkotanyi*, adding "the reason we will exterminate them is that they belong to one ethnic group". In the 5 June 1994 RTLM broadcast, Ananie Nkurunziza acknowledged that this extermination was underway and expressed the hope that "we continue exterminating them at the same pace". On the basis of all the programming he listened to after 6 April 1994, Witness GO testified that RTLM was constantly asking people to kill other people, that no distinction was made between the *Inyenzi* and the Tutsi, and that listeners were encouraged to continue killing them so that future generations would have to ask what *Inyenzi* or Tutsi looked like.[1773]

These broadcasts constitute, as such, direct and public incitement to commit genocide. Appellant Barayagwiza does not raise any argument relating to them.

757. Regarding the assertion by Appellant Barayagwiza that "the country was under attack, and it could therefore be expected that the virulence of the broadcasts would increase in

[1771] *Supra* XIII. C. 1. (b) (ii).
[1772] Judgement, paras. 396 and 1032.
[1773] *Ibid.*, para. 483.

response to fear of what the consequences would be if the RPF invasion were successful",[1774] this has no impact on the finding that the RTLM broadcasts in fact targeted the Tutsi population. As the Trial Chamber noted, RTLM broadcasts exploited "the fear of armed insurrection, to mobilize the population, whipping them into a frenzy of hatred and violence that was directed largely against the Tutsi ethnic group".[1775]

758. The Appeals Chamber finds that it has not been demonstrated that the Trial Chamber erred in considering that some of the RTLM broadcasts after 6 April 1994 called for the extermination of Tutsi[1776] and amounted to direct and public incitement to commit genocide.

2. Direct and public incitement by the CDR

759. The Trial Chamber found that CDR members had promoted the killing of Tutsi civilians (1) by the chanting of "*tubatsembatsembe*" ("let's exterminate them!") at public meetings and demonstrations; the reference to "them" was understood to mean the Tutsi population; and (2) "through the publication of communiqués and other writings that called for the extermination of the enemy and defined the enemy as the Tutsi population".[1777] The Trial Chamber then found Appellant Barayagwiza guilty of direct and public incitement to commit genocide on the grounds, *inter alia*, of these factual findings.[1778] In his grounds of appeal relating to direct and public incitement to commit genocide, Appellant Barayagwiza does not directly challenge the finding that the CDR promoted the killing of Tutsi. Nevertheless, he submits that he could not be found guilty of direct and public incitement to commit genocide on the basis of acts which occurred before 1994.[1779] For the reasons given earlier, the Appeals Chamber concurs with this argument.[1780] The Appeals Chamber will now consider whether the acts cited in paragraph 1035 of the Judgement in order to convict Appellant Barayagwiza occurred in 1994.

760. The Trial Chamber found that the words "*tubatsembatsembe*" or "let's exterminate them" were chanted by CDR militants and *Impuzamugambi* during public meetings, without specifying when these meetings were held.[1781] However, it seems that the Chamber considered that these slogans were chanted both before and during 1994, as transpires from

[1774] Barayagwiza Appellant's Brief, para. 267.
[1775] Judgement, para. 488:

> Radio was the medium of mass communication with the broadest reach in Rwanda. Many people owned radios and listened to RTLM – at home, in bars, on the streets, and at the roadblocks. The Chamber finds that RTLM broadcasts exploited the history of Tutsi privilege and Hutu disadvantage, and the fear of armed insurrection, to mobilize the population, whipping them into a frenzy of hatred and violence that was directed largely against the Tutsi ethnic group. The *Interahamwe* and other militia listened to RTLM and acted on the information that was broadcast by RTLM. RLTM actively encouraged them to kill, relentlessly sending the message that the Tutsi were the enemy and had to be eliminated once and for all.

[1776] *Ibid.*, para. 486.
[1777] *Ibid.*, para. 1035.
[1778] *Idem.*
[1779] Barayagwiza Appellant's Brief, paras. 258-261.
[1780] See *supra* VIII. B. 2. and XIII. B. 2. (b) .
[1781] Judgement, para. 340.

its assessment of the evidence.[1782] Appellant Barayagwiza has failed to show that it was unreasonable to find that the words "*tubatsembatsembe*" or "let's exterminate them" were chanted by CDR militants and *Impuzamugambi* during public meetings held in 1994; this finding is therefore upheld.

761. Concerning the communiqués and other writings of the CDR which allegedly called for the killing of Tutsi, the Appeals Chamber notes that the Trial Chamber referred only to communiqués or writings that pre-dated 1994.[1783] Consequently, these communiqués and writings could not be relied on in order to find the Appellant guilty of direct and public incitement to commit genocide.

762. The Appeals Chamber will consider later in the Judgement the consequences of these findings in relation to Appellant Barayagwiza's conviction for the crime of direct and public incitement to commit genocide.[1784]

### 3. *Kangura*

#### (a) Arguments of the Parties

763. Appellant Ngeze submits that it was the exceptional events of 1994 which led to the genocide; that the genocide would still have occurred even if the articles published in *Kangura* had never existed, and that it has thus not been proved that these articles incited genocide;[1785] moreover, at the time when the genocide was being committed *Kangura* was not being published.[1786]

764. The Appellant argues that none of the *Kangura* articles considered by the Trial Chamber could constitute direct and public incitement to commit genocide.[1787] He submits, as Expert Witness Kabanda explained, that the themes of the articles published in *Kangura* consisted of: "(a) anti-Tutsi ethnic hatred; (b) the need for self-defence on the part of the majority, which was threatened by the minority; (c) the struggle against Hutu who did not tow [*sic*] the line; (d) the mobilization of the Hutu population to fight this danger";[1788] and that none of these themes "can be associated to a direct call to the extermination of the Tutsi population as required by the crime of direct and public incitement to commit genocide".[1789] He further contends that the articles cited by the Trial Chamber were ambiguous (in particular with regard to the meaning of the words *Inkotanyi* and *Inyenzi*), and that they thus could not

[1782] See Judgement, para. 336, which mentions, *inter alia*, the testimony of Appellant Nahimana that there were complaints against the CDR at the end of 1993 and beginning of 1994 for singing a song using the word "*tubatsembatsembe*". The Appeals Chamber also notes that Witness BI, whose testimony was accepted by the Trial Chamber (Judgement, para. 465), stated that in March 1994 *Impuzamugambi* were going round everywhere singing "*tubatsembatsembe*" at the top of their voices: T. 8 May 2001, pp. 96-97, and Judgement, para. 443.
[1783] See Judgement, paras. 278-301.
[1784] See *infra* XIII. D. 2. (b) .
[1785] Ngeze Appellant's Brief, paras. 241-253.
[1786] *Ibid.*, para. 267.
[1787] *Ibid.*, paras. 258-268. In particular, Appellant Ngeze submits that the article entitled "The Appeal to the Conscience of the Hutu" and the cover of No. 26 of *Kangura* could not constitute an unequivocal call to commit genocide, Ngeze Appellant's Brief, para. 261.
[1788] Ngeze Appellant's Brief, para. 263 (references to paragraphs of the Judgement omitted).
[1789] *Ibid.*, para. 264.

constitute direct incitement to commit genocide.[1790] Finally, Appellant Ngeze contends that the Trial Chamber erred in relying on witness testimonies in order to conclude that the content of *Kangura* incited the commission of genocide.[1791]

(b) Analysis

765. The Trial Chamber found that "[m]any of the writings published in *Kangura* combined ethnic hatred and fear-mongering with a call to violence to be directed against the Tutsi population, who were characterized as the enemy or enemy accomplices".[1792] As examples, it mentioned "The *Appeal to the Conscience of the Hutu*" (published in December 1990) and the cover of *Kangura* No. 26 (November 1991), and it noted the "increased attention in 1994 issues of *Kangura* to the fear of an RPF attack and the threat that [the] killing of innocent Tutsi civilians [...] would follow as a consequence".[1793] The Trial Chamber then recognized that not all of the writings published in *Kangura* and highlighted by the Prosecutor constituted direct incitement.[1794] Finally, it considered that, as founder, owner and editor of *Kangura*, Appellant Ngeze was responsible for the content of *Kangura*, and it found him guilty of direct and public incitement to commit genocide.[1795]

766. The Appeals Chamber summarily dismisses Appellant Ngeze's argument that the genocide would have occurred even if the *Kangura* articles had never existed, because it is not necessary to show that direct and public incitement to commit genocide was followed by actual consequences.[1796] Regarding the argument that *Kangura* was not being published at the time of the genocide, this is not relevant in deciding whether the *Kangura* publications constituted direct and public incitement to commit genocide.

767. Appellant Ngeze further submits that the testimony of Expert Witness Kabanda shows that *Kangura* never made a direct call for the extermination of the Tutsi.[1797] The Trial Chamber summed up the testimony on these facts as follows:

> Having read *Kangura* in its entirety, Prosecution Expert Witness Marcel Kabanda was asked to identify particular themes espoused by the newspaper. He enumerated four: anti-Tutsi ethnic hatred; the need for self-defense by the majority, which was threatened by the minority; the struggle against the Hutu who did not tow the line; and the mobilization of the Hutu population to fight this danger. Kabanda testified that in *Kangura* the enemy was well defined as those threatening the majority population, the Tutsi-*Inyenzi*. While the newspaper differentiated Tutsi in and outside the country, it underscored the fact that the two groups were in solidarity and working together to exterminate the Hutu and regain power, enslaving Hutu who survived.[1798]

[1790] *Ibid.*, para. 228.
[1791] *Ibid.*, para. 266.
[1792] Judgement, para. 1036.
[1793] *Idem*.
[1794] Judgement, para. 1037.
[1795] *Ibid.*, para. 1038.
[1796] *Supra* XIII. A.
[1797] Ngeze Appellant's Brief, paras. 263-264.
[1798] Judgement, para. 233, wrongly making reference to T. 14 May 2002, pp. 11-13, whereas the corresponding part is found on pp. 14-16.

768. It clearly appears that Expert Witness Kabanda considered that *Kangura* was calling on the Hutu majority to use every means to fight the "danger" posed by the Tutsi. Accordingly, the Appeals Chamber cannot see any inconsistency between this testimony and the Trial Chamber finding that certain *Kangura* articles constituted direct and public incitement to commit genocide.

769. The Appeals Chamber also dismisses the assertion by Appellant Ngeze that the Trial Chamber erred in relying on witness evidence in order to find that the content of *Kangura* had incited the commission of genocide. It notes that Appellant Ngeze has not raised any specific argument to support this assertion, and agrees with the Trial Chamber that witness evidence could be helpful in "assess[ing] the impact of *Kangura* on its readership, and the population at large".[1799]

770. However, the Appeals Chamber notes that the Trial Chamber did not clearly identify all the extracts from *Kangura* which, in its view, directly and publicly incited genocide, confining itself to mentioning only extracts from *Kangura* published before 1 January 1994 to support its findings.[1800] The Appeals Chamber has already found that the Trial Chamber erred in basing the convictions of the Appellant on pre-1994 issues.[1801] Moreover, as explained previously,[1802] the lack of particulars concerning the acts constituting direct and public incitement to commit genocide represented an error, and obliges the Appeals Chamber to examine the 1994 issues of *Kangura* mentioned in the Judgement in order to determine, beyond reasonable doubt, whether one or more of them constituted direct and public incitement to commit genocide.

- "The Last Lie"

771. In an article headed the "Last Lie", which appeared in issue No. 54 of *Kangura* (January 1994), Appellant Ngeze wrote:

> Let's hope the *Inyenzi* will have the courage to understand what is going to happen and realize that if they make a small mistake, they will be exterminated; if they make the mistake of attacking again, there will be none of them left in Rwanda, not even a single accomplice. All the Hutus are united…[1803]

The Appeals Chamber agrees with the Trial Chamber[1804] that the term "accomplice" refers to the Tutsi in general, in light of the sentence which immediately follows this reference and which was written by the Appellant: "All the Hutus are united…". The Appeals Chamber considers that this article called on the Hutu to stand united in order to exterminate the Tutsi if the RPF were to attack again. In the view of the Appeals Chamber, the fact that this call was conditional on there being an attack by RPF does nothing to lessen its impact as a direct call to commit genocide if the condition should be fulfilled; the Appeals Chamber finds that this article constituted direct and public incitement to commit genocide.

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[1799] *Ibid.*, para. 232.
[1800] *Ibid.*, paras. 1036-1038.
[1801] See *supra* VIII. B. 2. and XIII. B. 2. (b).
[1802] See *supra* XIII. B. 2 (c).
[1803] Exhibit P10, p. K0151349. This article is discussed by the Trial Chamber in paras. 213-217 of the Judgement.
[1804] Judgement, para. 217.

- "Who will survive the war of March?"

772. An article headed "Who Will Survive the War of March?", which appeared in issue No. 55 (January 1994) and was signed *Kangura*, included the following passage:

> If the *Inkotanyi* have decided to massacre us, the killing should be mutually done. This boil must be burst. The present situation warrants that we should be vigilant because they are difficult. The presence of U.N. forces will not prevent the *Inkotanyi* to start the war (…). These happenings are possible in Rwanda, too. When the *Inkotanyi* must have surrounded the capital of Kigali, they will appeal to those of Mulindi and their accomplices within the country, and the rest will follow. It will be necessary for the majority people and its army to defend itself … On that day, blood will be spilled. On that day, much blood must have been spilled.[1805]

The Appeals Chamber notes that this article contains an appeal to "the majority people" to kill the *Inkotanyi* and their "accomplices within the country" (meaning the Tutsi) in case of an attack by the RPF. Accordingly, the Appeals Chamber finds that this article constituted direct and public incitement to commit genocide.

- "How Will the UN Troops Perish?"

773. An editorial signed by Appellant Ngeze and published in issue No. 56 of *Kangura* (February 1994) stated that, after the departure of the United Nations troops, "[a]ll the Tutsis and cowardly Hutus will be exterminated".[1806] The Trial Chamber found that this editorial was both a prediction and a threat.[1807] In the opinion of the Appeals Chamber, this article goes even further: it implicitly calls on its readers to exterminate Tutsi (and "cowardly Hutus") after the departure of the United Nations troops. The Appeals Chamber finds that this article constituted direct and public incitement to commit genocide against the Tutsi.

- "One Would Say That Tutsis Do Not Bleed, That Their Blood Does Not Flow"

774. Paragraphs 227 to 229 of the Judgement also refer to an extract from an article headed "One Would Say That Tutsis Do Not Bleed, That Their Blood Does Not Flow", published in

[1805] Exhibit P117B, pp. 27163. This article is examined at paras. 220-224 of the Judgement.

[1806] Exhibit P115/56-A, p. K0151339. The relevant excerpt is as follows:

> As happened in Somalia where about two hundred UN soldiers were killed because of their partisan stance, in Rwanda the Government will soon be formed and those who will be left out will fight against it, and so will those participating in the Government but without recognizing it. The country will be teeming with opponents. The United Nations troops will continue supporting the Arusha Accords because they justify their presence here. Those who reject the Accords will take it out on those soldiers and will massacre them; they will throw grenades at them and they will die each day. A time will come when those soldiers would grow weary and leave. And it is after their departure that blood will really flow. All the Tutsis and the cowardly Hutus will be exterminated. The *Inyenzi* would once more enlist MUSEVENI's support in attacking the Hutus, who will be tortured to death. The tragedy would be as a result of the ill-conceived accords.

The excerpt cited in paragraph 225 of the French translation of the Judgement differs somewhat from P115/56-A, pp. 8082*bis* and 8081*bis*; it would appear that it is a translation of the English version of Exhibit P115/56-A, p. K0151339.

[1807] Judgement, para. 226.

issue No. 56 of *Kangura* (February 1994).[1808] This article does not appear to threaten all the Tutsi, but only the Tutsi who acclaimed Tito Rutaremara and who, in doing so, demonstrated their support for an armed insurrection. In the absence of any element demonstrating that all the Tutsi were actually targeted by this article, or that some Tutsi were targeted on the sole basis of their ethnicity, the Appeals Chamber cannot find that this article constituted direct incitement to commit genocide.

(c) Conclusion

775. The Appeals Chamber finds that *Kangura* articles published in 1994 directly and publicly incited the commission of genocide

## D. Responsibility of the Appellants

### 1. Responsibility of Appellant Nahimana

(a) Responsibility pursuant to Article 6(1) of the Statute

776. Appellant Nahimana contends that he could not be convicted of direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute.[1809] The Appeals Chamber has already concluded that the Appellant could not be convicted under Article 6(1) of the Statute for RTLM broadcasts which instigated genocide.[1810] For the same reasons, the Appellant could not be convicted on the basis of Article 6(1) for RTLM broadcasts which directly and publicly incited the commission of genocide; the Appeals Chamber also quashes that conviction.

(b) Responsibility pursuant to Article 6(3) of the Statute

777. Appellant Nahimana asserts that the Trial Chamber erred in finding that he incurred superior responsibility pursuant to Article 6(3) of the Statute for direct and public incitement to commit genocide by RTLM employees and journalists.[1811] The Appeals Chamber will examine in turn the errors of law and fact alleged by the Appellant.

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[1808] Footnote 132 of the Judgement makes reference to T. 3 April 2003, pp. 33-34, where Appellant Ngeze reads the following excerpt from *Kangura* No. 56:

> What Kanyarengwe did to them must be true what was said of the Tutsis, that they are like children, that they are childish. During the press conference that the *Inkotanyi* recently gave at *Hôtel Diplomate*, they stated things, which were surprising to the people in attendance. Tito Rutaremara said, 'I took arms to fight against the dictatorship. I will once again take up those arms to fight against the dictatorship, the same dictatorship.' And there was applause, there was sustained applause.
>
> The Tutsis who acclaimed Rutaremara, do they remember that they themselves can have their bloodshed? The war that was threatened by Rutaremara, it is obvious that he will be the first victim instead of those related to him. That question should be put to him.

Once again, para. 227 of the French translation of the Judgement does not cite the precise words of the transcript for 3 April 2003.

[1809] Nahimana Appellant's Brief, paras. 296-336; Nahimana Brief in Reply, paras. 90-127.

[1810] See *supra* XII. D. 1. (b) (ii) e.

[1811] Nahimana Appellant's Brief, paras. 337-535; Nahimana Brief in Reply, paras. 128-163. The arguments raised by Appellant Nahimana on this issue also concern his conviction for the crime of persecution as a crime

(i) Errors of law

a. The Appellant's submissions

778. Appellant Nahimana first submits that the Trial Chamber erred in law when it held that mere civilians, acting in a purely private context and without any authority analogous to that of military commanders, could be held responsible as superiors pursuant to Article 6(3) of the Statute.[1812] He argues that only civilian leaders possessing "excessive *de jure* or *de facto* powers in ordinary law similar to the powers of public authorities" have, so far, been convicted on the basis of their superior responsibility.[1813]

779. Secondly, the Appellant asserts that the Trial Chamber committed an error of law in failing to apply the effective control test,[1814] which in his view requires a direct and individualized relationship.[1815] In this respect, the Appellant argues that international jurisprudence confirms that "mere belonging to leading organs or a group of leaders" does not suffice to establish effective control.[1816]

780. Thirdly, the Appellant submits that the Trial Chamber erred in concluding that he possessed a *de jure* power over RTLM, since neither Rwandan law nor the Statutes of RTLM, or any other official document, gives the Appellant a *de jure* power of control over RTLM employees.[1817]

781. The Appellant further argues that "none of the elements admitted by the Judges gives room for establishing the existence of an effective and compelling superior-subordinate nexus".[1818] He accordingly contends that, in the absence of detailed evidence,[1819] none of the following elements is capable of supporting the Trial Chamber's finding that he was a superior exercising effective control over RTLM employees:

- The Appellant was "number one" in the management of RTLM;[1820]
- The Appellant represented RTLM at meetings with the Ministry of Information;[1821]
- The Appellant controlled the finances of RTLM;[1822]
- The Appellant was a member of the RTLM board of directors;[1823]

against humanity. The Appeals Chamber will examine the question of the Appellant's superior responsibility in the present section and will assess the impact of its conclusions on the conviction for the crime of persecution as a crime against humanity in the relevant chapter.

[1812] Nahimana Appellant's Brief, paras. 337-348.
[1813] *Ibid.*, paras. 340-347 (quotation taken from para. 345, emphasis omitted).
[1814] *Ibid.*, para. 353.
[1815] *Ibid.*, paras. 349-352.
[1816] *Ibid.*, para. 352.
[1817] *Ibid.*, paras. 355- 359, 482.
[1818] *Ibid.*, para. 360.
[1819] The Appellant submits that the finding that he had the material ability to prevent or punish the commission of crimes by his subordinates is not sufficiently motivated: Nahimana Appellant's Brief, paras. 387-391.
[1820] Nahimana Appellant's Brief, para. 361.
[1821] *Ibid.*, para. 362.
[1822] *Ibid.*, para. 363.

- The Appellant was responsible for RTLM editorial policy;[1824]
- Appellants Nahimana and Barayagwiza were the two most active members of the Steering Committee;[1825]
- As a member of the Technical and Program Committee, the Appellant oversaw RTLM programming;[1826]
- After 6 April 1994, the Appellant had the authority to prevent the commission of crimes;[1827]
- The Appellant maintained a continuing connection with RTLM until July 1994.[1828]

782. In his Brief in Reply, the Appellant adds that, in order to find that he had control over RTLM staff after 6 April 1994, the Trial Chamber relied solely on facts from before that date, ignoring the drastic changes that had occurred at that time and reversing the burden of proof by requiring him to prove that he had no control after 6 April 1994, rather than determining whether the Prosecutor had tendered positive evidence to show that the alleged power of control prior to 6 April 1994 had remained effective after that date.[1829]

783. The Appellant further maintains that the Trial Chamber erred in law in finding that the fact that he knew that RTLM broadcasts were generating concern sufficed to establish the *mens rea* required pursuant to Article 6(3) of the Statute, whereas, in his view, it had to be shown that he had direct and personal knowledge of what was actually being said.[1830]

784. Finally, the Appellant appears to take issue with the Trial Chamber for its failure sufficiently to explain what necessary or reasonable measures he omitted to take in order to prevent or punish the commission of crimes by his subordinates.[1831]

### b. Analysis

#### i. Superior position and effective control

[1823] *Ibid.*, paras. 364-368, 383-385. The Appellant submits in this respect that the mere fact that he was a member of the RTLM Steering Committee, a collegiate body, does not justify the inference that he personally had a power of control. He adds in paragraphs 436 and 437 that the fact that the Judges noted that the Steering Committee convened a meeting with RTLM employees and journalists to discuss an RTLM broadcast of concern shows that none of its members personally possessed such a power of control. See also Nahimana Brief in Reply, paras. 128-132.
[1824] Nahimana Appellant's Brief, para. 369.
[1825] *Ibid.*, para. 371. The Appellant argues that "this assertion does not sufficiently establish the effective power of coercion of a particularly high degree required to hold a civilian liable for the charge of a crime against humanity or genocide under Article 6.3 of the Statute" (emphasis omitted).
[1826] *Ibid.*, para. 372.
[1827] *Ibid.*, para. 374. The Appellant argues in this respect that the power to prevent the commission of crimes does not suffice to establish his status as superior pursuant to Article 6(3) of the Statute.
[1828] *Ibid.*, para. 375.
[1829] Nahimana Brief in Reply, paras. 133-137.
[1830] Nahimana Appellant's Brief, paras. 376-380.
[1831] *Ibid.*, paras. 389-391.

785. The Appeals Chamber has already recalled the elements which must be proved in order to establish superior responsibility.[1832] It has also pointed out that civilian leaders need not be vested with prerogatives similar to those of military commanders in order to incur such responsibility under Article 6(3) of the Statute: it suffices that the superior had effective control of his subordinates, that is, that he had the material capacity to prevent or punish the criminal conduct of subordinates.[1833] For the same reasons, it does not have to be established that the civilian superior was vested with "excessive powers" similar to those of public authorities. Moreover, the Appeals Chamber cannot accept the argument that superior responsibility under Article 6(3) of the Statute requires a direct and individualized superior-subordinate relationship.[1834]

786. The Appeals Chamber is not convinced either by the Appellant's argument that the Trial Chamber failed to apply the effective control test. Although the Trial Chamber did not explicitly use the expression "effective control", the Appeals Chamber is of the view that it is clear from paragraphs 970 and 972 of the Judgement that it in fact applied that test.[1835]

787. The Appellant further contends that the Trial Chamber could not conclude that he possessed a *de jure* power, since neither the law of Rwanda, nor the RTLM Statutes or any other official document so provided. The Appeals Chamber recalls that a person possesses a *de jure* power when legally vested with such power.[1836] The Chamber is of the view that this power can derive from law, from a contract or from any other legal document; it may have been conferred orally or in writing and may be proved by documentary or any other type of evidence. The Appeals Chamber will examine below whether the Trial Chamber could conclude that the Appellant was vested with a *de jure* power over the RTLM staff, but considers that, in any event, this is not a decisive factor for the issue of effective control.[1837]

788. The Appeals Chamber further recalls that the authority enjoyed by a defendant must be assessed on a case-by-case basis, so as to determine whether he had the power to take necessary and reasonable measures to prevent the commission of the crimes charged or to punish their perpetrators. Consequently, while the Appeals Chamber concedes that mere membership of a collegiate board of directors does not suffice, *per se*, to establish the existence of effective control, it considers, nonetheless, that such membership may, taken together with other evidence, prove control.

789. With respect to the Appellant's argument that none of the evidence relied upon by the Trial Chamber supports the finding that he had superior status and effective control over RTLM staff, the Appeals Chamber would point out that these are matters which, along with

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[1832] See *supra* XI. B.
[1833] See *supra* XII. D. 2. (a) (i) .
[1834] *Halilović* Appeal Judgement, para. 59; *Kordić and Čerkez* Appeal Judgement, para. 828; *Blaškić* Appeal Judgement, para. 67; *Čelebići* Appeal Judgement, paras. 251-252, 303.
[1835] In this respect, see *supra* XII. D. 2. (a) (i).
[1836] See the definition of "*de jure*" in Bryan A. Garner (ed.), *Black's Law Dictionary,* 8th ed., Saint Paul, Minnesota, Thomson West Publishing Company, 2004, p. 458 ("Existing by right or according to law"). Thus, the jurisprudence describes a superior *de jure* as one whose power derives from an official appointment: *Kajelijeli* Appeal Judgement, para. 85; *Bagilishema* Appeal Judgement, para. 50 ; *Čelebići* Appeal Judgement, para. 193.
[1837] In this respect, see *supra* XII. D. 2. (a) (ii) b. i., where the Appeals Chamber explains that, even if the possession of *de jure* powers can certainly suggest a material capacity to prevent or punish criminal acts by subordinates, it is neither necessary nor sufficient to demonstrate such capacity.

the other constituent elements of superior responsibility, must be established beyond reasonable doubt on the basis of *the totality* of the evidence adduced.[1838] The Appeals Chamber will examine below whether the Appellant's superior position and effective control were, in the instant case, established beyond reasonable doubt.

790. Finally, the Appeals Chamber finds that there is no evidence that the Trial Chamber reversed the burden of proof and required the Appellant to show that he did not have effective control after 6 April 1994. It was indeed for the Prosecutor to prove the Appellant's effective control over RTLM after 6 April 1994. The Appeals Chamber will examine below whether the Trial Chamber could conclude that the Prosecutor had established this beyond reasonable doubt.

ii. The *Mens Rea*

791. Under Article 6(3) of the Statute, the *mens rea* of superior responsibility is established when the accused "knew or had reason to know" that his subordinate was about to commit or had committed a criminal act.[1839] The "reason to know" standard is met when the accused had "some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates"; such information need not provide specific details of the unlawful acts committed or about to be committed by his subordinates.[1840] The Appellant is therefore wrong when he contends that direct personal knowledge, or full and perfect awareness of the criminal discourse, was required in order to establish his superior responsibility. The Appellant cites no precedent and provides no authority to support his assertion that the crime of direct and public incitement requires direct personal knowledge of what is being said. The Appeals Chamber rejects this submission.

iii. Necessary and reasonable measures

792. The Appeals Chamber is not satisfied that the Trial Chamber failed properly to explain what necessary and reasonable measures the Appellant omitted to take in order to prevent or punish the commission of crimes by his subordinates. Having found that Appellant had the power to prevent or punish the broadcasting of criminal discourse by RTLM, the Trial Chamber did not need to specify the necessary and reasonable measures that he could have taken. It needed only to find that the Appellant had taken none.

(ii) Errors of fact

793. The Appeals Chamber will address the alleged errors by reference to the criteria for establishing superior responsibility under Article 6(3) of the Statute to which those errors relate.

a. Superior position and effective control

[1838] *Ntagerura et al.* Appeal Judgement, paras. 172-175, 399.
[1839] *Blaškić* Appeal Judgement, para. 62; *Bagilishema* Appeal Judgement, para. 28; *Čelebići* Appeal Judgement, paras. 216-241.
[1840] *Bagilishema* Appeal Judgement, paras. 28 and 42; *Čelebići* Appeal Judgement, paras. 238 and 241.

794. Before undertaking its examination, the Appeals Chamber observes that the Trial Chamber relied on the following facts in order to find that Appellant Nahimana had superior status and exercised effective control over RTLM employees from the station's creation until 6 April 1994:

- The Appellant was "number one" at RTLM;
- The Appellant represented RTLM at the highest level in meetings with the Ministry of Information;
- The Appellant controlled the finances of RTLM;
- The Appellant was a member of the Steering Committee, which functioned as a board of directors for RTLM, and to which the staff and journalists of RTLM were accountable;
- The Appellant was responsible for RTLM editorial policy.[1841]

795. The Trial Chamber found, in paragraph 972 of the Judgement, that even after 6 April 1994 Appellant Nahimana retained the authority vested in him as an office-holding member of the governing body of RTLM and had *de facto* authority to intervene with RTLM employees and journalists, as is evidenced by his intervention with RTLM personnel to halt attacks on UNAMIR and General Dallaire.

### i. The Appellant's submissions

796. The Appellant contends that the factual findings supporting the conclusion that he was a superior and had effective control over RTLM employees before 7 April 1994 are erroneous in several respects.[1842] In particular, the Trial Chamber allegedly erred:

- In failing to distinguish between RTLM s.a. and the RTLM radio station;[1843]
- In finding that the role played by the Appellant in establishing RTLM vested him with the authority to control and manage. First, in his interview with Dahinden in August 1993, Gaspard Gahigi did not refer to Nahimana as the Director of RTLM, but as "number one" among its founders or inceptors.[1844] Secondly, this interview of August 1993 is irrelevant in determining the Appellant's position in 1994.[1845] Thirdly, the Appellant did not admit that he personally had decided to create the radio; he had

[1841] Judgement, para. 970.
[1842] Nahimana Appellant's Brief, paras. 392-478. The Appeals Chamber notes that the Appellant frequently refers back to arguments developed by him in his Closing Brief at trial (see Nahimana Appellant's Brief, paras. 393, 414, 428, 440, 446, 476, 503, 509, 527). As explained above (*supra* XIII. C. 1. (b) (i)), an appellant's arguments must be presented in his appeal pleadings. Furthermore, a mere reference back to trial submissions cannot serve to establish an error by the Trial Chamber. Hence, the Appeals Chamber will not consider such references to arguments developed in Nahimana's Closing Brief at trial.
[1843] Nahimana Appellant's Brief., para. 394.
[1844] *Ibid.*, paras. 400-404.
[1845] *Ibid.*, para. 405.

merely had this decision endorsed by the Steering Committee, which held the decision-making power;[1846]

- In holding that membership of the RTLM Steering Committee *de jure* gave the Appellant power of control over RTLM's staff;[1847]

- In finding that the Appellant controlled the company's finances, whereas he merely possessed a power of signature for banking purposes, strictly circumscribed and shared with two other members of the Steering Committee.[1848] Furthermore, such power of signature was not evidence of any power of control by the Appellant over RTLM editorial policy and staff;[1849]

- In finding that the Technical and Programme Committee of the Steering Committee was responsible for overseeing RTLM programming, although there was no evidence to support that finding;[1850]

- In holding that his chairmanship of the Technical and Programme Committee gave him authority to intervene with RTLM journalists and management, and that it imposed on him a particular obligation to take action;[1851]

- In finding that his participation in meetings at the Ministry of Information on 26 November 1993 and 10 February 1994 demonstrated his control over RTLM, although he was not representing the company but merely accompanying its legal representatives, the President, Félicien Kabuga, and its Director, Phocas Habimana;[1852]

- In finding that he had the capacity to give orders, or that he played an active role in determining the content of RTLM broadcasts, when there was no evidence to support these findings;[1853]

- In relying on the testimonies of Witnesses GO, Nsanzuwera, Dahinden and Braeckman, as well as on reports from the Belgian Intelligence Service and the

[1846] *Ibid.*, paras. 406-408.
[1847] Nahimana Appellant's Brief, paras. 409-411, 437. The Appellant states that the Steering Committee's powers could only be exercised on a collegiate basis, and that only the Director-General had a *de jure* personal power of decision under Article 20 of the RTLM Statutes in regard to the way the company was run.
[1848] *Ibid.*, paras. 395, 412-417.
[1849] *Ibid.*, para. 418.
[1850] *Ibid.*, paras. 395, 419-425. See also Nahimana Brief in Reply, para. 145.
[1851] *Ibid.*, paras. 426-427.
[1852] *Ibid.*, paras. 430-432. See also Nahimana Brief in Reply, para. 148.
[1853] *Ibid.*, paras. 433-443. In this respect, the Appellant argues that : (1) Witness Kamilindi's statement that the Appellant was the "brain behind the operation" and that he was "the boss who gave orders" is a mere opinion without factual basis (paras. 434-435); (2) the fact that the Steering Committee called in journalists and members of the board of directors to discuss an RTLM broadcast shows that none of the members of the Steering Committee had, individually, the power to give orders (paras. 436 and 437); and (3) the Trial Chamber should not have relied on Witness Nsanzuwera's testimony that an RTLM journalist had told him that the radio editorials were written by the Appellant, because (a) Witness Nsanzuwera's testimony shows an appearance of bias, since Nsanzuwera later joined the Prosecutor's Office of ICTR, (b) the statements attributed to the RTLM journalist are highly suspect, since they were given in the course of criminal proceedings against him, doubtless in the hope of exonerating himself of his own responsibility, and (c) his testimony is basically hearsay, and not corroborated by other evidence (paras. 438-443). See also Nahimana Brief in Reply, para. 146.

French National Assembly, to find that Appellant Nahimana was the Director of the RTLM company, whereas the witnesses in question had no personal knowledge of the internal functioning of the company and the reports merely presented opinions without specifying their sources;[1854]

- In ignoring the evidence showing the real hierarchical structure of the company and of radio RTLM and stating the identity of the real managers,[1855] in particular Witness Bemeriki's testimony.[1856]

797. Appellant Nahimana further submits that the Trial Chamber's conclusion that he possessed *de jure* and *de facto* authority over RTLM radio after 6 April 1994 is based on erroneous factual findings.[1857] He specifically contends that:

- The evidence shows that after 6 April 1994 RTLM radio was under the control of the army, and managed by its Director, Phocas Habimana, and the Editor-in-Chief, Gaspard Gahigi;[1858]

- The Appellant, having had no *de jure* or *de facto* management authority prior to 6 April 1994, could not "continue" to exercise such powers after that date;[1859]

- The Appellant was under no obligation to act in lieu of the chairman of the Steering Committee, who was in Rwanda and still in contact with RTLM journalists even after 6 April 1994, as is clear from Witness Ruggiu's testimony;[1860]

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[1854] Nahimana Appellant's Brief, paras. 444-450. The Appellant further argues that: (1) Witness GO's testimony lacks credibility, in particular because there are substantial inconsistencies between his statements to the Prosecution investigators and his live testimony (para. 446); (2) Witness Nsanzuwera abandoned any attempt to present the Appellant as Director of RTLM and provided no indication of the position held by the Appellant within RTLM (para. 446); (3) Witness Dahinden uses metaphorical expressions ("spiritual father", "kingpin") which make it impossible to ascertain the Appellant's precise duties (para. 446); (4) Witness Braeckman did not describe the Appellant as Director of RTLM (para. 446); and (5) the Report of the French National Assembly Mission of Enquiry includes a letter from former Rwandan Prime Minister, Faustin Twagiramungu (Exhibit 1D54), formally stating that the Appellant had never been Director of RTLM, but the Trial Chamber failed to consider it (paras. 448-450). See also Nahimana Brief in Reply, para. 146.

[1855] Nahimana Appellant's Brief, paras. 451-478. The Appellant submits that the authorities who had effective control over RTLM s.a. and RTLM radio were known: the President of RTLM s.a. was Félicien Kabuga, and its Director-General was Phocas Habimana, while the Editor-in-Chief of the radio was Gaspard Gahigi (paras. 451, 452, 472-478, referring *inter alia* to Exhibits 1D11, 1D39, P53, 1D148 A and B, 1D149). See also Nahimana Brief in Reply, para. 147.

[1856] Nahimana Appellant's Brief, paras. 454-471. The Appellant asserts in this respect that the Judges wrongly dismissed the in-court testimony of Valerie Bemeriki, although (1) she was a direct witness in regard to the meeting at the Ministry of Information on 10 February 1994 and to the internal functioning and hierarchical structure of RTLM during the period January to July 1994 (paras. 455-457), and confirmed that the Appellant never interfered with the management of the radio (paras. 458 and 459); (2) her credibility in this respect was not questioned by the Prosecution or the Judges (paras. 461-464); (3) contrary to what the Trial Chamber stated, her testimony was consistent with her statement to the Prosecution's investigators (paras. 465-467); and (4) contrary to the view taken by the Trial Chamber, none of the inconsistencies noted by the Judges concerned matters affecting the Appellant's defence (paras. 468-471). See also Nahimana's Brief in Reply, para. 140.

[1857] Nahimana Appellant's Brief, paras. 479-501, 527-535.

[1858] *Ibid.*, paras. 480, 527-535, referring to testimonies of Witnesses Bemeriki and Ruggiu. See also Nahimana Brief in Reply, paras. 160-163.

[1859] *Ibid.*, para. 482 (see also the heading preceding this paragraph).

- Witness Dahinden's testimony cannot support the finding that the Appellant had maintained continuous links with RTLM, or been involved in the activities of the station after 6 April 1994;[1861]

- The finding that the Appellant possessed *de facto* control over RTLM after 6 April 1994 is based solely on his alleged intervention to halt RTLM attacks on General Dallaire and UNAMIR. However, this single "piece of evidence" relies solely on Expert Witness Des Forges' testimony, which was inadmissible, since (1) an expert witness cannot also testify as a factual witness; (2) Expert Witness Des Forges' testimony was second-degree hearsay evidence collected more than five years after the event, and (3) the Prosecutor did not call any direct witness, and the Judges refused to hear another direct witness, or an indirect witness, on this point.[1862] Furthermore, Expert Witness Des Forges' testimony on this issue has no probative value, since (1) there was no evidence that the Appellant in fact intervened with RTLM after being asked to do so, nor that it was such intervention, rather than an order from the military, that caused the halting of the broadcasts; and (2) this aspect of Expert Witness Des Forges' testimony is contradicted by the testimonies of the Appellant and of Witness Bemeriki.[1863]

### ii. Effective control before 6 April 1994

798. The Appeals Chamber will first examine the factual errors alleged by the Appellant before determining whether the finding that he was a superior and exercised effective control over RTLM staff before 6 April 1994 can be upheld in light of the confirmed factual findings.

- The distinction between the company RTLM and RTLM radio

799. With respect to the alleged confusion between the *company* RTLM and RTLM *radio*, the Appeals Chamber notes that the Trial Chamber expressly stressed that it "finds no significance in the distinction drawn by Nahimana between the company, RTLM s.a., and the radio station RTLM",[1864] explaining that:

> The radio was fully owned and controlled by the company as a matter of corporate structure. When confronted with the public comment he made in 1992 on the responsibility of a media owner for the policy expressed through that media, Nahimana did not deny this responsibility. He testified that when the RTLM board became aware of programming that

[1860] *Ibid.*, paras. 483-487.
[1861] *Ibid.*, paras. 488-494. The Appellant stresses in particular that (1) at the start of the meeting of June 1994 described by the witness, the Appellant indicated that he had no control over RTLM; (2) the witness did not specify which, of Appellants Nahimana and Barayagwiza, told him that Radio RTLM was about to be transferred to Gisenyi; (3) RTLM was only transferred to Gisenyi on 3 July 1994, which showed that the person who provided the previous information was particularly ill-informed about the activities of RTLM and had no connection with it. See also Nahimana Brief in Reply, paras. 152, 153, 156-159.
[1862] Nahimana Appellant's Brief, para. 496; Nahimana Brief in Reply, para. 154.
[1863] *Ibid.*, paras. 497-499; Nahimana Brief in Reply, paras. 155, 158.
[1864] Judgement, para. 559.

> violated accepted principles of broadcasting, they stood up and raised these concerns with management.[1865]

800. In the view of the Appeals Chamber, the mere allegation of confusion cannot demonstrate on appeal that it was unreasonable to conclude that the distinction betwen the *company* RTLM and RTLM *radio* was of no significance. This contention by the Appellant is therefore rejected.

- The Appellant's role in the creation of RTLM

801. The Appeals Chamber is not satisfied that the Trial Chamber misinterpreted the interview with Gaspard Gahigi. During this interview, Gahigi described the Appellant as "the top man" or "the number one" at RTLM, and not just as number one among the founders or inceptors of this project.[1866] Paragraph 554 of the Judgement gives a correct account of the content of the interview, stating that: "Gaspard Gahigi referred to Nahimana as 'the top man'" at RTLM. The Appeals Chamber takes the view that the interview of August 1993 demonstrates at the very least the importance of the role played by the Appellant in the early days of RTLM.

802. With respect to the alleged misinterpretation of Appellant Nahimana's testimony, the Appeals Chamber notes that the latter declared during his examination-in-chief:

> […] at my level, I was already working together with the small committee that we had formed. I decided that the RTLM-to-be should, over and above the administrative section, the accounting and so forth, should start off with the radio. So the priority for me and for this RTLM was the setting up of the radio station. Once this selection, made by the small technical and programming committee, had been discussed by the comité d l'initative [*sic*] and adopted, my second level of involvement, together with my small committee, was the selection of equipment to be ordered. And then there was contact with suppliers.[1867]

However, contrary to what the Appellant asserts, paragraph 555 of the Judgement exactly summarizes this portion of his testimony, explaining that "[b]y Nahimana's own account, he was the one who decided that the first priority for the RTLM company was the creation of the radio station and he brought this priority to the Steering Committee, which endorsed it".[1868]

803. In consequence, the Appeals Chamber is of the view that the Trial Chamber could reasonably conclude that the evidence showed that the Appellant played a role of primary importance in the creation of RTLM. Furthermore, although this fact alone would not suffice to demonstrate that the Appellant was a superior exercising effective control over RTLM staff in 1994, it was reasonable to find that that role suggested that the Appellant was vested with a certain authority with respect to RTLM staff, even in 1994.

- Membership of the Steering Committee

[1865] *Idem*, implicitly relying on evidence set out in paragraphs 504-505.
[1866] T. 31 October 2000, pp. 144-146. The Appeals Chamber notes that Exhibit P3 consists of an audiovisual recording of Witness Dahinden's interview with Gaspard Gahigi. It is clear from the Exhibit itself and from the transcripts of Witness Dahinden's testimony that this interview was in French (see T. 31 October 2000, pp. 27-30, 145). Consequently, the Appeals Chamber considers that the French version of the court transcripts in respect of this interview must prevail over their English version.
[1867] T. 23 September 2002, p. 67.
[1868] See also Judgement, para. 492.

804. In the view of the Appeals Chamber, although the Appellant's membership of the Steering Committee did not vest him with a general *de jure* authority within RTLM, such membership at least suggests that the Appellant possessed *de facto* a certain general authority within RTLM. The Trial Chamber could therefore rightly rely on this fact in order to determine whether it had been established that the Appellant was a superior exercising effective control over RTLM staff.

- Control over RTLM finances

805. The Appellant claims that he possessed no control over RTLM company finances, and that all he had was a power of signature for banking purposes. The Appeals Chamber has already rejected Appellant Barayagwiza's similar argument; it accordingly refers back to the discussion *supra*,[1869] and concludes that the Trial Chamber could reasonably rely on this factual finding when determining whether the Appellant's superior position and effective control were proven.

- The role of the Technical and Programme Committee and the capacity of its Chairman

806. The Trial Chamber noted that a document tendered into evidence (Exhibit P53) indicated that the Technical and Programme Committee was *inter alia* responsible for the "review and improvement of RTLM program policy".[1870] The Trial Chamber then noted that "[n]o other of the four committees working under the Steering Committee have responsibilities relating to RTLM programming", and it concluded that the Technical and Programme Committee had delegated authority from the Steering Committee, acting as a board of directors, to oversee RTLM programming.[1871] The Appeals Chamber is of the view that this was a reasonable conclusion to reach, and that the Appellant has not shown that, in so doing, the Trial Chamber wrongly rejected the evidence tendered by him in this respect.[1872] In the absence of any argument on the point in the Appellant's pleadings, the Appeals Chamber finds that it was equally reasonable to conclude that the Appellant's position as Chairman of the Technical and Programme Committee entailed a specific obligation to take action to prevent or punish the broadcast of criminal discourse.

- The meetings at the Ministry of Information

807. The Appellant does not dispute that he attended meetings between RTLM and the Ministry of Information in 1993 and 1994, but he submits that he was not representing RTLM and was only accompanying its legal representatives. The Appeals Chamber is not convinced by this argument. Even if, at a purely formal level, the Appellant may not have had authority to represent RTLM, the Appeals Chamber considers that his presence at these meetings and

[1869] See *supra* XII. D. 2. (a) (ii) b. i.
[1870] Judgement, para. 556. See also Judgement, para. 507 and Exhibit P53, p. 4.
[1871] Judgement, para. 556.
[1872] In particular, the Appellant has not shown why any reasonable trier of fact would have accepted Witness ZI's testimony or Exhibits 1D149 and 1D7. Nor does he show that this evidence contradicted the Trial Chamber's finding. In this respect, the Appeals Chamber notes that Witness ZI, who was a member of the Technical and Program Committee according to Exhibit P53 (last page), said that he had taken part in the restructuring of RTLM programming: T. 5 November 2002, pp 28-35 (closed session); see also Exhibit 1D149. As to Exhibit 1D7, it does not mention the Technical and Program Committee and, a fortiori, does not show that its powers were limited as contended by the Appellant.

the views he expressed there are highly indicative of his role and real powers within RTLM. In this respect, the Trial Chamber stated:

> Nahimana and Barayagwiza participated in both meetings. Each acknowledged mistakes that had been made by journalists and undertook to correct them, and each also defended the programming of RTLM without any suggestion that they were not entirely responsible for the programming of RTLM.[1873]

The Appellant does not show that these factual findings were erroneous. The appeal on this point is accordingly dismissed.

- The Appellant's power to give orders and his role in determining the content of RTLM broadcasts

808. First, the Appeals Chamber takes the view that a reasonable trier of fact could accept Witness Kamilindi's testimony that the Appellant was "the brain behind the operation" and "the boss who gave orders". Witness Kamilindi identified Gaspard Gahigi as his source for this information and gave precise indications as to the circumstances in which he received it.[1874] Moreover, Witness Kamilindi himself acknowledged that the Appellant held no official function at the RTLM, but he maintained that he was "the brain behind the project" and "the boss who gave orders".[1875] Accordingly, the Appellant's arguments are rejected.

809. Secondly, the Appeals Chamber finds that the fact that the Steering Committee called in journalists and members of the RTLM board of directors to discuss a broadcast does not necessarily mean that the Appellant did not personally exercise effective control.

810. With respect to Witness Nsanzuwera's testimony, the Appeals Chamber recalls that, except in special circumstances, there is no need for corroboration in order for a testimony to have probative value.[1876] The Appeals Chamber also rejects the argument regarding Witness Nsanzuwera's credibility. Since the witness was not a member of the Office of the Prosecutor when he testified, the Trial Chamber could reasonably conclude that no appearance of bias affected his testimony. Moreover, even assuming that it was in the context of a criminal investigation that the RTLM journalist told Witness Nsanzuwera that the Appellant had ordered him to read a text on air, the Trial Chamber was informed of this circumstance, and the Appeals Chamber is not satisfied that the Trial Chamber erred in relying on this portion of Witness Nsanzuwera's testimony.

- The directorship of RTLM

811. Appellant Nahimana submits that the Trial Chamber could not rely on the testimonies of Witnesses GO, Nsanzuwera, Dahinden and Braeckman, or on documents emanating from the Belgian Intelligence Service and from the French National Assembly, in order to find in paragraph 567 of the Judgement that he was the Director of RTLM s.a.

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[1873] Judgement, para. 619.
[1874] See T. 21 May 2001, pp. 55 *et seq.*; Judgement, para. 510.
[1875] T. 22 May 2001, p. 125, and T. 23 May 2001, pp. 27, 59. See also Judgement, para. 510.
[1876] See *supra*, footnote 1312.

812. The Appellant argues that Witness GO's testimony lacked credibility because it was inconsistent with his previous statements, without specifying what these inconsistencies were; he has therefore failed to show that it was unreasonable to rely on this testimony.

813. Furthermore, contrary to what the Appellant submits, Witness Nsanzuwera did not withdraw his description of the Appellant as Director of RTLM. On the contrary, during his cross-examination by the Appellant's Counsel, he confirmed that, at a meeting at the Ministry of Information in February 1994, the Appellant introduced himself as such.[1877]

814. With respect to the testimonies of Witnesses Dahinden and Braeckman, the Appeals Chamber notes that Witness Dahinden stated:

> I wanted to show in using that terminology ["kingpin"] that was out of the formal structure that is the reality behind the said titles or formal positions of responsibility.[1878]

Similarly, Witness Braeckman indicated that Appellant Nahimana had been introduced as Director of RTLM and took the floor "as the principal official of the RTLM at the time" during the conference which took place at the Kigali *préfecture* on 15 March 1994,[1879] adding: "call it manager, call it director. There was no doubt for those who were present in the hall and in the panel".[1880] These two witnesses thus precisely stressed that they were describing the position occupied by the Appellant *de facto* within RTLM. On this point, their respective testimonies fully corroborate one other. The Appeals Chamber accordingly rejects the Appellant's allegation that the Trial Chamber misinterpreted these two testimonies.

815. The Belgian Intelligence Service's report (Exhibit P153) is referred to at paragraphs 515 and 553 of the Judgement. This report is dated[1881] and identifies its author by name as well as its addressees. Review of the transcripts of the examination-in-chief – during which the report was admitted into evidence – and cross-examination of Expert Witness Des Forges reveal no question put to the witness as to the origin of Exhibit P153.[1882] Only one objection was raised by Appellant Ngeze's Counsel during the examination-in-chief, to which Witness Des Forges responded.[1883] Nor does a review of the trial record show that a motion was ever filed by Appellant Nahimana with the Trial Chamber, requesting the appearance of the author of the report presented as Exhibit P153. In these circumstances, the Appeals Chamber finds that the Appellant has failed to show on appeal that it was unreasonable for the Trial Chamber to find that Exhibit P153 had probative value when he himself had not challenged it at trial. The Appeals Chamber accordingly rejects the Appellant's appeal on this point.

816. With respect to the report of the French National Assembly, which is referred to in paragraphs 544 and 553 of the Judgement and was admitted as Exhibit P154,[1884] the Appellant

[1877] T. 25 April 2001, pp. 47-48, 61-62.
[1878] T. 1 November 2000, pp. 122-123.
[1879] T. 30 November 2001, pp. 115-116 (quote at p. 116).
[1880] *Idem.* See also Judgement, para. 512.
[1881] This report is a supplement dated 2 February 1994 issued by the Belgian Intelligence Services and initially discussed in the Parliamentary Commission of Enquiry on Rwanda, set up by the Belgian Senate.
[1882] See T. 20 to 31 May 2002, in particular T. 22 May 2002, pp. 215-221.
[1883] See T. 22 May 2002, pp. 216-222.
[1884] Extract from the *Rapport de la Mission d'information de l'Assemblée nationale française sur les opérations militaires menées par la France, d'autres pays et l'ONU au Rwanda entre 1990 et 1994* [Report of the French National Assembly Mission of Enquiry into the Military Operations Conducted by France, Other Countries and

appears to question its probative value in light of Exhibit 1D54,[1885] in particular criticizing the Trial Chamber for having failed to examine this latter exhibit. However, the Appeals Chamber is not convinced that the lack of a reference to Exhibit 1D54 in the Judgement shows any error. The Appeals Chamber recalls that the fact that an item of evidence or a testimony, even if inconsistent with the Trial Chamber's finding, is not mentioned in a judgement does not necessarily mean that the Trial Chamber did not take it into account.[1886] The Appeals Chamber takes the view that the Appellant has not shown that the finding that, although not officially Director of RTLM, he was nevertheless "referred to as the Director of RTLM, and […] he referred to himself as the Director of RTLM" [1887] was unreasonable in light of the inconsistency noted by him between Exhibits P154 and 1D54. First, Exhibit 1D54 could be understood as merely stating that the Appellant was never formally appointed director of RTLM. Secondly, the fact that the witness who spoke to the French parliamentary mission repeatedly referred to Appellant Nahimana as Director of RTLM in Exhibit P154[1888] fully supports the Trial Chamber's finding that he was perceived as the station head. The Appeals Chamber accordingly rejects the appeal on this point.

817. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber was entitled to find that the Appellant was referred to as the Director of RTLM, and that he referred to himself as such, even if that was not his official title, and that this factual finding could be taken into consideration when assessing whether the Appellant was a superior exercising effective control over RTLM staff before 6 April 1994.

- Exculpatory evidence

818. The Appeals Chamber is not convinced that no reasonable trier of fact could have concluded that the Appellant was a superior exercising effective control over RTLM employees in light of Exhibits 1D11, 1D39, P53, 1D148A, 1D148B and 1D149. It recalls that, even if certain of these Exhibits are not referred to in the Judgement,[1889] this does not mean that the Trial Chamber failed to consider them. The Appeals Chamber further finds that, even if Exhibits 1D11, 1D39, P53 and 1D148A and B could provide an idea of the structure and give information on who was formally responsible for RTLM, this is not

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the United Nations in Rwanda between 1990 and 1994], citing statements by Jean-Christophe Belliard, French representative in an observer capacity at the Arusha negotiations.

[1885] Letter dated 25 May 1998 from Faustin Twagiramungu to President Paul Quilès, annexed to the *Rapport de la Mission d'information de l'Assemblée nationale française* [Report of the French National Assembly Mission of Enquiry]. In this letter, Twagiramungu states that the Appellant was never RTLM Director, but that he was "one of the principal promoters of the project for the creation and installation of RTLM" (p. 2).

[1886] *Ndindabahizi* Appeal Judgement, para. 75, citing *Kvo~ka et al.* Appeal Judgement, para. 23 ("It is to be presumed that the Trial Chamber evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence.")

[1887] Judgement, para. 553.

[1888] This description of the Appellant is repeated at pages 283 and 288 of Exhibit P154.

[1889] Exhibits 1D148A and B and 1D149 are not mentioned in the Judgement. Exhibits 1D148A and B consist of a diagram drawn by Appellant Nahimana himself, based on Exhibits 1D11 and P53 (see T. 23 September 2002, pp. 96-97), mentioned above and showing the structure of RTLM s.a. Exhibit 1D149 is a working document on the restructuring of the RTLM programming grid dated 10 March 1994 and signed by Gaspard Gahigi and Froduald Ntawulikura. Exhibits P53 (entitled "*Organisation et structure du Comité d'initiative élargi*" ["Organisation and Structure of the Expanded Steering Committee" ]) and 1D39 (copy of an employment certificate signed by Phocas Habimana as RTLM Director-General) are respectively referred to in paragraph 507 and footnote 548 of the Judgement. Paragraph 493 of the Judgement also refers to the RTLM articles of incorporation [Statutes] (Exhibit 1D11).

necessarily conclusive for purposes of assessing whether, in fact, the Appellant was a superior exercising effective control. Thus the Trial Chamber could reasonably rely on other evidence which, in its view, established the real powers within RTLM. As to Exhibit 1D149, the Appellant has in no way explained how this evidence was capable of affecting the findings of the Trial Chamber; the Appeals Chamber accordingly rejects the appeal on this point.

819. The Appellant further argues that the Trial Chamber improperly rejected Witness Bemeriki's entire testimony. The credibility of this witness is addressed at paragraphs 550 and 551 of the Judgement. In rejecting this testimony in its entirety, the Trial Chamber relies on (1) the witness' own admission that many statements made by her to the Prosecution investigators were false – which is supported by Witness Bemeriki's cross-examination transcripts;[1890] (2) that she repeatedly testified in response to specific questions that she did not know the answer when the answer was clearly of a nature that she would know;[1891] (3) the numerous evasions and lies in her testimony.[1892]

820. The Appeals Chamber considers that the fact that the Prosecutor did not cross-examine Witness Bemeriki on some aspects of her testimony, or that the Judges did not put questions to her on certain points cannot imply that the Trial Chamber should have accepted as credible certain aspects of her testimony.[1893] The Trial Chamber could reasonably hold that the above-mentioned discrepancies, silences and evasions discredited Witness Bemeriki's testimony in its entirety. The Appeals Chamber will not consider the Appellant's argument that Witness Bemeriki's testimony was corroborated at trial,[1894] since he fails to substantiate it.

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[1890] See in particular T. 9 April 2003, pp. 31-35; T. 10 April 2003, pp. 14-18, 25.

[1891] Judgement, para. 551. The Trial Chamber mentioned the following example:

> Her claim, for example, that there are many named Juvenal Habyarimana in Rwanda, without acknowledging that one such person was the President of the Republic, does not manifest a desire to tell the truth in full.

[1892] *Idem*:

> In contrast, Bemeriki mixed her responses, often in answer to the same question, saying for example that she remembered well her statement that *Kangura* was an extremist publication and shortly thereafter saying she did not remember making the statement […] In her testimony, she lied repeatedly, denying that she made many statements, including her own broadcast, until confronted with them. Evasive to the point of squirming, her voice often reaching the feverish pitch of her broadcasts, which have been played in the courtroom, this witness made a deplorable impression on the Chamber.

[1893] Moreover, contrary to what the Appellant appears to allege (see Nahimana Appellant's Brief, para. 463), the Trial Chamber was under no compulsion to accept any part of a testimony which had not been directly challenged during cross-examination. Notwithstanding the somewhat infelicitous language of paragraph 334 of the Judgement, referred to by the Appellant, the Trial Chamber assesses the credibility of a number of individual testimonies, but does not lay down a general standard for assessment. It accepts that these testimonies were credible on certain issues only, on the basis that these points were not challenged in cross-examination. The Appeals Chamber recalls that it is not unreasonable for a trier of fact to accept some parts of a witness' testimony, but reject others: see *Ntagerura et al.* Appeal Judgement, para. 214. Moreover, it is clear that a party is under no obligation to challenge the credibility of a testimony during cross-examination; credibility can also be impugned by other evidence. The party in question is entitled to take the view that cross-examination is pointless, since there has already been enough to show that the witness is not credible.

[1894] Nahimana Appellant's Brief, para. 460.

821. Nor can the Appeals Chamber accept the argument that the Trial Chamber misinterpreted Witness Bemeriki's testimony when it concluded that her testimony was a volte-face that accommodated the Appellant's defence. The Trial Chamber noted that Witness Bemeriki had acknowledged in earlier statements that the Tutsi had been victims of genocide and that RTLM had played a role in this respect, but had denied this during her testimony.[1895] The Appellant has failed to show that there was no such discrepancy.[1896] The Appeals Chamber finds, as did the Trial Chamber, that this represented an inconsistency on a key issue,[1897] and concludes that the Trial Chamber could reasonably consider that Witness Bemeriki's testimony was a volte-face that accommodated the Appellant's defence.

- Conclusion

822. In light of the foregoing, the Appeals Chamber is of the view that a reasonable trier of fact could have found, on the basis of the confirmed factual findings, that Appellant Nahimana was a superior and had the material capacity to prevent or punish the broadcasting of criminal discourse by RTLM staff at least until 6 April 1994.

### iii. Control after 6 April 1994

- The Defence position

823. Relying on the testimonies of Witnesses Bemeriki and Ruggiu, the Appellant asserts that the Defence evidence establishes that from 6 April 1994 onwards RTLM was managed by Phocas Habimana and Gaspard Gahigi, and that it was controlled by the army. Both testimonies were rejected in their entirety by the Trial Chamber,[1898] and the Appeals Chamber has already concluded that the Appellant did not demonstrate that it was unreasonable to reject Witness Bemeriki's testimony in its entirety.

824. Turning to Witness Ruggiu's testimony, the Appeals Chamber observes that the Trial Chamber rejected it in its entirety because of (1) the number of inconsistencies between pre-trial statements and his trial testimony, which could not be reconciled; (2) the witness' own admission that he had lied several times in his pre-trial statements; and (3) the fact that he was an accomplice to the crimes for which the Appellants were charged.[1899] The Appellant nevertheless argues that the Trial Chamber should have accepted certain portions of Witness Ruggiu's testimony because they were in conformity with his previous statements, and had not been challenged, or were corroborated by Witness Bemeriki's testimony and by other evidence.[1900] The Appeals Chamber considers that this assertion does not suffice to establish an error on the part of the Trial Chamber in assessing Witness Ruggiu's credibility. The Trial Chamber, having found Witness Ruggiu not credible, was under no obligation to accept portions of his testimony that were consistent with his previous statement or which had not

[1895] See Judgement, paras. 529 and 550.
[1896] The Appellant merely asserts, providing no precise reference, that Witness Bemeriki's testimony during examination-in-chief was wholly consistent with the statements she had earlier made to Prosecution investigators: Nahimana Appellant's Brief, para. 467, merely referring to the Transcript of 8 April 2002.
[1897] See Judgement, para. 550.
[1898] *Ibid.*, paras. 549 (Witness Ruggiu), 551 (Witness Bemeriki).
[1899] *Ibid.*, paras. 548-549.
[1900] Nahimana Brief in Reply, paras. 141-143.

been challenged in cross-examination. Moreover, the mere fact that some portions of a non-credible witness' testimony are "corroborated" by another non-credible witness' testimony can in no way demonstrate that the Trial Chamber should have accepted the uncontested portions. Finally, with respect to the existence of other evidence which allegedly corroborates Witness Ruggiu's testimony, the Appellant merely refers to this generally, without citing any items or identifying them precisely. For these reasons, the Appeals Chamber rejects the appeal on this point.

825. The Appeals Chamber accordingly finds that Appellant Nahimana's claim that the army exercised control over RTLM after 6 April 1994 is without foundation.

- Continuing authority after 6 April 1994

826. The Appellant submits that, since he had no *de jure* or *de facto* authority prior to 6 April 1994, the thesis that such authority continued after 6 April 1994 was necessarily precluded.[1901] The Appeals Chamber has concluded that the Trial Chamber did not err in finding that before 6 April 1994 the Appellant was a superior with the material capacity to prevent or punish the broadcast of criminal discourse by RTLM journalists. The Appellant's argument must therefore fail.

827. The Appeals Chamber has also found that the Appellant has failed to show that RTLM came under control of the military after 6 April 1994. Consequently, the Chamber is of the view that the Trial Chamber could reasonably conclude that the Appellant continued to possess the power to intervene at RTLM, unless there was reasonable doubt as to whether such powers continued to exist after 6 April 1994. The Appeals Chamber will now examine this question.

- Witness Dahinden's testimony

828. With respect to the Appellant's challenge to the Trial Chamber's finding that the Appellant maintained a connection with RTLM after 6 April 1994, the Appeals Chamber notes that Witness Dahinden stated that *both* Appellants Nahimana and Barayagwiza had, on 15 June 1994, "confirmed that it [RTLM] was about to be transferred".[1902] In consequence, the Appeals Chamber considers that the Trial Chamber not only faithfully reproduced Witness Dahinden's testimony in paragraphs 542 and 564 of the Judgement, but also reasonably concluded that, in stating that RTLM had been, was being, or was about to be, transferred to Gisenyi, less than 20 days before its actual transfer, the Appellants clearly showed that "they were in contact with RTLM and familiar with its future plans".[1903] The Appeals Chamber accordingly rejects the appeal on this point.

- Intervention to halt RTLM attacks on UNAMIR and General Dallaire

829. The Trial Chamber found in paragraphs 565, 568 and 972 of the Judgement that Appellant Nahimana intervened in late June or early July 1994 to put an end to RTLM attacks on General Dallaire and UNAMIR. The Appeals Chamber observes that these findings rely

[1901] Nahimana Appellant's Brief, para. 482.
[1902] T. 24 October 2000, p. 143.
[1903] Judgement, para. 564.

exclusively on Expert Witness Des Forges' report and testimony, according to which the French Ambassador Yannick Gérard told the Appellant around the end of June or the beginning of July 1994 that the RTLM broadcasts attacking General Dallaire and UNAMIR must cease, that the Appellant promised to intervene with the RTLM journalists, and that the attacks ceased shortly thereafter.[1904]

830. The Appeals Chamber has already recalled that the role of expert witnesses is to assist the Trial Chamber in assessing the evidence before it and not to testify to facts in dispute as would ordinary witnesses.[1905] However, the Appellant does not appear to have objected at trial to this part of Expert Witness Des Forges' testimony.[1906] The Appeals Chamber recalls that, in principle, a party cannot refrain from raising an objection on an issue that was evident at trial, with a view to raising it on appeal if it has lost the case at first instance.[1907] In these circumstances, the Appeals Chamber considers that the Appellant waived his right to raise an objection to this portion of Expert Witness Des Forges' report and testimony.

831. Turning to the argument that the information received from Expert Witness Des Forges was secondary hearsay collected more than five years after the event, the Appeals Chamber recalls that trial chambers may admit and rely on hearsay testimony if they consider it to have probative value.[1908] In the instant case, the Trial Chamber noted that "Des Forges specifies in detail that her source of information about Nahimana's interaction with the French Government is a diplomat who was himself present in meetings between Nahimana and French Ambassador Yannick Gérard, who had a documentary record of the interaction in the form of a diplomatic telegram", and it considered that this piece of information was reliable.[1909] The Appeals Chamber finds that this conclusion was reasonable.

832. The Appellant further submits that, even if the matters reported by Expert Witness Des Forges were true, they could not constitute evidence that the Appellant effectively intervened with RTLM journalists to halt the attacks on UNAMIR and General Dallaire. The Appeals Chamber notes that, according to Expert Witness Des Forges' report and testimony, the said attacks ceased "immediately"[1910] or within two days[1911] after the Appellant met Ambassador Gérard. In these circumstances, the Appeals Chamber is of the view that the Trial Chamber could reasonably conclude that it was the Appellant's intervention that put an end to these attacks. The fact that the Appellant and Witness Bemeriki denied that there was

[1904] *Ibid.*, para. 543, referring to Exhibit P158A (Des Forges Expert Report), pp. 52-53, and to T. 23 May 2002, pp. 211-213. However, contrary to what the Chamber appears to be saying in paragraph 543 of the Judgement, Expert Witness Des Forges did not rely solely on her conversation of 28 February 2000 with Jean-Christophe Belliard at the French Ministry of Foreign Affairs; in her report, she also cites a press report by Anne Chaon of 7 July 2002.
[1905] See *supra* IV. B. 2. (b) and XII. B. 3. (b) (i) a.
[1906] Nahimana Appellant's Brief does not refer to any specific objection raised at trial. The Appeals Chamber notes that Appellant Nahimana submitted a written motion objecting generally to the scope of Witness Des Forges' testimony (see Motion to Restrict the Testimony of Alison Desforges [*sic*] to Matters Requiring Expert Evidence, 10 May 2002), but this motion did not specifically object to that aspect of Expert Witness Des Forges' report. Moreover the Appellant's motion was submitted prior to Witness Des Forges' testimony on this issue.
[1907] See, for example, *Niyitegeka* Appeal Judgement, para. 199; *Kayishema and Ruzindana* Appeal Judgement, para. 91.
[1908] See *supra*, para. 215 (footnote 519).
[1909] Judgement, para. 563.
[1910] Exhibit P158A, p. 53.
[1911] T. 23 May 2002, p. 212.

such intervention in their respective testimonies does not show that the Trial Chamber's conclusion was erroneous. The Trial Chamber in fact rejected these testimonies,[1912] and the Appellant has failed to show that it was unreasonable to do so.[1913]

833. The Appeals Chamber finds that the Appellant has not demonstrated that the Trial Chamber erred in concluding that he intervened with RTLM journalists to halt attacks on General Dallaire and UNAMIR in late June or early July 1994.

- Conclusion

834. The Appeals Chamber has rejected all of Appellant Nahimana's arguments relating to his effective control after 6 April 1994. It further finds that the facts proved against the Appellant demonstrate that he had the material capacity to prevent or punish RTLM broadcasts of criminal discourse even after 6 April 1994. The Appeals Chamber will consider later whether the Appellant made use of these powers.

b. *Mens Rea*

835. The Appeals Chamber would begin by observing that the Trial Chamber examined the *mens rea* standard applicable to superior responsibility pursuant to Article 6(3) of the Statute in two stages: before and after 6 April 1994. Thus, for the period prior to that date, paragraph 971 of the Judgement cites the following facts in support of the finding that the Appellant knew or had reason to know that his subordinates had committed, or were about to commit, criminal acts:

- Appellant Nahimana, as a member of the provisional board, knew that RTLM programming was generating concern;
- However, he defended RTLM programming at meetings with the Ministry of Information in 1993 and 1994;
- RTLM programming followed its trajectory, steadily increasing in vehemence and reaching a pitched frenzy after 6 April.

836. In paragraph 972 of the Judgement, the Trial Chamber concluded that "[a]fter 6 April 1994, […] it is clear that Nahimana […] knew what was happening at RTLM".

i. The Parties' submissions

837. The Appellant submits that the Trial Chamber wrongly found that he possessed the required *mens rea* for a conviction pursuant to Article 6(3) of the Statute. With respect to RTLM broadcasts prior to 6 April 1994, the Appellant asserts that "despite constant monitoring by the Rwandan administrative and judicial authorities, who were politically opposed to RTLM, no *crime* was reported during this period; no legal or administrative

[1912] The Trial Chamber "[did] not generally accept" the Appellant's testimony: Judgement, para. 696; Witness Bemeriki's testimony was rejected in its entirety: Judgement, para. 551.
[1913] Concerning Witness Bemeriki's testimony, see *supra* XIII. D. 1. (b) (ii) a. ii. The Appellant does not specifically dispute the Trial Chamber's finding regarding the lack of credibility of his own testimony.

proceedings were undertaken; no punishment was meted out".[1914] Furthermore, the Minister of Information only reproached RTLM for broadcasting messages of ethnic hatred and false propaganda, not for committing crimes.[1915]

838. As to RTLM broadcasts after 6 April 1994, the Appellant asserts that "the great majority of broadcasts considered criminal that were examined at trial were only brought to the attention of the Appellant on the occasion of the trial".[1916] He acknowledges having personally heard some broadcasts after 6 April 1994 calling for violence against the Tutsi population,[1917] but he submits that, at the time of his interview broadcast by Radio Rwanda (on 25 April 1994), he was not "perfectly" or "fully" aware of the criminal nature of these broadcasts.[1918] He further submits that, having been evacuated to Burundi, he could not receive RTLM broadcasts. Specifically, of the 27 broadcasts from after 6 April 1994 that were cited in the Judgement, only two of them dated from the month of April 1994 and he could not have heard that of 13 April 1994, because he was in Burundi at that time.[1919]

### ii. Analysis

839. As explained above, the mental element required pursuant to Article 6(3) of the Statute is that the accused "knew or had reasons to know" that his subordinates had committed or were about to commit crimes.[1920]

840. The Appeals Chamber is not convinced by the Appellant's arguments. As did the Trial Chamber,[1921] the Appeals Chamber finds that the Appellant "knew or had reason to know", as soon as he received the letter of 25 October 1993, or at least from the meeting of 26 November 1993 at the Ministry of Information. Moreover, the Appeals Chamber considers that the meeting of 10 February 1994, at which the Minister of Information repeated the concerns raised by the promotion of ethnic division by RTLM, leaves no doubt that Appellant Nahimana had the mental element required pursuant to Article 6(3) of the Statute. Indeed, from that moment the Appellant "had general information in his possession which would put him on notice of possible unlawful acts by his subordinates"; such information did not need to "contain precise details of the unlawful acts committed or about to be committed by his subordinates".[1922] In this respect, the Appeals Chamber stresses that the fact that no crime was denounced at the time or that the Ministry of Information did not describe the broadcasts as criminal is irrelevant: the Appellant had at a minimum reason to know that there was a significant risk that RTLM journalists would incite the commission of serious crimes against the Tutsi, or that they had already done so.

841. The Appeals Chamber notes, moreover, that the Appellant himself admitted having heard RTLM broadcasts after 6 April 1994 calling for violence against the Tutsi

[1914] Nahimana Appellant's Brief, para. 503 (emphasis in the original).
[1915] *Ibid.*, para. 504.
[1916] *Ibid.*, para. 505.
[1917] *Ibid.*, para. 506.
[1918] *Ibid.*, paras. 285-286, 508 and 510.
[1919] *Ibid.*, paras. 283-284 and 511.
[1920] *Supra* XIII. D. 1. (b) (i) b. ii.
[1921] See Judgement, paras. 617-619 and 971.
[1922] *Supra* XIII. D. 1. (b) (i) b. ii, referring to *Bagilishema* Appeal Judgement, paras. 28 and 42 and to *Čelebići* Appeal Judgement, paras. 238 and 241.

population.[1923] Therefore, there can be no doubt that the Appellant "knew or had reason to know" that his RTLM subordinates were preparing to broadcast, or had already broadcast, speeches inciting the killing of Tutsi, and there is no need to address the Appellant's other arguments in this respect.

c. Reasonable and necessary measures to prevent or punish commission of the crime

842. The Trial Chamber concluded that the Appellant failed to exercise the authority vested in him to "prevent the genocidal harm that was caused by RTLM programming".[1924]

i. The Parties' submissions

843. Appellant Nahimana submits that the Trial Chamber wrongly concluded that, in the absence of Félicien Kabuga, it was for Appellants Nahimana and Barayagwiza to convene the Steering Committee, although Witness Ruggiu testified that Kabuga was actually present in Gisenyi in May 1994.[1925]

844. Appellant Nahimana further submits that he could not take measures to put an end to RTLM broadcasts without risking his life and the lives of his family.[1926] He argues that his position as personal adviser to the interim President was no guarantee against such a threat.[1927] The Appellant adds that he never played any role within the interim Government, that his position as personal adviser to the President gave him no power of decision or of intervention, but that he nevertheless specifically drew the President's attention to the need to take steps to put an end to the RTLM broadcasts.[1928]

845. The Prosecutor responds that the Appellant's argument that he could no longer intervene with the management of RTLM and was powerless to do anything about the threat represented by the station is contradicted by his conduct after 25 April.[1929]

846. Appellant Nahimana appears to reply that he could not take the sole reasonable and necessary measure evoked by the Trial Chamber in its Judgement, namely reporting the crimes to the appropriate authorities, since the latter were perfectly well aware of the broadcasts.[1930]

ii. Analysis

[1923] T. 24 September 2002, pp. 44-47. In particular, at page 46, Appellant Nahimana admitted that he heard broadcasts where the journalist urges listeners to flush out the enemy, the word "enemy" being capable of being understood as the Tutsi in general. See also Nahimana Appellant's Brief, para. 506.
[1924] Judgement, para. 972.
[1925] Nahimana Appellant's Brief, paras. 483-487.
[1926] *Ibid.*, paras. 513, 516-519. In this respect, the Appellant stresses that the Trial Chamber itself noted that "in the context of events as they unfolded after 6 April 1994, any attempt to oppose or protest, exposed one to the risk of immediate reprisals" (para. 516).
[1927] *Ibid.*, paras. 514-519.
[1928] *Ibid.*, paras. 520-526.
[1929] Respondent's Brief, para. 348.
[1930] Nahimana Brief in Reply, paras. 138-139.

- The obligation to act in the absence of the RTLM President

847. The Appeals Chamber is not convinced that the Appellant has shown that the Trial Chamber should have found that the RTLM President, Félicien Kabuga, was in Rwanda after 6 April 1994. The only evidence supporting this hypothesis is Witness Ruggiu's assertion that he saw Félicien Kabuga in Gisenyi around 20 May 1994. However, the Trial Chamber rejected Witness Ruggiu's testimony in its entirety, and the Appeals Chamber has already found that the Appellant has not shown that this was unreasonable. The appeal on this point must accordingly be rejected.

848. In any event, even if Félicien Kabuga had been present in Rwanda after 6 April 1994, the Appeals Chamber fails to see how this could exonerate the Appellant from all responsibility. Since the Appellant was a superior who enjoyed power of effective control after 6 April 1994, he was under an obligation to exercise that power, even if it was shared with others.

- The risk of taking measures

849. The Appeals Chamber notes that the Trial Chamber took into account the Appellant's argument that he could not, without risking his life, or the lives of his family members, take any measure to prevent or punish the broadcast of criminal discourse by RTLM.[1931] However, the Trial Chamber rejected this argument, noting that the Appellant's allegations stood in sharp contrast with the evidence of his role at the time. It observed in particular that the Appellant was Political Adviser to the President, and that he played an important role within the interim Government. It also noted that the Appellant had *de jure* authority over RTLM and that the one occasion on which he did intervene to stop RTLM from broadcasting attacks on General Dallaire and UNAMIR showed that he had *de facto* power.[1932] The Appeals Chamber has upheld this latter finding.

850. The Appeals Chamber takes the view that the fact that the Appellant possessed *de facto* authority to intervene with RTLM suggests that he had nothing to fear from his subordinates. It was thus not unreasonable for the Trial Chamber to have rejected the Appellant's assertion that he could not take measures without risking his life or the lives of his family members, particularly in light of the fact that the Trial Chamber did not generally accept the Appellant's testimony. In any event, the Appeals Chamber considers that it was reasonable for the Trial Chamber to find that the Appellant's position as personal adviser to the interim President protected him against such risks.

851. The Appellant concedes having been personal adviser to the interim President. What he disputes is (1) the possession of any decision-making power, or the capacity to intervene, as a result of this position; and (2) his role within the interim Government. The Appeals Chamber agrees that the Appellant's role *within* the interim Government was not established in the Judgement. The Trial Chamber cited no evidence to support this finding, although the Appellant's position as personal adviser to the interim President was established on the basis

[1931] Judgement, para. 565.
[1932] *Idem*.

of a number of testimonies.[1933] The Appeals Chamber considers that the Trial Chamber erred in failing to motivate its finding.

852. Nevertheless, the Appeals Chamber notes that, when testifying, Expert Witness des Forges stated:

> Mr. Nahimana played the role of councillor [*sic*] to the President, Sindikubwabo, who was generally acknowledged to be an extremely weak and ineffective President, one who had serious problems, it has since emerged, with the Government itself, to such a point where he was even considering resigning at the end of May. Mr. Nahimana, who accompanied the President abroad, appeared to exercise a position of some importance in his company. There was testimony before this Court, I believe, by Mr. Dahindin [*sic*], who sought to meet the President in Geneva and who was referred to Mr. Nahimana as the person who had the authority to approve that meeting with the President. In addition, Mr. Nahimana engaged in two meetings with the senior French representative who was running *operation turquoise* in early July […] The President was part of the Government and in that sense his advisor was also part of the Government, although, here, we may have a translation problem because, in one sense of the English usage, government is a restricted term meaning ministers, heads of departments. In another sense government means that group in charge of the country. In the sense of group in charge of the country, rather than ministerial -- occupants of ministerial posts; indeed, Mr. Nahimana would have been counted a member of the Government […] Mr. Nahimana has been seen throughout this entire period as serving as a spokesperson for the Government, as a kind of public relations man, as the term would be in American-English, someone who would present and justify and argue for the stand of the Government beginning in October 1990. Subsequently, […] in this capacity as presidential advisor, Mr. Nahimana was called upon repeatedly to be the educated, articulate public face of the Rwandan Government. He is described in French diplomatic correspondence as the director of RTLM and he is received by the head of the French diplomatic mission in Goma as a spokesperson for the Government in the company of the foreign minister, Mr. Bicamumpaka.[1934]

In the view of the Appeals Chamber, these extracts suffice to show that, on the basis of his capacity as adviser to the interim President and of the fact that he presented himself as spokesperson for the interim Government, the Appellant indeed occupied an important position *with* the Government.

853. As to the Appellant's argument that this was contradicted by Witness AGR's testimony,[1935] it suffices to note that the Trial Chamber did not accept this testimony,[1936] which the Appellant does not dispute on appeal. The Appeals Chamber therefore finds that the Trial Chamber could reasonably conclude that the Appellant had occupied an important position with the interim Government. This finding supports the conclusion that the Appellant enjoyed sufficient influence to take necessary and reasonable measures to prevent RTLM broadcasts of criminal discourse without having to fear for his own life, or for the lives of his family.

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[1933] Expert Witness Des Forges stated that the Appellant was political advisor or "*Conseiller*" to President Sindikubwabo and the Appellant himself said that he had been invited by the President to Gitarama on 25 or 26 May 1994, then to Tunis for the OAU summit in June (see Judgement, para. 540). Witness Dahinden testified that, having requested a meeting with the President of the Interim Government in June 1994, he was in fact received by Nahimana (see Judgement, para. 542).

[1934] T. 23 May 2002, pp. 203-208.

[1935] Nahimana Appellant's Brief, para. 523.

[1936] The Judgement does not mention Witness AGR, and it seems logical to assume that the Chamber did not accept his testimony.

- The only measure the Appellant could have taken would have been useless

854. The Appeals Chamber is not convinced that the only measure the Appellant could have taken was to inform the authorities that RTLM was broadcasting criminal discourse. On this point, it refers to it discussion *supra*, upholding the Trial Chamber's finding that the Appellant could himself have intervened to prevent and punish the broadcast of criminal discourse. Consequently, the Appellant's argument that there was no point in informing the authorities of crimes they were already aware of cannot exonerate him. It was incumbent on the Appellant to take all necessary and reasonable measures in his power to stop the broadcast of criminal discourse and to punish its authors.

- The Appellant drew the interim President's attention to the need to intervene with RTLM

855. As to the assertion that the Appellant testified without being challenged that he drew the interim President's attention to the need to take measures to stop the RTLM broadcasts, the Appeals Chamber notes that the Trial Chamber did not generally accept the Appellant's version of events.[1937] The Appellant does not dispute this finding. Furthermore, the extract from the transcripts mentioned in his Appellant's Brief does not suffice to demonstrate that he took all necessary and reasonable measures in his power. His testimony in this respect was evasive,[1938] while there was no other evidence with probative value to support this defence. In consequence, the Appeals Chamber finds that the Appellant has failed to demonstrate any error on the part of the Trial Chamber. The appeal on this point is accordingly dismissed.

- Conclusion

856. For the foregoing reasons, the Appeals Chamber finds that Appellant Nahimana has not shown that the Trial Chamber erred in concluding that he failed to take necessary and reasonable measures to prevent or punish direct and public incitement to murder Tutsi in 1994 by RTLM staff.

(c) Conclusion

857. The Appeals Chamber accordingly upholds the Appellant's conviction for direct and public incitement to commit genocide, pursuant to Article 6(3) of the Statute.

2. Responsibility of Appellant Barayagwiza

(a) RTLM broadcasts

[1937] Judgement, para. 696.

[1938] The Appeals Chamber moreover notes that, during his testimony, Appellant Nahimana did not spontaneously indicate that he had mentioned the matter to the President. It was only when asked by Judge Pillay that Appellant Nahimana stated :

> […] as from June 1994 when I was able, indeed, to have contact with President Sindikubwabo, I was able to meet a number of ministers; the minister of foreign affairs was with me in Tunis. I did discuss it. (T. 18 October 2002, pp. 42-44)

858. The Trial Chamber found Appellant Barayagwiza guilty of direct and public incitement to commit genocide pursuant to Article 6(3) of the Statute.[1939] The Appeals Chamber has already found that the Trial Chamber was entitled to conclude that the Appellant was a superior with effective control over the journalists and employees of RTLM before 6 April 1994.[1940] However, the Appeals Chamber has also concluded that it could not be held beyond reasonable doubt that RTLM broadcasts between 1 January and 6 April 1994 constituted direct and public incitement to commit genocide.[1941] Therefore, the Appeals Chamber is of the view that Appellant Barayagwiza could not be convicted pursuant to Article 6(3) of the Statute for direct and public incitement to commit genocide by RTLM staff.

(b) CDR

859. The Appeals Chamber notes that the Trial Chamber found Appellant Barayagwiza guilty of direct and public incitement to commit genocide on account of his activities within the CDR and as a superior of CDR members and *Impuzamugambi*:

> As found in paragraph 276, Jean-Bosco Barayagwiza was one of the principal founders of CDR and played a leading role in its formation and development He was a decision-maker for the party. The killing of Tutsi civilians was promoted by the CDR, as evidenced by the chanting of *"tubatsembatsembe"* or "let's exterminate them", by Barayagwiza himself and by CDR members and *Impuzamugambi* in his presence at public meetings and demonstrations. The reference to "them" was understood to mean the Tutsi population. The killing of Tutsi civilians was also promoted by the CDR through the publication of communiqués and other writings that called for the extermination of the enemy and defined the enemy as the Tutsi population. The Chamber notes the direct involvement of Barayagwiza in this call for genocide. Barayagwiza was at the organizational helm of CDR. He was also on site at the meetings, demonstrations and roadblocks that created an infrastructure for the killing of Tutsi civilians. For these acts, the Chamber finds Jean-Bosco Barayagwiza guilty of direct and public incitement to genocide under Article 2(3)(c) of its Statute, pursuant to Article 6(1) of its Statute. The Chamber found in paragraph 977 above that Barayagwiza had superior responsibility over members of CDR and the *Impuzamugambi*. For his failure to take necessary and reasonable measures to prevent the acts of direct and public incitement to commit genocide caused by CDR members, the Chamber finds Barayagwiza guilty of direct and public incitement to commit genocide pursuant to Article 6(3) of its Statute.[1942]

860. In his submissions concerning direct and public incitement to commit genocide, Appellant Barayagwiza does not specifically challenge this conviction. However, the Appellant challenges elsewhere many of the factual findings underlying it, and the Appeals Chamber will now consider these arguments.

(i) Responsibility pursuant to Article 6(1) of the Statute

[1939] Judgement, para. 1034. As noted above (footnote 1604), the French translation of this paragraph states that the Appellant was convicted under Article 6(1) and (3) of the Statute, but this is a translation error, the original English version referring only to Article 6(3) of the Statute.
[1940] See *supra* XII. D. 2. (a) (ii) (b).
[1941] See *supra* XIII. C. 1. (b) (iv).
[1942] Judgement, para. 1035.

861. The Appeals Chamber has already rejected the Appellant's arguments that he never directly called for the extermination of the Tutsi.[1943] However, the witnesses who stated that the Appellant Barayagwiza had personally called for the extermination of Tutsi referred only to events that occurred before 1994.[1944] It follows that the Appellant's conviction for direct and public incitement to commit genocide could not be based on those facts.

862. The Appeals Chamber notes that, in convicting the Appellant of direct and public incitement to commit genocide under Article 6(1) of the Statute, the Trial Chamber also relied on the fact that CDR promoted the killing of Tutsi, that the Appellant "was at the organizational helm of CDR" and that "he was also on site at the meetings, demonstrations and roadblocks that created an infrastructure for the killing of Tutsi".[1945] However, the Judgement does not explain how these facts constituted personal acts of the Appellant which would form a basis for his conviction for direct and public incitement to commit genocide under any of the modes of responsibility set out in Article 6(1) of the Statute. In particular, the supervision of roadblocks cannot form the basis for the Appellant's conviction for direct and public incitement to commit genocide; while such supervision could be regarded as instigation to commit genocide, it cannot constitute public incitement, since only the individuals manning the roadblocks would have been the recipients of the message and not the general public. Therefore, the Appeals Chamber sets aside the Appellant's conviction under Article 6(1) of the Statute for direct and public incitement to commit genocide.

(ii) Responsibility pursuant to Article 6(3) of the Statute

863. The Trial Chamber also found that the Appellant could be held liable under Article 6(3) of the Statute for the acts of direct and public incitement to commit genocide of CDR members.[1946] The Appeals Chamber has already held that the conviction of the Appellant could be based only on acts of direct and public incitement having taken place in 1994.[1947] It has also held that a reasonable trier of fact was entitled to find that in 1994 CDR militants had engaged in chanting, directly and publicly inciting the commission of genocide against the Tutsi.[1948] The Appeals Chamber will now consider whether the Appellant could be convicted under Article 6(3) of the Statute on account of that chanting.

a. Elements to be established

864. Appellant Barayagwiza submits that, in order to prove that he had superior responsibility under Article 6(3), it was necessary for the Prosecutor to prove the following: (1) that he had a *dolus specialis*; (2) that he had superior responsibility for CDR members; and (3) that CDR members killed Tutsi civilians.[1949]

[1943] See *supra* XII. C. 3. (a) (ii) .
[1944] See *supra* para. 647. Witness AFB asserted that he had heard Appellant Barayagwiza call for the extermination of Tutsi at a CDR meeting held at Umuganda stadium in 1993: T. 6 March 2001, pp. 20-21, 52; Judgement, paras. 308 and 708. Witness X stated that he had heard Appellant Barayagwiza call for the murder of Tutsi during a CDR meeting held at Nyamirambo stadium in February or March 1992: T. 18 February 2002, pp. 72-76; Judgement, paras. 310 and 708. Witness AAM referred to demonstrations in the town of Gisenyi towards the end of 1992: T. 12 February 2001, pp. 102-105; Judgement, paras. 702 and 718.
[1945] Judgement, para. 1035.
[1946] *Idem*.
[1947] See *supra* VIII. B. 2.
[1948] See *supra* XIII. C. 2.
[1949] Barayagwiza Appellant's Brief, para. 178.

865. The Appeals Chamber has already recalled the elements to be established in order to convict a defendant under Article 6(3) of the Statute.[1950] In particular, it is not necessary for the accused to have had the same intent as the perpetrator of the criminal act; it must be shown that the accused "knew or had reason to know that the subordinate was about to commit such act or had done so".[1951] Furthermore, it is not necessary for the Appellant's subordinates to have killed Tutsi civilians: the only requirement is for the Appellant's subordinates to have committed a criminal act provided for in the Statute, such as direct and public incitement to commit genocide.

866. The Appeals Chamber will now consider whether Appellant Barayagwiza could be convicted under Article 6(3) of the Statute on account of acts of direct and public incitement to commit genocide by CDR militants in 1994.

### b. Analysis of the Appellant's submissions

#### i. National President of the CDR

867. Appellant Barayagwiza maintains that the Trial Chamber erred in finding that in February 1994, after the assassination of Martin Bucyana, he became National President of the CDR.[1952] The Appellant argues that this finding was not established beyond reasonable doubt, since it was based on "unsupported hearsay"[1953] and not supported by any documentary evidence.[1954] The Appellant further contends that, under Article 19 of the CDR constitution, the Vice-President of the CDR automatically became its President until new elections were called.[1955] He also points out that, at a CDR press conference held on 2 April 1994, he was only introduced as "an advisor to the executive committee".[1956] In his Brief in Reply, the Appellant adds that (1) the Trial Chamber could not rely on issues 58 and 59 of *Kangura* in order to conclude that he had become National President of the CDR, since Appellant Ngeze had explained — giving plausible reasons — that the information in these issues was inaccurate;[1957] and (2) contrary to what the Prosecutor submits,[1958] Colonel Bagosora did not write that he (Appellant Barayagwiza) was National President of the CDR, but only that he was one of its leaders.[1959]

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[1950] See *supra* XI. B.
[1951] Article 6(3) of the Statute.
[1952] Barayagwiza Notice of Appeal, p. 2 (Ground 18); Barayagwiza Appellant's Brief, paras. 181-184; Barayagwiza Brief in Reply, paras. 118-122; T(A) 17 January 2007, pp. 59-65. The Appellant also filed a motion seeking the admission of additional evidence in support of this ground of appeal (The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence, 13 September 2006), but this motion was dimissed because the Appellant failed to show that the additional evidence sought to be admitted (1) was unavailable at trial and (2) that its exclusion on appeal would lead to a miscarriage of justice (Decision of 8 December 2006, paras. 25-31).
[1953] Barayagwiza Appellant's Brief, para. 184. See also Barayagwiza Brief in Reply, para. 120.
[1954] *Ibid.*, para. 182.
[1955] *Ibid.*, para. 183 (reference to the relevant exhibit not provided); Barayagwiza Brief in Reply, para. 119.
[1956] *Ibid.*, para. 183 (referring to a "*Cassette* CE56/95 of RTLM (2 April 1994)"); Barayagwiza Brief in Reply, paras. 118-119; T(A) 17 January 2007, p. 60, referring to "Exhibit P103".
[1957] Barayagwiza Brief in Reply, para. 121.
[1958] Respondent's Brief, para. 546, referring to Exhibit P142, p. 26.
[1959] Barayagwiza Brief in Reply, para. 122.

868. The Trial Chamber's finding that Appellant Barayagwiza became National President of the CDR in February 1994[1960] is based on the following evidence: the testimonies of Witnesses ABC, LAG, Serushago, AHB and Kamilindi, and of Expert Witnesses Kabanda and Des Forges, and on extracts from *Kangura* issues 58 and 59.[1961] The Appellant asserts that the Trial Chamber's finding is erroneous because based on "unsupported hearsay", but he does not otherwise support this assertion; the appeal on this point therefore cannot succeed.[1962] The Appeals Chamber notes, however, that the reference to the testimony of Expert Witness Des Forges in paragraph 266 of the Judgement cannot support the conclusion that Appellant Barayagwiza had become President of the CDR on the death of Martin Bucyana.[1963] Nevertheless, the Appeals Chamber is satisfied that this conclusion could be reached on the basis of the other evidence cited by the Trial Chamber.

869. The Appeals Chamber also dismisses the Appellant's argument based on the CDR constitution, recalling that this argument was considered by the Trial Chamber,[1964] which nonetheless found on the basis of other evidence that the Appellant had become National President of the CDR. The Appellant has not shown that this finding was unreasonable.[1965] The same applies to the argument that the information in *Kangura* issues 58 and 59 was inaccurate: this argument was considered and rejected by the Trial Chamber,[1966] and the Appellant has not demonstrated that this was unreasonable.

870. As to the argument that the Appellant was introduced merely as "an advisor to the executive committee" at a CDR press conference on 2 April 1994, the Appellant cites no

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[1960] Judgement, para. 276.

[1961] *Ibid.*, paras. 266, 267 and 273, the latter paragraph referring more specifically to the testimonies of Witnesses ABC and Serushago, as well as to issues No. 58 and 59 of *Kangura*.

[1962] The only specific argument raised by the Appellant in this connection is that Witness Kamilindi was not credible because he was a member of the PSD, a party allied to the RPF and staunchly opposed to the CDR (Barayagwiza Brief in Reply, para. 120). However, this argument does not suffice to demonstrate that it was unreasonable to accept this testimony, especially since the Trial Chamber was aware of this fact (T. 21 May 2001, p. 82 and T. 22 May 2001, pp. 29-30). At the appeal hearing, Appellant Barayagwiza also attacked the testimony of Expert Witness Des Forges with respect to the alleged struggle for power between Appellant Barayagwiza and Martin Bucyana within the CDR (T(A) 17 January 2007, p. 60-64), but the arguments made in this connection do not show why it was unreasonable to conclude that the Appellant became President of the CDR on the death of Bucyana.

[1963] Footnote 200 to the Judgement refers to T. 21 May 2002, pp. 55-56, where Expert Witness Des Forges explains that Appellant Barayagwiza was one of the main founders of the CDR. However, Des Forges later states that witnesses told her that Barayagwiza was the real head of the CDR: T. 21 May 2002, pp. 150-151.

[1964] See Judgement, para. 267.

[1965] Moreover, Article 19 of the CDR constitution (Exhibit 2D9), to which the Appellant refers, does not provide that the Vice-President of the CDR automatically becomes its President until new elections are called, but reads as follows:

> The President of the Executive Committee is the President of the Party. He is its Legal Representative.
>
> The first Vice-President of the Executive Committee is the first Substitute Legal Representative.
>
> The second Vice-President of the Executive Committee is the second Substitute Legal Representative.

In any case, even if it were the case that in theory the Vice-President succeeded the President until new elections were called, this would not necessarily imply that this is what happened in practice.

[1966] See Judgement, paras. 266 and 273.

evidence on file (or at least gives no specific reference), and the Appeals Chamber will accordingly not consider it.[1967]

871. Finally, the Trial Chamber did not rely on the article by Colonel Bagosora in order to conclude that the Appellant had become National President of the CDR. In any event, the Appeals Chamber notes that what Colonel Bagosora wrote was: "[t]he example of the attack on the residence of Mr Barayagwiza Jean Bosco, leader of the Coalition for the Defence of the Republic (C.D.R.) was the most eloquent".[1968] It is not clear whether Colonel Bagosora meant to say that the Appellant was "the" leader or "one of the" leaders of the CDR; this extract therefore cannot invalidate the finding that the Appellant had become National President of the CDR. The Appellant's appeal on these points is dismissed.

### ii. Head of the CDR in Gisenyi

872. The Appellant submits that the Trial Chamber erred in finding that he "was President of CDR in Gisenyi before 1994"; he maintains that he was in fact elected to this position on the 5th or the 6th of February 1994, as demonstrated by a fax dated 6 February 1994.[1969]

873. The Trial Chamber found on the basis of a series of testimonies[1970] that "[a]t some time prior to February 1994, Barayagwiza became the head of the CDR in Gisenyi prefecture".[1971] The Appellant's assertion that "[t]his finding was based on nothing more than rumour and hearsay"[1972] is unsupported and cannot therefore show that the Trial Chamber erred.[1973] As to the fax of 6 February 1994, it is not even on record.[1974] The Appellant's appeal on these points is dismissed.

### iii. Membership in the Executive Committee of the CDR

874. The Appellant argues that the Trial Chamber erred in finding that he was a member of the Executive Committee of the CDR.[1975] First, he asserts that "[t]his finding was based

[1967] The Appellant has referred to a "*Cassette* CE56/95 of RTLM (2 April 1994)" (Barayagwiza Appellant's Brief, para. 183) and to Exhibit P103 (T(A) 17 January 2007, p. 60). It is unclear whether the tape mentioned by the Appellant is in the case-file. With respect to Exhibit P103, the Appellant fails to make it clear what he is referring to (Exhibit P103 contains a whole series of tapes in Kinyarwanda).
[1968] Exhibit P142, p. 26.
[1969] Barayagwiza Notice of Appeal, p. 2 (Ground 19); Barayagwiza Appellant's Brief, para. 185 (stating that the Appellant was elected on 5 February 1994); Barayagwiza Brief in Reply, para. 123 (stating that the Appellant was elected on 6 February 1994).
[1970] Judgement, paras. 264, 265 and 273, relying on the testimonies of Witnesses AHI, BI, EB, AFX, Serushago and Kamilindi, and of Expert Witness Des Forges.
[1971] *Ibid.*, para. 276.
[1972] Barayagwiza Appellant's Brief, para. 185.
[1973] The Appeals Chamber considers that this conclusion has not been affected by the fact that, following the admission of additional evidence on appeal, the testimonies of Witnesses EB and AFX can no longer be accepted, since a reasonable trier of fact could reach this conclusion on the basis of other evidence adduced.
[1974] At para. 123 of his Brief in Reply, the Appellant argues that this fax was part of the supporting material in his Indictment (no reference provided). Even if this were the case, it would not make the fax an exhibit admitted to the record.
[1975] Barayagwiza Notice of Appeal, p. 2 (Ground 20); Barayagwiza Appellant's Brief, paras. 186-189; Barayagwiza Brief in Reply, paras. 124-129; T(A) 17 January 2007, pp. 68-70.

entirely on rumour, or vague and unfounded information from dubious sources";[1976] in particular, the statement by Expert Witness Des Forges that the Appellant was "self-chosen" as member of the Executive Committee, or that the CDR could have acted in breach of its own rules, was unfounded.[1977] The Appellant maintains that the authenticity of the only document produced in support of the Trial Chamber's finding – a letter from CDR President, Martin Bucyana, to General Dallaire which included the Appellant's name in a list of members of the CDR for which protection was requested – has not been established,[1978] and that, in any case, this letter "was not intended to provide a complete list of members of the Executive Committee of the CDR".[1979] The Appellant adds that the official documents of the party filed with the Ministry of Internal Affairs show that he was not a member of the Executive Committee, that the Prosecutor did not produce any document proving his election to the Executive Committee and that he had always been known and designated as adviser to the Executive Committee.[1980] In his Brief in Reply, the Appellant maintains that: (1) the disputed finding is in contradiction with the CDR constitution, which provides that the general assembly elects the members of the executive committee; (2) he was not elected at the only general assembly, held on 22 February 1992; and (3) a letter dated 14 December 1992 shows that the Appellant was not a member of the Executive Ccommittee.[1981]

875. The Trial Chamber found that "[a]t some time prior to February 1994, Barayagwiza became […] a member of the national Executive Committee".[1982] This finding appears to rely on the testimonies of Witness Kamilindi, Expert Witness Chrétien and Appellant Ngeze, as well as on the letter from the President of the CDR to General Dallaire.[1983]

876. In the opinion of the Appeals Chamber, the Appellant has not shown that the Trial Chamber erred in relying on the letter from the President of the CDR, Martin Bucyana, to General Dallaire. First, the fact that the Prosecutor was able to produce only a copy of the letter is not sufficient to cast doubt on its authenticity.[1984] Second, the letter's content is clear: the President of the CDR requests General Dallaire to provide protection for the nine named members of the Executive Committee, who include Appellants Barayagwiza and Ngeze.[1985] It

[1976] Barayagwiza Appellant's Brief, para. 186. See also Barayagwiza Brief in Reply, para. 129.
[1977] *Ibid.*, para. 188; Barayagwiza Brief in Reply, para. 125, referring to T. 29 May 2002, pp. 242-249 (In French) and 30 May 2002, pp. 13-14.
[1978] *Ibid.*, para. 187.
[1979] *Ibid*, para. 188.
[1980] *Idem*.
[1981] Barayagwiza Brief in Reply, paras. 125-128, referring to Exhibits 2D9, 2D12 and P203.
[1982] Judgement, para. 276.
[1983] *Ibid.*, paras. 261, 264-265, 273.
[1984] Moreover, contrary to what the Appellant appears to argue (Barayagwiza Appellant's Brief, para. 187), the Prosecutor did not have to produce a "certified copy signed by the Registrar".
[1985] Exhibit P107/37, the relevant part of which reads as follows:

> SUBJECT: Protection of members of the Executive Committee of the CDR Party
>
> General,
>
> I have the honour to inform you that recently the members of the Executive Committee of the CDR Party have received death threats from individuals not sharing their ideology.
>
> I would therefore ask you to ensure the security of the following persons: […]
>
> 8. Mr. NGEZE Hassan, residing in the Biryogo Sector, Nyarugenge Commune.

was certainly not unreasonable to rely on this letter of 30 December 1993 in order to conclude that the Appellant had become a member of the Executive Committee of the CDR at some time prior to February 1994.

877. As to the argument that the testimony of Expert Witness Des Forges should have been rejected, the Appeals Chamber notes that, when she was questioned as to why she thought the Appellant was a member of the Executive Committee of the CDR, she answered that she relied on the letter to General Dallaire,[1986] adding that it was reasonable to assume that the President of the party knew who the members of his Executive Committee were.[1987] Co-Counsel Pognon objected that there was no evidence that the Appellant had been elected to the Committee after the assembly of 22 February 1992,[1988] but Ms. Des Forges maintained her answer, limiting herself to suggesting how the Appellant might have become a member of the Committee.[1989] This cannot invalidate her testimony on this point.

878. The Appeals Chamber notes that the Appellant raises no specific argument to show that the Trial Chamber erred in accepting the testimonies of Witness Kamilindi and Expert Witness Chrétien. The Appeals Chamber finds that, on the basis of these testimonies and the letter sent by the President of the CDR to General Dallaire on 30 December 1993, it was reasonable to conclude that the Appellant had become a member of the Executive Committee of the CDR before February 1994. The fact that he was not elected to the Committee at the general assembly of the CDR of 22 February 1992[1990] – a fact recognized by the Trial Chamber[1991] – or that documents of 1992 and 1993 did not refer to him as a member of the Committee cannot invalidate this finding. The appeal on this point is therefore dismissed.

### iv. Effective control over CDR militants and *Impuzamugambi*

879. The Appellant asserts that the Trial Chamber erred in finding that he could be held liable as hierarchical superior of the CDR militants and *Impuzamugambi*.[1992] Invoking *Kordić* and *Čerkez*[1993] and the analysis of the Trial Chamber at paragraph 976 of the Judgement, he maintains that, even if he was National President of the CDR, this would not imply that he was the hierarchical superior of the CDR militants, in the absence of a showing by the Trial Chamber that his powers met the criterion of effective control.[1994]

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> 9. Mr. BARAYAGWIZA Jean Bosco, residing in the Nyarugenge Sector, Nyarugenge Commune […]

The letter is signed "BUCYANA Martin President of the CDR Party" and bears the stamp of the CDR.

[1986] T. 29 May 2002, p. 209.

[1987] T. 30 May 2002, pp. 8, 15.

[1988] T. 29 May 2002, p. 210; T. 30 May 2002, pp. 6-17.

[1989] T. 29 May 2002, p. 210 ("That would presume if he was elected, perhaps he was self-chosen.") and 211; T. 30 May 2002, p. 12, 14 ("Q. Do you agree with me that in order for one to be a member of a bureau of a party, one has to go through an electoral process? A. That depends on the rules of the party and whether or not they are observed.").

[1990] In this connection, the Appeals Chamber notes that it appears that the Executive Committee elected on 22 February 1992 was a provisional one: Exhibit 2D12, p. 172*bis* (Registry numbering).

[1991] Judgement, para. 272.

[1992] Barayagwiza Notice of Appeal, p. 2 (Ground 21); Barayagwiza Appellant's Brief, paras. 190-193; Barayagwiza Brief in Reply, paras. 90-91.

[1993] Barayagwiza Appellant's Brief, para. 191, no specific reference provided.

[1994] *Ibid.*, paras. 190-192; Barayagwiza Brief in Reply, paras. 90-91.

880. The Prosecutor responds that the Appellant "truncated the Trial Chamber's position regarding the accountability of political party leadership for acts committed by members or affiliates to the party", the Trial Chamber having found that CDR militants and *Impuzamugambi* acted in conformity with the dictates or instructions of the party.[1995] The Prosecutor further argues that the Appellant misrepresents the criteria for superior responsibility, since proof of an official position is not required.[1996] The Prosecutor finally submits that the Trial Chamber did not have to examine the powers deriving from the position of CDR President, since it had concluded that the Appellant had in practice exercised effective control over CDR members and *Impuzamugambi*, noting in particular that they were directed and supervised by the Appellant and that he had given them weapons.[1997]

881. Paragraph 976 of the Judgement reads as follow:

> The Chamber notes that, in *Musema*, the Tribunal found that superior responsibility extended to non-military settings, in that case to the owner of a tea factory. The Chamber has considered the extent to which Barayagwiza, as leader of the CDR, a political party, can be held responsible pursuant to Article 6(3) of its Statute for acts committed by CDR party members and *Impuzamugambi.* The Chamber recognizes that a political party and its leadership cannot be held accountable for all acts committed by party members or others affiliated to the party. A political party is unlike a government, military or corporate structure in that its members are not bound through professional affiliation or in an employment capacity to be governed by the decision-making body of the party. Nevertheless, the Chamber considers that to the extent that members of a political party act in accordance with the dictates of that party, or otherwise under its instruction, those issuing such dictates or instruction can and should be held accountable for their implementation. In this case, CDR party members and *Impuzamugambi* were following the lead of the party, and of Barayagwiza himself, who was at meetings, at demonstrations, and at roadblocks, where CDR members and *Impuzamugambi* were marshalled into action by party officials, including Barayagwiza or under his authority as leader of the party. In these circumstances, the Chamber holds that Barayagwiza was responsible for the activities of CDR members and *Impuzamugambi*, to the extent that such activities were initiated by or undertaken in accordance with his direction as leader of the CDR party.[1998]

882. The Appeals Chamber is of the view that these factual findings were capable of supporting a conviction of the Appellant pursuant to Article 6(1) of the Statute for having ordered or instigated certain acts of CDR militants and *Impuzamugambi*. The Appeals Chamber has indeed already upheld the conviction of this Appellant on this count.[1999] The question here is whether the Appellant could incur liability as a superior for all of the acts committed by CDR militants and *Impuzamugambi*. The Appeals Chamber is not convinced that the evidence cited by the Trial Chamber suffices to establish the effective control of the Appellant over all CDR militants and *Impuzamugambi* in all circumstances. In particular, as noted by the Trial Chamber, the leaders of a political party "cannot be held accountable for all acts committed by party members or others affiliated to the party".[2000] Although the Appellant doubtless exerted substantial influence over CDR militants and *Impuzamugambi*, that is insufficient – absent other evidence of control – to conclude that he had the material

[1995] Respondent's Brief, para. 552, referring to the Judgement, para. 976.
[1996] *Ibid.*, para. 553.
[1997] *Ibid.*, para. 554, referring to Judgement, paras. 261, 314, 336, 340-341, 954 and 977.
[1998] Judgement, para. 976 (referring to *Musema* Trial Judgement, paras. 148 and 905).
[1999] See *supra* XII. D. 2. (b) (viii) .
[2000] Judgement, para. 976.

capacity to prevent or punish the commission of crimes by all CDR militants and *Impuzamugambi*.[2001]

883. Accordingly, the Appeals Chamber sets aside the Appellant's conviction pursuant to Article 6(3) of the Statute for direct and public incitement to commit genocide on account of acts by CDR militants and *Impuzamugambi*.

### 3. Responsibility of Appellant Ngeze

#### (a) *Kangura* articles

884. Appellant Ngeze appeals against his conviction by the Trial Chamber for various crimes in his capacity as founder, owner and editor of *Kangura*, alleging that none of the articles in the paper support the thesis that he directly and personally participated in the perpetration of these crimes.[2002]

885. The Trial Chamber concluded that Appellant Ngeze "was the owner, founder and editor of *Kangura.* He controlled the publication and was responsible for its contents".[2003] This finding was based on the following evidence:

> That Hassan Ngeze was the founder and editor of *Kangura* is not contested. The Chamber notes that Ngeze accepted responsibility for and defended the publication in his testimony. Others such as Witness AHA, who worked for *Kangura*, confirmed that Ngeze was "the boss" and had the last word in editorial meetings.[2004]

The Trial Chamber then found the Appellant guilty of direct and public incitement to commit genocide on the basis of *Kangura* articles.[2005]

886. The Appeals Chamber has already concluded that certain articles and editorials published in *Kangura* in 1994 directly and publicly incited the commission of the genocide.[2006] The Appellant has failed to demonstrate that he could not have been held personally responsible for matters published in *Kangura*. The Appeals Chamber considers that, on the basis of the evidence before it, the Trial Chamber could reasonably attribute the totality of articles and editorials published in *Kangura* to Appellant Ngeze. Moreover, the Appellant had himself written two of the three articles published in 1994 found to have constituted direct and public incitement to commit genocide (the other article being signed *Kangura*).[2007] Furthermore, there can be no doubt that, by his acts, the Appellant Ngeze had the intent to instigate others to commit genocide. The Appeals Chamber accordingly upholds the conviction of the Appellant for having directly and publicly incited the commission of genocide through matters published in *Kangura* in 1994.

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[2001] See in this connection *Čelebići* Appeal Judgement, para. 266 (stating that substantial influence is insufficient to establish effective control). See also *Kordić and Čerkez* Trial Judgement, paras. 838-841, finding that, even though Kordić had substantial influence as political leader, this was insufficient to conclude that he had effective control (this finding was not challenged on appeal by the ICTY Prosecutor).
[2002] Ngeze Appellant's Brief, paras. 354-355.
[2003] Judgement, para. 135. See also paras. 977A and 1038.
[2004] *Ibid.*, para. 134.
[2005] *Ibid.*, para. 1038.
[2006] See *supra* XIII. C. 3. (c).
[2007] See *supra* XII. C. 3. (b).

(b) Acts of the Appellant in Gisenyi

887. Appellant Ngeze argues that the Trial Chamber erred in considering that the fact that he mobilized the population to attend CDR meetings and spread the message that the *Inyenzi* would be exterminated were acts which called for the extermination of the Tutsi population.[2008] He submits that to invite the population to attend a political meeting is not a crime and contends that, even if he had mobilized the population by driving around with a megaphone in his vehicle, it was the entire population that he was mobilizing, not just the Hutu.[2009] He further claims that the Trial Chamber erred in finding it established beyond reasonable doubt that he announced through a megaphone that the *Inyenzi* would be exterminated.[2010]

888. The Trial Chamber found Appellant Ngeze guilty of direct and public incitement to commit genocide under Articles 2(3)(c) and 6(1) of the Statute for his acts which called for the extermination of the Tutsi population: "Hassan Ngeze often drove around with a megaphone in his vehicle, mobilizing the Hutu population to come to CDR meetings and spreading the message that the *Inyenzi* would be exterminated, *Inyenzi* meaning, and being understood to mean, the Tutsi ethnic minority."[2011]

889. The Appeals Chamber notes that the Trial Chamber did not rely solely on the invitation to attend CDR meetings in convicting Appellant Ngeze of the crime of direct and public incitement to commit genocide, but rather on this fact coupled with his announcements that the *Inyenzi* (*i.e.*, the Tutsi) would be exterminated.

890. The Appeals Chamber notes Appellant Ngeze's argument that, even if he had in fact mobilized people to come to CDR meetings, it was the entire population that he was mobilizing, and not just the Hutu. However, whether or not Appellant Ngeze sought to mobilize the Hutu population or the entire population is of no relevance; what is important is that direct and public incitement to commit genocide did occur.

891. Appellant Ngeze further argues that paragraph 834 of the Judgement demonstrates that it was not proved beyond reasonable doubt that he announced through a megaphone that the *Inyenzi* would be exterminated. However, this paragraph shows that, even though some Defence witnesses testified that Appellant Ngeze did not have a megaphone in his vehicle, the Trial Chamber was satisfied beyond reasonable doubt that the Appellant was seen with a megaphone. Appellant Ngeze has failed to demonstrate any error on the part of the Trial Chamber.

892. Nonetheless, the Trial Chamber did not specify when the acts in question took place. The factual finding in paragraph 837 of the Judgement is based on the testimonies of Witnesses Serushago, ABE, AAM and AEU. [2012] The Appeals Chamber notes that Witness Serushago refers to events which allegedly took place in February 1994,[2013] Witness ABE to

[2008] Ngeze Appellant's Brief, paras. 269-272.
[2009] *Ibid.*, para. 270.
[2010] *Ibid.*, para. 271.
[2011] Judgement, para. 1039, referring to para. 837.
[2012] *Ibid.,* para. 834.
[2013] T. 15 November 2001, pp. 118-119; Judgement, paras. 784 and 834.

events in 1993,[2014] and Witness AAM to events prior to 1994.[2015] As for Witness AEU, it is not clear when the events which the witness describes occurred.[2016] Since only Witness Serushago clearly refers to events which allegedly took place in February 1994 and this testimony cannot be relied on if it is not corroborated by other reliable evidence,[2017] it has not been demonstrated beyond reasonable doubt that in 1994 Appellant Ngeze "often drove around with a megaphone in his vehicle, mobilizing the Hutu population to come to CDR meetings and spreading the message that the *Inyenzi* would be exterminated, *Inyenzi* meaning, and being understood to mean, the Tutsi ethnic minority". For this reason, this part of Appellant Ngeze's conviction for the crime of direct and public incitement to commit genocide must be quashed.

## XIV. CONSPIRACY TO COMMIT GENOCIDE

893. The Appellants contend that, in convicting them of the crime of conspiracy to commit genocide, the Trial Chamber committed several errors of law and fact.[2018]

### A. Elements of the crime of conspiracy to commit genocide

894. Conspiracy to commit genocide under Article 2(3)(b) of the Statute has been defined as "an agreement between two or more persons to commit the crime of genocide".[2019] The existence of such an agreement between individuals to commit genocide (or "concerted agreement to act"[2020]) is its material element (*actus reus*); furthermore, the individuals involved in the agreement must have the intent to destroy in whole or in part a national, ethnical, racial or religious group as such (*mens rea*).[2021]

### B. Alleged errors

895. Appellants Nahimana and Ngeze argue that the Trial Chamber could not infer the existence of an agreement to commit genocide based on the concerted or coordinated action of a group of individuals, because "[t]he fact that individuals react simultaneously and in the same way to a common situation (war, political crisis, murder of political leaders, ethnic conflicts, etc.) does not in any way prove the existence of a prior agreement and a concerted

[2014] T. 26 February 2001, p. 95.
[2015] T. 12 February 2001, pp. 104, 110-111, 131-132; Judgement, para. 797.
[2016] The Trial Chamber (Judgement, para. 798, footnote 824) referred to the following portions of Witness AEU's testimony: T. 26 June 2001, pp. 5-9, 32-36 and T. 27 June 2001, pp. 119-121. Although Witness AEU stated that she had seen Appellant Ngeze at the front of the convoys going to the CDR meetings and bragging about having killed *Inkotanyi* (T. 26 June 2001, pp. 34-35), the time when this occurred is not specified.
[2017] Judgement, para. 824.
[2018] Nahimana Notice of Appeal, pp. 11-15; Nahimana Appellant's Brief, paras. 50, 55-57, 76-78, 585-639; Nahimana Brief in Reply, paras. 28-37; Barayagwiza Notice of Appeal, p. 3; Barayagwiza Appellant's Brief, paras. 241-256; Barayagwiza Brief in Reply, paras. 56-68; Ngeze Notice of Appeal, paras. 94-119; Ngeze Appellant's Brief, paras. 24-27, 32, 45-47, 286-332; Ngeze Brief in Reply, paras. 24, 26, 75-79.
[2019] *Ntagerura et al*. Appeal Judgement, para. 92. See also *Kajelijeli* Trial Judgement, para. 787; *Niyitegeka* Trial Judgement, para. 423; *Ntakirutimana* Trial Judgement, para. 798; *Musema* Trial Judgement, para. 191.
[2020] The jurisprudence of the Tribunal refers to an "agreement" and to a "concerted agreement to act", in which a number of individuals join (*Ntagerura et al.* Appeal Judgement, para. 92; *Kajelijeli* Trial Judgement, paras. 787-788; *Niyitegeka* Trial Judgement, para. 423; *Musema* Trial Judgement, para. 191).
[2021] *Niyitegeka* Trial Judgement, para. 423; *Musema* Trial Judgement, para. 192.

plan".[2022] They contend that the *Rutaganda* Appeal Judgement rejected any form of responsibility "in application of '*guilt by association*', including guilt from '*similarity of conduct*'".[2023] They argue that the jurisprudence of the Nuremberg International Military Tribunal and of this Tribunal requires, in order for a defendant to be convicted of conspiracy, his or her direct and personal participation in meetings to plan crimes.[2024] Appellant Barayagwiza maintains that a tacit agreement cannot establish conspiracy to commit genocide, adding that "[t]he Prosecution could not prove any individual criminal act attributable to the Appellant Barayagwiza".[2025]

896. The Appeals Chamber recalls that the *actus reus* of the crime of conspiracy to commit genocide is a concerted agreement to act for the purpose of committing genocide. While such *actus reus* can be proved by evidence of meetings to plan genocide, it can also be inferred from other evidence.[2026] In particular, a concerted agreement to commit genocide may be inferred from the conduct of the conspirators.[2027] However, as in any case where the Prosecutor seeks, on the basis of circumstantial evidence, to prove a particular fact upon which the guilt of the accused depends,[2028] the existence of a conspiracy to commit genocide must be the only reasonable inference based on the totality of the evidence.

897. The Appeals Chamber takes the view that the concerted or coordinated action of a group of individuals can constitute evidence of an agreement. The qualifiers "concerted or coordinated" are important: as the Trial Chamber recognized, these words are "the central element that distinguishes conspiracy from 'conscious parallelism', the concept put forward

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[2022] Nahimana Appellant's Brief, paras. 586-588 (the extract cited above is at para. 588). See also Ngeze Appellant's Brief, para. 289(ii). Appellant Nahimana adds that "the fact of sharing the same convictions or the same 'objective' does not presuppose any prior interaction, and does not of necessity lead to the conception of a *concerted plan* aimed at achieving these": Nahimana Appellant's Brief, para. 594 (emphasis in the original). In reply, Appellant Nahimana concedes that the conspirators' conduct could constitute circumstantial evidence of a criminal conspiracy, but he adds that such conduct must be reasonably explicable only by the existence of a conspiratorial agreement, which is not the present case: Nahimana Brief in Reply, paras. 28-30.

[2023] Ngeze Appellant's Brief, para. 289(ii) (emphasis in the original). See also Nahimana Appellant's Brief, para. 590.

[2024] Nahimana Appellant's Brief, paras. 591-592; Nahimana Brief in Reply, paras. 31-32; Ngeze Appellant's Brief, para. 289(iii) and (v).

[2025] Barayagwiza Brief in Reply, para. 57. Appellant Barayagwiza adds at para. 59 :

> The Prosecution has failed to prove that the conversations between Nahimana and Barayagwiza were part of an agreement to kill off Tutsi, nor were there any individual criminal acts from which such a conspiracy could be inferred. The theory of the Appellant being a lynchpin (§§ 1050 of the judgement) was not based on any evidence, nor was it ever alleged by the Prosecution, in the indictment or the later amendment.

[2026] See, in this respect, *Kajelijeli* Trial Judgement, para. 787 ("[t]he agreement in a conspiracy is one that may be established by the prosecutor in no particular manner, but the evidence must show that an agreement had indeed been reached"). In the *Ntakirutimana*, *Niyitegeka* and *Kajelijeli* cases, the Trial judges noted that the accused had attended meetings although they did not require meetings as elements of the crime of conspiracy to commit genocide: see *Kajelijeli* Trial Judgement, paras. 434-453, 787-788, 794; *Niyitegeka* Trial Judgement, paras. 423-429; *Ntakirutimana* Trial Judgement, paras. 799-800.

[2027] In this respect, the Appeals Chamber notes that a number of legal systems explicitly recognize that the agreement can be inferred from the conduct of the parties to the conspiracy: United States: *Glasser v. United States*, 315 U.S. 60, 80 (1942); United Kingdom: *R. v. Anderson*, [1986] A.C. 27, 38; Canada: *R. v. Gagnon*, [1956] S.C.R. 635, para. 12.

[2028] *Ntagerura et al.* Appeal Judgement, paras. 306, 399; *Stakić* Appeal Judgement, para. 219; *Krstić* Appeal Judgement, para. 41; *Vasiljević* Appeal Judgement, paras. 120, 128, 131; *Čelebići* Appeal Judgement, para. 458.

by the Defence to explain the evidence in this case".[2029] The Appeals Chamber thus considers that the Appellants were not found guilty by association or by reason of the similarity of their conduct: rather, the Trial Chamber found that there had been a concerted or coordinated action and, on the basis *inter alia* of this factual finding, it inferred the existence of a conspiracy. The Appeals Chamber will consider below whether such findings and inference were the only reasonable ones that could be drawn from the evidence.

898. Turning to Appellant Barayagwiza's argument, the Appeals Chamber considers that the agreement need not be a formal one.[2030] It stresses in this respect that the United States Supreme Court has also recognized that the agreement required for conspiracy "need not be shown to have been explicit".[2031] The Appellant is thus mistaken in his submission that a tacit agreement is not sufficient as evidence of conspiracy to commit genocide. The Appeals Chamber recalls, however, that the evidence must establish beyond reasonable doubt a concerted agreement to act, and not mere similar conduct.

899. The Appeals Chamber will now consider whether, in the instant case, the Trial Chamber could find that the existence of a concerted agreement to act between the Appellants had been established beyond reasonable doubt.

900. The Trial Chamber concluded that the Appellants had "consciously interacted with each other, using the institutions they controlled to promote a joint agenda, which was the targeting of the Tutsi population for destruction".[2032] It subsequently declared the Appellants guilty of conspiracy to commit genocide "through personal collaboration as well as interaction among institutions within their control, namely RTLM, *Kangura* and CDR".[2033]

901. In the absence of direct evidence of the Appellants' agreement to commit genocide, the Trial Chamber inferred the existence of the conspiracy on the basis of circumstantial evidence. The Appeals Chamber will now consider whether this was the only possible reasonable inference.

### 1. The Parties' submissions

902. The Appellants contend that the evidence of their personal collaboration does not establish an agreement to commit genocide.[2034] In this respect, Appellants Nahimana and Ngeze submit that the Trial Chamber's findings in regard to the content of the meetings between the Appellants are not supported by any evidence.[2035]

903. The Appellants deny that there was any "interaction among institutions", and submit that, even if there had been, that would not establish beyond reasonable doubt that those who

[2029] Judgement, para. 1048. See also paras. 1045, 1047.
[2030] As held by common law courts with respect to *conspiracy*: see for example, *R. v. Anderson*, [1986] A.C. 27, 37 (United Kingdom).
[2031] *Iannelli v. United States*, 420 U.S. 770, 777, footnote 10 (1975), reaffirming *Direct Sales Co. v. United States*, 319 U.S. 703, 711-713 (1943).
[2032] Judgement, para. 1054.
[2033] *Ibid.*, para. 1055.
[2034] Nahimana Appellant's Brief, paras. 601-605, 628-630; Nahimana Brief in Reply, paras. 34-37; Barayagwiza Appellant's Brief, paras. 244, 247, 249; Barayagwiza Brief in Reply, paras. 59, 66-67; Ngeze Appellant's Brief, paras. 310-314, 326-327.
[2035] Nahimana Appellant's Brief, paras. 618-620; Ngeze Appellant's Brief, paras. 305-306.

controlled those institutions had come to an agreement to commit genocide.[2036] The Appellants also dispute the existence of a "common media front" between *Kangura*, RTLM and the CDR,[2037] contending that the fact that news media and a political party shared a common objective in a specific situation is not sufficient to establish the existence of a criminal conspiracy.[2038]

904. The Prosecutor challenges the Appellants' "piecemeal approach", arguing that the totality of the evidence shows the existence of a conspiracy to commit genocide among the Appellants, both on a personal and institutional level, and that the Appellants have not shown that the Trial Chamber's findings were unreasonable.[2039] At the Appeals hearings, the Prosecutor added that the institutional coordination, which went beyond mere business promotion or publicity, was undoubtedly aimed at calling for Hutu solidarity and extermination of the Tutsi.[2040]

2. Could criminal conspiracy be inferred from the personal collaboration between the Appellants?

905. In order to conclude that the Appellants had personally collaborated, the Trial Chamber relied, in paragraphs 1049 and 1050 of the Judgement, on the following factual findings:

(1) Appellants Nahimana and Barayagwiza were the two most active members of the RTLM Steering Committee and they had the power to sign cheques on behalf of the company;[2041]

(2) Appellants Nahimana and Barayagwiza both attended meetings at the Ministry of Information, where they represented RTLM.[2042] The Trial Chamber noted in this respect that the Minister of Information expressed concern at RTLM's promotion of ethnic hatred, and that Appellants Nahimana and Barayagwiza had responded to these

[2036] Nahimana Appellant's Brief, paras. 606-617; Nahimana Brief in Reply, para. 33; Barayagwiza Appellant's Brief, paras. 244, 248-249; Barayagwiza Brief in Reply, paras. 62-63, 67; Ngeze Appellant's Brief, paras. 308-309, 315-327. See also Appellant Nahimana's submissions during the appeal hearings (T(A) 17 January 2007, pp. 5-6).
[2037] See Judgement, para. 943.
[2038] Nahimana Appellant's Brief, paras. 587-589, 594-595; Barayagwiza Appellant's Brief, paras. 244, 248; Ngeze Appellant's Brief, paras. 289(ii), 298-299, 301-303. During the appeal hearings, Appellant Nahimana, citing the *Kambanda* case, stressed that RTLM had been founded by MRND supporters, that President Habyarimana was its main shareholder and that *Kangura* had constantly attacked the MRND and RTLM: T(A) 17 January 2007, p. 7.
[2039] Respondent's Brief, paras. 284-290.
[2040] T(A) 18 January 2007, p. 35.
[2041] The finding that Appellants Nahimana and Barayagwiza were the two most active members of the RTLM Steering Committee appears at para. 554 of the Judgement; it relies on various items of evidence (see Judgement, paras. 552-560). Paragraphs 552, 555 and 567 of the Judgement deal with the Appellants' authority to sign cheques on behalf of the company and their control of its financial operations.
[2042] The Trial Chamber appears to have relied here on the findings concerning the meetings of 26 November 1993 and 10 February 1994 (see Judgement, paras. 617-619; see also paras. 573-599, 606-607, where the testimonies of Witnesses GO and Nsanzuwera are summarized, as well as the exhibits on which the Trial Chamber relied).

concerns by defending the programming of RTLM and by undertaking to correct the journalists' mistakes;[2043]

(3) Appellants Nahimana and Barayagwiza attended clandestine meetings between the MRND and the CDR at the Ministry of Transport.[2044] The content of these meetings is not known;

(4) Appellants Nahimana and Barayagwiza together met Witness Dahinden in Geneva to talk about RTLM.[2045] The Appellants told him that "RTLM was about to be transferred to Gisenyi" and the Trial Chamber found that, in so doing, they had indicated "that they were in contact with RTLM and familiar with its future plans";[2046]

(5) Appellants Barayagwiza and Ngeze were together at CDR meetings and demonstrations;[2047]

(6) Appellants Nahimana and Ngeze met with Barayagwiza at his office at the Ministry of Foreign Affairs;[2048] Appellants Barayagwiza and Ngeze also met without Appellant Nahimana.[2049] During their meetings, Appellants Barayagwiza and Ngeze "discussed RTLM, CDR and *Kangura* as all playing a role in the struggle of the Hutu against the Tutsi";[2050]

(7) All three Appellants participated in a MRND rally in Nyamirambo Stadium, where both Appellants Nahimana and Barayagwiza spoke about "Hutu empowerment" and the "fight against the *Inyenzi*"; [2051]

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[2043] Judgement, paras. 617-619.
[2044] This is stated in paragraph 887 of the Judgement, on the basis of Witness MK's testimony (see Judgement, paras. 884, 886).
[2045] This is stated in paragraph 564 of the Judgement, on the basis of Witness Dahinden's testimony (see Judgement, para. 542).
[2046] Judgement, para. 564.
[2047] The Appeals Chamber observes, however, that the Trial Chamber did not expressly state this finding. It simply noted, at paragraph 339 of the Judgement, that the CDR policy was "explicitly communicated to members and the public by Barayagwiza and Ngeze", but it did not specify whether the two Appellants communicated it *together* or separately. However, apart from this reference, three sections of the Judgement discussing evidence mention meetings between Appelants Barayagwiza and Ngeze, at the CDR Constituent Assembly (Judgement, para. 274), at the MRND meeting at Nyamirambo Stadium (Judgement, para. 907) and at Martin Bucyana's funeral in February 1994 (Judgement, para. 333).
[2048] This factual finding appears in paragraph 887 of the Judgement. It relies on the testimonies of Witnesses AHA (see Judgement, paras. 879, 887) and AGK (see Judgement, paras. 883, 887). Witness AGK does not make it clear whether Appellants Nahimana and Ngeze's visits took place at the same time: see Judgement, para. 883, and T. 21 June 2001, p. 70-73, 86.
[2049] This factual finding appears at paragraph 887 of the Judgement and relies on Witness AHA's testimony (summarized in para. 879 of the Judgement).
[2050] Judgement, para. 1050. The Trial Chamber acknowledged that there was no information as to the content of the Appellants' meetings, except for the meetings between Appellants Barayagwiza and Ngeze, which Witness AHA attended (see Judgement, para. 879, 887).
[2051] In its factual findings in paragraph 907 of the Judgement, the Trial Chamber found that Appellant Nahimana had "said [that] RTLM should be used to disseminate their ideas relating to Hutu empowerment, and he requested that people support RTLM with financial contributions", while Appellant Barayagwiza "spoke about collaboration with the CDR and working together to fight the *Inyenzi.* He also spoke of using RTLM to fight against the *Inyenzi*. He said the *Inyenzi* were not far, and were even there among them".

(8) All three Appellants were depicted "on the cover of *Kangura* in connection with the creation of RTLM in a cartoon which showed the three Accused as representing the new radio initiative within the framework of advancing a common Hutu agenda".[2052]

906. The Appeals Chamber finds that, even if this evidence is capable of demonstrating the existence of a conspiracy to commit genocide among the Appellants, on its own it is not sufficient to establish the existence of such a conspiracy beyond reasonable doubt. It would also have been reasonable to find, on the basis of this evidence, that the Appellants had collaborated and entered into an agreement with a view to promoting the ideology of "Hutu power" in the context of the political struggle between Hutu and Tutsi, or even to disseminate ethnic hatred against the Tutsi, without, however, going as far as their destruction in whole or in part. Consequently, a reasonable trier of facts could not conclude that the only reasonable inference was that the Appellants had conspired together to commit genocide.

3. Could a criminal conspiracy be inferred from the interaction between the institutions?

907. The Appeals Chamber is of the opinion that in certain cases the existence of a conspiracy to commit genocide between individuals controlling institutions could be inferred from the interaction between these institutions. As explained above, the existence of the conspiracy would, however, have to be the only reasonable inference to be drawn from the evidence.

908. In order to conclude that RTLM, CDR and *Kangura* interacted together, the Trial Chamber relied on various factual findings, which are summarized in paragraphs 1051 to 1053 of the Judgement :

(1) *Kangura* was a shareholder of RTLM;[2053]

(2) *Kangura* welcomed the creation of RTLM as an initiative in which *Kangura* had a role to play;[2054]

(3) RTLM promoted issues of *Kangura* to its listeners;[2055]

(4) *Kangura* and RTLM undertook the joint initiative of a competition to make readers and listeners familiar with the contents of past issues of *Kangura* and to

[2052] Judgement, para. 1050. See also paras. 932, 940, 943. Paragraph 932 describes this evidence in the following terms (Exhibit P6, *Kangura* No. 46, cover page) :

> In the cartoon, Ngeze says that RTLM should be the way to protect the people in its fight with those who did not accept the Republic. Barayagwiza says that RTLM should be the banner of collaboration between the Hutu. Nahimana says that RTLM should be a forum for Hutu intellectuals who are working for the masses.

[2053] This finding appears at paragraph 940 of the Judgement on the basis of the testimonies of Witnesses Nsanzuwera and Musonda and of two exhibits mentioned in paragraph 508.

[2054] The Trial Chamber so found in paragraph 940 of the Judgement, on the basis of an article from *Kangura* No. 46, as indicated in paragraph 931 of the Judgement.

[2055] This finding appears in paragraph 941 of the Judgement. The Trial Chamber relies on the testimonies of Witnesses AFB, GO and Kabanda, as well as on the transcript of extracts from RTLM broadcasts (see Judgement, paras. 933-934, 938).

survey readers and listeners on their views regarding RTLM broadcasts, reserving one of the prizes for CDR members only;[2056]

(5) *Kangura* welcomed the creation of the CDR with a special issue devoted to it and it urged its readers to join CDR;[2057]

(6) *Kangura* associated Appellant Ngeze with the CDR;[2058]

(7) A *Kangura* article published in May 1992 called on readers to join the CDR in a "mental revolution";[2059]

(8) RTLM was primarily made up of MRND and CDR shareholders, some of whom were key officials in both RTLM and CDR, such as Stanislas Simbizi and Appellant Barayagwiza;[2060]

(9) Stanislas Simbizi was a member of the CDR Executive Committee, of the RTLM Steering Committee and of the editorial board of *Kangura*;[2061]

(10) An article published in *Kangura* in January 1994 links all three entities;[2062]

(11) Appellants Nahimana, Barayagwiza and Ngeze were depicted in a cartoon on the cover of *Kangura* in connection with the creation of RTLM, which was represented as a step forward in the promotion of a common Hutu agenda;[2063]

(12) *Kangura* worked together with RTLM;[2064]

(13) *Kangura* worked together with the CDR.[2065]

909. On the basis of these factual findings, the Trial Chamber drew two further conclusions on which the inference of coordination among the three institutions relies:

[2056] This finding is made by the Chamber in paragraph 257 of the Judgement – it is repeated in paragraphs 939, 943 – on the basis of various exhibits and of Expert Witness Kabanda's testimony (see Judgement, paras. 247-256).
[2057] This finding, in paragraphs 925 and 930 of the Judgement, relies on Expert Witness Kabanda's testimony on the special *Kangura* issue (see Judgement, paras. 914-915).
[2058] This finding appears in paragraph 930 of the Judgement, on the basis of the evidence discussed in paragraphs 914-927.
[2059] This article is mentioned in paragraph 916 of the Judgement.
[2060] This finding relies on the evidence examined by the Trial Chamber in paragraph 560 of the Judgement; it is set out in paragraph 566 of the Judgement.
[2061] The Trial Chamber found that Stanislas Simbizi was a member of the CDR Executive Committee and of the RTLM Steering Committee in paragraph 566 of the Judgement, on the basis of various exhibits (see Judgement, paras. 494, 507). The Trial Chamber appears to have concluded that Stanislas Simbizi was a member of the editorial board of *Kangura* on the basis of Expert Witness Kabanda's testimony (Judgement, para. 919).
[2062] An extract from *Kangura* No. 54 and the Expert Witness Kabanda's testimony (see Judgement, para. 937) support this finding, which appears in paragraphs 942 and 943 of the Judgement.
[2063] The Trial Chamber relied on the evidence mentioned in paragraph 932 of the Judgement in order to make the finding in paragraph 940.
[2064] This finding is set out in paragraph 943 of the Judgement, although in slightly different terms ("*Kangura* and RTLM functioned as partners in a Hutu coalition"), on the basis of the evidence referred to in paragraphs 931-939 and discussed in paragraphs 940-942 of the Judgement.
[2065] This finding appears to have been inferred from a number of the previous findings set out above.

- *Kangura* interacted extensively with both RTLM and CDR;

- CDR provided an ideological framework for genocide, and the two media institutions formed part of a coalition that disseminated the message of CDR.[2066]

910. At this stage, the question for the Appeals Chamber is to determine whether, assuming that such institutional coordination has been proved, a reasonable trier of fact could find that the only possible reasonable inference was that the coordination was the result of a conspiracy to commit genocide. There is no doubt, in the Appeals Chamber's view, that the aforementioned factual findings are compatible with the existence of "a joint agenda" aiming at committing genocide. However, it is not the only reasonable inference. A reasonable trier of fact could also find that these institutions had interacted to promote the ideology of "Hutu power" in the context of a political struggle between Hutu and Tutsi, or to disseminate ethnic hatred against the Tutsi without going as far as the destruction, in whole or in part, of that group.

911. Accordingly, it is not necessary to consider whether the Trial Chamber's findings on interinstitutional coordination were reasonable, or whether the Trial Chamber was entitled to infer that the Appellants controlled and used RTLM, the CDR and *Kangura*.

#### 4. Conclusion

912. The Appeals Chamber finds that a reasonable trier of fact could not conclude beyond reasonable doubt, on the basis of the elements recalled above, that the only reasonable possible inference was that the Appellants had personally collaborated and organized institutional coordination beween RTLM, the CDR and *Kangura* with the specific purpose of committing genocide. The Chamber allows this ground of appeal of the Appellants and sets aside the convictions of Appellants Nahimana, Barayagwiza and Ngeze for the crime of conspiracy to commit genocide (first Count of the Appellants' Indictments). The effect of this decision will be addressed later in this Judgement, in the section on sentencing. The Appeals Chamber further dismisses, as moot, the other submissions of the Appellants.

## XV. CRIMES AGAINST HUMANITY

913. The Appellants contend that the Trial Chamber erred in law and in fact in finding them guilty of crimes against humanity.[2067]

### A. Header to Article 3 of the Statute

914. The Appellants submit first that the Trial Chamber erred in holding that there was a widespread and/or systematic attack before 7 April 1994, or that certain of their acts formed part of such attack.[2068]

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[2066] Judgement, para. 1053.

[2067] Nahimana Notice of Appeal, pp. 13-17; Nahimana Appellant's Brief, paras. 537-561, 578-584; Barayagwiza Notice of Appeal, p. 3; Barayagwiza Appellant's Brief, paras. 271-312; Ngeze Notice of Appeal, paras. 147-179; Ngeze Appellant's Brief, paras. 388-448.

[2068] Nahimana Appellant's Brief, paras. 74-75, 548-556; Nahimana Brief in Reply, paras. 38-51; Barayagwiza Appellant's Brief, paras. 271-274, 279-285; Barayagwiza Brief in Reply, para. 73; Ngeze Appellant's Brief, paras. 389-392.

1. Meaning of "as part of a widespread or systematic attack against a civilian population"

(a) Attack

915. Appellant Nahimana contends that the Trial Chamber erred in finding that there was an attack (within the meaning of Article 3 of the Statute) against the Tutsi population before 7 April 1994, since "the notion of 'attack' […] requires a demonstration of inhumane acts which themselves fall within the *actus reus* of the crime against humanity".[2069] Appellant Ngeze argues to the same effect,[2070] while Appellant Barayagwiza submits in his Brief in Reply that, while the attack is not necessarily limited to the use of armed force, there must be violence or severe mistreatment directed at the civilian population targeted.[2071]

916. According to the *Kunarac et al.* Trial Judgement, an attack "can be described as a course of conduct involving the commission of acts of violence".[2072] This characterization was endorsed by the Appeals Chamber of ICTY,[2073] which added the following:

> The concepts of "attack" and "armed conflict" are not identical. Under customary international law, the attack could precede, outlast, or continue during the armed conflict, but it need not be a part of it. Also, the attack in the context of a crime against humanity is not limited to the use of armed force; it encompasses any mistreatment of the civilian population.[2074]

917. This position is reiterated in the *Kordić and Čerkez* Appeal Judgement[2075] and was adopted in a number of ICTY Trial judgements.[2076] According to the *Kayishema and Ruzindana* Trial Judgement:

> The attack is the event of which the enumerated crimes must form part. Indeed, within a single attack, there may exist a combination of the enumerated crimes, for example murder, rape and deportation.[2077]

918. In agreement with these authorities, the Appeals Chamber concludes that, for purposes of Article 3 of the Statute, an attack against a civilian population means the perpetration against a civilian population of a series of acts of violence, or of the kind of mistreatment referred to in sub-paragraphs (a) to (i) of the Article.[2078] The Appeals Chamber

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[2069] Nahimana Appellant's Brief, para. 553.
[2070] Ngeze Appellant's Brief, para. 390.
[2071] Barayagwiza Brief in Reply, para. 72.
[2072] *Kunarac et al.* Trial Judgement, para. 415. See also *Krnojelac* Trial Judgement, para. 54.
[2073] *Kunarac et al.* Appeal Judgement, para. 89.
[2074] *Ibid*., para. 86.
[2075] *Kordić and Čerkez* Appeal Judgement, para. 666.
[2076] *Limaj et al.* Trial Judgement, paras. 182, 194; *Blagojević and Jokić* Trial Judgement, para. 543; *Brđanin* Trial Judgement, para. 131; *Galić* Trial Judgement, para. 141; *Stakić* Trial Judgement, para. 623; *Naletilić and Martinović* Trial Judgement, para. 233; *Vasiljević* Trial Judgement, para. 29.
[2077] *Kayishema and Ruzindana* Trial Judgement, para. 122.
[2078] Likewise, the Elements of Crimes under the Statute of the International Criminal Court (ICC-ASP/1/3, Article 7 Crimes Against Humanity, Introduction, para. 3) provide:

> "Attack directed against a civilian population" is understood in this context to mean a course of conduct involving the multiple commission of acts referred to in article 7,

will examine *infra* if, in this instance, the Trial Chamber erred in finding that there was an attack directed against the Tutsi population before 6 April 1994.

(b) Widespread and/or systematic

919. Appellants Nahimana and Barayagwiza submit that a conviction for a crime against humanity requires proof that the acts charged were part of an attack that was *both* generalized *and* systematic.[2079] They point out that, whereas the English version of Article 3 of the Statute uses the conjunction "or", the French version uses the conjunction "*et*" ["and"]; they contend that the French version should be followed, as it is the least damaging to the accused's interests.[2080] They add that, since the Trial Chamber did not conclude that there was a widespread *and* systematic attack before 7 April 1994, they cannot be convicted of crimes against humanity for acts committed prior to this date.[2081]

920. The Appeals Chamber rejects this argument. It is well established that the attack must be widespread *or* systematic.[2082] In particular, the Appeals Chamber has held that the conjunction "*et*" in the French version of Article 3 of the Statute is a translation error.[2083] The Appeals Chamber further recalls that:

> "widespread" refers to the large-scale nature of the attack and the number of victims, whereas "systematic" refers to "the organised nature of the acts of violence and the improbability of their random occurrence." Patterns of crimes – that is the non-accidental repetition of similar criminal conduct on a regular basis – are a common expression of such systematic occurrence.[2084]

2. Existence of a plan or a policy and use of substantial resources

921. Appellant Nahimana submits that crimes against humanity must be carried out "on the basis of a common policy and involving substantial public or private resources".[2085] Likewise, Appellant Barayagwiza submits that "the widespread and systematic attack must result from a discriminatory policy led by a group or organization"[2086] and that it must be proven that the act charged "is part of widespread or systematic attack done following a plan, a preconceived policy".[2087] Appellant Ngeze makes a similar argument.[2088]

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> paragraph 1, of the Statute against any civilian population. […] The acts need not constitute a military attack.

[2079] Nahimana Appellant's Brief, para. 548; Barayagwiza Appellant's Brief, para. 272; Barayagwiza Brief in Reply, para. 71.
[2080] *Idem*.
[2081] Nahimana Appellant's Brief, para. 550; Barayagwiza Appellant's Brief, paras. 279-285.
[2082] *Ntakirutimana* Appeal Judgement, footnote 883; *Kordić and Čerkez* Appeal Judgement, para. 93; *Blaškić* Appeal Judgement, para. 98; *Kunarac et al.* Appeal Judgement, para. 97.
[2083] *Ntakirutimana* Appeal Judgement, footnote 883.
[2084] *Kordić and Čerkez* Appeal Judgement, para. 94. See also *Blaškić* Appeal Judgement, para. 101; *Kunarac et al*. Appeal Judgement, para. 94.
[2085] Nahimana Appellant's Brief, para. 555. See also Nahimana Brief in Reply, paras. 41-43.
[2086] Barayagwiza Appellant's Brief, para. 273.
[2087] *Ibid.*, para. 274. See also para. 272, defining a systematic attack as one "perpetrated on the basis of a policy or a pre-conceived plan".
[2088] Ngeze Appellant's Brief, para. 390.

922. The Appeals Chamber rejects the Appelants' arguments on this point. It is well established that, while it may be helpful to prove the existence of a policy or plan, that is not a legal element of crimes against humanity.[2089] The same applies to "substantial resources". Contrary to what certain early Tribunal judgements might be taken to imply,[2090] "substantial resources" do not constitute a legal element of crimes against humanity. It is the widespread or systematic attack which must be proved.

### 3. Multiplicity of victims

923. Appellant Nahimana argues that "[t]he inhumane acts that constitute the *actus reus* of the crime against humanity must be carried out against a 'multiplicity of victims'" and that "[s]ingle or isolated acts are excluded".[2091]

924. The Appeals Chamber considers that, except for extermination,[2092] a crime need not be carried out against a multiplicity of victims in order to constitute a crime against humanity. Thus an act directed against a limited number of victims, or even against a single victim, can constitute a crime against humanity, provided it forms part of a widespread or systematic attack against a civilian population.[2093]

### 4. Was there a systematic attack before 6 April 1994, and did the Appellants' acts form part thereof ?

925. The Appellants further submit that the Trial Chamber erred in holding that there was a widespread attack on the Tutsi population before 6 or 7 April 1994. In this respect, Appellant Nahimana submits that the Trial Chamber relied only on events prior to 1 January 1994, which shows *a contrario* that there was no systematic attack on the Tutsi population between 1 January and 7 April 1994.[2094] Likewise, Appellant Ngeze contends that the Trial Chamber cites no act of violence directed against the Tutsi population during this period.[2095] Moreover, since no *Kangura* issues were published after March 1994, he could not be found guilty of crimes against humanity.[2096] For his part, Appellant Barayagwiza contends that, if there were widespread and systematic attacks before 6 April 1994, these were carried out by the RPF and were largely directed against Hutu civilians.[2097]

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[2089] *Gacumbitsi* Appeal Judgement, para. 84; *Semanza* Appeal Judgement, para. 269; *Blaškić* Appeal Judgement, para. 120; *Krstić* Appeal Judgement, para. 225; *Kunarac et al.* Appeal Judgement, paras. 98, 104.
[2090] For example, paragraph 580 of the *Akayesu* Trial Judgement suggests that a systematic attack implies "a common policy … involving substantial public or private resources".
[2091] Nahimana Appellant's Brief, para. 555. See also Ngeze Appellant's Brief, para. 390.
[2092] Extermination requires a great number of victims: *Stakić* Appeal Judgement, para. 259; *Ntakirutimana* Appeal Judgement, paras. 521-522.
[2093] *Deronjić* Appeal Judgement, para. 109; *Kordić and Čerkez* Appeal Judgement, para. 94; Bla{ki} Appeal Judgement, para. 101; *Kunarac et al.* Appeal Judgement, para. 96.
[2094] Nahimana Appellant's Brief, paras. 74-75, 556. In paragraphs 71 and 75, Appellant Nahimana submits that the Trial Chamber exceeded its jurisdiction in relying on acts that took place before 1 January 1994 in order to establish the *actus reus* and *mens rea* of the charges brought against him. As stated *supra* at VIII. B. 3. , a Trial Chamber can rely on evidence of pre-1994 crimes to establish by inference the constituent elements of criminal conduct occurring in 1994.
[2095] Ngeze Appellant's Brief, paras. 389, 391.
[2096] *Ibid.*, para. 392.
[2097] Barayagwiza Appellant's Brief, para. 284.

926. The Appellants further submit that the Trial Chamber erred in finding that the *Kangura* issues, the RTLM broadcasts before 6 or 7 April 1994 and the activities of the CDR formed part of an attack on the Tutsi population.[2098] In this regard, Appellant Nahimana contends that the RTLM broadcasts before 7 April 1994 could not form part of an attack on the Tutsi population, "because mere speeches do not, by themselves, constitute the *actus reus* of a crime against humanity"[2099] and that these broadcasts "can on no account be considered as forming part of a widespread and systematic attack that began *after* that date",[2100] because "the responsibility of the Accused must be established for a period that matches the attack, and one of the conditions for his responsibility is knowledge of the said attack".[2101] Appellant Barayagwiza argues that the Trial Chamber failed to indicate the evidence on which it relied in order to conclude that *Kangura* issues, the RTLM broadcasts and the activities of CDR formed part of widespread or systematic attacks on the Tutsi population.[2102] Finally, Appellant Ngeze submits that the *Kangura* articles published before 7 April 1994 cannot form an integral part of an attack, since an article cannot be a material element of a crime against humanity.[2103]

927. The Prosecutor responds that the Appellants have not shown that the Trial Chamber erred in holding that there was a systematic attack against a civilian population before 6 April 1994. According to the Prosecutor:

> the evidence adduced at trial clearly showed that prior to 6/7 April 1994, there were systematic attacks against a civilian population, mainly Tutsis. Those attacks were organized, generally regular and not merely random or accidental, thus meeting the tests of being systematic.[2104]

928. The Prosecutor submits that "it was clear that the attacks launched by the Appellants were part of the systematic attacks directed against a civilian population".[2105] He further contends that the attacks launched by the Appellants before 6 April 1994 were also part of the widespread and systematic attacks which started on 6 and 7 April 1994.[2106] Moreover, RTLM broadcasts prior to and after 6 April 1994 should be considered together, as forming part of a continuous systematic criminal attack.[2107]

929. The Trial Chamber found that there were a number of attacks on Tutsi civilians, beginning in 1990:

> In her evidence Des Forges named seventeen such attacks between 1990 and 1993, mostly in the northwestern part of Rwanda. The Chamber considers that these attacks formed part of a larger initiative, beginning in 1990, which systematically targeted the Tutsi population

[2098] Nahimana Appellant's Brief, paras. 554-556; Barayagwiza Appellant's Brief, paras. 279-285; Ngeze Appellant's Brief, paras. 389-392.
[2099] Nahimana Appellant's Brief, para. 554.
[2100] *Ibid.*, para. 551 (emphasis in original).
[2101] *Ibid.*, para. 552.
[2102] Barayagwiza Appellant's Brief, para. 282.
[2103] Ngeze Appellant's Brief, para. 390.
[2104] Respondent's Brief, para. 400, referring to Judgement, paras. 110-120,136-389. See also Respondent's Brief, para. 404.
[2105] Respondent's Brief, para. 405.
[2106] *Ibid.*, paras. 378, 406-408, 468-470.
[2107] *Ibid.*, para. 407.

> as suspect accomplices of the RPF. The Chamber notes that attacks by the RPF against civilians during this time have also been documented.[2108]

930. On the basis of these factual findings, the Trial Chamber considered that systematic attacks against the Tutsi population also took place prior to 6 April 1994 and that:

> the broadcasting of RTLM and the publication of *Kangura* prior to the attack that commenced on 6 April 1994 formed an integral part of this widespread and systematic attack, as well as the preceding systematic attacks against the Tutsi population. Similarly, the activities of the CDR that took place prior to 6 April 1994 formed an integral part of the widespread and systematic attack that commenced on 6 April, as well as the preceding systematic attacks against the Tutsi population.[2109]

931. The Appeals Chamber observes that, in finding that systematic attacks against the Tutsi took place before 6 April 1994, the Trial Chamber relied only on pre-1994 events.[2110] In particular, the Trial Chamber accepted that at least 17 attacks on Tutsi civilians took place between 1990 or 1991 and 1993.[2111] The Appeals Chamber notes first that the only reference provided in the Judgement on this matter does not support such a finding.[2112] At most, the extract from Expert Witness Des Forges' report supports the finding that, while repelling the first RPF incursion in 1990, Rwandan forces killed between 500 and 1000 civilians, mostly Bahima, people usually identified with the Tutsi, who were accused of having aided the RPF.[2113] However, even if there were indeed 17 attacks on Tutsi civilians between 1990 or 1991 and 1993, this does not support the conclusion that there was an ongoing systematic attack against Tutsi civilians between 1 January and 6 April 1994.

932. Moreover, while the Trial Chamber considered that there was "a larger initiative, beginning in 1990, which systematically targeted the Tutsi population as suspect accomplices of the RPF",[2114] it did not clearly explain what the initiative involved (other than stating that 17 attacks took place between 1990 or 1991 and 1993). Thus the Trial Chamber identified no evidence showing that there was a systematic attack (within the meaning explained above) against the Tutsi population between 1 January and 6 April 1994.[2115] The Appeals Chamber accordingly concludes that it was not possible in the instant case to find that there was such an attack.

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[2108] Judgement, para. 118. See also para. 120.
[2109] *Ibid.*, para. 1058. See also para. 1070.
[2110] *Ibid.*, paras. 110-120.
[2111] *Ibid.*, paras. 110 (attacks between 1991 and 1993) and 118 (attacks between 1990 and 1993).
[2112] See Judgement, footnote 20, referring to Exhibit P158 (Expert Witness Des Forges' Report), p. 24.
[2113] Exhibit P158B, p. 16:

> Within several weeks, Rwandan troops had driven the RPF back towards the Ugandan border. As the government soldiers advanced through the northeastern region of Mutara, they killed between 500 and 1,000 civilians. The victims were largely Bahima, a people usually identified with Tutsi, and they were accused of having aided the RPF (footnote omitted).

[2114] Judgement, para. 118.
[2115] In paragraph 314 of the Judgement, the Trial Chamber noted in Expert Witness Des Forges' testimony that, after CDR President Bucyana was killed, the *Interahamwe* and the CDR attacked Tutsi and members of opposition political parties; killing about 70 people. However, the Trial Chamber did not mention those events in support of its finding that there was a systematic attack on the Tutsi population before 6 April 1994. In any event, the Appeals Chamber is of the opinion that those events alone are not sufficient to conclude that there was a systematic attack on the Tutsi population between 1 January and 6 April 1994.

933. Nor is the Appeals Chamber satisfied that the *Kangura* issues, the RTLM broadcasts and the activities of the CDR prior to 6 April 1994 could be regarded as forming part of the widespread and systematic attacks which occurred after that date; rather, they preceded them.

934. Nonetheless, those publications, broadcasts and activities could have substantially contributed to the commission of crimes against humanity after 6 April 1994, for which a defendant could be held liable under other modes of responsibility pleaded, such as planning, instigation or aiding and abetting. Whereas the crime *per se* must be committed as part of a widespread and systematic attack, preparatory acts, instigation or aiding and abetting can be accomplished before the commission of the crime and the occurrence of the widespread and systematic attack.[2116] The Appeals Chamber will consider below whether it has been established that the *Kangura* issues, RTLM broadcasts and activities of the CDR between 1 January and 6 April 1994 substantially contributed to the commission of crimes against humanity after 6 April 1994.

## B. Extermination

### 1. Convictions on account of RTLM broadcasts

935. The Trial Chamber considered that the RTLM broadcasts formed an integral part of the systematic attacks against the Tutsi population before 6 April 1994, as well as of the widespread and systematic attack that took place from this date.[2117] It then stated that RTLM broadcasts had instigated killings on a large scale,[2118] and went on to find Appellants Nahimana and Barayagwiza guilty of extermination "for RTLM broadcasts in 1994 that caused the killing of Tutsi civilians".[2119]

936. Appellant Nahimana submits that extermination presupposes the perpetration of mass killings, but it is common knowledge that no mass killings took place betwen 1 January 1994 and 7 April 1994; the RTLM broadcasts prior to 7 April 1994 could thus not establish the crime of extermination.[2120] He further contends that no causal link was established between RTLM broadcasts and massacres of Tutsi civilians,[2121] that it was not established that he had the requisite *mens rea*[2122] and that he could not be convicted of extermination, since there was no factual evidence of his direct and personal participation in the extermination.[2123]

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[2116] By its nature, planning occurs before the commission of the crime. The same applies to instigation under Article 6(1) of the Statute, while aiding and abetting can take place before, during or after the commission of the crime: see *supra* XI. A.
[2117] Judgement, para. 1058.
[2118] *Ibid*., para. 1062. The French version of paragraph 1062 states: "[*t*]*ant* Kangura *que la RTLM ont encouragé la perpétration de meurtres à grande échelle".* The original English version of this paragraph reads as follows: "Both *Kangura* and RTLM instigated killings on a large-scale". Hence the French translation should have used the term *"incité*" (Article 6(1) of the Statute) rather than "*encouragé*".
[2119] *Ibid.*, paras. 1063-1064.
[2120] Nahimana Appellant's Brief, paras. 579-581.
[2121] *Ibid.*, para. 582, referring back to the submissions relating to the convictions for genocide and persecution.
[2122] *Ibid.*, para. 583, referring back to the submissions relating to the conviction for direct and public incitement to commit genocide.
[2123] *Ibid.*, par. 584, referring back to the submissions relating to the convictions for genocide and direct and public incitement to commit genocide.

937. For his part, Appellant Barayagwiza submits that the Trial Chamber erred in finding that RTLM encouraged killings on a large scale, because it did not state the evidence it relied on to support this finding.[2124] He further submits that he did not have superior responsibility for RTLM and that no causal link had been established between his actions and RTLM.[2125]

938. The Prosecutor responds that Appellant Nahimana fails to explain how the Trial Chamber erred or what was the impact of such error,[2126] and that, in any event, the Trial Chamber was right in convicting Appellant Nahimana of extermination.[2127] He submits that the Trial Chamber was correct in considering that RTLM broadcasts both before and after 6 April 1994 contributed to the 1994 large-scale killings, and that they formed an integral part of the widespread and systematic attacks that commenced on 6 April 1994;[2128] the Trial Chamber committed no error in considering that Nahimana had the requisite *mens rea* for extermination.[2129] The Prosecutor does not specifically respond to the issues raised by Appellant Barayagwiza.

(a) Did the RTLM broadcasts instigate extermination?

939. The Appeals Chamber will first consider Appellant Nahimana's contention that the RTLM broadcasts before 7 April 1994 could not establish the crime of extermination, since no large-scale killings took place before that date. In the opinion of the Appeals Chamber, this argument is misconceived, since the Trial Chamber found that the RTLM broadcasts instigated extermination and that such instigation could obviously occur before the commission of the crime of extermination (which took place after 6 April 1994).[2130] Rather, the real issue is whether the RTLM broadcasts before 6 April 1994 substantially contributed to extermination after that date.

940. The Appeals Chamber has already found that, while the pre-6 April 1994 RTLM broadcasts incited ethnic hatred, it has not been established that they substantially contributed to the killing of Tutsi.[2131] Consequently, it cannot be concluded that these broadcasts substantially contributed to the extermination of Tutsi civilians.

941. Regarding RTLM broadcasts after 6 April 1994, the Appeals Chamber has already found that these broadcasts substantially contributed to the killing of large numbers of

[2124] Barayagwiza Appellant's Brief, paras. 287-289.
[2125] *Ibid.*, para. 290.
[2126] Respondent's Brief, para. 461.
[2127] *Ibid.*, para. 463, referring back to the submissions relating to genocide, persecution and direct and public incitement to commit genocide.
[2128] *Ibid.*, paras. 468-470.
[2129] *Ibid.*, para. 472, referring back to the submissions relating to Appellant Nahimana's intent under the heading Direct and Public Incitement to Commit Genocide.
[2130] In this regard, it is important to point out that it cannot be reasonably be disputed that the Tutsi population was the target of widespread and systematic attacks between 6 April and 17 July 1994, resulting in the death of large numbers of Tutsi: *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision of Judicial Notice, 16 June 2006, paras. 28-31 (see also paras. 33-38, judicial notice of the genocide of the Tutsi in Rwanda between 6 April and 17 July 1994); *Semanza* Appeal Judgement, para. 192.
[2131] See *supra* XII. B. 3. (b) (i) a.

Tutsi.[2132] It accordingly follows that they substantially contributed to the extermination of Tutsi.

(b) Responsibility of Appellants Nahimana and Barayagwiza

942. Appellant Nahimana was charged and convicted of extermination only on the basis of his responsibility under Article 6(1) of the Statute.[2133] The Appeals Chamber has already found that the Appellant could not be found liable under Article 6(1) of the Statute for RTLM broadcasts.[2134] The Appeals Chamber accordingly sets aside the conviction of Appellant Nahimana on the count of extermination as a crime against humanity.

943. Appellant Barayagwiza was convicted of extermination as a superior of RTLM staff.[2135] However, the Appeals Chamber has already found that the Appellant could not be held responsible as a superior for the crimes committed by RTLM staff after 6 April 1994.[2136] Since it cannot be concluded that RTLM broadcasts prior to 6 April 1994 substantially contributed to extermination, Appellant Barayagwiza could not be convicted of extermination on account of RTLM broadcasts. This part of his conviction is therefore set aside.

2. Responsibility of Appellant Barayagwiza for the activities of the CDR

944. The Trial Chamber found that the CDR and the *Impuzamugambi* caused killing on a large-scale, often following meetings and demonstrations.[2137] It then found Appellant Barayagwiza guilty of ordering or instigating the extermination of Tutsi civilians by CDR members and *Impuzamugambi*;[2138] it also convicted him of the same crimes under Articles 3(b) and 6(3) of the Statute as a superior of CDR members and *Impuzamugambi*.[2139] Lastly, it found the Appellant guilty of planning extermination by organizing the distribution of weapons in Gisenyi one week after 6 April 1994 and supervising roadblocks manned by *Impuzamugambi.*[2140]

(a) Responsibility for having ordered or instigated extermination

945. Appellant Barayagwiza contends that the Trial Chamber erred in finding that the activities of the CDR and the *Impuzamugambi* provoked killings on a large scale.[2141] He argues that the Prosecutor did not adduce any evidence in that regard and that the Trial Chamber did not state the evidence on which it relied in reaching this finding.[2142] The Prosecutor does not appear to respond specifically to this contention.

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[2132] See *supra* XII. B. 3. (b) (i) b.
[2133] Judgement, para. 1063.
[2134] See *supra* XII. D. 1. (b) (ii) e.
[2135] Judgement, para. 1064.
[2136] See *supra* XII. D. 2. (a) (ii) b.
[2137] Judgement, para. 1062.
[2138] *Ibid.*, para. 1065. This paragraph does not clearly indicate which mode of liability the Trial Chamber relied on in this regard; it speaks of Appellant Barayagwiza giving orders ("at the direction of" in the original English version). However, paragraph 975 (to which paragraph 1065 refers) talks of "instigating".
[2139] *Ibid.*, para. 1066.
[2140] *Ibid.*, para. 1067, referring to paragraph 954, which in turn refers to paragraphs 719 and 730.
[2141] Barayagwiza Appellant's Brief, para. 287.
[2142] *Ibid.*, paras. 288-289.

946. With the exception of the killings at roadblocks manned by members of the CDR and the *Impuzamugambi*, the Trial Chamber did not clearly indicate the large-scale killings having occurred in 1994 which, in its view, were attributable to the CDR and the *Impuzamugambi*.[2143] On reading the Judgement, the Appeals Chamber is not persuaded that it was established that the activities of the CDR and the *Impuzamugambi* substantially contributed to the killing of Tutsi, with the exception of those carried out at roadblocks. However, the Appeals Chamber notes with regard to these killings that the Trial Chamber found that, under the leadership of Appellant Barayagwiza, members of the CDR and the *Impuzamugambi* killed a large number of Tutsi civilians at roadblocks.[2144] This finding was based on a detailed analysis of the evidence adduced.[2145] The Appeals Chamber is of the opinion that Appellant Barayagwiza has not shown that these findings were unreasonable; therefore his conviction under Articles 3(b) and 6(1) of the Statute for instigating or ordering extermination is upheld. However, the Appellant's conviction for the same crimes under Article 6(3) of the Statute[2146] must be set aside.[2147]

(b) Responsibility for having planned extermination

947. As noted above,[2148] Appellant Barayagwiza submits that the Trial Chamber erred (1) in relying on the uncorroborated testimony of Witness AHB to find, in paragraph 730 of the Judgement, that he had distributed weapons in Gisenyi;[2149] and (2) in finding, in paragraph 954 of the Judgement, that his role in the distribution of weapons showed that "he was involved in planning this killing [of Tutsi civilians in Gisenyi]".[2150]

(i) Distribution of weapons

948. Appellant Barayagwiza raises eight arguments to support his contention that the Trial Chamber should not have accepted Witness AHB's testimony on the distribution of weapons in Gisenyi:[2151] (1) Witness AHB gave several versions of events;[2152] (2) there were uncertainties as to the origin of the weapons allegedly distributed by the Appellant;[2153] (3) the Appellant did not own a red vehicle as the witness alleged;[2154] (4) the witness acknowledged that his testimony before the Chamber did not exactly reflect what he had said in his statement to the Rwandan Public Prosecutor, which was used by the Prosecution investigators;[2155] (5) the Trial Chamber did not cross-check the witness's statements as to details of names and distances, although these were erroneous in several regards;[2156] (6) the

[2143] See Judgement, para. 341. See also para. 336.
[2144] Judgement, para. 341.
[2145] See *supra* XII. D. 2. (b) (vii) . See also Judgement, paras. 313-338.
[2146] Judgement, para. 1066.
[2147] See *supra* XI. C.
[2148] See *supra* XII. D. 2. (b) (iv).
[2149] Barayagwiza Appellant's Brief, paras 208, 217.
[2150] *Ibid.*, paras. 218-219.
[2151] *Ibid.*, paras. 209-217.
[2152] *Ibid.*, para. 210; T(A) 17 January 2007, p. 78-79.
[2153] *Ibid.*, para. 211.
[2154] *Idem.*
[2155] Barayagwiza Appellant's Brief, para. 212.
[2156] *Ibid.*, para. 213.

details provided in cross-examination undermined the credibility of the witness;[2157] (7) the Trial Chamber wrongly shifted the burden of proof onto the Appellant by asking him to prove the date on which an RTLM antenna was installed;[2158] (8) the fact, according to the witness, that the Appellant allegedly took part in a CDR meeting in 1991 is incorrect, since the CDR was only formed in 1992, and there is no evidence that a preliminary meeting may have taken place in 1991.[2159]

949. The Appeals Chamber recalls that the jurisprudence of the Tribunal does not require the corroboration of the testimony of a sole witness,[2160] and that the trial Judges are in the best position to assess the credibility of a witness and the reliability of the evidence adduced.[2161]

950. The Appeals Chamber considers at the outset that the Appellant's claim that Witness AHB committed many errors in his testimony concerning names of persons and locations and distances between locations[2162] should be dismissed without further consideration, in the complete absence of any details in this regard in the Appellant's Brief. Similarly, the Appeals Chamber will not examine the argument that the many inconsistencies in the witness' testimony should have impelled the Trial Chamber to find that the explanations provided by Witness AHB in cross-examination had the effect of undermining, not strengthening, his credibility,[2163] since this argument is not substantiated. Furthermore, the Appeals Chamber considers that the arguments as to the origin of the weapons distributed by the Appellant[2164] do not demonstrate that Witness AHB's testimony was unreliable, and cannot invalidate the finding of the Trial Chamber. Lastly, the allegation that the Appellant did not own a red vehicle[2165] does not show that Witness AHB's testimony was unreliable. These arguments are therefore summarily dismissed.

951. As to the allegation that Witness AHB gave several different versions of the events, the Appeals Chamber notes that, according to Appellant Barayagwiza, the witness "initially said that the Appellant contributed to the killings which started on 7th April 1994 because the Appellant delivered arms to Gisenyi. The second version of his evidence was that there were arms delivered by the army which were used on 7 April to kill Tutsi. In a third version the witness stated that the arms delivered by the Appellant were used to kill people who were not killed in the first phase."[2166] The Appeals Chamber observes that, contrary to what the Appellant claims, the extracts from Witness AHB's testimony at the hearing show that the witness had always asserted that the arms brought by Appellant Barayagwiza were used to kill Tutsi who were not killed in the attacks which took place on 7 April 1994.[2167]

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[2157] *Ibid.*, para. 214.
[2158] *Idem*.
[2159] Barayagwiza Appellant's Brief, paras. 215-216.
[2160] See the case-law cited *supra*, footnote 1312.
[2161] *Rutaganda* Appeal Judgement, para. 188; *Akayesu* Appeal Judgement, para. 132; *Furundžija* Appeal Judgement, para. 37; *Aleksovski* Appeal Judgement, para. 63; *Tadić* Appeal Judgement, para. 64.
[2162] Barayagwiza Appellant's Brief, para. 213.
[2163] *Ibid.*, para. 214.
[2164] *Ibid.*, para. 211.
[2165] *Idem*.
[2166] Barayagwiza Appellant's Brief, para. 210, referring to T. 28 November 2001, pp. 46-48, 54-55, 111-117.
[2167] T. 28 November 2001, pp. 47-48, 52, 54-55.

952. With regard to the argument based on the inconsistencies between the witness' written statement and his testimony at trial, the Appeals Chamber notes that, in cross-examination, the witness explained that those who transcribed his statement confused some events and omitted some details,[2168] and that the transcript of his statement was not read back to him.[2169] Moreover, he provided the clarifications requested by the Defence and gave additional details on the events in question.[2170] In the opinion of the Appeals Chamber, the Appellant has not demonstrated that it was unreasonable to accept the testimony of this witness because of the alleged inconsistencies between his written statement and testimony at trial.

953. The Appeals Chamber turns now to the argument that the Trial Chamber reversed the burden of proof as to the date an RTLM antenna was installed, a matter raised during the testimony of Witness AHB.[2171] Paragraph 726 of the Judgement notes "that although the witness was challenged on the date of this event and Barayagwiza's presence for it, no evidence was adduced by the Defence that the antenna was not installed in 1993 or that Barayagwiza was not present."[2172] The Appeals Chamber notes that this paragraph examines the evidence adduced by the Defence to challenge the credibility of the witness, and that the Trial Chamber confines itself to observing that the Defence challenge was not supported by any evidence. This does not amount to a reversal of the burden of proof in respect of a fact that must be proved beyond a reasonable doubt; rather this is a finding that the Defence has not succeeded in demonstrating in cross-examination that the testimony lacked credibility in relation to the events in question.

954. Appellant Barayagwiza submits lastly that the Trial Chamber had no basis for its inference that it was "possible that a preliminary meeting of the party for recruitment purposes took place prior to [...] the official launch" of the CDR.[2173] The Appeals Chamber notes that, in paragraph 726 of the Judgement, the Trial Chamber merely accepted the explanation given by Witness AHB, namely that there was a local meeting of the CDR separately from its official launch, which happened much later, and, after a detailed examination, found him credible. The Appeals Chamber considers that the Trial Chamber in the instant case did not exceed the bounds of its discretionary power in assessing the evidence. This ground of appeal is dismissed.

(ii) Participation in the planning of killings

955. In his twenty-fifth ground of appeal, Appellant Barayagwiza contends that the Trial Chamber erred in finding in paragraph 954 of the Judgement that the Appellant "was involved in planning the killing [in Gisenyi]". He argues that the Chamber reached this conclusion on the basis of its finding in paragraph 730 of the Judgement that the Appellant had delivered weapons to Gisenyi, and submits that, if this finding – which is in fact challenged in the preceding ground – is set aside, then the finding in paragraph 954 must be set aside also.[2174] He adds that, even if the Appeals Chamber were to find that he did deliver

[2168] *Ibid*., pp. 45-47.
[2169] *Ibid*., pp. 60-61, 63-64.
[2170] Judgement, paras. 724, 726; T. 28 November 2001, pp. 45-47, 54.
[2171] Barayagwiza Appellant's Brief, paras. 209, 214.
[2172] Judgement, para. 726.
[2173] Barayagwiza Appellant's Brief, para. 209. See also para. 215.
[2174] *Ibid.*, para. 218.

weapons to Gisenyi, this would not be sufficient to prove that he was involved in planning the killings, given that there is no evidence showing his participation in discussions at which the killings were planned.[2175]

956. In paragraph 730 of the Judgement, the Trial Chamber notes the following facts:

> The Chamber finds that Barayagwiza came to Gisenyi in April 1994, one week after the shooting of the plane on 6 April, with a truckload of weapons for distribution to the local population. The weapons were to be used to kill Tutsi civilians, and outreach to three cellules was coordinated in advance, to recruit attackers from among the residents of these cellules and bring them together to collect the weapons. That same day at least thirty Tutsi civilians were killed, including children and older people, with the weapons brought by Barayagwiza. Barayagwiza played a leadership role in the distribution of these weapons.

957. In its legal findings, the Trial Chamber holds that "Barayagwiza played a leadership role in the distribution of these weapons, which formed part of a predefined and structured plan to kill Tutsi civilians. From Barayagwiza's critical role in this plan, orchestrating the delivery of the weapons to be used for destruction, the Chamber finds that Barayagwiza was involved in planning this killing."[2176]

958. The Appeals Chamber has already found that Appellant Barayagwiza has not shown that the Trial Chamber erred in finding that he was involved in the distribution of weapons in Gisenyi. The Trial Chamber, relying on the factual findings resulting from an examination of Witness AHB's testimony, which is summarized in paragraphs 720 to 722 of the Judgement, could, notwithstanding the absence of direct evidence, reasonably infer that the killings of Tutsi had been planned at the local level, and that the Appellant had participated in the planning through his involvement in the distribution of weapons in Gisenyi one week after the downing of the presidential plane. The trial Judges described the Appellant's role in the matter as one of "leadership",[2177] or as having "orchestrated" it.[2178] The Appellant brought the weapons in his vehicle to the house of Ntamaherezo, MRND President in the commune;[2179] he was accompanied by two *Impuzamugambi*, who remained there and took part in the killing of Tutsi;[2180] his arrival was announced and a message was disseminated by CDR and MRND leaders indicating that people were to meet at Ntamaherezo's house to collect weapons;[2181] the Appellant conversed with Ntamaherezo while the weapons were being offloaded;[2182] once the delivery of the weapons was complete, the Appellant left in the same vehicle with part of the weapons in the company of some *Impuzamugambi*;[2183] some of the weapons were delivered to Aminadab in Kabari and to Ruhura, Barayagwiza's younger brother, who was the CDR Chairman in Kanzenze sector.[2184]

959. Although the Trial Chamber did not explicitly state that the weapons distribution substantially contributed to the extermination of Tutsi, the factual findings underlying the

[2175] *Ibid.*, para. 219.
[2176] Judgement, para. 954.
[2177] *Ibid.*, para. 730.
[2178] *Ibid.*, para. 954.
[2179] *Ibid.*, para. 720.
[2180] *Idem*.
[2181] *Idem* and para. 721.
[2182] Judgement, para. 720.
[2183] *Idem*.
[2184] Judgement., para. 722.

legal finding in paragraph 954 of the Judgement clearly indicate that this was indeed its opinion. Thus the Chamber found in paragraph 730 of the Judgement that "the weapons distributed to the local population … were to be used to kill Tutsi civilians." This finding is supported by the testimony of Witness AHB referred to above. The Appellant has not demonstrated that the Trial Chamber's finding was unreasonable.

(iii) Conclusion

960. Appellant Barayagwiza's conviction for having planned extermination[2185] is upheld.

3. Responsibility of Appellant Ngeze for acts in Gisenyi

961. The Trial Chamber found Appellant Ngeze guilty of extermination on account of his acts in ordering and aiding and abetting the killing of Tutsi civilians.[2186] The Appeals Chamber has already found that the Appellant cannot be held liable for having ordered the killing of Tutsi civilians in Gisenyi on 7 April 1994 or for having distributed weapons on 8 April 1994,[2187] and it is therefore not necessary to examine the Appellant's challenge to these findings.

(a) Submissions of the Parties

962. Appellant Ngeze submits that the Trial Chamber erred in finding him guilty of extermination.[2188] He notes first that the Trial Chamber found him liable "for his acts in ordering and aiding and abetting the killing of Tutsi civilians, as set forth in paragraph 954" of the Judgement, but that paragraph does not deal with his acts;[2189] he argues that this error, whether or not typographical, totally invalidates the Judgement, because it prevents him from knowing on precisely which facts his conviction for extermination is based.[2190]

963. Appellant Ngeze submits further that he could not be found guilty of extermination on the basis of his alleged activities in the Gisenyi region.[2191] He argues in particular that none of the witnesses directly testified to having received instructions from him at a roadblock, but had only heard him giving instructions at the roadblocks to others.[2192] Appellant Ngeze further submits that the Trial Chamber erred in finding that he had the necessary authority to give orders or instructions to others,[2193] and that he had the requisite *mens rea* for extermination.[2194]

(b) Analysis

964. The Appeals Chamber notes, as stated by Appellant Ngeze, that paragraph 1068 of the Judgement refers erroneously to paragraph 954, which does not concern the acts of Appellant

[2185] *Ibid.*, para. 1067.
[2186] *Ibid.*, para. 1068, referring erroneously to para. 954 of the Judgement, instead of paras. 955 and 956.
[2187] See *supra* X. D.
[2188] Ngeze Notice of Appeal, paras. 151-161; Ngeze Appellant's Brief, paras. 393-421.
[2189] Ngeze Appellant's Brief, paras. 393-395, referring to Judgement, para. 1068.
[2190] *Ibid.*, para. 395.
[2191] *Ibid.*, paras. 409-412.
[2192] *Ibid.*, para. 411(b), referring to Judgement, para. 833.
[2193] *Ibid.*, paras. 420-421.
[2194] *Ibid.*, paras. 417-419.

Ngeze, but those of Appellant Barayagwiza. However, the Appeals Chamber considers that the reference to paragraph 954 is clearly a typographical error; the reference should have been to paragraphs 955 and 956 of the Judgement, which deal with the activities of Appellant Ngeze. In the opinion of the Appeals Chamber, Appellant Ngeze did not suffer any prejudice because of this typographical error, and it does not warrant setting aside his conviction for extermination.

965. The Appellant's conviction for extermination therefore rests on the acts described in paragraphs 955 and 956 of the Judgement. Some of the factual findings in this regard have already been set aside by the Appeals Chamber in the chapter on alibi.[2195] However, the finding that the Appellant "set up, manned and supervised roadblocks in Gisenyi in 1994 that identified targeted Tutsi civilians who were subsequently taken to and killed at the *Commune Rouge*" still stands.[2196] The Appeals Chamber is not persuaded that the Appellant has demonstrated that this finding was unreasonable. First, it is not clear how Appellant Ngeze's submissions on this issue, even if they were to succeed, would invalidate this finding.[2197] Secondly, the Appeals Chamber finds no inconsistency in the evidence capable of invalidating the Trial Chamber's finding. Witness AHI saw the Appellant giving instructions to individuals manning roadblocks; this evidence corroborates that of Omar Serushago.[2198]

966. As to Appellant Ngeze's contention that he did not have the authority to give instructions at roadblocks, the Appeals Chamber recalls that it is not necessary, in order to convict an accused of having aided and abetted another person in the commission of a crime, to prove that the accused had authority over that other person.[2199]

967. Finally, the Appeals Chamber is of the opinion that Appellant Ngeze has not shown that the Trial Chamber was wrong in finding that he had the requisite intent to be convicted for aiding and abetting extermination. The fact is that the acts retained against Appellant Ngeze are sufficient to sustain the inference that he knew that his acts were contributing to the perpetration of extermination by others. Further, the Appeals Chamber is of the opinion that the Appellant himself had the intent to destroy the Tutsi in whole or in part.[2200]

968. For these reasons, the Appeals Chamber upholds Appellant Ngeze's conviction for aiding and abetting extermination.

4. Responsibility of Appellant Ngeze on account of *Kangura* publications

969. Although the Trial Chamber found in paragraph 1062 of the Judgement that *Kangura* instigated killings on a large scale, paragraph 1068 of the Judgement does not base Appellant Ngeze's conviction for extermination on his responsibility for publishing *Kangura*, as is noted by the Appellant himself.[2201] There is thus no need to examine the Appellant's

[2195] See *supra* X. D.
[2196] Judgement, para. 956.
[2197] Although no witness testified to receiving instructions from the Appellant at a roadblock, but only to hearing such instructions given to others at roadblocks, this does not in any way prove that the Appellant played no role in the setting up and supervision of roadblocks in Gisenyi.
[2198] See Judgement, para. 833.
[2199] See *supra* XII. D. 3.
[2200] See *supra* XII. C. 4. (d) .
[2201] Ngeze Appellant's Brief, para. 396.

submission that he could not be convicted of extermination on account of matters published in *Kangura.*[2202]

## C. Persecution

970. The Trial Chamber found the Appellants guilty of persecution on the following grounds:

- Appellant Nahimana: for RTLM broadcasts in 1994 advocating ethnic hatred or inciting violence against the Tutsi population, guilty of persecution under Articles 3(h), 6(1) and 6(3) of the Statute;[2203]

- Appellant Barayagwiza: for RTLM broadcasts in 1994 advocating ethnic hatred or inciting violence against the Tutsi population, guilty of persecution under Articles 3(h) and 6(3) of the Statute;[2204]

- Appellant Barayagwiza: for his own acts and for the activities of CDR that advocated ethnic hatred or incited violence against the Tutsi population, guilty of persecution under Articles 3(h), 6(1) and 6(3) of the Statute;[2205]

- Appellant Ngeze: for *Kangura* publications advocating ethnic hatred or inciting violence against the Tutsi population, as well as for his own acts that advocated ethnic hatred or incited violence against the Tutsi population, guilty of persecution under Articles 3(h) and 6(1) of the Statute.[2206]

971. The Appellants allege that the Trial Chamber erred in law and in fact in finding them guilty of persecution as a crime against humanity.[2207]

### 1. Can hate speech constitute the *actus reus* of persecution as a crime against humanity?

#### (a) Submissions of the Parties

972. The Appellants submit that hate speech cannot constitute an act of persecution pursuant to Article 3(h) of the Statute. In this connection, they argue that:

- hate speech is not regarded as a crime under customary international law (except in the case of direct and public incitement to commit genocide), and to condemn

[2202] See *ibid.*, paras. 399-406.
[2203] Judgement, para. 1081.
[2204] *Ibid.*, para. 1082.
[2205] *Ibid.*, para. 1083
[2206] *Ibid.*, para. 1084.
[2207] Nahimana Notice of Appeal, pp. 13, 15-17; Nahimana Appellant's Brief, paras. 537-557; Nahimana Brief in Reply, paras. 38-70; Barayagwiza Notice of Appeal, p. 3 (grounds of appeal 36-38); Barayagwiza Appellant's Brief, paras. 292-312; Barayagwiza Brief in Reply, paras. 70-78; Ngeze Notice of Appeal, paras. 162-179; Ngeze Appellant's Brief, paras. 422-448; Ngeze Brief in Reply, paras. 94-96.

the Appellants for such acts under the count of persecution would violate the principle of legality;[2208]

- hate speech does not fall within the definition of the crime against humanity of persecution, because it does not lead to discrimination in fact and is not as serious as other crimes against humanity, as recognized by the *Kordić and Čerkez* Trial Judgement;[2209]

- the Trial Chamber erred in relying on the *Ruggiu* Trial Judgement to conclude that hate speech targeting a population by reason of its ethnicity is sufficiently serious to constitute a crime against humanity, because that judgement was not the result of a real trial; the Trial Chamber "only confirmed the guilty plea of that accused and the content of the agreement he had signed with the Prosecutor", without any adversarial debate;[2210]

- international criminal law cannot adopt the extensive meaning given to the concept of " persecution" in international refugee law, because (1) that would violate the principle of legality[2211] and (2) in international refugee law, the concept of persecution is used for the protection of refugees, whereas in international criminal law the concept relates to criminal prosecution.[2212] In any case, even in international refugee law, "the mere fact of belonging to a group targeted by speeches calling for hatred and violence is not sufficient for admission to the status of refugee."[2213]

973. The Prosecutor responds that hate speech and incitement to ethnic violence can constitute persecution as a crime against humanity.[2214] He maintains that the Trial Chamber did not confuse ordinary racial discrimination with persecution as a crime against humanity.[2215] He further argues that the reference to the *Kordić and Čerkez* and *Kupreškić et*

[2208] Nahimana Appellant's Brief, paras. 539-541; Nahimana Brief in Reply, paras. 58-60; Barayagwiza Appellant's Brief, paras. 302, 308; Ngeze Appellant's Brief, paras. 428-430. The Appellants refer to para. 209 and footnote 272 of the *Kordić and Čerkez* Trial Judgement. At para. 308 of his Appeal Brief, Appellant Barayagwiza argues that the Trial Chamber erred in holding that there is a rule of international law prohibiting discrimination and in failing to make it clear "whether such a norm, which allegedly exists in international law to protect human rights, also exists in international criminal law". In this connection, he argues that: (1) even if Streicher was convicted for anti-semitic propaganda, this is insufficient to create a norm of customary international criminal law; (2) the decisions of the ECHR cited by the Trial Chamber do not relate to crimes against humanity and cannot contribute to the establishment of a norm of customary international criminal law.

[2209] Nahimana Appellant's Brief, para. 542; Nahimana Brief in Reply, paras. 52-57; Barayagwiza Appellant's Brief, paras. 300-306; Ngeze Appellant's Brief, paras. 430-433. The Appellants all refer to *Kordić and Čerkez* Trial Judgement, para. 209 and footnote 272.

[2210] Barayagwiza Appellant's Brief, para. 305; Barayagwiza Brief in Reply, para. 75. The Appellant adds that none of the Appellants in the current case had the opportunity to challenge the assertions made by Ruggiu in the agreement with the Prosecutor, but that, at their trial, they succeeded in convincing the Chamber that George Ruggiu's testimony was not reliable nor credible (Barayagwiza Appellant's Brief, para. 305, referring to the Judgement, para. 549).

[2211] Nahimana Appellant's Brief, para. 543; Barayagwiza Appellant's Brief, para. 303. In this respect, the Appellants refer to *Kupreškić et al.* Trial Judgement, para. 589.

[2212] Nahimana Appellant's Brief, para. 544.

[2213] *Idem*.

[2214] Respondent's Brief, paras. 378, 380-393, 409-418.

[2215] *Ibid.*, paras. 380-381.

*al.* Trial Judgements does not support the Appellants' position because: (1) these Judgements do not bind the ICTR;[2216] (2) the position adopted in the *Kordić and Čerkez* Trial Judgement "only excludes from the ambit of persecution criminal speeches falling short of criminal incitement to violence"; however, in the instant case, "the criminal speech in question reached the form of direct and public incitement to commit genocide and is thus persecutory within the meaning of *Kordić* itself";[2217] and (3) the paragraphs of the *Kupreškić et al.* Trial Judgement cited by the Appellants were not specifically concerned with hate speech or incitement to violence as persecution, and the Appellants have not demonstrated that the Trial Chamber in the instant case applied the definition of persecution as contained in international refugee law or human rights law in violation of paragraph 589 of the *Kupreškić et al.* Trial Judgement.[2218]

974. The Prosecutor further submits that the Trial Chamber adopted a definition of persecution in accordance with the applicable jurisprudence and, on the basis of the evidence before it, concluded that the tests enunciated in that definition were satisfied.[2219] He recalls that the list of persecutory acts is inexhaustive and that persecutory acts need not be considered as crimes in international law.[2220]

975. The Prosecutor takes the view that the Trial Chamber correctly found that hate speech and incitement to violence targeting a population on the basis of ethnicity are capable of reaching the level of gravity of the crimes in Article 3 of the Statute, and can thus constitute persecution.[2221] He notes that, in the instant case, "the *actus reus* was systematic incitement to hatred and violence, having been consistently executed over a considerable period of time, and contributed to acts of violence directed against a civilian population, mainly Tutsi."[2222] Thus, according to the Prosecutor, the Trial Chamber correctly found that the broadcasts of RTLM, in singling out and attacking the Tutsi ethnic minority, constituted a serious deprivation of the fundamental rights to life, liberty and basic humanity.[2223] In the instant case, the cumulative effect of the speeches was sufficiently serious to constitute persecution.[2224]

976. In response to Appellant Barayagwiza's claim that the Trial Chamber erred in relying on the *Ruggiu* Trial Judgement to find that a hate speech may be characterized as persecution, the Prosecutor submits that the Trial Chamber relied on this Judgement for a point of law and that the fact that the Judgement is pursuant to a plea of guilt is irrelevant.[2225]

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[2216] *Ibid.,* paras. 382-383.
[2217] *Ibid.,* para. 382.
[2218] *Ibid.*, para. 383.
[2219] *Ibid.*, paras. 384-385.
[2220] *Ibid.*, para. 386.
[2221] *Ibid.*, paras. 386, 409.
[2222] *Ibid.*, para. 386. At para. 389, the Prosecutor maintains that the Trial Chamber properly concluded that the gravity of the acts must be assessed in their context and taking into account their cumulative effect.
[2223] Respondent's Brief, para. 386, referring to Judgement, para. 1072. See also Respondent's Brief, para. 439.
[2224] *Ibid.*, paras. 390-393, 396.
[2225] *Ibid.*, para. 433.

977. The Prosecutor contends that the Trial Chamber committed no error in fnding that there need not be a link between persecution and violence.[2226] He maintains that in any case such nexus was established by the evidence before the Trial Chamber.[2227]

978. Finally, regarding Appellant Barayagwiza's argument that customary international law does not prohibit discrimination, the Prosecutor responds that the materials and practices reviewed by the Trial Chamber point, on the contrary, to the existence of such a norm.[2228] Moreover, even assuming such norm did not exist, no error of law was committed, since the crime of persecution consists of an act or omission which discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law. In the instant case, it is indisputable that freedom from discrimination as well as the right to life, liberty and human dignity (rights violated by hate speech and incitement to ethnic violence) are part of international customary and treaty law.[2229]

(b) *Amicus Curiae* Brief and responses thereto

979. *Amicus Curiae* submits that the Trial Chamber erred in convicting the Appellants for persecution on account of hate speech not inciting to violence.[2230] First, he argues that the interpretation of the *Streicher* case relied on by the Trial Chamber is wrong, because Streicher was not found guilty of persecution "for anti-semitic writings that significantly predated the extermination of Jews in the 1940s,"[2231] but for prompting "to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions";[2232] thus the Streicher case does not show that hate speech short of incitement to violence can constitute persecution, but the contrary.[2233] *Amicus Curiae* submits that this interpretation of the *Streicher* case is confirmed by the fact that the IMT acquitted Hans Fritzsche, on grounds that his hate speeches did not seek "to incite the Germans to commit atrocities against the conquered people."[2234] *Amicus Curiae* further argues that the *Ruggiu* Trial Judgement cannot provide support for the Trial Chamber's finding that hate speech which contains no call for violence could constitute persecution because what that Judgement shows is that it is only speech whose ultimate aim is to destroy life that constitutes persecution.[2235] Lastly, *Amicus Curiae* criticizes the Trial Chamber for having failed to follow the *Kordić and Čerkez* Trial Judgement, which had found that mere hate speech could not constitute persecution.[2236]

980. In response to the *Amicus Curiae* Brief, the Prosecutor asserts that it is clear from case-law of the Tribunal that hate speech can constitute persecution, since such discourse violates the fundamental right to equality, and such violation may attain the same degree of

[2226] *Ibid.*, paras. 434-435.
[2227] *Ibid.*, para. 436.
[2228] *Ibid.*, para. 438.
[2229] *Ibid.*, para. 439. At the Appeal hearings, the Prosecutor also referred to the right to equality: T(A) 18 January 2007, pp. 33-34.
[2230] *Amicus Curiae* Brief, p. 3-4, 28-34.
[2231] Judgement, para. 1073.
[2232] *Amicus Curiae* Brief, p. 29, citing the Nuremberg Judgement, p. 131.
[2233] *Ibid.*, p. 30.
[2234] *Ibid.*, p. 31, citing the Nuremberg Judgement, p. 163.
[2235] *Ibid.*, pp. 31-32.
[2236] *Ibid.*, p. 32, referring to the *Kordić and Čerkez* Trial Judgement, para. 208.

gravity as other crimes against humanity.[2237] The Prosecutor explains that persecution does not necessarily have to occur through physical violence,[2238] and that the Appeals Chamber has acknowledged that harassment, humiliation and psychological violence may constitute acts of persecution.[2239] The Prosecutor further contends that the *Streicher* Judgement does not preclude the criminalization of hate speech; in any case, international human rights law has developed since Nuremberg and the Tribunal should recognize that violation of the right to equality can constitute persecution.[2240] Lastly, the Prosecutor argues that, even if only hate speech inciting to violence can constitute persecution, the speech in question here incited to violence, whether considered on its own or in context.[2241]

981. Appellant Nahimana repeats the arguments of *Amicus Curiae* that a simple hate speech cannot constitute persecution.[2242] He also notes that *Amicus Curiae* seems to suggest that a speech calling for violence could constitute the *actus reus* of crime against humanity (persecution), but he asserts in this regard that international criminal law prosecutes only direct calls for extermination.[2243] The Appellant further submits that no call for violence has been identified in any RTLM broadcasts prior to 6 April 1994.[2244]

982. Appellants Barayagwiza and Ngeze agree with *Amicus Curiae* that hate speech cannot constitute an act of persecution.[2245] In this regard, they reiterate several of the arguments in their Appeal Briefs and in the *Amicus Curiae* Brief.[2246]

(c) Analysis

983. The Trial Chamber defined the crime of persecution as "'a gross or blatant denial of a fundamental right reaching the same level of gravity' as the other acts enumerated as crimes against humanity under the Statute."[2247] The Chamber then stated:

> It is evident that hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches this level of gravity and constitutes persecution under Article 3(h) of its Statute. In *Ruggiu*, the Tribunal so held, finding that the radio broadcasts of RTLM, in singling out and attacking the Tutsi ethnic minority, constituted a deprivation of "the fundamental rights to life, liberty and basic humanity enjoyed by members of the wider society." Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group

[2237] Prosecutor's Response to the A*micus Curiae* Brief, paras. 32-37.
[2238] *Ibid.*, paras. 36, 38-41.
[2239] *Ibid.*, para. 39, referring to the *Kvočka et al.* Appeal Judgement, paras. 323-325.
[2240] *Ibid.*, para. 42.
[2241] *Ibid.*, paras. 43-44.
[2242] Nahimana's Response to the *Amicus Curiae* Brief, p. 5.
[2243] *Ibid.*, pp. 5-6.
[2244] *Ibid.*, pp. 6-7.
[2245] Barayagwiza's Response to the *Amicus Curiae* Brief, para. 21; Ngeze's Response to the *Amicus Curiae* Brief, p. 7.
[2246] Barayagwiza's Response to the *Amicus Curiae* Brief, paras. 36-43; Ngeze's Response to the *Amicus Curiae* Brief, pp. 7-10.
[2247] Judgement, para. 1072, referring to *Ruggiu* Trial Judgement, para. 21.

> membership in and of itself, as well as in its other consequences, can be an irreversible harm.[2248]

984. The Trial Chamber explained that the speech itself constituted the persecution and that there was therefore no need for the speech to contain a call to action,[2249] or for there to be a link between persecution and acts of violence.[2250] It recalled that customary international law prohibits discrimination and that hate speech expressing ethnic and other forms of discrimination violates this prohibition.[2251] It found that the expressions of ethnic hatred in the RTLM broadcasts, *Kangura* publications and the activities of the CDR constituted persecution under Article 3(h) of the Statute.[2252]

985. The Appeals Chamber reiterates that "the crime of persecution consists of an act or omission which discriminates in fact and which: denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*)."[2253] However, not every act of discrimination will constitute the crime of persecution: the underlying acts of persecution, whether considered in isolation or in conjunction with other acts, must be of a gravity equal to the crimes listed under Article 3 of the Statute.[2254] Furthermore, it is not necessary that these underlying acts of persecution amount to crimes in international law.[2255] Accordingly, there is no need to review here the Appellants' arguments that mere hate speech does not constitute a crime in international criminal law.

986. The Appeals Chamber considers that hate speech targeting a population on the basis of ethnicity, or any other discriminatory ground, violates the right to respect for the dignity[2256] of the members of the targeted group as human beings,[2257] and therefore constitutes "actual discrimination". In addition, the Appeals Chamber is of the view that speech inciting to violence against a population on the basis of ethnicity, or any other discriminatory ground,

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[2248] *Ibid*., para. 22.
[2249] Judgement, para. 1073. In paragraph 1078, the Trial Chamber added that persecution is broader than direct and public incitement to commit genocide, including advocacy of ethnic hatred in other forms.
[2250] Judgement, para. 1073.
[2251] *Ibid.*, paras. 1074-1076.
[2252] *Ibid.*, para. 1077.
[2253] *Krnojelac* Appeal Judgement, para. 185 (citing with approval *Krnojelac* Trial Judgement, para. 431), reiterated in *Simić* Appeal Judgement, para. 177; *Stakić* Appeal Judgement, paras. 327-328; *Kvočka et al.* Appeal Judgement, para. 320; *Kordić and Čerkez* Appeal Judgement, para. 101; *Blaškić* Appeal Judgement, para. 131; *Vasiljević* Appeal Judgement , para. 113.
[2254] *Brđanin* Appeal Judgement, para. 296; *Simić* Appeal Judgement, para. 177; *Naletilić and Martinović* Appeal Judgement, para. 574; *Kvočka et al*. Appeal Judgement, para. 321; *Kordić and Čerkez* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, para. 135; *Krnojelac* Appeal Judgement, paras. 199, 221.
[2255] Br|anin Appeal Judgement, para. 296; *Kvočka et al*. Appeal Judgement, para. 323. Contrary to what the Appellants contend, this is not a breach of the legality principle, since the crime of persecution as such is sufficiently defined in international law.
[2256] On the content of this right, see for example the Universal Declaration on Human Rights, the Preamble of which expressly refers to the recognition of dignity inherent to all human beings, while the Articles set out its various aspects.
[2257] In this regard, it should be noted that, according to the *Kvočka et al.* Appeal Judgement (paras. 323-325), violations of human dignity (such as harassment, humiliation and psychological abuses) can, if sufficiently serious, constitute acts of persecution.

violates the right to security[2258] of the members of the targeted group and therefore constitutes "actual discrimination". However, the Appeals Chamber is not satisfied that hate speech alone can amount to a violation of the rights to life, freedom and physical integrity of the human being. Thus other persons need to intervene before such violations can occur; a speech cannot, in itself, directly kill members of a group, imprison or physically injure them.

987. The second question is whether the violation of fundamental rights (right to respect for human dignity, right to security) is as serious as in the case of the other crimes against humanity enumerated in Article 3 of the Statute. The Appeals Chamber is of the view that it is not necessary to decide here whether, in themselves, mere hate speeches not inciting violence against the members of a group are of a level of gravity equivalent to that for other crimes against humanity. As explained above, it is not necessary that every individual act underlying the crime of persecution should be of a gravity corresponding to other crimes against humanity: underlying acts of persecution can be considered together. It is the cumulative effect of all the underlying acts of the crime of persecution which must reach a level of gravity equivalent to that for other crimes against humanity. Furthermore, the context in which these underlying acts take place is particularly important for the purpose of assessing their gravity.

988. In the present case, the hate speeches made after 6 April 1994[2259] were accompanied by calls for genocide against the Tutsi group[2260] and all these speeches took place in the context of a massive campaign of persecution directed at the Tutsi population of Rwanda, this campaign being also characterized by acts of violence (killings, torture and ill-treatment, rapes …) and of destruction of property.[2261] In particular, the speeches broadcast by RTLM – all of them by subordinates of Appellant Nahimana[2262] –, considered as a whole and in their context, were, in the view of the Appeals Chamber, of a gravity equivalent to other crimes against humanity.[2263] The Appeals Chamber accordingly finds that the hate speeches and calls for violence against the Tutsi made after 6 April 1994 (thus after the beginning of a systematic and widespread attack against the Tutsi) themselves constituted underlying acts of persecution.[2264] In addition, as explained below,[2265] some speeches made after 6 April 1994 did

[2258] On the right to security, see for example Article 3 of the Universal Declaration on Human Rights ("Everyone has the right to life, liberty and security of person").

[2259] As explained *infra* XV. C. 2 (a) (ii) a. and XV. C. 2. (c), speeches made before 6 April 1994 cannot constitute acts of persecution since it cannot be concluded that they took place in the context of a systematic or widespread attack.

[2260] See *supra* XII. B. 3. (b) (i) b. and XIII. C. 1 (c), where the Appeals Chamber has concluded that post-6 April 1994 RTLM broadcasts directly called for the murder of Tutsi.

[2261] It should be recalled that it cannot reasonably be disputed that the Tutsi population was the victim of generalized and systematic attacks between 6 April and 17 July 1994, resulting in the murder of a great number of Tutsi: *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision of Judicial Notice, 16 June 2006, paras. 28-31 (see also paras. 35-38, taking judicial note of the genocide committed against the Tutsi in Rwanda between 6 April and 17 July 1994); *Semanza* Appeal Judgement, para. 192.

[2262] See *supra* XIII. D. 1. (b) (ii) a. iii.

[2263] Such speeches constituted a grave violation of the right to human dignity of the Tutsi, as well as very seriously threatening their physical and mental security.

[2264] The Appeals Chamber notes that an ICTY Trial Chamber has found that speeches inciting hatred on political or other grounds, as alleged in the present case, could not constitute acts of persecution (*Kordić and Čerkez* Trial Judgement, para. 209). This legal finding was not appealed and the *Kordić and Čerkez* Appeal Judgement accordingly did not address the issue. The reasoning underlying that finding is, however, inconsistent with the established case-law of the Appeals Chamber, which does not require that the underlying acts of persecution be

in practice substantially contribute to the commission of other acts of persecution against the Tutsi; these speeches thus also instigated the commission of acts of persecution against the Tutsi.

2. The Trial Chamber's conclusions in the present case

(a) Responsibility for RTLM broadcasts

989. The Trial Chamber found Appellants Nahimana and Barayagwiza guilty of persecution "[f]or RTLM broadcasts in 1994 advocating ethnic hatred or inciting violence against the Tutsi population".[2266] Appellant Nahimana was convicted under Article 6(1) and (3) of the Statute, and Appellant Barayagwiza under Article 6(3).[2267]

(i) Arguments of the Parties

990. Appellant Nahimana submits that RTLM broadcasts prior to 6 April 1994 did not contain calls for hatred and violence against the Tutsi, and that none of those broadcasts reached the level of gravity required to constitute a crime against humanity.[2268] Moreover, it had not been proved that he possessed the requisite intent to be convicted of persecution.[2269]

991. Appellant Barayagwiza submits that RTLM broadcasts before 6 April 1994 could not amount to a crime against humanity because the Prosecutor had failed to show that Tutsi had been deprived of any fundamental right as a result of these broadcasts.[2270] The Appellant further contends that the Trial Chamber confuses crimes against humanity and unlawful ethnic discrimination, and that it failed to show "how the ethnic hate speech attributed to the RTLM radio rises from ordinary racial discrimination level to the level of crime against humanity."[2271]

992. The Prosecutor responds that RTLM broadcasts both before and after 6 April 1994 instigated ethnic hatred and violence, and that they contributed to the commission of acts of violence.[2272] In particular, contrary to the Appellants' submissions, RTLM broadcasts before

"enumerated as a crime elsewhere in the International Tribunal Statute" (*Kordić and Čerkez* Trial Judgement, para. 209) or regarded as crimes under customary international law. Moreover, it is not necessary that each underlying act of persecution be of a gravity equal to the other crimes against humanity; the underlying acts can be considered together. Finally, the finding that hate speech can constitute an act of persecution does not violate the principle of legality, as the crime of persecution is itself sufficiently well defined in international law. Moreover, the Appeals Chamber is not convinced by the argument that mere hate speech cannot constitute an underlying act of persecution because discourse of this kind is protected under international law.

[2265] See *infra* XV. C. 2. (a) (ii) b.

[2266] Judgement, paras. 1081-1082.

[2267] *Idem*.

[2268] Nahimana Appellant's Brief, para. 546 ; Nahimana Brief in Reply, paras. 61-69.

[2269] Nahimana Appellant's Brief, para. 557, referring to the arguments on genocidal intent and explaining that "the discriminatory intent required for crime against humanity (persecution) is the same as for genocide, with the one exception that it is not necessary to show intent to *destroy* the targeted group" (emphasis in the original, footnote omitted).

[2270] Barayagwiza Appellant's Brief, paras. 300-301, 306; Barayagwiza Brief in Reply, para. 73.

[2271] Barayagwiza Appellant's Brief, para. 301. See also para. 309. In that paragraph, the Appellant adds: "In paragraph 1078 of the Judgement, the Chamber maintains that RTLM broadcast the 'Ten Commandments' published by *Kangura* in 1990, but the Prosecutor produced no evidence of this." However, the Trial Chamber did not find that RTLM had broadcast the "Ten Commandments": see Judgement, para. 1078.

[2272] Respondent's Brief, paras. 378, 394-398.

6 April 1994 did contain direct calls for genocide against the Tutsi.[2273] As a result of their cumulative effect (as well as in conjunction with *Kangura*),[2274] the RTLM broadcasts reached a sufficient level of gravity to constitute persecution.[2275] The Prosecutor further submits that the Trial Chamber did not err in concluding that Appellant Nahimana had the necessary criminal intent to be convicted of persecution.[2276]

(ii) RTLM broadcasts in 1994

a. Broadcasts prior to 6 April 1994

993. The Appeals Chamber is of the view that the RTLM broadcasts from 1 January to 6 April 1994 cannot amount to underlying acts of persecution pursuant to Article 3 of the Statute, since it cannot be concluded that they were part of a widespread or systematic attack against the Tutsi population. These broadcasts could, however, have instigated the commission of persecution.

994. The Appeals Chamber has already determined that it has not been established that the broadcasts prior to 6 April 1994 substantially contributed to the murder of Tutsi after 6 April 1994. Consequently, the Appeals Chamber cannot conclude that broadcasts prior to 6 April 1994 instigated the commission of acts of persecution.

b. Broadcasts after 6 April 1994

995. The Appeals Chamber has already concluded that certain RTLM broadcasts after 6 April 1994 (*i.e.*, after the start of the widespread and systematic attack against the Tutsi) substantially contributed to the commission of genocide against Tutsi.[2277] The acts characterized as acts of genocide committed against the Tutsi also constituted acts of persecution,[2278] and hence these broadcasts also instigated the commission of acts of persecution. Furthermore, the Appeals Chamber is of the view that hate speeches and direct calls for genocide broadcast by RTLM after 6 April 1994,[2279] while a massive campaign of violence against the Tutsi population was being conducted, also constituted acts of persecution.[2280] Judge Meron does not agree with these findings.

(iii) Responsibility of the Appellants

a. Appellant Nahimana

[2273] *Ibid.*, para. 395. The Prosecutor refers to his arguments that the broadcasts prior to 6 April 1994 constituted a form of direct and public incitement to commit genocide.
[2274] *Ibid.*, para. 398.
[2275] *Ibid.*, paras. 396-397.
[2276] *Ibid.*, para. 419, referring to submissions on Appellant Nahimana's intent in the section on direct and public incitement to commit genocide.
[2277] See *supra* XII. B. 3. (b) (i) b.
[2278] In particular, the murders of Tutsi committed after 6 April 1994 (see *supra* para. 515) constitute not only acts of genocide, but also acts of persecution against the Tutsi population.
[2279] The broadcasts are examined in paragraphs 390-433 and 468 *et seq*. of the Judgement.
[2280] See *supra*, para. 988.

996. For the reasons set out above, the Appeals Chamber considers that Appellant Nahimana could not be convicted of persecution pursuant to Article 6(1) of the Statute on account of RTLM broadcasts after 6 April 1994.[2281] However, the Appellant's conviction under Article 6(3) is upheld, since he did not take necessary and reasonable measures to prevent or punish the acts of persecution and instigation to persecution committed by RTLM staff after 6 April 1994. Judge Meron does not agree with these findings.

b. Appellant Barayagwiza

997. Appellant Barayagwiza was convicted of persecution as a superior of RTLM staff.[2282] However, the Appeals Chamber has already found that the Appellant could not be held responsible as a superior for the crimes committed by RTLM staff after 6 April 1994.[2283] Since it could not be found that RTLM broadcasts before 6 April 1994 had substantially contributed to persecution, Appellant Barayagwiza could not be convicted of persecution on account of RTLM broadcasts. That part of his conviction is acordingly set aside.

(b) Appellant Barayagwiza's responsibility for CDR activities

998. Appellant Barayagwiza submits that the Trial Chamber erred in convicting him of persecution on account of CDR activities, because it does not explain how such activities constituted persecution, but merely makes a general finding, based on no specific act.[2284] The Appellant further argues that he could not be convicted under both Article 6(1) and Article 6(3) of the Statute in respect of the same acts.[2285]

999. The Prosecutor does not appear to respond to these arguments.

1000. The Trial Chamber found Appellant Barayagwiza guilty of persecution pursuant to Articles 3(h) and 6(1) of the Statute "[f]or his own acts and for the activities of CDR that advocated ethnic hatred or incited violence against the Tutsi population", as discussed in paragraph 975 of the Judgement.[2286] The Trial Chamber also convicted the Appellant under Article 6(3) of the Statute for "his failure to take necessary and reasonable measures to prevent the advocacy of ethnic hatred or incitement of violence against the Tutsi population by CDR members and *Impuzamugambi*."[2287]

(i) Responsibility pursuant to Article 6(1) of the Statute

1001. The Trial Chamber first found Appellant Barayagwiza guilty "[f]or his own acts".[2288] The Appeals Chamber understands this to be a reference by the Trial Chamber to Appellant Barayagwiza's acts as described in paragraph 975 of the Judgement, namely: (1) the chanting of a song instigating the extermination of the Tutsi; (2) supervising roadblocks manned by *Impuzamugambi*; (3) the fact that he "was at the organizational helm"; (4) the fact that he

[2281] See *supra* XII. D. 1. (b) (ii) e.
[2282] Judgement, para. 1082.
[2283] See *supra* XII. D. 2. (a) (ii) b.
[2284] Barayagwiza Appellant's Brief, paras. 310-311. See also Barayagwiza Brief in Reply, para. 70.
[2285] Barayagwiza Appellant's Brief, para. 312.
[2286] Judgement, para. 1083.
[2287] *Idem*.
[2288] *Idem.*

"was also on site at the meetings, demonstrations and roadblocks that created an infrastructure for and caused the killing of Tutsi civilians". With respect to the first item, the Appeals Chamber concluded above that it had not been established that the Appellant had himself chanted the song in 1994;[2289] this cannot therefore support the Appellant's conviction. With respect to the third and fourth items, the Appeals Chamber cannot see how these facts could constitute personal acts of the Appellant justifying his conviction for persecution pursuant to one of the modes of responsibility in Article 6(1) of the Statute.

1002. Turning to the second item, the Appeals Chamber recalls that it has already concluded that the Appellant's supervision of roadblocks manned by *Impuzamugambi* substantially contributed to the murder of many Tutsi.[2290] The Appeals Chamber considers that murders of Tutsi at the roadblocks after 6 April 1994 also constituted acts of persecution. In consequence, it finds that the supervision of roadblocks by the Appellant substantially contributed to the commission of acts of persecution, and it finds the Appellant guilty pursuant to Article 6(1) of the Statute for having instigated[2291] persecution.

(ii) Responsibility pursuant to Article 6(3) of the Statute

1003. The Appeals Chamber concluded above that the Appellant Barayagwiza could not be convicted as a superior for acts of CDR militants and *Impuzamugambi*.[2292] The Appeals Chamber accordingly sets aside the Appellant's conviction for persecution pursuant to Article 6(3) of the Statute on account of acts committed by CDR members and *Impuzamugambi.*

(c) Appellant Ngeze's Responsibility

1004. The Trial Chamber found Appellant Ngeze guilty of persecution pursuant to Articles 3(h) and 6(1) of the Statute "[f]or the contents of this publication [*Kangura*] that advocated ethnic hatred or incited violence, as well as for his own acts that advocated ethnic hatred or incited violence against the Tutsi population".[2293]

1005. Appellant Ngeze submits that he was wrongly convicted of persecution.[2294] He notes first that paragraph 1084 of the Judgement states that his responsibility for the content of *Kangura* is based on findings set out in "paragraphs 977 and 978",[2295] but that these paragraphs do not deal with his responsibility, which in his view invalidates the verdict.[2296] Appellant Ngeze further contends that the articles published in *Kangura* in 1994 before 7 April do not represent a call for hatred or violence[2297] and that, although the Trial Chamber

[2289] See *supra* XII. D. 2. (b) (iii).
[2290] See *supra* XII. D. 2. (b) (vii).
[2291] Paragraph 1083 of the Judgement does not indicate on which mode of responsibility under Article 6(1) of the Statute the Appellant's conviction relies. However, in para. 975 of the Judgement, the Trial Chamber treats supervision of roadblocks as an act instigating the commission of genocide (see *supra* XII. D. 2. (b) (vii)). The Appeals Chamber considers that the same mode of responsibility should be relied on for the crime of persecution.
[2292] See *supra* XIII. D. 2. (b) (ii) b. iv.
[2293] Judgement, para. 1084.
[2294] Ngeze Notice of Appeal, paras. 162-179; Ngeze Appellant's Brief, paras. 422-448.
[2295] Judgement, para. 1084.
[2296] Ngeze Appellant's Brief, paras. 422-423.
[2297] *Ibid.*, para. 434.

concluded at paragraph 1078 of the Judgement that two articles constituted persecution ("A Cockroach Cannot Give Birth to a Butterfly", and "The Ten Commandments"), these were published before 1994 and were therefore outside the temporal jurisdiction of the Tribunal.[2298] He further argues that there is no evidence of a causal link between the comments in *Kangura* and the events that occurred after 6 April 1994 (in particular the maltreatment of Tutsi women), and that this had indeed been acknowledged by the Trial Chamber.[2299]

1006. Appellant Ngeze further submits that the Trial Chamber erred in also finding him guilty of persecution for having urged the Hutu population to attend CDR meetings and for having announced that the *Inyenzi* would be exterminated.[2300] In this respect, he asserts that (1) "some witnesses place these facts at dates falling outside the Tribunal's jurisdiction";[2301] (2) it has not been established that he urged the Hutu population to attend CDR meetings after 7 April 1994, when the widespread and systematic attack against the Tutsi population started;[2302] (3) even if he had urged the population to attend CDR meetings, this could not constitute persecution as a crime against humanity;[2303] (4) it was not proved that he invited only Hutu to attend such meetings;[2304] and (5) even if he had stated that the *Inyenzi* would be exterminated, there was no evidence of a causal link between these words and the massacre of Tutsi civilians.[2305]

1007. Appellant Ngeze asserts that the Trial Chamber erred in finding that he possessed the requisite *mens rea* to be convicted of persecution.[2306] He refers in this respect to the arguments developed by him in relation to genocidal intent.[2307] Furthermore, he submits that the Trial Chamber erred in that, rather that relying on the personal acts of the Accused in order to determine whether they had the required discriminatory intent, it based itself on the fact that RTLM, *Kangura* and the CDR targeted Tutsi and Hutu opponents.[2308]

1008. Lastly, Appellant Ngeze submits that he could not be convicted of persecution pursuant to Article 6(1) of the Statute,[2309] in particular because it had not been shown that he had "the authority required under Article 6(1) of the Statute".[2310]

1009. The Prosecutor responds that the *Kangura* publications are capable of constituting the crime of persecution,[2311] and that Appellant Ngeze has not demonstrated in what way the Trial Chamber erred in this respect.[2312]

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[2298] *Ibid.*, para. 435.
[2299] *Ibid.*, paras. 436 (referring to para. 242 of the Judgement) to 438.
[2300] *Ibid.*, paras. 439-443.
[2301] *Ibid.*, para. 441, no reference given.
[2302] *Idem*.
[2303] Ngeze Appellant's Brief., para. 442.
[2304] *Idem*.
[2305] Ngeze Appellant's Brief, para. 443.
[2306] *Ibid.*, paras. 444-445.
[2307] *Ibid.*, para. 444, where it is contended that "the discriminatory intent required for persecution as a crime against humanity is the same as that characterizing the crime of genocide, with the difference that, for a crime against humanity, there is no need to establish the intent to destroy the group in whole or in part."
[2308] *Ibid.*, para. 445.
[2309] *Ibid.*, paras. 446-448.
[2310] *Ibid.*, para. 447.
[2311] Respondent's Brief, para. 17, p. 184.
[2312] *Ibid.*, para. 582.

1010. The Appeals Chamber rejects from the outset the Appellant's arguments that his *mens rea* for the crime of persecution was not established. It recalls that it has already upheld the Trial Chamber's conclusion that the Appellant possessed genocidal intent.[2313] As the Trial Chamber found,[2314] a person who possesses genocidal intent necessarily possesses the intent required for persecution.[2315] The Appeals Chamber finds that the Appellant had the required *mens rea* for persecution. It also finds that, on the basis of the acts committed by the Appellant, he also possessed the intent to instigate others to commit persecution against Tutsi. The Appeals Chamber will now consider whether the Appellant in fact committed acts of persecution or of instigation to persecution.

(i) Responsibility for the content of *Kangura*

1011. In convicting Appellant Ngeze of persecution, the Trial Chamber concluded that he was responsible for the content of *Kangura* as found in "paragraphs 977 and 978".[2316] The reference to paragraphs 977 and 978 is obviously a typographical error.[2317] It should instead have been a reference to paragraph 977A of the Judgement, where the Trial Chamber found Ngeze guilty of genocide pursuant to Article 6(1) of the Statute "[a]s founder, owner and editor of *Kangura*, a publication that instigated the killing of Tutsi civilians, and for his individual acts in ordering and aiding and abetting the killing of Tutsi civilians". The Appeals Chamber is of the view that the Appellant suffered no prejudice as a result of this error.

1012. The Appeals Chamber has already concluded that the Appellant could not be convicted on the basis of *Kangura* publications prior to 1994. Thus, the Appeals Chamber must determine whether *Kangura* issues published in 1994 could constitute persecution or instigation to persecution.

1013. The Appeals Chamber notes first that *Kangura* was not published between 6 April and 17 July 1994, when the widespread and systematic attack against the Tutsi population of Rwanda took place. Thus it is difficult to see how *Kangura* articles published between 1 January and 6 April 1994 can be regarded as forming part of that widespread and systematic attack, even if they may have prepared the ground for it. Consequently, the Appeals Chamber is unable to conclude that the *Kangura* articles published between 1 January and 6 April 1994 amounted to acts of persecution as a crime against humanity.

1014. Furthermore, for the aforementioned reasons, the Appeals Chamber is of the view that it could not be concluded that certain articles published in *Kangura* in the first months of 1994 substantially contributed to the massacres of Tutsi civilians after 6 April 1994.[2318] For the same reasons, it has not been established that these *Kangura* publications did in practice substantially contribute to the commission of acts of persecution against Tutsi. The Appeals

[2313] See *supra* XII. C. 4. (d) .
[2314] Judgement, para. 1077.
[2315] Thus the intent to destroy in whole or in part a group protected by the Genocide Convention necessarily includes the intent to discriminate, on prohibited grounds, the members of the group. See also *infra* XVI. D. 3.
[2316] Judgement, para. 1084.
[2317] Paragraph 977 of the Judgement deals with Barayagwiza's responsibility as a superior of the CDR members and *Impuzamugambi*; paragraph 978 deals with the elements of the crime of direct and public incitement to commit genocide.
[2318] See *supra* XII. B. 3. .

Chamber accordingly considers that Appellant Ngeze cannot be convicted for having instigated the crime of persecution through matters published in *Kangura*.

(ii) Responsibility for his acts in Gisenyi

1015. The Trial Chamber considered that, by urging the Hutu population to attend CDR meetings and announcing that the *Inyenzi* would be exterminated, the Appellant committed persecution.[2319] The relevant factual conclusion is found at paragraph 837 of the Judgement and is based on the testimonies of Witnesses Serushago, ABE, AAM and AEU.[2320] The Appeals Chamber notes that it does not appear that these witnesses were referring to events having occurred after the start of the widespread and systematic attack against Tutsi on 6 April 1994. On the contrary, Witness Serushago refers to events having taken place in February 1994,[2321] Witness ABE to events in 1993[2322] and Witness AAM to events before 1994.[2323] With respect to Witness AEU, it is unclear when the events she describes occurred.[2324] In these circumstances, it cannot therefore be concluded that the acts of the Appellant formed part of the widespread and systematic attack against the Tutsi population which started on 6 April 1994. Consequently, these acts cannot constitute persecution as a crime against humanity.

1016. As to whether the acts of Appellant Ngeze instigated the commission of acts of persecution, the Appeals Chamber first considers that the Appellant has not shown that it was unreasonable to find that he had announced that the *Inyenzi* would be exterminated. However, as noted above, only Witness Serushago clearly places these words in 1994, and his testimony cannot be accepted unless it is corroborated by other credible evidence.[2325] Furthermore, the Appeals Chamber notes that the Trial Chamber did not find that the Appellant's words substantially contributed to massacres of Tutsi civilians. The conviction of the Appellant for persecution cannot therefore be founded on his acts in Gisenyi. His conviction for persecution as a crime against humanity must accordingly be set aside.

## XVI. CUMULATIVE CONVICTIONS

1017. The Appellants contend that the Trial Chamber erred in entering cumulative convictions under Articles 2 and 3 of the Statute.[2326]

### A. Applicable law in respect of cumulative convictions

1018. The three Appellants were found guilty of the crimes of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide and extermination and

[2319] Judgement, para. 1084, referring to para. 1039.
[2320] *Ibid.,* para. 834.
[2321] T. 15 November 2001, pp. 118-119; Judgement, para. 834.
[2322] T. 26 February 2001, p. 95.
[2323] T. 12 February 2001, pp. 104, 110-111, 131-132; Judgement, para. 797.
[2324] See *supra* footnote 2016.
[2325] Judgement, para. 824.
[2326] Nahimana Notice of Appeal, p. 15; Nahimana Appellant's Brief, paras. 640-648; Barayagwiza Notice of Appeal, p. 3; Barayagwiza Appellant's Brief, paras. 313-321; Ngeze Notice of Appeal, paras. 180-190; Ngeze Appellant's Brief, paras. 449-483; Ngeze Brief in Reply, paras. 97-107. As to the submissions relating to cumulative modes of responsibility under Articles 6(1) and 6(3) of the Statute, the Appeals Chamber refers to its analysis *supra* at XI. C.

persecution as crimes against humanity.[2327] Appellants Ngeze and Barayagwiza challenge the legal standard applied by the Trial Chamber and submit that the propriety of entering cumulative convictions must be examined on a case-by-case basis depending on "what facts are relied on by the Prosecution for each count".[2328]

1019. The Appeals Chamber recalls that cumulative convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other.[2329] The test to be applied with respect to cumulative convictions is to take account of all the legal elements of the offences, including those contained in the provisions' introductory paragraph.[2330]

1020. Moreover, like the ICTY Appeals Chamber,[2331] the Appeals Chamber considers that whether the same conduct violates two distinct statutory provisions is a question of law. Accordingly, contrary to the Appellants' contentions, the legal elements of each offence, not the acts or omissions giving rise to the offence, are to be taken into account in determining whether it is permissible to enter cumulative convictions.

1021. The Appeals Chamber will now examine the Appellants' contentions regarding the cumulative convictions entered by the Trial Chamber.

## B. Cumulative convictions under Article 2 of the Statute

### 1. Cumulative convictions for genocide and direct and public incitement to commit genocide

1022. The Appellants contend that it is impermissible to enter cumulative convictions for direct and public incitement to commit genocide and the crime of genocide on the basis of the same facts.[2332] However, since a number of their convictions have been set aside, none of the Appellants is now in the situation of being convicted for both genocide and direct and public incitement to commit genocide on the basis of the same facts. This ground of appeal has thus become moot.

### 2. Cumulative convictions for genocide and conspiracy to commit genocide

1023. Appellants Nahimana and Ngeze further submit that the Trial Chamber erred in convicting them of genocide and conspiracy to commit genocide on the basis of the same

[2327] Judgement, paras. 1091-1094.
[2328] Barayagwiza Appellant's Brief, para. 316. In his Brief in Reply (para. 99), Appellant Ngeze submits generally that the conduct for which he was convicted is the same for all the convictions. See also Nahimana Notice of Appeal, p. 15, and Nahimana Appellant's Brief, paras. 643-645 (where Appellant Nahimana raises this argument with specific reference to cumulative convictions for the counts of genocide, direct and public incitement to commit genocide and conspiracy to commit genocide).
[2329] See *Ntagerura et al*. Appeal Judgement, para. 425, where the Appeals Chamber further stated that an element is materially distinct from another if it requires proof of a fact not required by the other.
[2330] *Musema* Appeal Judgement, para. 363.
[2331] *Stakić* Appeal Judgement, para. 356; *Kordić and Čerkez* Appeal Judgement, para. 1033.
[2332] Nahimana Appellant's Brief, paras. 642-644; Barayagwiza Appellant's Brief, paras. 313, 318-319, 321; Ngeze Appellant's Brief, paras. 456, 460-461; Ngeze Brief in Reply, para. 100. See also T(A) 18 January 2007, pp. 52, 55-56.

facts.[2333] However, since the Appeals Chamber has set aside the Appellants' convictions for the crime of conspiracy to commit genocide, this ground of appeal has thus become moot.

### C. Cumulative convictions under Article 3 of the Statute

1024. Appellants Nahimana and Ngeze submit that the Trial Chamber was wrong in convicting them of both extermination and persecution as crimes against humanity. They contend that persecution does not have any materially distinct element to be proved that is not present as an element of the crime of extermination.[2334] They emphasize in this regard that the Trial Chamber acknowledged that "persecution when it takes the form of killings is a lesser included offence of extermination".[2335] In his Brief in Reply, Appellant Ngeze relies on the *Kupreškić et al.* Trial Judgement in submitting that the count of persecution, as *lex generalis,* ought to be subsumed by extermination, which he qualifies as *lex specialis.*[2336]

1025. The Appeals Chamber recalls that it has set aside the conviction entered against Appellant Nahimana for extermination as a crime against humanity,[2337] as well as Appellant Ngeze's conviction for persecution as a crime against humanity.[2338] As a consequence, the question of cumulative convictions for the crimes of persecution (Article 3(h) of the Statute) and extermination (Article 3(b) of the Statute) as crimes against humanity is no longer relevant for these Appellants, and their appeals on this point could therefore be declared to have become moot. However, the Appeals Chamber has upheld Appellant Barayagwiza's convictions for extermination and persecution as crimes against humanity on account of the killings committed by CDR militants and *Impuzamugambi* at roadblocks supervised by him.[2339] The Appeals Chamber therefore considers it necessary to consider the question of these cumulative convictions, even though Appellant Barayagwiza did not raise it.

1026. The Appeals Chamber observes in this respect that in the *Kordić and Čerkez* Appeal Judgement the ICTY Appeals Chamber found that cumulative convictions are permissible for persecution and other inhumane acts, since each offence has a materially distinct element not contained in the other.[2340] Relying on this jurisprudence, the ICTY Appeals Chamber found in the *Stakić* Appeal Judgement that it was permissible to enter cumulative convictions for extermination and persecution as crimes against humanity on the basis of the same facts. It found that extermination requires proof that the accused caused the death of a large number of people, while persecution requires proof that an act or omission was in fact discriminatory and that the act or omission was committed with specific intent to discriminate.[2341] The Appeals Chamber endorses the analysis of the ICTY Appeals Chamber.

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[2333] Nahimana Appellant's Brief, paras. 641, 645; Ngeze Appellant's Brief, paras. 454-456, 462-464, citing *Musema* Judgement, para. 198. See also Ngeze Brief in Reply, para. 101.
[2334] Nahimana Appellant's Brief, paras. 646-647; Ngeze Appellant's Brief, paras. 465-467.
[2335] Nahimana Appellant's Brief, paras. 646-647; Ngeze Appellant's Brief, paras. 465-466, citing paragraph 1080 of the Judgement.
[2336] Ngeze Brief in Reply, paras. 102-103, referring to paragraphs 706 and 708 of the *Kupreskić et al.* Trial Judgement.
[2337] See *supra* XV. B. 1. (b).
[2338] See *supra* XV. C. 2. (c).
[2339] See *supra* XV. B. 2. (a) and XV. C. 2. (b) (i).
[2340] *Kordić and Čerkez* Appeal Judgement, paras. 1040-1043.
[2341] *Stakić* Appeal Judgement, paras. 364, 367.

1027. According to the foregoing, the Appeals Chamber finds that it is permissible to convict Appellant Barayagwiza cumulatively of both persecution and extermination on the basis of the same facts, Judge Güney dissenting from this finding.

## D. Cumulative convictions under Articles 2 and 3 of the Statute

### 1. Cumulative convictions for genocide and extermination as a crime against humanity

1028. Appellants Ngeze and Barayagwiza appeal against their cumulative convictions for genocide and extermination as a crime against humanity for having ordered and aided and abetted the killing of Tutsi civilians.[2342] Appellant Ngeze invokes in particular the *Kayishema and Ruzindana* Trial Judgement in contending that the two offences protect the same social interest.[2343] Appellant Barayagwiza concedes that the requisite elements for genocide and extermination are not the same, but contends that "on the facts of this case, the conviction for the offence of extermination added nothing to the conviction for genocide", since "[t]he required 'widespread and systematic attack against a civilian Tutsi population' was subsumed within the large-scale killings".[2344]

1029. It is established case-law that cumulative convictions for genocide and crime against humanity are permissible on the basis of the same acts, as each has a materially distinct element from the other, namely, on the one hand, "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group", and, on the other, "a widespread or systematic attack against a civilian population".[2345]

1030. Accordingly, the Appeals Chamber finds that the Trial Chamber was right to enter cumulative convictions under Articles 2(3)(a) and 3(b) of the Statute on the basis of the same acts. It therefore dismisses the Appellants' appeal on this point.

### 2. Cumulative convictions for genocide and persecution as a crime against humanity

1031. Appellant Ngeze appeals against his convictions for both genocide and persecution as a crime against humanity.[2346] Since Appellant Ngeze's conviction for persecution has been set aside,[2347] this ground could be said to have become moot.

1032. However, since this issue could be raised in connection with Appellant Barayagwiza (whose convictions for both instigating genocide and persecution have been upheld),[2348] the Appeals Chamber would recall that the crime of genocide *inter alia* requires the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.

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[2342] Barayagwiza Appellant's Brief, para. 320; Ngeze Appellant's Brief, paras. 469-476. See also Ngeze Brief in Reply, para. 106.
[2343] Ngeze Appellant's Brief, paras. 473-475, referring to the *Rutaganda* Trial Judgement, para. 113, and to the *Kayishema and Ruzindana* Trial Judgement, para. 627.
[2344] Barayagwiza Appellant's Brief, para. 320.
[2345] *Ntagerura et al*. Appeal Judgement, para. 426; *Semanza* Appeal Judgement, para. 318. With specific reference to cumulative convictions for genocide and extermination, see *Ntakirutimana* Appeal Judgement, para. 542; *Musema* Appeal Judgement, paras. 366-367, 370.
[2346] Ngeze Appellant's Brief, para. 477.
[2347] See *supra* XV. C. 2. (c).
[2348] See *supra* XII. D. 2. (b) (viii) and XV. C. 2. (b) (i).

Persecution, like the other acts enumerated in Article 3 of the Statute, must have been committed as part of a widespread and systematic attack on a civilian population. It was therefore open to the Trial Chamber to enter cumulative convictions under Articles 2(3)(a) and 3(h) of the Statute on the basis of the same acts. This ground is therefore dismissed.

#### 3. Cumulative convictions for direct and public incitement to commit genocide and persecution as a crime against humanity

1033. Appellants Nahimana and Ngeze challenge their cumulative convictions for direct and public incitement to commit genocide and persecution as a crime against humanity, contending that the Trial Chamber itself noted that the material and mental elements of both crimes are the same.[2349]

1034. The Appeals Chamber recalls that the crime of incitement requires direct and public incitement to commit genocide as a material element and the intent to incite others to commit genocide (itself implying a genocidal intent) as a mental element, which is not required by Article 3(h) of the Statute. As stated *supra*, persecution as a crime against humanity requires the underlying act to have been committed as part of a widespread and systematic attack on a civilian population, unlike the crime of direct and public incitement to commit genocide.

1035. The argument that the Trial Chamber noted that the material and mental elements of both crimes are the same is manifestly unsubstantiated. The Appeals Chamber notes, first, that in paragraph 1077 of the Judgement the Trial Chamber noted no such thing: it merely stated that, as genocidal intent was established for the communications, "the lesser intent requirement of persecution, the intent to discriminate" had also been met.[2350] Secondly, the Appeals Chamber emphasizes that, while the intent to discriminate required by persecution can in practice be considered to be subsumed within genocide, the reverse is not true. The fact remains that the crime of direct and public incitement to commit genocide, like the crime of genocide, requires the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, which is not required for persecution as a crime against humanity.

1036. The Appeals Chamber accordingly finds that the Trial Chamber did not err in entering cumulative convictions under Articles 2(3)(c) and 3(h) of the Statute on the basis of the same acts, and dismisses the Appellants' appeal on this point.

## XVII. THE SENTENCES

### A. Introduction

1037. Article 24 of the Statute allows the Appeals Chamber to "affirm, reverse or revise" a sentence imposed by a Trial Chamber. However, the Appeals Chamber recalls that Trial Chambers have a wide power of discretion in determining the appropriate sentence. This stems from their obligation to tailor the sentence according to the individual circumstances of

[2349] Nahimana Appellant's Brief, para. 648 (Appellant Nahimana raises this ground of appeal in the alternative); Ngeze Appellant's Brief, para. 468. Both Appellants cite paragraph 1077 of the Judgement. See also Ngeze Brief in Reply, paras. 104-105.

[2350] Judgement, para. 1077: "Having established that all communications constituting direct and public incitement to genocide were made with genocidal intent, the Chamber notes that the lesser intent requirement of persecution, the intent to discriminate, has been met with regard to these communications".

the accused and the gravity of the crime.[2351] Generally, the Appeals Chamber will not substitute its own sentence for that imposed by the Trial Chamber unless it has been shown that the latter committed a manifest error in exercising its discretion, or failed to follow the applicable law.[2352]

1038. The factors that a Trial Chamber is obliged to take into account in sentencing a defendant are set out in Article 23 of the Statute and in Rule 101 of the Rules. They are:

> (1) the general practice regarding prison sentences in the courts of Rwanda. However, Trial Chambers are not obliged to conform to that practice but need only to take account of it;[2353]
>
> (2) the gravity of the offences (*i.e*. the gravity of the crimes of which the accused has been convicted, and the form or degree of responsibility for these crimes). It is well established that this is the primary consideration in sentencing;[2354]
>
> (3) the individual circumstances of the accused, including aggravating and mitigating circumstances. Aggravating circumstances must be proved by the Prosecutor beyond reasonable doubt;[2355] the accused bears the burden of establishing mitigating factors based on the most probable hypothesis (or according to the term of art used in certain jurisdictions, "on a balance of probabilities").[2356] While the Trial Chamber is legally required to take into account any mitigating circumstances, what constitutes a mitigating circumstance and the weight to be accorded thereto is a matter for the Trial Chamber to determine in the exercise of its discretion.[2357] In particular, the existence of mitigating circumstances does not automatically imply a reduction of sentence or preclude the imposition of a sentence of life imprisonment;[2358]
>
> (4) the extent to which any sentence imposed on the defendant by a court of any State for the same act has already been served.

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[2351] *Ntagerura et al.* Appeal Judgement, para. 429; *Naletilić and Martinović* Appeal Judgement, para. 593; *Kajelijeli* Appeal Judgement, para. 291; *Semanza* Appeal Judgement, para. 312; *Čelebići* Appeal Judgement, para. 717.
[2352] *Ntagerura et al.* Appeal Judgement, para. 429; *Naletilić and Martinović* Appeal Judgement, para. 593; *Jokić* Appeal Judgement, para. 8; *Kajelijeli* Appeal Judgement, para. 291; *Semanza* Appeal Judgement, para. 312; *Musema* Appeal Judgement, para. 379; *Tadić* Judgement on Sentencing Appeal, para. 22.
[2353] *Jokić* Appeal Judgement, para. 38; *D. Nikolić* Appeal Judgement, para. 69; *Kordić and Čerkez* Appeal Judgement, para. 1085; *Čelebići* Appeal Judgement, paras. 813, 816; *Serushago* Appeal Judgement, para. 30.
[2354] *Muhimana* Appeal Judgement, paras. 233, 234; *Ndindabahizi* Appeal Judgement, para. 138; *Gacumbitsi* Appeal Judgement, para. 204; *Kamuhanda* Appeal Judgement, para. 357; *Musema* Appeal Judgement, para. 382; *Kayishema and Ruzindana* Appeal Judgement, para. 352; *Čelebići* Appeal Judgement, paras. 731, 847-849; *Aleksovski* Appeal Judgement, para. 182.
[2355] *Kajelijeli* Appeal Judgement, para. 294; *Blaškić* Appeal Judgement, paras. 686, 688; *Čelebići* Appeal Judgement, para. 763.
[2356] *Muhimana* Appeal Judgement, para. 231; *Babić* Appeal Judgement, para. 43; *Kajelijeli* Appeal Judgement, paras. 294, 299; *Blaškić* Appeal Judgement, para. 697; *Čelebići* Appeal Judgement, para. 590.
[2357] *Zelenović* Appeal Judgement, para. 18; *Ntagerura et al.* Appeal Judgement, para. 430; *Niyitegeka* Appeal Judgement, para. 266; *Musema* Appeal Judgement, paras. 395, 396; *Kupreškić et al.* Appeal Judgement, para. 430; *Čelebići* Appeal Judgement, para. 775; *Kambanda* Appeal Judgement, para. 124.
[2358] *Muhimana* Appeal Judgement, para. 234; *Kajelijeli* Appeal Judgement, para. 299; *Niyitegeka* Appeal Judgement, para. 267; *Musema* Appeal Judgement, para. 396.

The Appeals Chamber further recalls that credit shall be given for any period of detention of the defendant prior to final judgement.[2359]

1039. Having found the three Appellants guilty of conspiracy to commit genocide, genocide, direct and public incitement to commit genocide, persecution and extermination as crimes against humanity, the Trial Chamber imposed on each Appellant a single sentence of life imprisonment.[2360] However, the Trial Chamber reduced the sentence of Appellant Barayagwiza to 35 years to take account of the violation of his rights, as instructed by the Appeals Chamber in its Decision of 31 March 2000.[2361] The Appellants raise a number of grounds of appeal against the sentences imposed by the Trial Chamber.[2362]

### B. Single sentence

1040. Appellants Nahimana[2363] and Ngeze[2364] argue that the Trial Chamber committed an error of law in failing to impose a separate sentence in respect of each offence, as required under Rule 87(C) of the Rules.

1041. Paragraph 1104 of the Judgement reads as follows:

> The Chamber notes that in the case of an Accused convicted of multiple crimes, as in the present case, the Chamber may, in its discretion, impose a single sentence or one sentence for each of the crimes. The imposition of a single sentence will usually be appropriate in cases in which the offences may be recognized as belonging to a single criminal transaction.[2365]

1042. The Appeals Chamber notes that, under Rule 87(C) of the Rules, "if the Trial Chamber finds the accused guilty on one or more of the counts contained in the indictment, it shall also determine the penalty to be imposed in respect of each of the counts". However, the Appeals Chamber has held that Trial Chambers may impose a single sentence in respect of multiple convictions in the following circumstances:

> Where the crimes ascribed to an accused, regardless of their characterisation, form part of a single set of crimes committed in a given geographic region during a specific time period, it is appropriate for a single sentence to be imposed for all convictions, if the Trial Chamber so decides. [2366]

1043. The Appeals Chamber has further held that, when the acts of the accused are linked to the systematic and widespread attack which occurred in 1994 in Rwanda against the Tutsi, this requirement is fulfilled and a single sentence for multiple convictions can be imposed.[2367] The Appeals Chamber reaffirms the position stated in the *Kambanda* Appeal Judgement. In

[2359] Rule 101(D) of the Rules.
[2360] Judgement, paras. 1105-1106, 1108.
[2361] *Ibid.*, paras. 1106, 1107.
[2362] Nahimana Notice of Appeal, p. 17; Nahimana Appellant's Brief, paras. 651-652; Nahimana Brief in Reply, paras. 164-174; Barayagwiza Notice of Appeal, p. 3; Barayagwiza Appellant's Brief, paras. 339-379; Ngeze Notice of Appeal, para. 191; Ngeze Appellant's Brief, paras. 484-494; Ngeze Brief in Reply, paras. 108-112.
[2363] Nahimana Brief in Reply, para. 164.
[2364] Ngeze Appellant's Brief, para. 485.
[2365] Judgement, para. 1104, citing *Blaškić* Trial Judgement, para. 807, and *Krstić* Trial Judgement, para. 725.
[2366] *Kambanda* Appeal Judgement, para. 111.
[2367] *Ibid*., para. 112.

the present case, since the acts of the Appellants were all linked to the genocide of the Tutsi in Rwanda in 1994, the Trial Chamber could impose a single sentence. The Appellants' appeals on this point are therefore rejected.

## C. Appellant Nahimana

1044. Appellant Nahimana contends that the Trial Chamber imposed a clearly excessive sentence having regard to international jurisprudence and to the following facts: (1) the Appellant never personally or directly committed, or ordered or approved the commission of any of the crimes provided for in the Statute; (2) he was a mere civilian, he held no post of authority and did not have any means by which he could effectively oppose the crimes committed in Rwanda in 1994; and (3) he always made himself available to the judicial authorities before his arrest, and fully participated in the trial out of concern for the truth to be ascertained.[2368] In his Brief in Reply, the Appellant further argues that (1) his criminal responsibility was at most indirect and this type of responsibility has never been punished by imprisonment for life;[2369] (2) the Trial Chamber should have taken into account the fact that "the slightest initiative to oppose the killings exposed the opponents to fatal reprisals";[2370] and (3) the Trial Chamber, notwithstanding what it said in paragraph 1099 of the Judgement, never took into account the representations by Defence witnesses affirming his refusal to adhere to extremist ideologies.[2371]

1045. The reasons given by the Trial Chamber to justify the sentence of imprisonment for life were as follows:

- the crimes of which the Appellant had been convicted were of the gravest kind;[2372]
- the Appellant was involved in the planning of the criminal activities;[2373]
- the Appellant abused his authority and betrayed the trust placed in him;[2374]
- no representations on sentencing were made on his behalf at trial.[2375]

### 1. Comparison with other cases

1046. In his Appellant's Brief, the Appellant contends that the sentence imposed by the Trial Chamber was clearly excessive in light of the jurisprudence, but he does not substantiate this affirmation.[2376] In his Brief in Reply, the Appellant refers to *Blaškić* and *Rutaganira*,[2377] but does not explain how these cases were so similar to his case that a similar sentence should have been imposed. The Appeals Chamber recalls that Trial Chambers have broad discretion to tailor the penalties to fit the individual circumstances of the accused and

[2368] Nahimana Appellant's Brief, para. 651.
[2369] Nahimana Brief in Reply, paras. 166-168, referring to *Blaškić* Appeal Judgement and *Rutaganira* Trial Judgement (without giving any specific reference).
[2370] *Ibid.*, para. 171.
[2371] *Ibid.*, paras. 172-174.
[2372] Judgement, paras. 1096, 1103.
[2373] *Ibid.*, para. 1102.
[2374] *Ibid.*, paras. 1098, 1099.
[2375] *Ibid.*, para. 1099.
[2376] See Nahimana Appellant's Brief, para. 651.
[2377] See Nahimana Brief in Reply, paras. 167 (footnote 161) and 168.

the gravity of the crime.[2378] The comparison between cases is thus generally of limited assistance.[2379] As the Appeals Chamber explained in the *Čelebići* Appeal Judgement:

> While it [the Appeals Chamber] does not disagree with a contention that it is to be expected that two accused convicted of similar crimes in similar circumstances should not in practice receive very different sentences, often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results.[2380]

1047. The appeal on this point is dismissed.

### 2. Impossibility of intervention

1048. The Appellant contends that he could not intervene with RTLM without exposing himself to danger and that this should have been considered as a mitigating circumstance. The Trial Chamber found that the Appellant could intervene without danger for himself, and the Appeals Chamber has confirmed this finding.[2381] This argument of the Appellant is dismissed.

### 3. Attitude of the Appellant towards the Tribunal

1049. The Appeals Chamber likewise rejects the Appellant's argument that the fact that he made himself available to the judicial authorities and that he fully participated in the trial should have been taken into consideration as a mitigating circumstance. The Appeals Chamber repeats that the Appellant did not put this forward at trial as a mitigating circumstance, and the Appellant cannot raise this issue for the first time at the appeal stage,[2382] particularly since his appeal does not include any submission regarding the quality of his representation at trial.

### 4. Representations by Defence witnesses

1050. The Appeals Chamber is of the view that the Appellant has failed to show that the Trial Chamber declined to take account of statements by Defence witnesses that he had refused to adhere to extremist ideologies or organisations. As noted in paragraph 1099 of the Judgement, the Trial Chamber clearly took into account these statements but refused to give them any weight, considering more meaningful the fact that the Appellant had betrayed the trust placed in him. The Appellant has not shown that the Trial Chamber committed an error in the exercise of its discretion.

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[2378] *Semanza* Appeal Judgement, paras. 312, 394; *Krstić* Appeal Judgement, para. 248; *Kayishema and Ruzindana* Appeal Judgement, para. 352; *Čelebići* Appeal Judgement, para. 731.

[2379] *Limaj et al.* Appeal Judgement, para. 135; *Blagojević and Jokić* Appeal Judgement, para. 333; *M. Nikolić* Appeal Judgement, para. 38; *Semanza* Appeal Judgement, para. 394; *D. Nikolić* Appeal Judgement, para. 19; *Musema* Appeal Judgement, para. 387; *Čelebići* Appeal Judgement, para. 719.

[2380] *Čelebići* Appeal Judgement, para. 719, cited with approval in *Musema* Appeal Judgement, para. 387. See also *Furundžija* Appeal Judgement, para. 250:

> A previous decision on sentence may indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances; otherwise, a Trial Chamber is limited only by the provisions of the Statute and the Rules.

[2381] See *supra* XIII. D. 1. (b) (ii) c. ii.

[2382] *Muhimana* Appeal Judgement, para. 231; *Bralo* Appeal Judgement, para. 29; *Kamuhanda* Appeal Judgement, para. 354; *Deronjić* Appeal Judgement, para. 150; *Babić* Appeal Judgement, para. 62.

5. Consequences of the findings of the Appeals Chamber

1051. The Appeals Chamber recalls that it has set aside the convictions of Appellant Nahimana under Article 6(1) of the Statute for:

- conspiracy to commit genocide (Count 1 of Nahimana's Indictment);[2383]
- genocide (Count 2 of Nahimana's Indictment); [2384]
- direct and public incitement to commit genocide (Count 3 of Nahimana's Indictment);[2385]
- extermination as a crime against humanity (Count 6 of Nahiman's Indictment);[2386]
- persecution as a crime against humanity (Count 5 of Nahimana's Indictment).[2387]

On the other hand, the Appeals Chamber has upheld the convictions of Appellant Nahimana under Article 6(3) of the Statute for:

- direct and public incitement to commit genocide (Count 3 of Nahimana's Indictment);[2388]
- persecution as a crime against humanity (Count 5 of Nahimana's Indictment).[2389]

1052. Having regard to the sentence imposed by the Trial Chamber and the setting aside of certain convictions in the present Appeal Judgement, the Appeals Chamber finds that the sentence of Appellant Nahimana should be reduced to one of 30 years' imprisonment, Judge Meron dissenting.

## D. Appellant Barayagwiza

1. Gravity of the offences and Appellant's degree of responsibility

(a) The Appellant did not personally commit acts of violence

1053. Appellant Barayagwiza argues that the sentence is excessive and disproportionate in view of the fact that "the major part of the crimes imputed to the responsibility of the Barayagwiza are attributed to non identified third persons", that he "had been found innocent of any crime related to murder"[2390] and that "there was no evidence he had personally engaged in acts of violence".[2391]

[2383] See *supra* XIV. B. 4.
[2384] See *supra* XII. D. 1. (b) (ii) e.
[2385] See *supra* XIII. D. 1. (a).
[2386] See *supra* XV. B. 1. (b).
[2387] See *supra* XV. C. 2. (a) (iii) a.
[2388] See *supra* XIII. D. 1. (c).
[2389] See *supra* XV. C. 2 (a) (iii) a.
[2390] Barayagwiza Appellant's Brief, para. 347.
[2391] *Ibid.*, para. 339(i), where the Appellant argues that the fact that George Ruggiu had not personally committed any act of violence was "considered to be a mitigating factor".

1054. In the view of the Appeals Chamber, the Appellant has not shown that the sentence imposed by the Trial Chamber was excessive and disproportionate. The Trial Chamber found the Appellant guilty of extremely serious crimes. In particular, the Trial Chamber found that he planned, ordered or instigated the commission of crimes by others. In these circumstances, the Trial Chamber was entitled to hold that the fact that the Appellant had not personally committed acts of violence did not mitigate his guilt, as the Appellant had carried out preliminaries to acts of violence, substantially contributing to the commission of such acts by others.[2392]

1055. That said, the Appeals Chamber has set aside certain of the Appellant's convictions, and will consider later whether the sentence imposed on the Appellant should accordingly be revised.

(b) Purposes of the sentence

1056. Appellant Barayagwiza argues that, in determining his sentence, the Trial Chamber placed too much emphasis on the objectives of retribution and deterrence, and not enough on those of national reconciliation and rehabilitation.[2393]

1057. The Appeals Chamber is not convinced by this argument. First, the Appellant does not explain how the sentence imposed by the Trial Chamber would damage national reconciliation. Secondly, the Appeals Chamber is of the opinion that, in view of the gravity of the crimes in respect of which the Tribunal has jurisdiction, the two main purposes of sentencing are retribution and deterrence; the purpose of rehabilitation should not be given undue weight.[2394] In these circumstances, and having regard to the crimes of which the Appellant has been convicted, the Appeals Chamber cannot find that the Trial Chamber committed an error by giving undue weight to the purposes of retribution and deterrence.

(c) Categorization of offenders

1058. Appellant Barayagwiza argues that the Trial Chamber committed an error of law by finding, on the basis of the Rwandan law, that the three Accused "fall into the category of the most serious offenders".[2395] The Appellant contends that (1) the Statute of the Tribunal, its Rules or general international criminal law do not provide for such categorization; (2) categorization was introduced into Rwandan law following the entry into force of a Law of 30 August 1996; and (3) categorization is not based "on judicial decisions, but on decisions which are clearly political" and it "rests on ethnic discrimination and presumption of guilt of all Hutu associated with the former regime".[2396]

1059. In paragraph 1097 of the Judgement, the Trial Chamber stated the following:

> The Chamber considers that life imprisonment, being the highest penalty permissible at the Tribunal, should be reserved for the most serious offenders, and the principle of gradation in sentencing allows the Chamber to distinguish between crimes, based on their gravity.

[2392] *Cf.*, *Stakić* Appeal Judgement, para. 380.
[2393] Barayagwiza Appellant's Brief, para. 340.
[2394] *Stakić* Appeal Judgement, para. 402; *Deronjić* Appeal Judgement, paras. 136-137; *Kordić and Čerkez* Appeal Judgement, para. 1079; *Ţelibiţi* Appeal Judgement, para. 806; *Aleksovski* Appeal Judgement, para. 185.
[2395] Judgement, para. 1103.
[2396] Barayagwiza Appellant's Brief, para. 343.

> The Chamber is mindful that it has an "overriding obligation to individualize the penalty", with the aim that the sentence be proportional to the gravity of the offence and the degree of responsibility of the offender. The Chamber has also considered the provisions of the Rwandan Penal Code and Rwandan Organic Law relating to sentencing, and the sentencing practices in both ad-hoc Tribunals.[2397]

The Trial Chamber then found that "[h]aving regard to the nature of the offences, and the role and the degree of participation of the Accused, the Chamber considers that the three Accused fall into the category of the most serious offenders."[2398]

1060. The Appeals Chamber cannot discern any error in the findings of the Trial Chamber. First, the Appellant does not explain what leads him to assert that the Trial Chamber based itself on the categories introduced by the Rwandan Law of 1996. Furthermore, although there is no pre-established hierarchy between crimes within the jurisdiction of the Tribunal,[2399] and international criminal law does not formally identify categories of offences, it is obvious that, in concrete terms, some criminal behaviours are more serious than others. As recalled above, the effective gravity of the offences committed is the deciding factor in the determination of the sentence:[2400] the principle of gradation or hierarchy in sentencing requires that the longest sentences be reserved for the most serious offences.[2401] The Trial Chamber merely applied this principle to the case at hand. The Appellant's appeal on this point is dismissed.

(d) Practice of courts and tribunals

1061. Appellant Barayagwiza argues that the 35 year sentence imposed by the Trial Chamber is not in conformity with the practice of the Rwandan courts or of the Tribunal.[2402] He adds that Article 77(1) of the Statute of the International Criminal Court provides for a maximum fixed term of imprisonment of 30 years.[2403]

(i) Practice of the Rwandan courts

1062. Appellant Barayagwiza argues that the sentence of 35 years imprisonment imposed by the Trial Chamber is clearly excessive by comparison with the practice of the Rwandan courts. In this connection, he refers to Article 83 of the Rwandan Penal Code, which "provides substantial reductions for the most serious offences"[2404] and to Article 35 of that Code, where the maximum term of imprisonment is allegedly 20 years. Finally, the Appellant relies on the principle that criminal penalties cannot be increased retrospectively in order to argue that the Rwandan Organic Law of 30 August 1996 did not apply.[2405]

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[2397] References omitted.
[2398] Judgement, para. 1103.
[2399] *Stakić* Appeal Judgement, para. 375.
[2400] See *supra* XVII. A.
[2401] As recognized by the Trial Chamber; see Judgement, para. 1097.
[2402] Barayagwiza Appellant's Brief, para. 344.
[2403] *Idem*.
[2404] Barayagwiza Appellant's Brief, para. 348. Article 83 of the Rwandan Penal Code provides: "Where there are mitigating circumstances, […] the sentence of life imprisonment shall be replaced by a sentence of imprisonment for a fixed period, which shall not be less than 2 years".
[2405] Barayagwiza Appellant's Brief, paras. 348-349.

1063. The Appeals Chamber recalls that, while the Trial Chamber must take account of the general practice regarding sentences in the Rwandan courts,[2406] it is well established in the jurisprudence that the Trial Chamber is not bound by that practice.[2407] The Trial Chamber is therefore "entitled to impose a greater or lesser sentence than that which would have been imposed by the Rwandan courts".[2408]

1064. The Appeals Chamber notes that, in reaching its decision, the Trial Chamber made it clear that it had had regard to Rwandan law.[2409] The Trial Chamber was not obliged to follow Articles 35 and 83 of the Rwandan Penal Code. In any event, the Appeals Chamber notes that, contrary to what the Appellant alleges, the maximum term of imprisonment in Rwanda is not 20 years but life.[2410] Regarding the Rwandan Organic Law of 30 August 1996, the Appellant has produced no evidence that it was applied by the Trial Chamber. The Appellant's appeal on this point is dismissed.

(ii) Practice of international criminal tribunals

1065. Appellant Barayagwiza argues that the sentence of 35 years imposed at first instance is not in conformity with the jurisprudence of the Tribunal or of the ICTY.[2411] In support of this claim, he cites the prison sentences imposed on Elizaphan and Gérard Ntakirutimana, Obed Ruzindana and Laurent Semanza, and notes that the length of the sentences pronounced by the Tribunal varies between 10 and 25 years.[2412] The Appellant further points out that the accused in the *Ruggiu* and *Serushago* cases received sentences of 12 and 15 years respectively, despite the fact that their fundamental rights had not been violated.[2413]

1066. As recalled above, Trial Chambers are under an obligation to tailor penalties to fit the gravity of the crime and the individual circumstances of the case and of each accused; a comparison of cases is thus often of limited assistance.[2414] In the present case, the Appellant has done nothing to show how his case was so similar to those of Elizaphan and Gérard Ntakirutimana, Obed Ruzindana and Laurent Semanza as to require a similar sentence. As to the *Ruggiu* and *Serushago* cases, the Appeals Chamber notes that the sentences imposed in these cases relied on mitigating circumstances capable of justifying a reduction of the sentence, namely: a guilty plea, expressions of remorse and substantial cooperation with the Prosecution,[2415] which is not the case here. The Appeals Chamber dismisses the appeal on this point.

(iii) The Statute of the International Criminal Court

[2406] Article 23(1) of the Statute; Rule 101(B)(iii) of the Rules.
[2407] *Semanza* Appeal Judgement, paras. 377, 393; *Akayesu* Appeal Judgement, para. 420; *Serushago* Appeal Judgement, para. 30. See also *Stakić* Appeal Judgement, para. 398; *D. Nikolić* Appeal Judgement, para. 69; *Čelebići* Appeal Judgement, para. 813;
[2408] *Semanza* Appeal Judgement, para. 393. See also *Krstić* Appeal Judgement, para. 262.
[2409] Judgement, paras. 1095, 1097.
[2410] Rwandan Penal Code, Article 34 ("Imprisonment may be either for life or for a fixed period"). Article 35 moreover provides that imprisonment can exceed 20 years "in cases of repeated or other offences where the law has fixed other limits".
[2411] Barayagwiza Appellant's Brief, paras. 344, 377-379.
[2412] *Ibid.*, para. 344.
[2413] *Ibid.*, paras. 377-379.
[2414] See *supra* XVII. C. 1.
[2415] *Serushago* Trial Judgement, paras. 31-35, 38, 40-41; *Ruggiu* Trial Judgement, paras. 53-58, 69-72.

1067. Appellant Barayagwiza argues that the Statute of the International Criminal Court provides for a maximum fixed term of imprisonment of 30 years.[2416]

1068. This provision does not bind the Tribunal, and the Appellant has not shown that it reflects the state of international customary law in force in 1994. The Appeals Chamber recalls that Rule 101(A) of the Rules does not limit the length of the custodial sentence that can be imposed by the Tribunal. The Appeals Chamber accordingly rejects the appeal on this point.

### 2. Mitigating circumstances

1069. On appeal, Appellant Barayagwiza has raised a series of matters which he claims should have been taken into account by the Trial Chamber as mitigating circumstances. However, most of these were not presented as mitigating circumstances at the trial and, in the view of the Appeals Chamber, the Appellant has not shown that the failure to present them constituted negligence on the part of his Counsel; rather, it was due to the refusal of the Appellant to cooperate with Counsel. In any event, and for the following reasons, the Appeals Chamber is not convinced that the matters now presented by the Appellant constitute mitigating circumstances, or that they would have played a significant role in the determination of the sentence:

- the Appellant argues that his actions were lawful, democratic and peaceful.[2417] He further appears to argue that the genocide was a reaction of the population to the invasion by the RPF and the murder of the President, and that he was unable to exercise any real control in this context.[2418] However, he makes no reference to anything in the case record to support his argument. Further, the acts proved against the Appellant contradict his claims: in particular, the Appellant played an active role in planning, ordering and instigating the killing of Tutsi;[2419]

- the Appellant argues that the Trial Chamber should have taken into account his previous good reputation, his lack of a criminal record and the fact that he is a father.[2420] However, no reference to the record is made to sustain these claims. Furthermore, the Appeals Chamber recalls that, according to the jurisprudence of the Tribunal and of the ICTY, the previous good moral character of the accused carries little weight in the determination of the sentence;[2421] similarly, the lack of a previous

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[2416] Barayagwiza Appellant's Brief, para. 344, referring to Article 77(1)(a) and (b) of the Statute of the International Criminal Court, which provides:

> (1) Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:
>
> (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
>
> (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

[2417] *Ibid.*, para. 339 (ii) to (vi).
[2418] *Ibid.*, para. 339 (vii) to (ix).
[2419] See *supra* XII. D. 2. and XV. B. 2.
[2420] Barayagwiza Appellant's Brief, paras. 342, 347.
[2421] *Babić* Appeal Judgement, para. 50; *Kajelijeli* Appeal Judgement, para. 301; *Semanza* Appeal Judgement, para. 398; *Niyitegeka* Appeal Judgement, paras. 264-266.

criminal record "is a common characteristic among many accused persons which is accorded little if any weight in mitigation absent exceptional circumstances".[2422] As to a defendant's family situation, the Tribunal and the ICTY do not treat it as an important factor, save in exceptional circumstances, the main factor being the gravity of the crimes.[2423]

1070. The Appellant's appeal on these points is dismissed.

### 3. Lack of reasoning

1071. The Appellant argues that the Trial Chamber did not give any reasons for its decision to impose a custodial sentence of 35 years.[2424] The Appeals Chamber observes that, in support of the sentence imposed, the Trial Chamber noted *inter alia* the gravity of the offences, the individual circumstances of Appellant Barayagwiza and, in accordance with the Decision of 31 March 2000, the violations of his right to a fair trial.[2425] The Appeals Chamber accordingly considers that the Trial Chamber did not fail to provide reasons for the sentence. Nor does the Appellant specifically explain in what way the Trial Chamber's reasoning was insufficient, confining himself to general observations on the importance of providing reasons to explain a sentence. The appeal on this point is dismissed.

### 4. Excessive delay in rendering the Judgement

1072. Appellant Barayagwiza contends that his sentence should have been reduced because of the undue delay in trying him.[2426] He argues that the delay between his arrest and his conviction (7 years, 8 months and 5 days) is abusive, inexcusable and solely attributable to the Trial Chamber and to the Prosecutor.[2427] The Appellant adds to this the delays in the appeal, claiming in particular that the Registrar refused for a year to allow him to exercise "his right to the assistance of a competent counsel of his choice".[2428]

1073. The Appeals Chamber observes at the outset that, in pleading the excessive length of the proceedings, the Appellant is in fact raising a substantive issue going to the regularity of the trial. However, inasmuch as the Appellant raises this issue in his appeal against sentence

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[2422] *Ntagerura et al.* Appeal Judgement, para. 439.
[2423] *Jokić* Appeal Judgement, para. 62; *Kunarac et al.* Appeal Judgement, para. 413 ; *Jelisić* Trial Judgement, para. 124; *Furundžija* Trial Judgement, para. 284.
[2424] Barayagwiza Appellant's Brief, paras. 351-352.
[2425] Judgement, paras. 1096, 1098, 1100, 1102-1103, 1106-1107. In particular, the Trial Chamber noted: (1) the gravity of the crimes of which the Appellant had been convicted; (2) that the Appellant occupied a position of leadership and public trust but that he acted contrary to the duties imposed by his position; (3) that despite his declared attachment to human rights, the Appellant violated the most fundamental human right (the right to life) through the institutions he created, and through his own personal acts; (4) that it could find no mitigating circumstances in his case. The Trial Chamber went on to state that the appropriate sentence was one of life imprisonment, but that, because of the violations of his rights noted in the Decisions of 3 November 1999 and 31 March 2000, a reduced sentence should be imposed.
[2426] Barayagwiza Appellant's Brief, paras. 353-357.
[2427] *Ibid.*, para. 354. In support of his claim that the delay between his arrest and the Trial Chamber Judgement represented an abuse of his rights, the Appellant cited *Lubuto v. Zambia*, Communication No. 390/1990, CCPR/C/55/D/390/1990, 17 November 1995, para. 7.3, in which the Human Rights Committee found that a delay of eight years between arrest and conviction was excessive.
[2428] *Ibid.*, para. 355.

with a view to having it reduced, and a reduction of sentence is one of the remedies[2429] available to redress the alleged violation, the Appeals Chamber will examine these arguments in this section. Nevertheless, the Appeals Chamber notes that the length of the proceedings is not one of the factors that a Trial Chamber must consider, even as a mitigating circumstance, in the determination of the sentence.[2430]

1074. The right to be tried without undue delay is provided in Article 20(4)(c) of the Statute. This right only protects the accused against *undue* delays.[2431] Whether there was undue delay is a question to be decided on a case by case basis.[2432] The following factors are relevant:

- the length of the delay;
- the complexity of the proceedings (the number of counts, the number of accused, the number of witnesses, the quantity of evidence, the complexity of the facts and of the law);
- the conduct of the parties;
- the conduct of the authorities involved; and
- the prejudice to the accused, if any.[2433]

1075. In the present case, the Appeals Chamber has already found that some initial delays, attributable to the Prosecutor or to the Cameroonian authorities, violated the fundamental rights of the Appellant, and the Trial Chamber reduced the Appellant's sentence in accordance with the instructions given in the Decision of 31 March 2000.[2434] It remains to be decided if the Appellant has established that there was undue delay since the Decision of 31 March 2000.

1076. In support of his argument on this point, the Appellant refers first to the period elapsed since his arrest, and cites a case where the Human Rights Committee found that a delay of 8 years between arrest and conviction was excessive. However, as explained above, what constitutes undue delay depends on the circumstances of each case, and a reference to another case is helpful only if strong similarities are shown, which the Appellant has failed to do. In this regard, the Appeals Chamber notes in particular that the case cited to support the Appellant's argument relates to criminal proceedings before a domestic court and not before

[2429] As the Appeals Chamber notes *infra*, other remedies are possible, such as the termination of proceedings against the accused or the award of compensation (see *infra*, footnote 2451).
[2430] See *supra* XVII.A.
[2431] *The Prosecutor v. Sefer Halilović,* Case No. IT-01-48-A, Decision on Defence Motion for Prompt Scheduling of Appeal Hearing, 27 October 2006 ("*Halilović* Decision"), para. 17.
[2432] *Halilović* Decision, para. 17; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, para. 14; *The Prosecutor v. Milan Kovačević*, Case No. IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998, para. 28. See also *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-PT, Decision on Defence Motion for Stay of Proceedings, 3 June 2005, paras. 19 *et seq*.
[2433] *The Prosecutor v. Prosper Mugiraneza*, Case No. ICTR-99-50-AR73, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, 27 February 2004.
[2434] Judgement, paras. 1106-1107.

an international tribunal. However, because of the Tribunal's mandate and of the inherent complexity of the cases before the Tribunal, it is not unreasonable to expect that the judicial process will not always be as expeditious as before domestic courts. There is no doubt that the present case is particularly complex, due *inter alia* to the multiplicity of counts, the number of accused, witnesses and exhibits, and the complexity of the facts and the law, and that the proceedings could be expected to extend over an extended period.

1077. The Appellant further claims that the delays are attributable to the Prosecutor, to the Trial Chamber and to the Registrar of the Tribunal, but he does not provide any detail in this respect. In particular, the Appellant does not explain how the delay in the assignment of his counsel on appeal is attributable to the Registrar. He has thus failed to show that his right to be tried without undue delay has been violated. The appeal on these points is dismissed.

### 5. Grounds of Appeal relating to the Decision of 31 March 2000

#### (a) Alleged errors in the Decision of 31 March 2000

1078. Appellant Barayagwiza submits that the Appeals Chamber committed a number of errors in its Decision of 31 March 2000, and that the violations of his fundamental rights were more extensive than was found in that decision.[2435] He thus appears to argue that the sentence imposed by the Trial Chamber should have been further reduced in order adequately to reflect the extent of those violations.

1079. The Appeals Chamber understands that the Appellant contends first that the Decision of 31 March 2000 wrongly found that he was informed at latest on 3 May 1996 of the general nature of the charges against him (and that he had thus spent a maximum of 18 days in detention without being informed of the reasons for his detention),[2436] whereas the Decision of 3 November 1999 had found that the Appellant had been informed of the general nature of the charges against him only on 10 March 1997 (and that he had thus spent 11 months in detention without being informed why).[2437] The Appeals Chamber notes that the Decision of 31 Mars 2000 found 3 May 1996 to be the relevant date because it appeared, in light of the new facts presented by the Prosecutor, that the Appellant had been aware of the general nature of the charges against him by that date, rather than 10 March 1997.[2438] The Appellant has failed to show in what way the date of 3 May 1996 was wrong. The appeal on this point is accordingly dismissed.

1080. The Appellant next appears to argue that the Appeals Chamber wrongly found that the Prosecutor had decided on 16 May 1996 not to prosecute him. The Appellant's argument in this regard appears to rely on a footnote to the Decision of 3 November 1999, which would rather suggest the date of 15 October 1996.[2439] However, the Appellant has not shown how the date of 16 May 1996 was wrong, and his appeal on this point is therefore dismissed.

1081. The Appellant also appears to claim that the calculations of the Appeals Chamber regarding the delays in the service of the indictment and in his initial appearance were wrong.

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[2435] Barayagwiza Appellant's Brief, paras. 358-360.
[2436] See Decision of 31 March 2000, paras. 54-55.
[2437] Decision of 3 November 1999, para. 85.
[2438] Decision of 31 March 2000, paras. 54-55.
[2439] Decision of 3 November 1999, footnote 122.

Once again, however, the Appellant fails to explain what errors were committed, confining himself to citing various paragraphs in the Decisions of 3 November 1999 and 31 March 2000 without further explanation. The appeal on this point is dismissed.

1082. The Appellant maintains that the Appeals Chamber was wrong in attributing to the Cameroonian authorities the delay in transferring the Appellant from Cameroon to the Tribunal.[2440] Again, the Appellant fails to show what error was committed, confining himself to references to the paragraphs in the Decision of 31 March 2000 which explained that the new facts showed that the delay in transferring the Appellant was attributable to the Cameroonian authorities.[2441] The appeal on this point is therefore dismissed.

1083. The Appellant further argues that the Decision of 31 March 2000 failed to sanction the Prosecutor for the delay in preparing the indictment against him.[2442] The Appeals Chamber cannot accept this argument: the Decision of 31 March 2000 did not modify the finding in the Decision of 3 November 1999 that the delay in preparing the indictment against the Appellant constituted a violation of his rights; on the contrary, it confirmed it.[2443]

1084. Finally, the Appellant appears to argue that the Decision of 31 Mars 2000 was based on documents containing errors or falsified by the Prosecutor; he adds that in refusing, on 14 September 2000,[2444] to examine his motion for review and/or reconsideration of the Decision of 31 March 2000, the Appeals Chamber committed a miscarriage of justice.[2445] However, the Appellant does not even identify the documents alleged to have contained errors or falsifications; nor has he produced any evidence of errors or falsification in the documents on which the Decision of 31 March 2000 was based. Moreover, he has failed to show in what way the Decision of 14 September 2000 was wrong. The appeal on this point is dismissed.

(b) <u>The Appeals Chamber should have specified in the Decision of 31 March 2000 the remedy to be provided</u>

1085. In his forty-eighth ground of appeal, the Appellant argues:

> In the Decision of 31st March 2000, the Appeal [*sic*] Chamber failed to direct the Trial Chamber as to the appropriate remedy. Yet, in the *Semanza* case which is identical to the Appellant's, the Appeals Chamber specified that the reduction must be done pursuant to article 23 of the Statute of the Tribunal. The Judges of the Trial Chamber III, in *Semanza* case considered therefore that this reduction had to be taken into account as mitigating circumstances. The Trial Chamber failed to consider this factor in the light of the mitigating circumstances applied by courts in Rwanda ante.[2446]

1086. In its Decision of 31 March 2000, the Appeals Chamber stated that the remedy to be granted by the Trial Chamber for the violation of the Appellant's rights was the following:

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[2440] Barayagwiza Appellant's Brief, para. 358.
[2441] See Decision of 31 March 2000, paras. 56-58.
[2442] Barayagwiza Appellant's Brief, para. 359.
[2443] See Decision of 31 March 2000, paras. 74-75.
[2444] Decision of 14 September 2000.
[2445] Barayagwiza Appellant's Brief, para. 360.
[2446] *Ibid.*, para. 361 (footnotes omitted). See also para. 362 ("The Appeals Chamber erred in law in that it failed to provide a clear and certain remedy […]").

> 3) DECIDES that for the violation of his rights the Appellant is entitled to a remedy, to be fixed at the time of the judgement at first instance, as follows:
>
> a) If the Appellant is found not guilty, he shall receive financial compensation;
>
> b) If the Appellant is found guilty, his sentence shall be reduced to take account of the violation of his rights.[2447]

The precise remedy to be granted was thus left to the discretion of the Trial Chamber, since the Appeals Chamber could not anticipate at that time whether the Appellant would be found guilty or, a fortiori, what sentence he would receive. Hence the Appeals Chamber could not give the Trial Chamber more detailed instructions. Nor can the Appeals Chamber discern in what way the disposition of the Decision of 31 May 2000 in the *Semanza* case, as cited by the Appellant, was more precise than that of the Decision of 31 March 2000: the only difference is the express reference to Article 23 of the Statute in the *Semanza* decision.[2448] Finally, the fact that the violation of the defendant's rights was not treated as a mitigating circumstance did not constitute an error. What was important was that the sentence should be reduced in order to take account of the rights violation, and this was done.[2449] The Appeals Chamber agrees with the Trial Chamber that the violation of the Appellant's rights was not a mitigating circumstance in the true sense of the term.

1087. For these reasons, the appeal on this point is dismissed. The Appeals Chamber will examine below the Appellant's argument that the reduction of sentence granted by the Trial Chamber was insufficient.

(c) The remedy granted in the Decision of 31 March 2000 was unlawful

1088. The Appellant argues that the remedy granted by the Appeals Chamber in the Decision of 31 March 2000 was not provided for by the Statute or the Rules of the Tribunal, and that the Appeals Chamber thus exceeded its powers.[2450] In the view of the Appeals Chamber, there can be no doubt that the Chambers of the Tribunal have the power to reduce a sentence to take into account the violation of the rights of an accused or to order any other remedy they deem appropriate.[2451] The appeal on this point is dismissed.

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[2447] Decision of 31 March 2000, para. 75.

[2448] See *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision, 31 May 2000, point 6 of the Disposition:

> DECIDES that for the violation of his rights, the Appellant is entitled to a remedy which shall be given when judgement is rendered by the Trial Chamber, as follows:
>
> (a) If he is found not guilty, the Appellant shall be entitled to financial compensation;
>
> (b) If he is found guilty, the Appellant's sentence shall be reduced to take into account the violation of his rights, pursuant to Article 23 of the Statute.

[2449] Judgement, para. 1107.

[2450] Barayagwiza Appellant's Brief, paras. 362-364.

[2451] See *e.g. André Rwamakuba v. The Prosecutor*, Case No. ICTR-98-44C-A, Decision on Appeal against Decision on Appropriate Remedy, 13 September 2007, paras. 23-30 ("*Rwamakuba* Decision"); *Kajelijeli* Appeal Judgement, para. 255; *Semanza* Appeal Judgement, para. 325, referring to *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision, 31 May 2000, point 6 of the operative part. As stated in the *Rwamakuba* Decision, para. 26 (footnotes omitted):

(d) The Decision of 31 March 2000 did not grant any remedy for the unlawful detention after 3 November 1999

1089. The Appellant argues that, since the Decision of 3 November 1999 had ordered his release, his detention from that date until 31 March 2000 was unlawful, and he is entitled to a remedy for this violation of his rights.[2452]

1090. As recalled above,[2453] the release of the Appellant could only take place after the Registrar had made the necessary arrangements for his delivery to the Cameroonian authorities.[2454] This did not occur because of the events following 3 November 1999,[2455] so that the continued detention of the Appellant until 31 March 2000 was thus not unlawful.

1091. The Appellant further argues that the Decision of 31 March 2000 constituted an abuse of process and was *ultra vires*, and that his detention following this decision was unlawful.[2456] The Appeals Chamber understands that the Appellant refers back to his arguments under his second ground of appeal concerning the question of abuse of process. The Appeals Chamber has already dismissed those arguments.[2457] Accordingly, the Appellant has not shown that his detention after 31 March 2000 was unlawful. These submissions are dismissed.

(e) Excessive delay in granting a remedy

1092. The Appellant argues that the remedy provided in the Decision of 31 March 2000 was ordered too late, explaining that, in order for the remedy to produce "its optimal effect, it must not be too distant from the moment when the prejudice occurred. This must be so in order to satisfy the expectations of the prejudiced person and to stop the impunity and prevent all desire of recidivism on behalf of the author of the damaging act."[2458]

1093. The Appeals Chamber is of the view that the remedy ordered by the Decision of 31 March 2000 was adequate. The Appellant does not cite any authority to support his argument and does not explain how the remedy ordered was unduly prejudicial to him. The appeal on this point is dismissed.

6. The remedy granted in the Judgement

1094. The Appellant argues that the remedy granted in the Judgement was not proportional to the serious violations of his fundamental rights, and that it did not represent an effective

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> The authority in the Statute to provide an effective remedy flows from Article 19(1) of the Statute, which obliges the Trial Chambers to ensure a fair trial and full respect for the accused's rights. The existence of fair trial guarantees in the Statute necessarily presumes their proper enforcement. In this respect, the Appeals Chamber observes that the Statute and Rules do not expressly provide for other forms of effective remedy, such as the reduction of sentences, yet such a remedy has been accorded on several occasions.

[2452] Barayagwiza Appellant's Brief, paras. 365-366.
[2453] See *supra* II. B. 2. (a) .
[2454] This condition had in fact been explicitly reaffirmed in the Order of 25 November 1999.
[2455] See *supra* II. B. 1.
[2456] Barayagwiza Appellant's Brief, paras. 365-366.
[2457] See *supra* III.
[2458] Barayagwiza Appellant's Brief, paras. 367-368 (citation taken from para. 367).

remedy.[2459] In particular, he contends that the Trial Chamber in fact gave him a life sentence, since he would be more than 80 years old at the time of his release and, having regard to the average life expectancy in Tanzania, it is unlikely that he will ever be released.[2460]

1095. The Appeals Chamber is not convinced by the Appellant's arguments. The Appeals Chamber agrees with the Trial Chamber that the remedy ordered in the Judgement did constitute a significant reduction of the sentence, which adequately compensated the Appellant for the violation of his fundamental rights. Furthermore, despite his age, the Appellant might still one day be released, which – if the possibility of a pardon or commutation of sentence is excepted[2461] – would not be possible if the Appellant had been sentenced to life imprisonment. The appeal on this point is dismissed.

### 7. Consequences of the findings of the Appeals Chamber

1096. The Appeals Chamber recalls that it has set aside Appellant Barayagwiza's conviction for conspiracy to commit genocide (Count 1 of Barayagwiza's Indictment).[2462] It has also set aside all of the Appellant's convictions relating to RTLM broadcasts.[2463] With regard to the responsibility of the Appellant for the activities of CDR members and *Impuzamugambi*, the Appeals Chamber has set aside Appellant Barayagwiza's conviction under Article 6(1) of the Statute for direct and public incitement to commit genocide (Count 4 of Barayagwiza's Indictment).[2464] On the other hand, it has upheld the Appellant's convictions under Article 6(1) of the Statute for:

- genocide (Count 2 of Barayagwiza's Indictment), under the mode of responsibility of instigation;[2465]

- extermination as a crime against humanity (Count 5 of Barayagwiza's Indictment), under the mode of responsibility of ordering or instigating and planning;[2466]

- persecution as a crime against humanity (Count 7 of Barayagwiza's Indictment), under the mode of responsibility of instigation.[2467]

The Appeals Chamber has also set aside the Appellant's convictions as superior of CDR members and *Impuzamugambi*.[2468]

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[2459] *Ibid.*, paras. 370-376.
[2460] *Ibid.*, paras. 370-375. The Appellant also cites the case of *R v.W (Sentencing: Age of the Defendant)*, an appeal court decision in which it was apparently held that a sentence should be reduced if it would result in the release of the offender when he was "well into his eighties"; but the only reference is a report from *The Times* of 26 October 2000. In any event, the Chambers of this Tribunal are not bound by the judicial practice of other jurisdictions.
[2461] See also Article 27 of the Statute, Rules 124-126 of the Rules, and Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Persons Convicted by the International Criminal Tribunal for Rwanda, 10 May 2000.
[2462] See *supra* XIV. B. 4.
[2463] See *supra* XII. D. 2. (a) (ii) b. iii (genocide), XIII. D. 2. (a) (direct and public incitement to commit genocide), XV. B. 1. (b) (extermination), and XV. C. 2. (a) (iii) b. (persecution).
[2464] See *supra* XIII. D. 2. (b) (i).
[2465] See *supra* XII. D. 2. (b) (viii).
[2466] See *supra* XV. B. 2. (a) and XV. B. 2. (b) (iii).
[2467] See *supra* XV. C. 2. (b) (i).

1097. Taking into account the sentence imposed by the Trial Chamber, which reflects, *inter alia*, the reduction of sentence granted to the Appellant for various violations of his rights, and the setting aside of certain convictions in the present Appeal Judgement, the Appeals Chamber considers that the sentence of Appellant Barayagwiza should be reduced to a term of imprisonment of 32 years.

## E. Appellant Ngeze

### 1. Gravity of the crimes

1098. Appellant Ngeze argues that the sentence imposed on him by the Trial Chamber is too harsh.[2469] He stresses in this respect that he was acquitted of the murder charge and that "there was no evidence that he killed anyone".[2470]

1099. In the view of the Appeals Chamber, the Appellant has not demonstrated any error on the part of the Trial Chamber. Even if Appellant Ngeze was acquitted of the murder charge, the Trial Chamber found him guilty of having committed, ordered, instigated and aided and abetted the commission of crimes such as conspiracy to commit genocide, genocide, direct and public incitement to commit genocide, persecution and extermination. In these circumstances, the Trial Chamber could, pursuant to its discretionary power, impose a sentence of life imprisonment.

1100. However, the Appeals Chamber has set aside certain of the Appellant's convictions. The impact of these findings on the Appellant's sentence will be examined later.

### 2. Mitigating factors

1101. The Appellant puts forward the following mitigating factors:

- he was not part of the Government or of the military;[2471] he was not sufficiently important in the country's hierarchy to have abused a position of trust, nor was he an architect of the strategy of genocide;[2472]
- he saved a number of Tutsi in 1994;[2473]
- his young age and the fact that his family depends on him (an aged mother and young children);[2474]
- his right to a Counsel of his own choosing was violated, and the Defence had limited resources.[2475]

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[2468] See *supra* XII. D. 2. (b) (ix) (genocide), XIII. D. 2. (b) (ii) b. iv (direct and public incitement to commit genocide), XV. B. 2. (a) (extermination), and XV. C. 2. (b) (ii) (persecution).
[2469] Ngeze Appellant's Brief, para. 485.
[2470] *Ibid.*, para. 493.
[2471] *Ibid*., para. 486.
[2472] Ngeze Brief in Reply, para. 111. The Appellant thus distinguishes his situation from that of former Prime Minister Jean Kambanda, who was also sentenced to life imprisonment.
[2473] Ngeze Appellant's Brief, para. 487.
[2474] *Ibid.*, para. 489; Ngeze Brief in Reply, para. 109.

1102. The Trial Chamber found:

> Hassan Ngeze, as owner and editor of a well-known newspaper in Rwanda, was in a position to inform the public and shape public opinion towards achieving democracy and peace for all Rwandans. Instead of using the media to promote human rights, he used it to attack and destroy human rights. He has had significant media networking skills and attracted support earlier in his career from international human rights organizations who perceived his commitment to freedom of expression. However, Ngeze did not respect the responsibility that comes with that freedom. He abused the trust of the public by using his newspaper to instigate genocide. No representations as to sentence were made on his behalf by his Counsel. The Chamber notes that Ngeze saved Tutsi civilians from death by transporting them across the border out of Rwanda. His power to save was more than matched by his power to kill. He poisoned the minds of his readers, and by words and deeds caused the death of thousands of innocent civilians.[2476]

1103. As recalled above, mitigating circumstances must be presented at trial.[2477] The Appellant made no representation as to sentence during his trial. This in itself would suffice for the Appeals Chamber to reject his arguments. However, the Chamber will now briefly examine the Appellant's arguments before dismissing them.

(a) The Appellant's position in Rwanda

1104. The Appellant submits that he was neither part of the Government nor of the military.[2478] In his Reply, he stresses that he was given the same sentence as the former Prime Minister Jean Kambanda, although he did not hold the same position in the country's hierarchy, nor was he one of the main architects of the strategy of genocide.[2479]

1105. In the opinion of the Appeals Chamber, the Appellant has failed to show that the Trial Chamber erred. Even if Appellant Ngeze was not part of the Government or of the military, this does not suffice to show that the Trial Chamber abused its discretion in imposing a sentence of life imprisonment. The Trial Chamber found that the Appellant had committed very serious crimes[2480] and that he had abused the public's trust while using his newspaper to instigate genocide.[2481] Furthermore, as regards the comparison between the Appellant's situation and that of Jean Kambanda, the Appeals Chamber recalls that the defendant's authority or influence is not the sole element to be taken into consideration when determining the sentence, since the latter must also be proportional to the seriousness of the crimes and the degree of responsibility of the offender. In any event, the Appeals Chamber finds that the *Kambanda* precedent does not buttress the Appellant's case, since (1) Jean Kambanda was sentenced to life imprisonment although he had pleaded guilty, which is not the Appellant's case; (2) life imprisonment being the maximum sentence, the fact that Jean Kambanda might have played a more significant role than the Appellant in the crimes committed in Rwanda in 1994 does not imply that the latter should automatically be given a lesser sentence, as the conduct of the Appellant could be sufficiently grave in itself to justify the maximum sentence. The appeal on this point is dismissed.

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[2475] Ngeze Appellant's Brief, paras. 491-492.
[2476] Judgement, para. 1101.
[2477] See *supra* XVII. C. 3.
[2478] Ngeze Appellant's Brief, para. 486.
[2479] Ngeze Brief in Reply, para. 111.
[2480] Judgement, paras. 1096, 1102-1103.
[2481] *Ibid.*, para. 1101.

(b) Assistance to a number of victims

1106. In its discussion of the Appellant's individual circumstances, the Trial Chamber took account of his submission that he had saved the lives of Tutsi in 1994. However, it did not give significant weight to this, as it found that "[h]is power to save was more than matched by his power to kill".[2482] The Appeals Chamber cannot find any error in the exercise of its discretion by the Trial Chamber.

(c) Family situation

1107. Appellant Ngeze submits that the Trial Chamber erred in disregarding his family situation (an "aged mother" and children under the age of 16). In this respect, he cites the *Jelisić* case, in which the Trial Chamber took into consideration the fact that the accused was the father of a young son.[2483]

1108. The Appeals Chamber notes that, in general, the Tribunal and the ICTY do not accord great weight to the family situation of the accused, given the gravity of the crimes committed.[2484] Therefore, even if the Trial Chamber had erred, such error could not have had any impact in this particular case, given the gravity of the crimes committed by the Appellant and the absence of exceptional family circumstances. The Appeals Chamber accordingly dismisses the present ground of appeal.

(d) Fair trial violations

1109. The Appeals Chamber recalls that it has already examined and rejected[2485] Appellant Ngeze's argument that the Trial Chamber erred in dismissing his motion for withdrawal of his Counsel.[2486]

1110. The Appeals Chamber further recalls that it has also considered and dismissed[2487] Appellant Ngeze's arguments concerning the appearance of Defence witnesses and failure to translate *Kangura* issues.[2488]

3. Deduction of the period of provisional detention

1111. Appellant Ngeze argues that the Trial Chamber failed to take into account the period of his provisional detention in accordance with Rule 101(D) of the Rules.[2489]

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[2482] *Idem*., The Trial Chamber also rejected the Appellant's claim that he had saved hundreds or thousands of Tutsi (Judgement, para. 850). The Appellant does not show that this was unreasonable, confining himself to a reference to his testimony (Ngeze Appellant's Brief, para. 487).
[2483] Ngeze Appellant's Brief, para. 489; Ngeze Brief in Reply, para. 109, referring to *Jelisić* Trial Judgement, para. 124.
[2484] *Jokić* Appeal Judgement, para. 62; *Kunarac et al.* Appeal Judgement, para. 413; *Jelisić* Trial Judgement, para. 124; *Furundžija* Trial Judgement, para. 284.
[2485] See *supra* VII. B.
[2486] Ngeze Appellant's Brief, para. 491, reproducing the arguments developed in paras. 127-143.
[2487] See *supra* VII. A. and VII. E.
[2488] Ngeze Appellant's Brief, para. 492.
[2489] *Ibid.*, para. 490; Ngeze Brief in Reply, para. 110, referring to *Kajelijeli* Appeal Judgement, paras. 289-290.

1112. The Appeals Chamber notes that, pursuant to Rule 101(D) of the Rules, the Chambers are obliged to give credit for any period during which a convicted person was held in provisional detention. Even though the sentence imposed here was life imprisonment, the Trial Chamber should have made it clear that Appellant Ngeze would be credited with the time spent in detention between his arrest and conviction, as this could have an effect on the application of any provisions for early release.

4. Consequences of the findings of the Appeals Chamber

1113. The Appeals Chamber recalls that Appellant Ngeze's conviction for conspiracy to commit genocide has been set aside (Count 1 of Ngeze's Indictment).[2490] With regard to the Appellant's responsibility for matters published in *Kangura*, the Appeals Chamber has set aside his convictions under Article 6(1) of the Statute for:

- genocide (Count 2 of Ngeze's Indictment);[2491]
- persecution as a crime against humanity (Count 6 of Ngeze's Indictment).[2492]

On the other hand, the Appeals Chamber has upheld the Appellant's conviction under Article 6(1) of the Statute for direct and public incitement to commit genocide (Count 4 of Ngeze's Indictment).[2493]

1114. With regard to the Appellant's responsibility for certain acts committed in Gisenyi, the Appeals Chamber recalls that it has set aside his convictions under Article 6(1) of the Statute for:

- genocide (Count 2 of Ngeze's Indictment), under the mode of responsibility of ordering;[2494]
- direct and public incitement to commit genocide (Count 4 of Ngeze's Indictment);[2495]
- extermination as a crime against humanity (Count 7 of Ngeze's Indictment), under the mode of responsibility of ordering;[2496]
- persecution as a crime against humanity (Count 6 of Ngeze's Indictment).[2497]

On the other hand, the Appeals Chamber has upheld the Appellant's convictions under Article 6(1) of the Statute for:

- genocide (Count 2 of Ngeze's Indictment), under the mode of responsibility of aiding and abetting;[2498]

[2490] See *supra* XIV. B. 4.
[2491] See *supra* XII. B. 3. (b) (ii).
[2492] See *supra* XV. C. 2. (c) (i).
[2493] See *supra* XIII. D. 3. (a).
[2494] See *supra* X. D.
[2495] See *supra* XIII. D. 3. (b).
[2496] See *supra* X. D.
[2497] See *supra* XV. C. 2. (c) (ii).

- extermination as a crime against humanity (Count 7 of Ngeze's Indictment), under the mode of responsibility of aiding and abetting.[2499]

1115. Having regard to the sentence imposed by the Trial Chamber and the setting aside of certain convictions in the present Appeal Judgement, the Appeals Chamber finds that Appellant Ngeze's sentence should be reduced to a term of imprisonment of 35 years.

[2498] See *supra* XII. D. 3.
[2499] See *supra* XV. B. 3. (b).

## XVIII. DISPOSITION

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

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

**NOTING** the written submissions of the parties and the hearings on 16, 17 and 18 January 2007;

**SITTING** in open session;

**WITH RESPECT TO THE GROUNDS OF APPEAL OF FERDINAND NAHIMANA**

**ALLOWS IN PART** the second ground of appeal of Appellant Nahimana (temporal jurisdiction of the Tribunal), as well as the grounds (no number given) by which he challenges his convictions for the crimes of genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, and extermination and persecution as crimes against humanity;

**DISMISSES** all other grounds of appeal of Appellant Nahimana;

**REVERSES** the convictions of Appellant Nahimana based on Article 6(1) of the Statute for the crimes of genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, and extermination and persecution as crimes against humanity;

**AFFIRMS** the convictions of Appellant Nahimana based on Article 6(3) of the Statute, but only in respect of RTLM broadcasts after 6 April 1994, for the crimes of direct and public incitement to commit genocide and, Judge Meron dissenting, persecution as a crime against humanity; and

**REPLACES** the sentence of life imprisonment imposed by the Trial Chamber by a sentence of 30 years, Judge Meron dissenting, subject to credit being given under Rule 101(D) for the period already spent in detention;

Judge Shahabuddeen partly dissents from these findings;

**WITH RESPECT TO THE GROUNDS OF APPEAL OF JEAN-BOSCO BARAYAGWIZA**

**ALLOWS IN PART** grounds 4, 14, 21, 23, 29, 30, 32-36 and 38 of Appellant Barayagwiza;

**DISMISSES** all other grounds of appeal of Appellant Barayagwiza;

**REVERSES** the convictions of Appellant Barayagwiza based on Article 6(1) of the Statute for the crimes of direct and public incitement to commit genocide for his acts within the CDR and conspiracy to commit genocide, as well as his convictions based on Article 6(3) of the Statute in respect of his acts within RTLM and the CDR for the crimes of genocide, direct and public incitement to commit genocide, and extermination and persecution as crimes against humanity;

**AFFIRMS** the convictions of Appellant Barayagwiza pursuant to Article 6(1) of the Statute for (1) having instigated the commission of genocide by CDR members and *Impuzamugambi* in Kigali; (2) having ordered or instigated the commission of extermination as a crime against humanity by CDR members and *Impuzamugambi* in Kigali, Judge Güney dissenting, and having planned this crime in the *préfecture* of Gisenyi; and (3) having instigated the commission of persecution as a crime against humanity by CDR members and *Impuzamugambi* in Kigali; and

**REPLACES** the sentence of 35 years imprisonment imposed by the Trial Chamber by a sentence of 32 years, subject to credit being given under Rule 101(D) for the period already spent in detention;

Judge Shahabuddeen partly dissents from these findings;

**WITH RESPECT TO THE GROUNDS OF APPEAL OF HASSAN NGEZE**

**ALLOWS IN PART** grounds 1, 3, 4, 5 and 6 of Appellant Ngeze;

**DISMISSES** all other grounds of appeal of Appellant Ngeze;

**REVERSES** the convictions of Appellant Ngeze based on Article 6(1) of the Statute for (1) the crimes of conspiracy to commit genocide and persecution as a crime against humanity; (2) having instigated genocide through matters published in his newspaper *Kangura* and having ordered genocide on 7 April 1994 in Gisenyi; (3) having directly and publicly incited the commission of genocide in the *préfecture* of Gisenyi; (4) having ordered extermination as a crime against humanity on 7 April 1994 in Gisenyi;

**AFFIRMS** the convictions of Appellant Ngeze pursuant to Article 6(1) of the Statute for (1) having aided and abetted the commission of genocide in the *préfecture* of Gisenyi; (2) having directly and publicly incited the commission of genocide through matters published in his newspaper *Kangura* in 1994; (3) having aided and abetted extermination as a crime against humanity in the *préfecture* of Gisenyi; and

**REPLACES** the sentence of life imprisonment imposed by the Trial Chamber by a sentence of 35 years**,** subject to credit being given under Rule 101(D) for the period already spent in detention;

Judge Shahabuddeen partly dissents from these findings;

and finally,

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

**ORDERS**, in accordance with Rules 103(B) and 107 of the Rules, that Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze are to remain in the custody of the Tribunal pending their transfer to the State in which each will serve his sentence.

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

| | | |
|---|---|---|
| [Signed] | [Signed] | [Signed] |
| Fausto Pocar<br>Presiding | Mohamed Shahabuddeen<br>Judge | Mehmet Güney<br>Judge |
| Andrésia Vaz<br>Judge | Theodor Meron<br>Judge | |

Judge Pocar appends a partly dissenting opinion to this Judgement.

Judge Shahabuddeen appends a partly dissenting opinion to this Judgement.

Judge Güney appends a partly dissenting opinion to this Judgement.

Judge Meron appends a partly dissenting opinion to this Judgement.

Signed 22 November 2007 at The Hague, The Netherlands,
and rendered 28 November 2007 at Arusha, Tanzania.

[Seal of the Tribunal]

## XIX. PARTLY DISSENTING OPINION OF JUDGE FAUSTO POCAR

1. I cannot concur with the majority with respect to one of the findings in this Appeal Judgement.

2. The Appeals Chamber held that under Article 7 of the Statute, which limits the Tribunal's temporal jurisdiction to the period starting on 1 January 1994 and ending on 31 December 1994, "even where such criminal conduct commenced before 1994 and continued during that year, a conviction may be based only on that part of such conduct having occurred in 1994".[1] I wish to state that I disagree with this finding, even if the issue of the application of Article 7 of the Statute to crimes characterized by criminal conduct which commenced prior to 1994 and continued after 1 January 1994 does not affect the verdict against the Appellants, in light of the quashing of the conviction for conspiracy and the findings in the Appeal Judgement regarding the crime of direct and public incitement to commit genocide.[2] I am not convinced that it is correct to hold that a conviction can be based solely on that part of the criminal conduct which took place in 1994. Insofar as offences are repeated over time and are linked by a common intent or purpose, they must be considered as a continuing offence, that is a single crime.[3] There can thus be no question of excluding a part of this single offence and relying only on acts committed after 1 January 1994. I further note that the observations of certain delegates during the adoption of Security Council Resolution 955 establishing the Tribunal do not justify the conclusion that the drafters of the Statute intended to exclude from the Statute's temporal scope a crime of which certain material elements were committed prior to 1 January 1994.[4]

3. With respect to the Appeals Chamber's findings on persecution as a crime against humanity, I would like to make the following clarifications. Paragraph 987 of the Appeal Judgement does not appear to rule definitively on the question whether a hate speech can *per se* constitute an underlying act of persecution. In my opinion, the circumstances of the instant case are, however, a perfect example where a hate speech fulfils the conditions necessary for it to be considered as an underlying act of persecution. Indeed, the hate speeches broadcast on RTLM by Appellant Nahimana's subordinates were clearly aimed at discriminating against the Tutsi and led the

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[1] Appeal Judgement, para. 317, see also para. 724, which reaches the same conclusion with specific reference to direct and public incitement to commit genocide.

[2] Appeal Judgement, paras. 723-724. I wish to add that in the instant case there was clearly no direct and public incitement to commit genocide of a continuing nature on the part of RTLM or *Kangura* having commenced prior to 1 January 1994 and continued thereafter.

[3] For example, Article 81 of the Italian Criminal Code provides that a "*reato continuato*" is constituted by a plurality of independent acts or omissions that form part of a single criminal purpose ("*disegno criminoso*"), and is relevant in determining sentence. In the United Kingdom, Lord Diplock stated for the House of Lords that "[…] two or more acts of a similar nature committed by one or more defendants are connected with one another in the time and place of their commission, or by their common purpose, […] they can fairly be regarded as forming part of the same transaction or criminal enterprise" *DPP v. Merriman* [1973] A.C. 584, 607. In French law, it is the concept of a "continuing offence", defined as "the repetition of a series of instantaneous offences of a similar nature, linked by a single intention", that would be most apt here; see Georges Levasseur, Albert Chavanne, Jean Montreuil, Bernard Bouloc, *Droit pénal général et procédure pénale*, 13th ed., (Paris: Sirey, 1999) pp. 30-31. Moreover, in such case, French law provides that the statute of limitation starts to run only from the time when the offence is completed, and that, in case of conflict in the application of statututory law over time, the law to be applied is that which was in force at the time when the offence ceased, even if that law is more severe, *Ibid.*, p. 31. Lastly, I note by way of subsidiary point that a number of decisions of national courts relating to the scope of their territorial jurisdiction for cross-border crimes tend, by analogy, to support this view; see *DPP v. Doot* [1973] A.C. 807, 817-818, 826-827 (H.L.) (United Kingdom); *Libman v. The Queen* [1985] 2 R.C.S. 178, paras. 25, 38-42 (Canada); *Liangsiriprasert v. United States* [1991] A.C. 225, 251 (Privy Council).

[4] See Appeal Judgement, para. 311.

population to discriminate against them, thus violating their basic rights. Taken together and in their context, these speeches amounted to a violation of equivalent gravity as other crimes against humanity. Consequently, the hate speeches against the Tutsi that were broadcast after 6 April 1994 – that is, after the beginning of the systematic and widespread attack against this ethnic group – were *per se* underlying acts of persecution.

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

[Signed]

Fausto Pocar
Judge

Signed 22 November 2007 at The Hague, The Netherlands,
and rendered 28 November 2007 at Arusha, Tanzania.

[Seal of the Tribunal]

## XX. PARTLY DISSENTING OPINION OF JUDGE SHAHABUDDEEN

1. I concur in part with the judgement of the Appeals Chamber. Unfortunately, there are areas in which I have been unable to do so. Also, on some aspects of the concurrence, I have a different point of view. These are my reasons.

### A. The nature of conspiracy

2. I agree with the Appeals Chamber that conspiracy is proved by agreement. As the Appeals Chamber said:[1]

> *L'entente en vue de commettre le génocide, incriminée par l'article 2(3)(b) du Statut, est définie comme « une résolution d'agir sur laquelle au moins deux personnes se sont accordées, en vue de commettre un génocide ». Cet accord entre des individus ayant pour but la commission du génocide (ou « résolution d'agir concertée ») en constitue l'élément matériel (actus reus) ; en outre, les individus parties à l'accord doivent être animés de l'intention de détruire en tout ou en partie un groupe national, ethnique, racial ou religieux comme tel (l'élément intentionnel ou* mens rea*).*

I interpret this to mean that agreement is the only legal requirement for the creation of a conspiracy. There is, however, a view that it is additionally necessary for the indictment to aver 'overt acts'. Because of the importance of that view and its possible relevance to this case, I shall state why I do not share it.

3. The common law accepts the necessity for proof of overt acts, but it limits the necessity to proof of the making of an agreement of conspiracy. The making of an agreement of conspiracy is regarded as an overt act for the reason that, where parties combine or otherwise collaborate in making such an agreement, the matter has moved from one of mere thought to one of positive action to implement the thought. By so combining, they have committed 'an act in advancement of the intention', to use the words of Lord Chelmsford in *Mulcahy v. R.*[2] But, as that and other cases show, there is no further necessity for proof of overt acts. In the words of Willes, J, giving the opinion of the judges in *Mulcahy*, 'a conspiracy [meaning an agreement of conspiracy] is a sufficient overt act'.[3] Thus, the common law[4] does not regard 'overt acts' (apart from the making of the agreement of conspiracy) as an element of conspiracy.

4. The civil law[5] does not accept the common law view, or accepts it but only to a limited extent. The French Judge M. Donnedieu de Vabres exemplified this at Nuremberg: visions of thought-crimes were strong. An international tribunal has to take account of other legal systems – willingly. In 1924 M. Politis, counsel for Greece, had complained that '[l]es gouvernements des pays anglo-saxons ont eu depuis longtemps la tendance de transporter ces habitudes judiciaires du domaine de la justice interne dans celui de la justice internationale'.[6] The Tribunal, as an

[1] Appeals Chamber Judgement, para. 894 (footnotes omitted). At the time of this writing, there is no official English translation of the Appeals Chamber Judgement.
[2] [1868] L.R. 3 H.L. 306.
[3] *Ibid.*, para. 12.
[4] By statutes, the United States position is, in parts, similar to the civil law system. See 18 U.S.C., para. 371. But see section 5.03(5) of the U.S. model penal code, which stipulates that an overt act is necessary for criminal responsibility, 'other than [in the case of] a felony of the first or second degree'. So, under the U.S. model penal code, the position is saved in serious crimes: no overt acts have to be proved.
[5] This is only a general view. *Cf.* the German Penal Code, Section 129 ('Formation of Criminal Organizations'), and see the French criminal code, articles 212-3.
[6] *Mavrommatis Concessions, P.C.I.J., Series C, No. 5-I,* (1924) p. 43.

international body, must have regard to that ongoing complaint. But, here, it seems to me that the common law point of view has come to be generally accepted in relation to genocide.

5. The civil law aversion to the common law position prevailed in international humanitarian law, but not in respect of the most heinous of crimes.[7] Nehemiah Robinson says '"Conspiracy to commit Genocide" means an agreement among a number of people to commit any of the acts enumerated in Art. II (of the Genocide Convention), even if these acts were never put into operation'.[8] Thus, the accepted view of the convention was that the essence of the crime lay in the agreement – even if, as Robinson says, the agreed acts were 'never put into operation'**.**

6. This was the view of an ICTR Trial Chamber in *Musema.*[9] There, after reviewing the *travaux preparatoires* of the Genocide Convention on the particular question of the common law and civil law understandings of conspiracy, the Trial Chamber held 'that conspiracy to commit genocide is to be defined as an agreement between two or more persons to commit the crime of genocide'. Authors are of different opinions. I respect but am not persuaded by the views of those who support the need for proof of overt acts; there seems to be greater merit in the opposite view. Having considered material on both sides, one scholar concludes: 'To establish conspiracy, the prosecution must prove that two or more persons agreed upon a common plan to perpetrate genocide.' [10] Two writers say that it 'is the process of conspiring itself that is punishable and not the result'.[11] In my view, these statements are correct: international humanitarian law treats the process of making an agreement to commit genocide as an autonomous crime.[12]

### B. The Trial Chamber has not expanded the scope of persecution as a crime against humanity

7. In a prosecution for persecution as a crime against humanity, the acts of the accused have to be proved to be grave; the standard of gravity is generally taken to be that of the other acts enumerated in article 3 of the Statute.[13] I understand the appellants to be arguing *inter alia* that, where statements are relied on as the underlying acts, this standard is met only where the statements amount to incitement to commit genocide or extermination.[14] Where there is a conviction although the standard is not so met, the appellants contend that the Trial Chamber is unlawfully expanding the scope of persecution as a crime against humanity.

8. If the appellants' argument is sound, there can be no complaint, for the Trial Chamber said:

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[7] See generally Virginia Morris and Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, Vol. 1 (New York, 1998), pp. 270-271, and Antonio Cassese, *International Criminal Law,* (Oxford, 2003), pp. 191 and 197.
[8] Nehemiah Robinson, *The Genocide Convention, A Commentary*, (New York, 1950), p. 66, fn. 1. He seems to be of the view that, in respect of genocide, the Convention reflected the common law concept of conspiracy.
[9] ICTR-96-13-T, 27 January 2000, para. 191.
[10] William A. Schabas, *Genocide in International Law,* (Cambridge, 2000), p. 265.
[11] John R.W.D. Jones and Stephen Powles, *International Criminal Practice* (Oxford, 2003), p.178, para. 4.2.152.
[12] I do not think that the United States case of *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), yields a different result. In addition to other matters, the view that is relevant was expressed in an individual opinion of four judges; it was not the opinion of the United States Supreme Court.
[13] See *Kupreškić*, IT-95-16-T, 14 January 2000, paras 619-621. See also *Kordić and Čerkez*, IT-95-14/2-A, 17 December 2004, para. 102. Acts other than the listed ones can be included provided that they measure up to the standard of the listed acts.
[14] See, for example, Mr Barayagwiza's Appeal Brief, para. 304. Mr Nahimana's Appeal Brief, para. 450, and Mr. Nahimana's Response to the *amicus curiae* brief, pp. 5-6.

> In Rwanda, the virulent writings of *Kangura* and the incendiary broadcasts of RTLM functioned in the same way, conditioning the Hutu population and creating a climate of harm, as evidenced in part by the extermination and genocide that followed.[15]

Interpretations of this statement may differ, but the view which I accept is that the Trial Chamber was considering a particular kind of incitement – one directed, at least in part, to causing 'extermination and genocide'. That meets the appellants' case, and thus there cannot be any complaint. On this view, it is not necessary to examine the appellants' argument. In case I am wrong, however, I shall consider it.

9. To begin with, it has to be remembered that persecution as a crime against humanity is wider than incitement to commit genocide.[16] To limit the former, effectively, to cases in which there is incitement to commit genocide is at variance with that verity. If the limitation is sound, the prosecution may as well charge for the crime of incitement to commit genocide; there will be a prosecutorial advantage in doing so, for, in that case, there is no requirement to prove a widespread and systematic attack on a civilian population, something that has to be proved if the other route is taken, *i.e.*, if the charge is for persecution as a crime against humanity.

10. The appellants rely on *Fritzsche*.[17] Fritzsche was acquitted of persecution as a crime against humanity because in the view of the International Military Tribunal he did not take part 'in originating or formulating propaganda campaigns'.[18] That was a sufficient reason for the acquittal. It is true that the Tribunal noted that[19] -

> It appears that Fritzsche sometimes made strong statements of a propagandistic nature in his broadcasts. But the Tribunal is not prepared to hold that they were intended to incite the German people to commit atrocities on conquered peoples, and he cannot be held to have been a participant in the crimes charged. His aim was rather to arouse popular sentiment in support of Hitler and the German war effort.

11. Fritzsche had limited himself to making statements which, though 'strong', were only of a 'propagandistic' nature. This meant that, while he was arousing 'popular sentiment in support of Hitler and the German war effort', he was presenting no particular proposal for action which constituted a crime at international law. The additional observation concerning 'atrocities on conquered peoples' does not bear the inference upon which the appellants rely. They argue that it shows that the International Military Tribunal regarded it as essential to the success of a charge for persecution (by making public statements) as a crime against humanity that it should be shown that the statements advocated genocide or extermination. It appears to me that it simply happened that 'atrocities on conquered peoples' were the particular acts referred to in Fritzsche's case. The case did not announce any general requirement to establish extermination or genocide in cases of prosecution for persecution as a crime against humanity.

12. A more satisfactory test is that an allegation of persecution as a crime against humanity has to show harm to 'life and liberty'. The expression was used in *Flick*, where it was said that these allegations must 'include only such as affect the life and liberty of the oppressed peoples'.[20]

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[15] Trial Judgement, para. 1073.
[16] See *Kupreškić*, IT-95-16-T, 14 January 2000, paras 605-606.
[17] Judgement of the International Military Tribunal, Trial of Major War Criminals (1946), Vol. 1.
[18] *Ibid*., p.128. Fritzsche's co-accused Streicher was convicted. Streicher had been notoriously involved in weekly publications calling for the extermination of the Jews.
[19] It is not suggested that the additional observation may be disregarded.
[20] *Flick Case*, Trials of War Criminals, (Nuernberg, 1949), Vol. VI, p. 1215.

Similarly, in *Einsatzgruppen* the United States Military Tribunal said that '[c]rimes against humanity are acts committed in the course of wholesale and systematic violation of life and liberty'.[21] What acts will be comprised in that description are debatable. Cases involving deprivation of industrial property are excluded, [22] on the ground no doubt that they do not impact on individual 'life and liberty' – at least in a 'wholesale' way. But economic and political discrimination by the Nazis against the Jews has been included, on the presumable ground that such discrimination *could* impact on the 'life and liberty' of victims in a 'wholesale' way.[23] It is not necessary to prove a physical attack.

13. In the *Ministries* case,[24] the United States Military Tribunal found as follows:

> The persecution of Jews went on steadily from step to step and finally to death in foul form. The Jews of Germany were first deprived of the rights of citizenship. They were then deprived of the right to teach, to practice professions, to obtain education, to engage in business enterprises; they were forbidden to marry except among themselves and those of their own religion; they were subject to arrest and confinement in concentration camps, to beatings, mutilation, and torture; their property was confiscated; they were herded into ghettos; they were forced to emigrate and to buy leave to do so; they were deported to the East, where they were worked to exhaustion and death; they became slave laborers; and finally over six million were murdered.[25]

In that case, to be sure, there were crimes of violence, but it is clear that there were acts of mistreatment not involving violence and that such acts were admissible as evidence of persecution. That happened in a trial held immediately after World War II. So, in the usual way, the case may be accepted as reflective of customary international law.

14. Not surprisingly, in *Kvočka* the Trial Chamber noted that –

> [J]urisprudence from World War II trials found acts or omissions such as denying bank accounts, educational or employment opportunities, or choice of spouse to Jews on the basis of their religion, constitute persecution. Thus, acts that are not inherently criminal may nonetheless become criminal and persecutorial if committed with discriminatory intent.[26]

On appeal, the Appeals Chamber recalled 'incidentally that acts underlying persecution under Article 5(h) of the Statute need not be considered a crime in international law'.[27] It went on to say:

> The Appeals Chamber has no doubt that, in the context in which they were committed and taking into account their cumulative effect, the acts of harassment, humiliation and psychological abuse ascertained by the Trial Chamber are acts which by their gravity constitute material elements of the crime of persecution.[28]

**In my argument, the court may well regard the 'cumulative effect' of harassment, humiliation and psychological abuse as impairing the quality of 'life', if not of 'liberty', within the meaning of the test laid down in the *Einsatzgruppen*.**

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[21] *Einsatzgruppen Case*, Trials of War Criminals, (Nuernberg, 1949), Vol. IV, p. 498.
[22] *Flick*, Trials of War Criminals, (Nuernberg, 1949), Vol. VI, p. 1215.
[23] Judgement of the International Military Tribunal, Trial of Major War Criminals, (1946), Vol. 1, pp. 259, 300, 305, 329.
[24] *Ernst von Weizsaker ('Ministries Case')*, Trial of War Criminals, (Nuernberg, 1949), Vol. XIV, p. 471.
[25] *Ibid.*
[26] IT-98-30/1-T, 2 November 2001, footnote omitted.
[27] *Kvočka*, IT-98-30/1-A, para. 323.
[28] *Ibid*., para. 324.

15. *Kordić and Čerkez* may be thought to support a narrower view.[29] There the Trial Chamber excluded an allegation in the indictment of 'encouraging, instigating and promoting hatred, distrust and strife on political, racial, ethnic or religious grounds, by propaganda, speeches or otherwise',[30] holding that no crime at international law was alleged. I agree that such an allegation *standing alone* cannot found a charge of persecution. But, in my view, it is different where the case is that there was a campaign of persecution. Where that is the case, such an allegation, if it forms part of the campaign, may be presented. This would seem to have been the case in the prosecution presented in *Kordić and Čerkez*. Count 1 of the indictment read:[31]

> This campaign of widespread or systematic persecutions was perpetrated, executed and carried out by or through the following means:
> (a) attacking cities, towns and villages inhabited by Bosnian Muslim civilians;
> (b) killing and causing serious injury or harm to Bosnian Muslim civilians, including women, children, the elderly and the infirm, both during and after such attacks;
> (c) encouraging, instigating and promoting hatred, distrust and strife on political, racial ethnic or religious grounds, by propaganda, speeches and otherwise;
> (d) selecting, detaining and imprisoning Bosnian Muslims on political, racial, ethnic or religious grounds;
> (e) dismissing and removing Bosnian Muslims from government, municipal and other positions;
> (f) coercing, intimidating, terrorising and forcibly transferring Bosnian Muslim civilians from their homes and villages;
> (g) physical and psychological abuse, inhumane acts, inhuman treatment, forced labor and deprivation of basic human necessities, such as adequate food, water, shelter and clothing, against Bosnian Muslims who were detained or imprisoned;
> (h) using detained or imprisoned Bosnian Muslims to dig trenches;
> (i) using detained or imprisoned Bosnian Muslims as hostages and human shields;
> (j) wanton and extensive destruction and/or plundering of Bosnian Muslim civilian dwellings, buildings, businesses, and civilian personal property and livestock, and
> (k) the destruction and wilful damage of institutions dedicated to Muslim religion or education.

16. In my opinion, the Trial Chamber's judgement in that case overlooked the fact that it is not possible fully to present a campaign as persecutory if integral allegations of hate acts are excluded. What is pertinent to such a case is the general persecutory campaign, and not the individual hate act as if it stood alone. The subject of the indictment is the persecutory campaign, not the particular hate act. This was why non-crimes were included with crimes in the *Ministries* case.[32] It may be said that an act, which is ordinarily a non-crime, can no longer be treated as a non-crime if it can be prosecuted when committed in a special context. But the possibility of the act being regarded as criminal if committed in a certain context only reinforces the proposition that the Trial Chamber's exclusion of it in *Kordić and Čerkez*[33] is not consistent with the *Ministries* case, or with other cases of the ICTY; the exclusion is contrary to customary international law and is incorrect.

17. The Appeals Chamber recognised[34] that the Trial Chamber was aware of the distinction between a mere hate speech and a hate speech which amounts to a direct and public incitement to commit genocide.[35] Without more, the Trial Chamber knew that a mere hate speech, *standing alone*,

[29] IT-95-14/2-T, 26 February 2001.
[30] *Ibid.*, para. 209 and p. 349.
[31] *Ibid.*, p. 349.
[32] *Ernst von Weizsaker ('Ministries Case')*, Trial of War Criminals, (Nuernberg, 1949), Vol. XIV, p. 471.
[33] IT-95-14/2-T, 26 February 2001.
[34] Appeals Chamber Judgement, para. 696.
[35] See Trial Judgment, paras 978-1029.

does not amount to direct and public incitement to commit genocide in international law.[36] I understand it to be saying that mere 'hate' publications could indeed progress into direct and public incitement to commit genocide but that, unless there was such progression, the crime of direct and public incitement to commit genocide was not committed.[37] Thus, it held that a publication, which was merely a hateful discussion of ethnic consciousness, did not rise to the level of counselling violence against the Tutsis and therefore was not incitement to commit genocide.[38]

18. The problem in this case hinges on the fact that the Trial Chamber made a comparison with the position under certain human rights instruments, such as the International Covenant on Civil and Political Rights and the Convention on the Elimination of all Forms of Racial Discrimination, which in pertinent parts require participating states, in their domestic arrangements, to proscribe propaganda that incites racial hatred, discrimination or violence – violence not being indispensable.[39] These instruments operate on the basis that a mere hate speech could be criminalised in domestic law: freedom of expression is not absolute.[40] But the Trial Chamber did not mean that the fact that a prosecution could be brought domestically by virtue of legislation enacted pursuant to these instruments necessarily showed that a similar prosecution could be brought internationally. Those instruments were illustrative, not foundational; they were used by the Trial Chamber to illustrate the nature of the rights breached at international law, not to found a right to complain of a breach at international law.

19. All that can be legitimately extracted from the post-World War II jurisprudence, including *Fritzsche*, is that the underlying acts must be sufficiently grave to affect the 'life and liberty' of the victims – though not necessarily by a physical act against them. It is for an international court to exercise its powers of clarification[41] by explaining what concrete cases will satisfy that criterion. It may be recalled that the ICTY Appeals Chamber, in its discussion of customary international law, unanimously[42] held that 'where a principle can be shown to have been so established, it is not an objection to the application of the principle to a particular situation to say that the situation is new if it reasonably falls within the application of the principle'. A new case, thus decided, is not an extension of customary international law; it is a further illustration of the workings of that law. This at the same time answers criticisms that the principle of legality was breached in this case. In holding that proof of extermination or genocide is not required, a Trial Chamber is not making new law with retrospective application, or at all.

20. To respond to what I believe to be the position of the appellants, I am of the view that, where statements are relied upon, the gravity of persecution as a crime against humanity can be established without need for proof that the accused advocated the perpetration of genocide or extermination.

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[36] *Ibid*., paras 984 *et seq*.
[37] *Ibid.,* paras 1020-1021.
[38] *Ibid*.
[39] For example, article 20 of the International Covenant on Civil and Political Rights provides that 'any advocacy of hatred that constitutes incitement to discrimination, hostility or violence' shall be prohibited by law.
[40] See *Gitlow v.People of New York*, 268 U.S. 652, 666 (1925), Mr Justice Sanford stating: 'It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled licence that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.' The problem is to fix the exact limitations of the freedom.
[41] *Aleksovski*, IT-95-14/1-A, 24 March 2000, para. 127.
[42] *Prosecutor v. Hadžihasanović,* IT-01-47-AR72, *Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003,* para. 12. On the particular point, the decision was unanimous, although on some matters there were dissenting opinions.

## C. The crime of direct and public incitement to commit genocide is a continuous crime

21. I regret that I am not able to support the finding of the Appeals Chamber that the crime of direct and public incitement of genocide is not a continuous crime; I agree with the contrary view of the Trial Chamber. The matter arises this way:

22. As was recognised by the Trial Chamber, the Tribunal does not have jurisdiction over offences occurring outside of the jurisdictional year of 1994. Article 1 of the Statute expressly confines the jurisdiction of the Tribunal to 'violations committed … between 1 January 1994 and 31 December 1994.' Based on this fact, the Appeals Chamber holds that *'la Chambre de première instance ne pouvait avoir compétence sur une incitation commise avant 1994 au motif que celle-ci se serait continuée dans le temps jusqu'à la survenance du génocide en 1994.'* [43] It considers that '*l'infraction d'incitation directe et publique à commettre le génocide est consommée dès que les propos en question ont été tenus ou publiés, même si les effets d'une telle incitation peuvent se prolonger dans le temps.'* [44] In other words, the crime is 'instantaneous' – though the word has not been used in the judgement of the Appeals Chamber. So, if the statements were made before 1994, any crime of incitement to commit genocide which they produced was instantaneous and not continuous, and the Tribunal has no jurisdiction. By contrast, the Trial Chamber considers that the crime of incitement to commit genocide 'continues to the time of the commission of the acts incited',[45] and that a previous incitement could therefore be prosecuted provided that liability could only be assigned as from 1 January 1994. Which view is right?

23. There is not much authority in the field. This no doubt is why the judgement of the Appeals Chamber has cited no cases in support of its conclusion.[46] I grant that the absence of precedent is not the same thing as the want of law. The law is to be extracted from the principles of the law as they stand. In considering the state of the law, all relevant sources must of course be taken into account. However, the generality of the issues allows for the exploration of the matter through the only system of which I have some knowledge. It is a principle of that system, and I take it of all legal systems, that caution is to be observed in construing a criminal statute. But, in my respectful opinion, that being done, the applicable law supports a conclusion opposite to that reached by the Appeals Chamber.

24. The inquiry may begin by considering this theoretical situation: An accused perpetrates direct and public incitement to commit genocide on 31 December 1993 – the last day of the previous non-jurisdictional period. He knows that the genocide will not be accomplished immediately. However, it commences on the very next day – on the first day of the jurisdictional period. Is there something to prevent him from being held to have directly and publicly incited the commission of genocide in the jurisdictional period?

25. As the cases show, incitement operates by way of the exertion of 'influence'.[47] Influence is a function of the processes of time.[48] The 1993 acts of the accused did not mysteriously cease to exert

[43] Appeals Chamber Judgement, para. 723.
[44] *Ibid*.
[45] Trial Judgement, para. 104.
[46] See Appeals Chamber Judgement, paras 722 – 723.
[47] See Holmes JA in *Nkosiyana* 1966 (4) SA 655 at 658, AD, defining an inciter as 'one who reaches and seeks to influence the mind of another to the commission of a crime. The machinations of criminal ingenuity being legion, the approach to the other's mind may take various forms, such as suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading, or the arousal of cupidity. The list is not exhaustive'. See also Lord Denning MR in *Race Relations Board v. Applin*, [1973] Q.B. 815 at 825, to the effect that incitement includes both 'persuasion' and 'pressure'.

influence at the moment when they were done. It is true that the crime is complete even though the incited persons do not succumb to the influence. But that is only due to the fact that, as will be argued, the development of the law placed the emphasis on punishing an inciter before the 'innocent' suffered from the commission of the incited crime; it was not meant to prevent punishing an inciter on the basis that his incitement continued – as in fact it would – until it ceased or was fulfilled by the commission of the incited crime.

26. The focus is not on the continuing effect of a cause which is done once and for all,[49] such as a continuing ailment caused by a serious assault; there the effect continues but the cause is instantaneous. Here the focus is on the continuing operation of the cause itself: the continuing operation of the influence exerted by an incitement may cause fresh outbreaks of genocide from time to time. One might consider the act of unlawfully detonating a nuclear device, which causes harm even to children yet unborn. Is the causative act completed at the time of explosion? Or, is the explosion merely the triggering of a cause, which then continues to produce new effects?[50]

27. Consideration may be given to the basis on which *conspiracy*, another inchoate crime, is regarded as continuous. A conspiracy is complete on the making of an agreement to commit an unlawful act or a lawful act by unlawful means.[51] Yet a 'conspiracy does not end with the making of the agreement: it will continue as long as there are two or more parties to it intending to carry out the design'.[52] Why?

28. First, there is a helpful general approach taken by the Supreme Court of Canada. What was before the court was a case in which it was alleged that a fraudulent solicitation was made in Canada of people in the United States. The question was where was the crime committed. Delivering the judgement of the court, La Forest, J., observed that 'the English courts have decisively begun to move away from definitional obsessions and technical formulations aimed at finding a single *situs* of a crime by locating where the gist of the crime occurred or where it was completed'.[53] But here, as it has been said, 'the difficulty lies not in the new ideas, but in escaping from the old ones'.[54] It is prudent to attend to that remark.

29. Second, where parties intend to carry out the design of a conspiracy, they may be regarded – both in English law and in American law – as renewing their agreement of conspiracy from day to day.[55] This is so for the reason given by Lord Salmon, namely, that the parties are 'still agreeing and conspiring'[56] up to the performance of the agreement or its abandonment. Thus, though criminal

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[48] See, too, the above discussion relating to persecution as a crime against humanity.

[49] As in an indictment for procuring the murder of a specific person. That happened in *R. v. Gonzague*, 4 C.C.C. (3rd) 505, 508 (1983), in which the Ontario Court of Appeal said that the offence of procuring 'is complete when the solicitation or incitement occurs even though it is immediately rejected by the person solicited …'.

[50] This consideration may explain and distinguish *R. v. Wimbledon Justices, ex parte Derwent*, [1953] Q.B. 380, in which it was held that an act of letting a house at a rate in excess of the prescribed maximum was not a continuous offence, i.e., apart from considerations based on the particular wording of the statute involved.

[51] This definition will do for present purposes. However, the exact definition is a matter of controversy. Lord Denman, who originated the definition, seemed to have doubts about its accuracy. See Smith and Hogan, *Criminal Law*, 11th ed. (Oxford, 2005), p.359, footnote 78.

[52] *Archbold, Criminal Pleading, Evidence and Practice*, *2007* (London, 2007), para. 34-8.

[53] *Libman v. The Queen,* 21 C.C.C. (3d) 206, 221 (para. 42), cited by the Privy Council in *Liangsiriprasert v. United States*, [1991] A.C. 225.

[54] J.M.Keynes, quoted by Chief Justice Earl Warren at p. 295 of his 'Toward a more active International Court', (1971) 11 Vir. J.I.L. 295.

[55] *DPP v. Doot*, [1973] A.C. 807, Viscount Dilhorne (825), Lord Pearson (829-830), Lord Salmon (835-836). And see *Hyde and Schneider v. U.S.* (1912) 225 U.S.347, and *People v. Mather,* 4 Wend. (N.Y.) 261.

[56] *DPP v. Doot*, [1973] A.C. 807, 835 (H.L.).

jurisdiction is ordinarily[57] territorial, a prosecution may be brought in a territory other than that in which the conspiratorial agreement was made if the intention was to implement it, in whole or in part, in this other territory.

30. The 'renewal' view neutralizes the effect of the agreement of conspiracy being regarded as having been made once and for all, or of the crime being regarded as instantaneous at the time of the first making of the agreement of conspiracy. In similar fashion, it may be said that an inciter stands to be regarded as having renewed his incitement from day to day. I uphold the written submission of the prosecution that 'the violation is constantly renewed by the continuing maintenance of the original criminal purpose'.[58] This view would mean that, in this case, there would be a fresh incitement within the jurisdictional year.

31. The Appeals Chamber has not taken issue with the starting view of the Trial Chamber that, in the case of conspiracy, parties are to be considered as renewing the conspiracy agreement from time to time. If the Appeals Chamber was challenging the 'renewal' view, it could have said so, more particularly as that view was set out in the Trial Judgement.[59] What the Trial Chamber did was to apply the reasoning underlying that view, which related to *conspiracy*, to the case of *incitement*. It is this extension by the Trial Chamber which the Appeals Chamber is disputing. The Appeals Chamber is relying on its own authority, no citations being given.[60] I respect the Appeals Chamber's authority. But I prefer the conclusion reached by the Trial Chamber as being more consonant with principle.

32. Third, as 'Lord Tucker pointed out in Board of Trade v. Owen [1957] 1 All ER 411 at 416, [1957] AC 602 at 626, inchoate crimes of conspiracy, attempt and *incitement*[61] developed with the principal object of frustrating the commission of a contemplated crime by arresting and punishing the offenders before they committed the crime.'[62] Lord Tucker referred to Stephen's *History of the Criminal Law*, vol. 2, p. 227, citing Coke's statement that 'in these cases the common law is a law of mercy, for it prevents the malignant from doing mischief, and the innocent from suffering it'.[63] This *justifies* punishing an inciter for his incitement even before the commission of the incited crime; it does not *prevent* him from being punished for his incitement at the time of the commission of the incited crime. This also explains statements to the effect that a crime of incitement is complete when the inciting acts are done; it does not follow that the crime of incitement comes to an end at that point.

33. Fourth, there is ground for considering that a crime which would otherwise be instantaneous would be continuous if repeated in circumstances in which the various acts are closely linked.[64] Thus, the repeated and unlawful holding of a Sunday market 'is a single offence and not a series of

[57] There are various qualifications.
[58] Consolidated Respondent's Brief, para. 127.
[59] Trial Judgement, paras 101, 104.
[60] See Appeals Chamber Judgement, paras 722 - 723.
[61] Emphasis added.
[62] *Liangsiriprasert v. United States Government*, [1991] 1 A.C. 225, per Lord Griffiths, delivering the judgment of the Privy Council.
[63] *Board of Trade v. Owen*, [1957] A.C. 602, 626. And see Coke's statement in *The Poulterers'* case, 9 Co. Rep. 57a.
[64] See Judge Dolenc's opinion that a crime is continuous if separate acts are closely linked. His view, as set out in a separate and dissenting opinion appended to the Trial Chamber Judgement in *Semanza***,** ICTR- 97-20-T, 15 May 2003, para. 32, reads: 'For these acts to be joined together, certain linking elements should be taken into account, such as the repetition of the same kind of crimes, the uniformity of the perpetrator's intent, the proximity in time between the acts, the location, the victim or class of victims, the object or purpose, and the opportunity'. That view, which presumably reflects the civil law position, is not in principle different from the common law position.

separate offences'.[65] In the circumstances of the instant case, an act of incitement, though committed in 1993, would fall to be considered as having been repeated from day to day right into 1994. Some reinforcement of the foregoing view is to be had from the fact that, in *Streicher*,[66] the International Military Tribunal at Nuremberg acted on the view that the many articles published in a weekly from 1938 to 1944 and calling for the destruction of the Jews manifested one course of criminal conduct.[67]

34. Fifth, it is interesting that a work of authority couples incitement with conspiracy for jurisdictional purposes. Archbold writes: 'The common law jurisdiction in respect of incitement appears to be the same as that for conspiracy,…'. [68] That would mean that the Tribunal would have jurisdiction over incitement to the same extent that it would have jurisdiction over conspiracy. Hence, if, as is agreed, conspiracy is a continuing crime, so is incitement.

35. The cases in the books do not concern a special jurisdictional bar such as the kind set up in this case by the vesting of jurisdiction in the Tribunal for only one year, namely, 1994. But, in my opinion, that confined jurisdiction is not to be interpreted as excluding a prosecution for a pre-1994 incitement to commit genocide if it could be reasonably inferred, as the Trial Chamber by implication found, that the appellants knew and intended that the persuasion exerted by such an incitement continued to work in the jurisdictional year. They were engaged in a continuous crime of inciting the commission of genocide. I agree with the view of the Trial Chamber.

## D. A pre-jurisdictional act can extend into the later jurisdictional period so as to coexist with an attack on the civilian population during the latter period

36. If the foregoing conclusion is correct, it assists in resolving a related problem. I am referring to a difficulty which I have with the view of the Appeals Chamber that the fact that Kangura was not published during the attack on the civilian population which began on 6 April 1994 defeats the charge of persecution as a crime against humanity on the ground of non-satisfaction of a legal requirement to show that Kangura appeared during the attack. The Appeals Chamber says:

> *La Chambre d'appel note tout d'abord que Kangura n'est pas paru entre le 6 avril et le 17 juillet 1994, période pendant laquelle avait lieu l'attaque généralisée et systématique contre la population tutsie au Rwanda. Ainsi, les articles de Kangura publiés entre le 1er janvier et le 6 avril 1994 peuvent difficilement être considérés comme s'inscrivant dans le cadre de cette attaque généralisée et systématique, même si ces articles peuvent l'avoir préparée. En conséquence, la Chambre d'appel ne peut conclure que les articles de Kangura publiés entre le 1er janvier et le 6 avril 1994 ont réalisé la persécution constitutive de crime contre l'humanité.*[69]

37. It is important to distinguish between the physical publication of *Kangura* and the act of the appellant Mr Ngeze in disseminating his message through *Kangura*; it is to the nature of that act of dissemination that attention should be addressed and not to the physical publication of *Kangura.* The charge of persecution relates not really to the physical publication of *Kangura*, but to the act of the accused in disseminating offending material through *Kangura.* This is not a case in which the

[65] *Hodgetts v. Chiltern District Council*, [1983] 2 AC 120, 128, HL, Lord Roskill. The idea underlies the practice of indicting in deficiency cases.
[66] Judgement of the International Military Tribunal, Trial of Major War Criminals (1946).
[67] The Trial Chamber considered the case at paras 1007, 1073 and 1076 of the Judgement. *Akayesu*, ICTR-96-4-T, 2 September 1998, was mentioned by the appellants. It concerned a question as to whether the accused could be convicted even though the incited crime was not committed (para. 562). It is not helpful on the problems of continuity raised in this case.
[68] *Archbold, Criminal Pleading, Evidence and Practice, 2007*, *(*London, 2007), paras 34-74.
[69] Appeals Chamber Judgement, para. 1013.

accused is charged, as he could be in some domestic jurisdictions, with physically publishing a newspaper without complying with some reasonable official requirement (such as the printing of the identity of the publisher); there it would be proper to regard the publication as an instantaneous affair. Not so the act of the accused in disseminating his message through *Kangura*. That act was an act of persuasion; it was not a once-for-all affair. By its very nature, it would continue[70] to send out its message after the publication of *Kangura*. Not merely would it produce a particular effect at a given time, but it could continue as an independent cause of many effects occurring at different later times.

38. It is true that the Appeals Chamber said that the *mens rea* of crimes against humanity is satisfied when, *inter alia*, the accused 'knows that there is an attack on the civilian population and also knows that his acts comprise part of that attack'.[71] It is said that the requirement cannot be satisfied if *Kangura* did not appear during the attack. But that dictum presents no difficulty if the act which the accused does is such, by reason of its nature, as to endure throughout the attack against the civilian population. The important thing is not whether *Kangura* appeared during the attack, but whether the act of the accused in disseminating his message was still exerting its influence. Publication might have been discontinued, but not the influence exerted by the publication. The influence of the publication would have continued during the attack.

39. It is not said that the publication did not, at least in part, cause the attack. That is virtually admitted: in the language of the Appeals Chamber, the publications '*peuvent l'avoir préparée*' or 'may have prepared' the attack.[72] No question of excess of temporal jurisdiction arises. On the views of the Appeals Chamber, granted everything else, the prosecution for persecution would fail even if the last issue of *Kangura* was published on the very eve of the attack. The improbability of an acquittal on that ground is palpable. As I understand the applicable legal concepts, they do not mandate so farcical a result.

## E. The pre-1994 *Kangura* publications constituted enough evidence of incitememt to commit genocide

40. The Appeals Chamber disregarded the pre-1994 *Kangura* publications because it held that they were outside of its temporal jurisdiction. For this reason, it did not make a finding as to whether those publications provided evidence on which a trier of fact could reasonably find that the appellants had incited genocide.[73] However, given my view that a pre-1994 incitement can give rise to liability for inciting genocide in 1994, it is necessary to examine these pre-1994 publications to determine whether they constituted evidence of direct and public incitement to commit genocide on which a trier of fact could reasonably make a finding of fact to that effect.

41. As has been noted above, the Appeals Chamber recognised[74] that the Trial Chamber was aware of the distinction between a mere hate speech and a hate speech which amounts to direct and public incitement to commit genocide.[75] With the distinction in mind, the Trial Chamber made a wide-ranging survey of the evidence. In four months, many Tutsis were slaughtered in Rwanda; it is

[70] The subject of continuous offences is dealt with above.
[71] *Blaškić*, IT-95-14-A, 29 July 2004, para. 124. See also *Kordić and Čerkez*, IT-95-14/2-A, 17 December 2004, para. 99.
[72] Appeals Chamber Judgement, para. 1013.
[73] *Ibid.,* para. 314.
[74] *Ibid.,* para. 696.
[75] See Trial Judgment, paras. 978-1029.

common knowledge[76] that some 800,000 perished – possibly more. That was an act of genocide – of monumental proportions, particularly in view of the short time and the basic way in which the crime was perpetrated; even if not the largest such tragedy known to humanity, it was stupendous in scale. The genocide did not spring from nowhere; it would be natural to presume that some developments in the previous years led to it.[77] At the same time, it would be incorrect to assume any particular development. The Trial Chamber made no assumption. It carefully examined the evidence. It found that in the previous years Hutus were systematically incited to do violence against Tutsis.[78] It concluded that the incitement was largely the work of the media. It did not cite every detail of the evidence; it did not have to do that. The judgement runs to 361 pages, in single space. It gave examples of the incitement – many examples. If the argument is that these examples were insufficient to base the conclusion reached by the Trial Chamber, on an appeal the burden of persuading the Appeals Chamber that the Trial Chamber erred lay on the appellants. In my opinion, they have not discharged it.

42. By contrast, the evidence before the Trial Chamber showed that readers were told by the pre-1994 publications to 'cease feeling pity for the Tutsi'. They were asked 'What weapons shall we use to conquer the *Inyenzi* once and for all?', a machete being shown alongside the question and a finding being made that the Inyenzis were the Tutsis.[79] Commenting in paragraph 950 of its judgement, the Trial Chamber considered that the 'cover of *Kangura* … promoted violence by conveying the message that the machete should be used to eliminate the Tutsi, once and for all.' The evidence supported the reasonableness of that comment.

43. Pre-1994 publications, appearing in *Kangura*, included *The Ten Commandments*, which was published in *Kangura* No. 6 in December 1990.[80] Commandment 16 stated that if 'we fail to achieve our goal, we will use violence'.[81] The Trial Chamber heard testimony that, by reason of the publication of *The Ten Commandments*, 'some men started killing their Tutsi wives, or children of a mixed marriage killed their own Tutsi parents'.[82] With 'regard to the commandment that the Hutu should not take pity on the Tutsi, [another witness] understood this to mean, "In other words they can even kill them", adding, "And that is actually what happened, and I think this was meant to prepare the killings"'.[83] The Trial Chamber said that these 'witnesses perceived a link between *The Ten Commandments* and the perpetration of violence against Tutsi'. The *Kangura* article, an *'Appeal to the Conscience of the Hutu'*, within which *The Ten Commandments* appeared, claimed that the enemy was 'waiting to decimate us'; it called on Hutus to 'wake up', and to 'take all necessary measures to deter the enemy from launching a fresh attack'. The particular wording does not deceive anyone. It is difficult to disagree with the Trial Chamber's finding that the 'text' of the *Appeal to the Conscience of the Hutu* 'was an unequivocal call to the Hutu to take action against the Tutsi …'.[84]

[76] See *Karemera*, ICTR 98-44-AR73(C), 16 June 2006, where the Appeals Chamber directed the Trial Chamber to take judicial notice under Rule 94(A) of the fact that '[b]etween 6 April 1994 and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group'.
[77] See the observation of the Soviet delegate on the occasion of the adoption of the Genocide Convention, referred to in para. 551 of *Akayesu*, ICTR-96-4-T, 3 September 1998, and Trial Judgement, para. 978.
[78] Trial Judgement, paras 120-121, 1026-1034.
[79] *Ibid.,* paras 158-160, 170-173.
[80] *Ibid.,* para. 138.
[81] *Ibid.,* para. 144.
[82] *Ibid.,* para. 140.
[83] *Ibid.*, para. 141.
[84] *Ibid.*, para. 153.

44. The Trial Chamber believed the witnesses as to how the publications were in fact interpreted by Hutus. It said that it 'considers the views of these witnesses to be well-founded and a reasonable illustration that an anti-Tutsi message of violence was effectively conveyed and acted upon'.[85] For a reasonable tribunal of fact to have found otherwise would have been curious, to say the least. Straighter terms in a public message were not to be expected; but, taking account of code words, metaphors, double entendre, 'mirror' expressions, and local culture, I am of the view that there was enough evidence on which the Trial Chamber could reasonably hold that the language used was understood by the public in Rwanda to be genocidal in import.

45. The appellants were deliberately pounding out a series of drumbeats with the expectation that, incrementally, these would one day explode in the national genocide which in fact took place. The appellants could not be prosecuted for any liability accruing in the years before 1994; but they would have liability as from 1 January 1994 for previous publications and could be prosecuted for that liability.

## F. In any event, there was enough evidence that, in the jurisdictional year of 1994, *Kangura* published inciting material

46. I support the view of the Appeals Chamber that, in any event, there was enough evidence that, in 1994, *Kangura* published inciting material.[86] It is only necessary to refer specifically to two points.

47. The first point, on which I agree with the Appeals Chamber,[87] concerns an editorial. In February 1994, an editorial in *Kangura* said that 'blood will really flow. All the Tutsis and the cowardly Hutus will be exterminated'.[88] The Trial Chamber was entitled to say – and to say without difficulty – what this meant to those to whom it was addressed. It said, 'While the content is in the form of a political discussion, the descriptive and dispassionate tenor of journalism is notably absent from the text, which consequently has a threatening tone rather that an analytical one'.[89] So the Trial Chamber considered the possible interpretations to be placed on the text. The interpretation which it accepted was reasonably supported by the evidence: the paper was not merely saying what was possible; it was calling for extermination. It was not analysing, it was threatening – threatening with genocide. The Appeals Chamber has rightly accepted the views of the Trial Chamber.

48. The second point, on which I respectfully disagree with the majority, concerns a competition. Twice in March 1994 *Kangura* advertised a competition asking questions requiring a reading of pre-1994 *Kangura* articles which, as explained above, incited genocide; it also offered prizes. The Appeals Chamber considers that the earlier publications were not 'put back into circulation in March 1994'[90] by the competition organized in that month. If the test were whether the pre-1994 articles were 'put back into circulation in March 1994' in the sense of being republished physically in that month, I would agree. But that is not the test. The test is whether the acts of the appellant (Mr Ngeze) in 1994 incited genocide. Here it is necessary to see what he did through the 1994 advertisement. He invited the public to read the pre-1994 articles. Since those articles incited genocide, by inviting the public in 1994 to read those articles the appellant in 1994

[85] *Ibid.*, para. 158 – 'an anti-Tutsi message of violence was effectively conveyed and acted upon'.
[86] Appeals Chamber Judgement, para. 886.
[87] *Ibid.*, para. 773.
[88] Trial Judgement, para. 225.
[89] *Ibid.,* para. 226.
[90] *Ibid*., paras 436 and 553.

(the jurisdictional year) did commit an act which incited genocide. It was the act of inviting readers to read the old articles that mattered, not the physical reproduction of the articles.

49. It is true, as noted by the Appeals Chamber,[91] that there is not enough evidence to demonstrate that all the pre-1994 issues of *Kangura* were easily available.[92] The pre-1994 issues went back four or five years; only the very recent ones, such as Nos. 58, 59 and 60, could reasonably be expected to be still available for sale. But readers were fairly understood to be asked to familiarise themselves with all the material – whether in their possession or in that of others, whether to be purchased or not. For example, issue No 58 asked readers, 'in which edition of *Kangura* did this appear?' As counsel for the prosecution said, 'that was a call, an invitation to read back editions'.[93] It was clear to the Trial Chamber that, as it found, in 'light of its stated purpose, the exercise was in fact designed to familiarise readers with past issues and ideas of *Kangura*'.[94] I have difficulty in disagreeing with that finding. In addition, it was not a question whether readers could in fact do what they were asked to do; the question was what were they asked to do. By one means or another, *Kangura* intended to renew public memory of pre-1994 incitements. The process of renewal was occurring in 1994. Therefore, there was a fresh incitement in that jurisdictional year.

50. The Trial Chamber found 'that the competition was designed to direct participants to any and to all of these issues of the publication and that in this manner in March 1994 *Kangura* effectively and purposely brought these issues back into circulation'.[95] By the phrase 'in this manner', the Trial Chamber was saying the same thing as above. The old publications were of course not physically republished, and the Trial Chamber did not say that, but attention was being drawn to them – all of them – more so because prizes were being offered. It was in that 'manner' that the Trial Chamber found that the old publications of *Kangura* were 'effectively and purposely brought … back into circulation'. The finding of the Trial Chamber was reasonably supported by the evidence.

51. The Appeals Chamber also takes the view that the fact that the competition allegedly 'brought back into circulation' issues of *Kangura* published prior to 1 January 1994 was not pleaded in Mr Ngeze's indictment.[96] The objection mixes up averments of fact with evidence of the fact. The former have to be pleaded in the indictment, not the latter. The indictment averred that the appellants worked 'out a plan with intent to exterminate the civilian Tutsi population' and that the 'incitement to ethnic hatred and violence was a fundamental part of the plan'.[97] That was the required averment of fact. The prosecution sought to support that averment of fact by adducing evidence of the competition in March 1994 which had the effect of reproducing certain incitements of the pre-1994 period. With respect, the criticism of the course taken by the prosecution is weak.

### G. <u>There was enough evidence that, in 1994, RTLM broadcast inciting material</u>

52. Two periods of the jurisdictional year need to be considered, *viz.*, 1 January 1994 to 6 April 1994, and the remainder of that year. The break does not mark a jurisdictional boundary; it marks only the time when the appellants' level of control over RTLM itself, or over RTLM

[91] Appeals Chamber Judgement, para. 409.
[92] Trial Judgement, para. 436.
[93] Trial transcript, 14 May 2002, pp. 154. See also, *ibid*., pp. 171-172.
[94] Trial Judgement, para. 256.
[95] *Ibid.,* para. 257.
[96] Appeals Chamber Judgement, paras 406 - 407.
[97] See, for example, paras 5.1 and 5.2 of the indictment against Mr Nahimana.

journalists and employees, changed, coinciding with the commencement of the genocide. Still, it would be convenient to discuss the matter in the framework of the two periods.

1. 1 January 1994 to 6 April 1994

53. I am unable to support the Appeals Chamber's view that RTLM did not incite genocide from 1 January 1994 to 6 April 1994.[98] RTLM's interaction with *Kangura* has to be considered. The Trial Chamber correctly found that RTLM and *Kangura* were conducting a 'joint enterprise'.[99] That was said in relation to the *Kangura* competition of March 1994, which I consider amounted to incitement. RTLM made a broadcast of the *Kangura* competition later that month. Thus, like the March 1994 issues of *Kangura* itself, RTLM adopted all of the *Kangura* articles of the pre-1994 period, which the Trial Chamber clearly considered incited genocide. There is nothing vague about the Trial Chamber's position on the question whether between 1 January 1994 and 6 April 1994 *Kangura* incited genocide. The contrary view really amounts to a rejection of the Trial Chamber's finding that the March 1994 competition had the effect of bringing back into circulation the pre-1994 issues of *Kangura.* On the rules regulating the functioning of an appellate court, I consider that rejection of the Trial Chamber's finding to be in excess of the authority of the Appeals Chamber.

54. In another RTLM broadcast, which was unquestionably made on 16 March 1994 by Valerie Bemeriki (otherwise found to be a liar), she said that listeners were ready to support their army by taking 'up any weapon, spears, bows … Traditionally, every man has one at home, however, we shall rise up'.[100] Hutus were being called to arms before 6 April 1994; any suggestion to the contrary cannot be right. And the object was clear – to kill the Tutsis as a racial group.

55. In these ways, RTLM became a party to the incitement before 6 April 1994. However, it is sought to say that this is not the case. That contrary view is based on the fact that the Trial Chamber found that '[a]fter 6 April 1994 [when the genocide started], the fury and intensity of RTLM broadcasting increased, particularly with regard to calls on the population to take action against the enemy'.[101] I am not in favour of a view that this means that, in the opinion of the Trial Chamber, RTLM had not been engaged, before 6 April 1994, in incitement to commit genocide. The statement does not mean that there was no incitement before that date, or that such incitement as there was before that date was neither furious nor intense. Incitement existed; it was furious and intense; its furiousness and intensity merely increased later.

2. The period after 6 April 1994

56. Here I agree with the Appeals Chamber that the RTLM was inciting genocide in the period following 6 April 1994.[102] As explained above, the momentum increased after 6 April 1994, when the genocide commenced; it is not to be overlooked that subsequent broadcasts were made against the background of an ongoing genocide and were clearly intended to be understood as endorsing that genocide. In an RTLM broadcast of 13 May 1994, Kantano Habimana, a journalist, spoke of exterminating the Inkotanyi so as 'to wipe them from human memory' and of exterminating the Tutsi 'from the surface of the earth … to make them disappear for good'.[103] On 23 May 1994, he

[98] Appeals Chamber Judgement, para. 754.
[99] Trial Judgement, para. 255.
[100] *Ibid*., para. 387.
[101] Trial Judgement, para. 481. See also para. 486.
[102] Appeals Chamber Judgement, para. 758.
[103] Trial Judgement, para. 483.

said on RTLM, 'At all costs, all Inkotanyi have to be exterminated, in all areas of our country'.[104] Another RTLM broadcast was made on 4 June 1994, in which he said, 'One hundred thousand young men must be recruited rapidly. They should all stand up so that we kill the Inkotanyi and exterminate them, all the easier … [T]he reason we will exterminate them is that they belong to one ethnic group'.[105] A few days later there was a bloodcurdling RTLM broadcast in which he said that the Inkotanyi 'looked like cattle for the slaughter'.[106] The 'fighting' words 'kill' and 'exterminate', used in these broadcasts, had occurred in the Jew-baiting articles published in Der Stürmer. The Appeals Chamber agreed with the Trial Chamber that the reference to the Inkotanyi was a reference to the Tutsis[107] - a finding that is important. Symptomatic of its evolution, by 6 April 1994 the RTLM became known as 'Radio Machete'.[108] Thus, the Appeals Chamber was correct in agreeing with the Trial Chamber that RTLM was inciting genocide in the period following 6 April 1994.

## H. The Trial Chamber had enough evidence that the appellants personally collaborated with the specific purpose of committing genocide

57. I regret that I cannot support the finding of the Appeals Chamber that there was not sufficient evidence that the appellants collaborated over the commission of genocide.[109] The Appeals Chamber accepts that a genocidal agreement among them can be inferred from the evidence.[110] But, in dealing with the evidence, it then says:

> *La question à ce stade pour la Chambre d'appel est de savoir si, à supposer que cette coordination institutionnelle ait été établie, un juge des faits raisonnable pouvait en conclure que la seule déduction raisonnable possible était que cette coordination institutionnelle résultait d'une résolution d'agir concertée en vue de commettre le génocide. Or, s'il ne fait aucun doute que l'ensemble de ces conclusions factuelles sont compatibles avec l'existence d'un « programme commun » visant la commission du génocide, il ne s'agit pas là de la seule déduction raisonnable possible. Un juge des faits raisonnable pouvait aussi conclure que ces institutions avaient collaboré pour promouvoir l'idéologie « Hutu power » dans le cadre du combat politique opposant Hutus et Tutsis ou pour propager la haine ethnique contre les Tutsis, sans toutefois appeler à la destruction de tout ou partie de ce groupe.*[111]

In paragraph 912 of its judgement, the Appeals Chamber concludes:

> *La Chambre d'appel considère qu'un juge des faits raisonnable ne pouvait conclure au-delà de tout doute raisonnable, sur la base des éléments récapitulés ci-dessus, que la seule déduction raisonnable possible était que les Appelants avaient collaboré personnellement et qu'ils avaient organisé une coordination institutionnelle entre la RTLM, la CDR et Kangura dans le but de commettre le génocide. Elle fait droit au moyen correspondant des Appelants et annule les déclarations de culpabilité prononcées contre les Appelants Nahimana, Barayagwiza et Ngeze pour le crime d'entente en vue de commettre le génocide (premier chef d'accusation des trois Actes d'accusation dressés à leur encontre). L'incidence de ces annulations sera considérée plus loin, dans le chapitre consacré à la peine. Elle rejette, les considérant sans objet, les autres arguments soulevés par les Appelants.*

[104] *Ibid.*, para. 425.
[105] *Ibid.,* para. 396.
[106] *Ibid.*, para. 415.
[107] Appeals Chamber Judgement, para. 53. *Cf. ibid.*, paras 740 -751, relating to the broadcast of 16 March 1994; the text of the broadcast was not directed to the equivalence between Inkotanyi and Tutsis, but the general context showed it.
[108] Trial Judgement, paras 444 & 1031.
[109] See Appeal Chamber Judgement, para. 912.
[110] *Ibid.,* para. 896.
[111] *Ibid.,* para. 910.

58. It does not appear that the Appeals Chamber held that the accused did not personally collaborate. What it held was that they did not personally collaborate '*dans le but de commettre le génocide*'.[112] The question raised by the Appeals Chamber was whether they collaborated merely over the promotion of 'Hutu power' by non-genocidal means, or whether they collaborated over the achievement of that aim by the specific means of genocide.

59. The Appeals Chamber accepts that genocidal purposes were '*compatibles avec l'existence d'un « programme commun » visant la commission du génocide*'[113]; in other words, it accepted that the evidence *could* support the view that the collaboration had a genocidal purpose. What it says is that a more limited purpose was equally compatible with the existence of that '*programme commune*' or 'joint agenda', namely, the purpose of promoting Hutu power by non-genocidal means, and that therefore the promotion of Hutu power by genocide was not proved beyond reasonable doubt. There are four answers.

60. First, since the Appeals Chamber had no 'doubt' that a genocidal purpose was 'compatible' with the 'joint agenda' of the appellants, the Appeals Chamber is to be taken to admit that there was evidence before the Trial Chamber on which it *could* reasonably hold that the purpose of their collaboration was to commit genocide. The Appeals Chamber has no basis for disagreeing with the holding which the Trial Chamber *proceeded* to make on that evidence; that holding is not shown to have been unreasonable.

61. Second, there seems to have been no argument before the Trial Chamber as to whether the aim of any collaboration was the establishment of Hutu power by means short of genocide. Paragraph 906 of the Appeals Chamber Judgement does not suggest that there was any such argument. There was no such argument because the argument would imply that the appellants did collaborate on some matters – and this they stoutly denied.[114] Thus, the argument that the aim of any collaboration was limited to the establishment of Hutu power by non-genocidal means was not made. In the result, the Appeals Chamber is without the benefit of the views of the parties or of the Trial Chamber on the argument.

62. Third, there is a consideration concerning the limited thrust of an argument that, in addition to the principle that guilt must be proved beyond reasonable doubt, in cases in which the evidence is purely circumstantial, the court must acquit unless the facts are not only consistent with guilt but are also inconsistent with any other rational explanation. The principle sought to be invoked by the argument does not stand in glorious independence of the principle that guilt must be proved beyond reasonable doubt, but is a consequence of the latter: if another explanation can with equal reason be drawn, it follows that guilt has not been proved beyond reasonable doubt.[115] No doubt, the rule about there being another equally reasonable explanation is a suitable way (particularly if there is a jury) of applying the general rule about reasonable doubt in some cases of circumstantial

[112] *Ibid.,* para. 912.
[113] Appeals Chamber Judgement, para. 910.
[114] See, for example, Nahimana's submissions during the appeal hearing, Transcript of the Appeals Chamber, 17 January 2007, at p. 6; Barayagwiza Appellant's Brief, para. 244; Ngeze Appellant's Brief, para. 289(ii).
[115] *McGreevy v. DPP* [1973] 1 All E.R. 503, HL. There are variations in other jurisdictions. See, for example, *Barca v. The Queen*, [1975] 113 C.L.R. 82, 104, *De Gruchy v. The Queen*, 211 CLR 85 (2002) HCA, para. 47, and *R. v. Chapman*, [2002] 83 S.A.S.R. 286, 291.

evidence,[116] and it has been employed by the Tribunal; but it does not introduce a separate or more stringent rule, being more a matter of form than of substance.

63. And, fourth, it has to be borne in mind that the trial jurisdiction was given to the Trial Chambers – not to the Appeals Chamber. The Appeals Chamber is to correct any errors which the Trial Chambers made; it must exercise that corrective jurisdiction firmly; but it must take care not to wrest the jurisdiction of the Trial Chambers or to act as an overseer. Appellate jurisdiction is not to be exercised to determine whether the appellate court agrees with a finding of fact made by the trial court, except in the sense of determining whether there was evidence on which a reasonable trier of fact could make that finding. If there was such evidence before the Trial Chamber, in the absence of a clear error of reasoning, it is immaterial that the Appeals Chamber, if it were the Trial Chamber, would have made a different finding of fact.[117] Otherwise, the competence of the Appeals Chamber to say whether there was evidence before the Trial Chamber on which a reasonable trier of fact could have made the same finding as the Trial Chamber degenerates into a device for escaping from the Appeals Chamber's duty to defer to the Trial Chamber's findings of fact.

64. In my view, there was enough material on which the Trial Chamber could reasonably find, as it did, that the three appellants personally collaborated with the specific purpose of committing genocide. Nor is the legal consequence of that collaboration to be overlooked. It meant that the appellants were responsible for the acts committed by each other; thus, there is no need for the Appeals Chamber to be preoccupied with the question whether the liability for any act physically done by one of the appellants is to be confined to him alone. More particularly, it meant that any inadequacy in the publications in *Kangura* could be filled by the transmissions of RTLM, and *vice versa.* It was only if the total material disseminated by both *Kangura* and the RTLM was deficient that the prosecution would fail; I do not find any basis for suggesting an overall deficiency.

## I. Whether any incitement was direct and public

65. A last point is whether any incitement was direct and public. It is not necessary to debate whether any incitement was public: it clearly was. It is more useful to consider whether it was direct. On this point, I fully accept that a prosecution fails if all that is established is that the incitement was vague or indirect; there must be no room for misunderstanding its meaning. Sometimes it is said that the incitement has to be 'immediate', which term is probably used in the dictionary sense of 'pressing or urgent'. The incitement must call for immediate action, but it certainly is not the case that the prosecution has to show that genocide in fact followed immediately after the message or at all. That would collide with the established law that the desired result does not have to be proved. So the fact that earlier messages were not followed by a genocide is not relevant. But some other qualifications have to be understood.

66. First, it is not necessary to require proof that incitement to commit genocide was made expressly, or that the term 'direct' was used in the findings of the Trial Chamber, even though the

[116] See *Knight v. The Queen*, (1992) 175 CLR 495, at 502, in which Mason CJ, Dawson and Toohey JJ considered the rule that the jury had to be directed that they should only find by inference an element of the crime charged if there were no other inference or inferences which were favourable to the appellant, and remarked that the rule 'is a direction which is no more that an amplification of the rule that the prosecution must prove its case beyond reasonable doubt and the question to which it draws attention - that arising from the existence of competing hypotheses or inferences – may occur in a limited way in a case which is otherwise one of direct rather than circumstantial evidence'.
[117] *Kupreškić*, IT-95-16-A, 23 October 2001, para. 30, quoting *Tadić*, IT-94-1-A, first separate opinion, para. 30.

term was in fact used by it; there is no need for sacramental words.[118] Euphemisms are often employed; and local culture has to be taken into account. As the Trial Chamber indicated, there may be no 'explicit call to action'.[119] But, as it found in this case, 'The message was nevertheless direct. That it was clearly understood is overwhelmingly evidenced by the testimony of witnesses that being named in *Kangura* would bring dire consequences'.[120] In other words, the question is, how was the message understood by those to whom it was addressed?

67. Second, it is necessary to attend to the methodology used by the Trial Chamber in answering the question whether the appellants intended specifically to incite others to commit genocide. Sometimes, the Trial Chamber would answer the question as a formal part of its findings. Sometimes it would impliedly answer the question in the course of dealing with the testimony of witnesses. Sometimes it might say expressly that the witness was credible, sometimes it might not. It does not matter how the Trial Chamber proceeded, provided that its position was clear. In my view, it was.

68. Third, whether the incitement was specific has to be judged on the evidence of the public's understanding of it, and that is *ultimately* a question of fact to be determined by the Trial Chamber. The Appeals Chamber could interfere but only if it considered that the inference which the Trial Chamber drew from the evidence was one which no reasonable tribunal of fact could draw. There could be lack of reasonableness if the Trial Chamber drew an inference of guilt from evidence which merely showed that the appellants were preaching a sermon on the mount. But this lamentably is not that kind of case.

69. The Trial Chamber had many RTLM broadcasts before it. I do not know of any rule which required it to reproduce them individually or verbatim in its judgement. Giving its impression of the broadcasts taken together, it said that 'many of the RTLM broadcasts explicitly called for extermination'.[121] Likewise, it said, 'The Chamber has also considered the progression of RTLM programming over time – the amplification of ethnic hostility and the acceleration of calls for violence against the Tutsi population. In light of [the] evidence…, the Chamber finds this progression to be a continuum that began with the creation of RTLM radio to discuss issues of ethnicity and gradually turned into a seemingly non-stop call for the extermination of the Tutsi.'[122] Then there is this passage in the Trial Judgement:

> The [Trial] Chamber finds that RTLM broadcasts exploited the history of Tutsi privilege and Hutu disadvantage, and the fear of armed insurrection, to mobilize the population, whipping them into a frenzy of hatred and violence that was directed largely against the Tutsi ethnic group. The *Interahamwe* and other militia listened to RTLM and acted on the information that was broadcast by RTLM. RTLM actively encouraged them to kill, relentlessly sending the message that the Tutsi were the enemy and had to (*sic*) [be] eliminated once and for all.[123]

70. Also, the relaxation of the hearsay rule permitted the Trial Chamber to rely on the evidence of witnesses who had listened to the programmes of RTLM. On the basis of 'all the programming he listened to after 6 April 1994, Witness GO testified that RTLM was constantly asking people to kill other people, that no distinction was made between the *Inyenzi* and the Tutsi, and that listeners

[118] M. Politis said that international law avoids sacramental words; see his argument in *Mavrommatis Concessions, P.C.I.J., Series C, No. 5-I,* (1924), p.50.
[119] Trial Judgement, para. 1028.
[120] *Ibid.*
[121] Trial Judgement, para. 483. See also, *ibid.*, paras. 484-485.
[122] *Ibid,.* para. 485.
[123] *Ibid,.* para. 488.

were encouraged to continue killing them so that future generations would have to ask what *Inyenzi* or Tutsi looked like'.[124] The Trial Chamber found Witness GO to be credible.[125] Dahinden, whom the Trial Chamber also considered to be credible,[126] 'said that beginning on 6 April 1994, RTLM had "constantly stirred up hatred and incited violence against the Tutsis and Hutu in the opposition, in other words, against those who supported the Arusha Peace Accords of August 1993."'[127]

71. Prosecution Expert Witness Alison Des Forges might be challenged in other fora[128] on other points but this does not affect her testimony in the Trial Chamber that –

> [T]he message she was getting from the vast majority of people she talked to at the time of the killings was 'stop RTLM'. She noted that potential victims listened to RTLM as much as they could, from fear, and took it seriously, as did assailants who listened to it at the barriers, on the streets, in bars, and even at the direction of authorities. She recounted one report that a *bourgmestre* had said, 'Listen to the radio, and take what it says as if it was coming from me'. Her conclusion on the basis of the information she gathered was that RTLM had an enormous impact on the situation, encouraging the killing of Tutsis and of those who protected Tutsis.[129]

72. Matters previously referred to must not be revisited. Enough has been cited to show that there was evidence on which the Trial Chamber could reasonably find that RTLM was 'constantly asking people to kill other people', namely, Tutsis; that it was engaged in an 'acceleration of calls for violence against the Tutsi population'; that it was 'whipping them [the Hutus] into a frenzy of hatred and violence that was directed largely against the Tutsi ethnic group'; that it was making 'a seemingly non-stop call for the extermination of the Tutsi'. In these and other ways, RTLM was directly inciting the public to commit genocide. Because of collaboration, all the appellants would be caught by that finding. In addition, they would have liability through the *Kangura* publications. In sum, there was ample evidence on which the Trial Chamber could reasonably find that incitement by the appellants through both *Kangura* and RTLM was direct.[130]

## J. Conclusion

73. The case is apt to be portrayed as a titanic struggle between the right to freedom of expression and abuse of that right. That can be said, but only subject to this: No margin of delicate appreciation is involved. The case is one of simple criminality. The appellants knew what they were doing and why they were doing it. They were consciously, deliberately and determinedly using the media to perpetrate direct and public incitement to commit genocide. The concept of guilt by association is a useful analytical tool, but, with respect, it can also be a battering ram; in my opinion, there is no room for its employment here. It was the acts of the appellants which led to the deeds which were done: a causal nexus between the two was manifest. The appellants were among the originators and architects of the genocide: that they worked patiently towards that end does not reduce their responsibility. The evidence reasonably supported the finding by the Trial Chamber that –

> *Kangura* and RTLM explicitly and repeatedly, in fact relentlessly, targeted the Tutsi population for destruction. Demonizing the Tutsi as having inherently evil qualities, equating the ethnic group with 'the enemy' and portraying its women as seductive enemy agents, the media called for the

[124] *Ibid,*. para. 483.
[125] *Ibid,*. para. 464.
[126] *Ibid,*. paras 464 and 546.
[127] *Ibid,*. para. 457.
[128] See *Mugesera v. Canada*, 2003 FCA 325.
[129] Trial Judgement, para. 458. Other footnotes omitted.
[130] *Ibid.*, paras 1033, 1034 and 1038.

> *extermination*[131] of the Tutsi ethnic group as a response to the political threat that they associated with Tutsi ethnicity.[132]

74. In the light of that and other similar findings, the Trial Chamber correctly noted that the 'present case squarely addresses the role of the media in the genocide that took place in Rwanda in 1994'.[133] In its view, the 'case raises important principles concerning the role of the media, which have not been addressed at the level of international criminal justice since Nuremberg. The power of the media to create and destroy fundamental human values comes with great responsibility. Those who control such media are accountable for its consequences'.[134] I agree.

75. For the foregoing reasons, I would maintain the judgement of the Trial Chamber save on three points. First, I agree with the Appeals Chamber in reversing the convictions of Mr Ngeze as far as they relate to his acts in Gisenyi;[135] this is due to the findings of the Appeals Chamber as to the credibility of a prosecution witness, there being in particular a question as to whether he recanted his testimony after the trial. Second, I agree with the Appeals Chamber that Mr. Barayagwiza cannot be held liable for all the acts committed by any CDR members,[136] and accordingly support the reversal of his convictions pursuant to article 6(3) insofar as they relate to his superior responsibility over CDR militias and *Impuzamugambi*. Third, I agree with the Appeals Chamber in reversing a conviction in cases where two convictions for the same conduct have been made under both paragraphs 1 and 3 of article 6 of the Statute, only a conviction under one paragraph being allowed**.**

76. These variations do not disable me from recognising that the case was a long and complicated one. The Trial Judgement has been the subject of many comments – all useful and interesting, if occasionally unsparing. For myself, I am mindful of the danger of thinking differently from respected fellow-members of the bench. I am sensible to the force of the opposing arguments, and appreciate the wisdom of being wary of a 'doctrinal disposition to come out differently'.[137] These weighty considerations oblige me to regret that, on the record, I see no course open to me but to dissent in part.

[131] Emphasis added.
[132] Trial Judgement, para. 963.
[133] *Ibid.,* para. 979.
[134] *Ibid.,* para. 945.
[135] Appeals Chamber Judgement, para. 468.
[136] *Ibid.,* para. 882, 1003
[137] *See Lewis v. Attorney General of Jamaica and Another*, [2001] 2 AC 50 at 90, Lord Hoffmann, dissenting.

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

[Signed]

Mohamed Shahabuddeen
Judge

Signed 22 November 2007 at The Hague, The Netherlands
and rendered 28 November 2007 at Arusha, Tanzania.

[Seal of the Tribunal]

## XXI. PARTLY DISSENTING OPINION OF JUDGE GÜNEY

1. In *Kordić and Čerkez*[1] and *Naletilić and Martinović*,[2] Judge Schomburg and I clearly stated that we were opposed to the reversal of the case-law by the majority of the Judges of the ICTY Appeals Chamber on the issue of cumulative convictions entered for persecution as a crime against humanity – a crime punishable under Article 5 of the ICTY Statute – and for imprisonment, murders, expulsion, extermination and other inhumane acts entered pursuant to the same Article and based on the same facts. I also made my position known on this issue in my Dissenting Opinion appended to the Appeals Chamber's Judgement in *Stakić*.[3] In the instant case, the majority of the Appeals Chamber agrees with the reasoning of the majority in the *Kordić and Čerkez* and *Stakić* Appeal Judgements and, on the basis of the same facts,[4] found Appellant Barayagwiza guilty of both persecution and extermination as crimes against humanity under Article 3 of the ICTR Statute.[5] I cannot endorse the findings of the majority of the Appeals Chamber in this matter and remain in disagreement with the underlying reasoning.

2. I shall not repeat here all the arguments I have developed in my previous Dissenting Opinions, and would specifically refer to these. I am, however, concerned to make the point that persecution as a crime against humanity has, in my view, to be seen as an empty hull, a sort of residual category designed to cover any type of underlying act. It is only when the underlying act of persecution is identified that the offence punishable under Article 3(h) of the ICTR Statute – Article 5(h) of the ICTY Statute - takes on a concrete form. Without the underlying act, the hull represented by the offence of persecution remains empty.

3. I therefore consider it futile to construe in a rigid and purely theoretical manner the concept of "materially distinct element", which is central to ICTR and ICTY case-law on cumulative convictions for purposes of a comparison between the crime of persecution and other crimes against humanity.[6] Thus I believe that, in specific cases where a Chamber has to consider the issue of cumulative convictions entered in respect of the same facts for persecution and for other crimes against humanity, it cannot – if it wishes to give an account of the accused's criminal conduct in as complete and fair a manner as possible – merely compare the constituent elements of the crimes in question, but must also consider the acts underlying the crime of persecution, without which there is no crime.

4. Hence, faced as it was in the present case with the issue of cumulative convictions for persecution and extermination as crimes against humanity on the basis of the same acts, the Appeals

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[1] *Dario Kordić and Mario Čerkez v. Prosecutor,* Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement"), Chapter XIII: "Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions".

[2] *Mladen Naletilić, alias "Tuta", and Vinko Martinović, alias "Štela" v. Prosecutor,* Case No. IT-98-34-A, Appeal Judgement, 3 May 2006 ("*Naletilić and Martinović* Appeal Judgement"), Chapter XII: "Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions".

[3] *Milomir Stakić v. Prosecutor,* Case No. IT-97-24-A, Judgement, 22 March 2006 (*"Stakić* Appeal Judgement"), Chapitre XIV: "*Opinion dissidente du Judge Güney sur le cumul de déclarations de culpabilité*".

[4] Namely, the murders committed by CDR militants and *Impuzamugambi* at roadblocks supervised by Appellant Barayagwiza: Appeal Judgement, para. 1025; see also paras. 946 and 1002.

[5] Appeal Judgement, paras. 1026-1027.

[6] I am referring to the test applied in the *Čelebići* Appeal Judgement, namely that cumulative convictions for the same fact and on the basis of different statutory provisions are permissible only if each provision involved has a materially distinct element not contained in the other. According to this Judgement, an element is materially distinct from another if it requires proof of a fact not required by the other*: Čelebići* Appeal Judgement, paras. 400 *et seq*.

Chamber should have relied, in order to convict Appellant Barayagwiza, only on the most specific provision, namely the crime of persecution.

5. Should I decide to remain silent on this matter in future cases, my silence should not in any way be construed as an approval of the reversal of the case-law by the majority of the Judges of the ICTR and ICTY Appeals Chambers.

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

[Signed]

Mehmet Güney
Judge

Signed 22 November 2007 at The Hague, The Netherlands,
and rendered 28 November 2007 at Arusha, Tanzania.

[Seal of the Tribunal]

# XXII. PARTLY DISSENTING OPINION OF JUDGE MERON

## A. The Case Should Have Been Remanded

1. The sheer number of errors in the Trial Judgement indicates that remanding the case, rather than undertaking piecemeal remedies, would have been the best course. Although any one legal or factual error may not be enough to invalidate the Judgement, a series of such errors, viewed in the aggregate, may no longer be harmless, thus favoring a remand. Such is the case here. Throughout the Appeals Judgement, the Appeals Chamber has identified several errors in the Trial Chamber decision, some of which it deems insufficient to invalidate the Judgement.[1] At other times, the Appeals Chamber has acted as a fact-finder in the first instance and substituted its own findings in order to cure the errors[2] when, in fact, the Trial Chamber is the body best suited to this task.

2. The volume of errors by the Trial Chamber is obvious as demonstrated by the numerous convictions that the Appeals Chamber reverses as well as the issue that I discuss below. Based on the quashed convictions and the cumulative effect of other errors, I believe that a remand was clearly warranted.

## B. Nahimana's Conviction for Persecution (RTLM Broadcasts)

3. The Trial Chamber convicted Appellant Nahimana for persecution pursuant to Articles 3(h), 6(1), and 6(3) of the Statute, and the Appeals Chamber has affirmed the conviction based on Articles 3(h) and 6(3). The conviction rests on Appellant Nahimana's superior responsibility for the post-6 April RTLM broadcasts. My objections to the conviction for persecution are two-fold: first, from a strictly legal perspective, the Appeals Chamber has improperly allowed hate speech to serve as the basis for a criminal conviction; second, the Appeals Chamber has misapplied the standard that it articulates by failing to link Appellant Nahimana directly to the widespread and systematic attack.

4. By way of clarification, when I refer to "mere hate speech," I mean speech that, however objectionable, does not rise to the level of constituting a direct threat of violence or an incitement to commit imminent lawless action.[3] Hate speech, by definition, is vituperative and abhorrent, and I

[1] To take a few examples: The Appeals Chamber explicitly holds that the Trial Chamber violated Appellant Barayagwiza's right to counsel, one of the most fundamental rights enjoyed by an accused in a criminal proceeding. Appeals Judgement, para. 173 (noting that the Trial Chamber undermined the equity of the proceedings and violated the principle of equality of arms). In addressing Appellant Ngeze's alibi defense, the Trial Chamber asserted that Ngeze's alibi was no alibi at all because, even if it were true, Ngeze still could have committed the acts with which he was charged. The Appeals Chamber finds such "pure speculation" to be an error. Appeals Judgement, para. 433. The Appeals Chamber also finds that the Trial Chamber erred when it noted that Ngeze reminded RTLM listeners not to kill Hutus accidentally instead of Tutsis. Ascribing to Ngeze the converse of this statement—that killing Tutsis at the roadblocks was acceptable—would have been an impermissible basis for finding genocidal intent. Appeals Judgement para. 569. Similarly, with regard to Appellant Barayagwiza, the Appeals Chamber finds that the Trial Chamber erred by failing to specify for what purpose it referred to Barayagwiza's pre-1994 statements at CDR meetings. If the Trial Chamber had used such statements to establish a material fact (owing to the vagueness, the purpose was impossible to discern), then there would have been a violation of the Tribunal's temporal jurisdiction. Appeals Judgement, para. 647. Again, none of the errors, in isolation, was sufficient to invalidate the Judgement, but the prevalence of these and other errors should give the Appeals Chamber greater pause.

[2] For instance, the Appeals Chamber observes that the Trial Chamber did not explicitly find that the *Impuzamugambi* whom Appellant Barayagwiza supervised at roadblocks actually killed large numbers of Tutsis. Rather, the Appeals Chamber deems the finding to have been implicit. The Appeals Chamber's conclusion was critical because Barayagwiza's supervision of the roadblocks was the only evidence of his genocidal intent following the exclusion of his statements at the pre-1994 CDR meetings. Appeals Judgement, para. 663. This is fact-finding in the first instance.

[3] *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

personally find it repugnant. But because free expression is one of the most fundamental personal liberties, any restrictions on speech—and especially any criminalization of speech—must be carefully circumscribed.

1. Mere Hate Speech is Not Criminal

5. Under customary international law and the Statute of the Tribunal, mere hate speech is not a criminal offense. Citing the obligation to ban hate speech under the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of all Forms of Racial Discrimination (CERD), the Trial Chamber held that "hate speech that expresses ethnic and other forms of discrimination violates the norm of customary international law prohibiting discrimination."[4] Although the Appeals Chamber does not address the accuracy of this statement,[5] the Trial Chamber incorrectly stated the law. It is true that Article 4 of the CERD and Article 20 of the ICCPR require signatory states to prohibit certain forms of hate speech in their domestic laws, but do not criminalize hate speech in international law. However, various states have entered reservations with respect to these provisions. Several parties to the CERD objected to any obligation under Article 4 that would encroach on the freedom of expression embodied in Article 5 of the CERD and in their own respective laws.[6] For example, France stated: "With regard to article 4, France wishes to make it clear that it interprets the reference made therein to the principles of the Universal Declaration of Human Rights and to the rights set forth in article 5 of the Convention as releasing the States Parties from the obligation to enact anti-discrimination legislation which is incompatible with the freedoms of opinion and expression and of peaceful assembly and association guaranteed by those texts."[7] With respect to Article 20 of the ICCPR, several states reserved the right not to introduce implementing legislation precisely because such laws might conflict with those states' protections of political liberty.[8] The United States has entered arguably the strongest reservations in light of the fact that the American Constitution protects even "vituperative" and "abusive" language[9] that does not qualify as a "true threat" to commit violence.[10] Critically, no state party has objected to such reservations. The number and extent of the reservations reveal that profound disagreement persists in the international community as to whether mere hate speech is or should be prohibited, indicating that Article 4 of the CERD and Article 20 of the ICCPR do not reflect a settled principle.[11] Since a consensus among states has not crystallized, there is clearly no norm under customary international law criminalizing mere hate speech.

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[4] Trial Judgement, para. 1076.
[5] Appeals Judgement, para. 987.
[6] International Convention on the Elimination of All Forms of Racial Discrimination, Reservations and Declarations, U.N. Doc. CERD/C/60/Rev. 4.
[7] *Id*. at 17. Similarly, the relevant reservation by the United States declares "[t]hat the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States." *Id.* at 28.
[8] United Nations, General Assembly, Human Rights Committee, Reservations, Declarations, Notifications and Objections Relating to the International Covenant on Civil and Political Rights and the Optional Protocols Thereto, U.N. Doc. CCPR/C/2/Rev. 3, *reproduced* in Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, Appendix at 749 (Australia), 762 (Malta), 765 (New Zealand), 770 (United Kingdom), 770 (United States) (1993).
[9] *Watts v. United States*, 394 U.S. 705, 708 (1969).
[10] *Id*. at 706, 708 (holding that a draft protester's statement that "[i]f they ever make me carry a rifle the first man I want to get in my sights is [the President]" did not qualify as a "true threat").
[11] *See* Nowak at 369 (summarizing the reservations and declarations of sixteen states restricting their interpretations of and obligations under Article 20 of the ICCPR).

6. The drafting history of the Genocide Convention bolsters this conclusion. An initial provision, draft Article III, stated: "All forms of public propaganda tending by their systematic and hateful character to provoke genocide, or tending to make it appear as a necessary, legitimate or excusable act shall be punished."[12] As the commentary to draft Article III made clear, the provision was not concerned with direct and public incitement to commit genocide, which fell under the purview of draft Article II; rather, draft Article III was aimed unequivocally at mere hate speech.[13] Importantly, the final text of the Convention did not include draft Article III or subsequent proposals by the Soviet delegation that also would have codified a ban on mere hate speech.[14] As a result, the Genocide Convention bans only speech that constitutes direct incitement to commit genocide; it says nothing about hate speech falling short of that threshold.

7. Furthermore, the only precedent of either International Tribunal to address this precise question notes that hate speech is not prohibited under the relevant statute or customary international law. The language of the *Kordić* Trial Judgement of the International Criminal Tribunal for the former Yugoslavia (ICTY) is instructive.

> The Trial Chamber notes that the Indictment against Dario Kordić is the first indictment in the history of the International Tribunal to allege [hate speech] as a crime against humanity. The Trial Chamber, however, finds that this act, as alleged in the Indictment, does not by itself constitute persecution as a crime against humanity. It is not enumerated as a crime elsewhere in the International Tribunal Statute, but most importantly, it does not rise to the same level of gravity as the other acts enumerated in Article 5. Furthermore, the criminal prohibition of this act has not attained the status of customary international law. Thus to convict the accused for such an act as is alleged as persecution would violate the principle of legality.[15]

The Prosecution did not appeal this important determination, and the Appeals Chamber did not intervene to correct a perceived error, lending credence to the notion that the *Kordić* Trial Judgement accurately reflects the law on hate speech. Notably, Article 5 of the Statute of the ICTY, including the prohibition against persecution, is virtually identical in scope to Article 3 of the Statute of the ICTR under which Nahimana was convicted.

8. In light of the reservations to the relevant provisions of the CERD and the ICCPR, the drafting history of the Genocide Convention, and the *Kordić* Trial Judgement, it is abundantly clear that there is no settled norm of customary international law that criminalizes hate speech. Similarly, a close textual analysis demonstrates that the Statute of the ICTR does not ban mere hate speech. This is as it should be because the Statute codifies established principles of international law, including those reflected in the Genocide Convention.[16] Were it otherwise, the Tribunal would violate basic principles of fair notice and legality. The Appeals Chamber asserts that finding that hate speech can constitute an act of persecution does not violate the principle of legality as the crime of persecution itself "is sufficiently precise in international law."[17] I find this statement

[12] The Secretary-General, Draft Convention on the Crime of Genocide, at 7, art. III, U.N. Doc. E/447 (26 June 1947).
[13] *Id.* at 32.
[14] U.N. Econ. & Soc. Council, 5 Apr. – 10 May 1948, Report of the Ad Hoc Committee on Genocide, at 9, U.N. Doc. E/794 (24 May 1948).
[15] *Prosecutor v. Kordić & Cerkez*, Case No. IT-95-14/2-T, Judgement, 26 February 2001, para. 209 (citations omitted).
[16] *See* The Statute 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, art. 1 (8 Nov. 1994), 33 I.L.M. 1598, 1602 (1994) ("Statute").
[17] Appeals Judgement, para. 988 n. 2264. The original French text reads: "le traitement d'un simple discours haineux comme un acte sous-jacent de persécution ne saurait en tant que tel constituer une entorse au principe de légalité puisque le crime de persécution lui-même est suffisamment défini en droit international."

puzzling. In international criminal law, a notion must be precise, not just "sufficiently precise." The Brief of *Amicus Curiae* correctly observes that "[i]n contrast to most other crimes against humanity . . . 'persecution' by its nature is open to broad interpretation."[18] Citing *Kordić*, which is given short shrift by the Appeals Chamber,[19] the Brief of *Amicus Curiae* continues: "Mindful of the attendant risks to defendants' rights, international courts have sought to ensure the 'careful and sensitive development' of the crime of persecution 'in light of the principle of *nullem crimen sine lege*'."[20] The Tribunal must proceed with utmost caution when applying new forms of persecution because, of the various crimes against humanity, persecution is one of the most indeterminate.[21] There are difficulties with the rubric or definition of persecution itself, and even more so with the vagueness of its constituent elements. The combined effect of this indeterminacy and the Tribunal's desire to address effectively such an egregious crime as persecution is to gravitate towards expansion through judicial decisions. Understandable as such tendency is, it may clash, as in the present case, with the fundamental principle of legality.

2. Why Hate Speech is Protected

9. The debate over the wisdom of protecting hate speech has raged for decades, and I do not purport to summarize the debate here. While some scholars have defended the protection of hate speech on the ground that tolerant societies must themselves exemplify tolerance or that the best antidote to malevolent speech is rational counterargument (rather than suppression), my objective here is more practical. Because of the extent to which hate speech and political discourse are often intertwined, the Tribunal should be especially reluctant to justify criminal sanctions for unpopular speech.

10. From an *ex post* perspective, courts and commentators may often be tempted to claim that no harm, and in fact much good, could come from the suppression of particularly odious ideas. In many instances, hate speech seems to have no capacity to contribute to rational political discourse. What, then, is its value? The reason for protecting hate speech lies in the *ex ante* benefits. The protection of speech, even speech that is unsettling and uncomfortable, is important in enabling political opposition, especially in emerging democracies. As *amicus curiae* in the instant case, the Open Society Justice Initiative has brought to the Tribunal's attention numerous examples of regimes' suppressing criticism by claiming that their opponents were engaged in criminal incitement. Such efforts at suppression are particularly acute where political parties correspond to ethnic cleavages. As a result, regimes often charge critical journalists and political opponents with "incitement to rebellion" or "incitement to hatred."[22] The threat of criminal prosecution for legitimate dissent is disturbingly common,[23] and officials in some countries have explicitly cited the example of RTLM in order to quell criticism of the governing regimes.[24] "[S]weepingly overbroad definitions of what constitutes actionable incitement enabled governments to threaten and often punish the very sort of probing, often critical, commentary about government that is of vital

[18] Brief of *Amicus Curiae*, p. 27.
[19] Appeals Judgement, para. 988 n. 2264.
[20] Brief of *Amicus Curiae*, p. 27.
[21] *Cf.*, Appeals Judgement, para. 985 n. 2255, para. 988 n. 2264.
[22] Brief of *Amicus Curiae*, p. 4.
[23] *See* Brief of *Amicus Curiae*, pp. 5-8.
[24] Brief of *Amicus Curiae*, p. 5 ("Repressive governments in countries with genuine ethnic problems have increasingly used the example of RTLM as an excuse to clamp down on legitimate criticism in the local press and civil society . . . ." (internal quotation marks omitted)).

importance to a free society."[25] In short, overly permissive interpretations of incitement can and do lead to the criminalization of political dissent.

11. The *ex ante* benefit of protecting political dissent, especially in nascent democracies, is the reason that speakers enjoy a wide berth to air their viewpoints, however crassly presented. Even when hate speech appears to be of little or no value (the so-called "easy cases"), criminalizing speech that falls short of true threats or incitement chills legitimate political discourse, as various countries have recognized. In South Africa, one of the few countries that has removed certain hate speech from constitutional protection, speech may be criminalized only when it "constitutes incitement to cause harm."[26] Similarly, the American Constitution does not protect "true threats"[27] or incitement designed and likely to provoke imminent lawless action.[28] However, "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[29]

12. The Statute of the ICTR explicitly prohibits genocide and incitement to commit genocide.[30] When hate speech rises to the level of inciting violence or other imminent lawless action, such expression does not enjoy protection. But for the reasons explained above, an attempt, under the rubric of persecution, to criminalize unsavory speech that does not constitute actual imminent incitement might have grave and unforeseen consequences. Thus, courts must remain vigilant in preserving the often precarious balance between competing freedoms.

### 3. Mere Hate Speech May Not Be the Basis of a Criminal Conviction

13. In upholding Appellant Nahimana's conviction, the Appeals Chamber has impermissibly predicated the conviction on mere hate speech. As noted above, my colleagues do not decide whether hate speech, without more, can be the *actus reus* of persecution under the Statute, but hate speech nonetheless is an important and decisive factor in the conviction for persecution.[31] In effect, the Appeals Chamber conflates hate speech and speech inciting to violence and states that both kinds of speech constitute persecution.[32] This, to my mind, is a distinction without a meaningful difference.

14. I agree with the Appeals Chamber that under the Tribunal's jurisprudence, cumulative convictions under different statutory provisions are permissible as long as each provision has at least one distinct element that the Prosecution must prove separately.[33] The same act – here, Nahimana's responsibility for the post-6 April RTLM broadcasts – may form the basis for convictions of direct and public incitement to commit genocide as well as persecution; however, the unique element of persecution is that the acts must be part of a widespread and systematic attack on

[25] Brief of *Amicus Curiae*, p. 8.
[26] S. Afr. Const. ch. 2, § 16(2)(c).
[27] *Watts v. United States*, 394 U.S. 705, 708 (1969).
[28] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).
[29] *Texas v. Johnson*, 491 U.S. 397, 414 (1989).
[30] Articles 6(1) & 6(3) of the Statute.
[31] *See* Appeals Judgement, paras 987-88.
[32] Appeals Judgement, para. 988. The original French text reads: "La Chambre d'appel conclut donc que les discours haineux et les discours appelant à la violence contre les Tutsis tenus après le 6 avril 1994 . . . constituent en eux-mêmes des actes de persécution."
[33] Appeals Judgement, para. 1019.

a civilian population.[34] Because of Nahimana's responsibility for the post-6 April broadcasts, the only remaining question concerns whether the unique element of persecution existed.

15. One might argue that the post-6 April broadcasts in themselves are enough to establish the existence of a widespread and systematic attack on a civilian population. The Appeals Chamber recognizes the weakness of such a conclusion; otherwise, the analysis would have been much more straightforward and would not have required a finessing of the hate speech question.[35] Clearly, then, the existence of mere hate speech contributed to the Appeals Chamber's finding of a widespread and systematic attack. My distinguished colleagues defend this approach by noting (1) that "underlying acts of persecution can be considered jointly"[36] and (2) that "it is not necessary that . . . underlying acts of persecution amount to crimes in international law."[37] According to this view, hate speech, though not criminal, may be considered along with other acts in order to establish that the Appellant committed persecution.

16. The fundamental problem with this approach is that it fails to appreciate that speech is unique—expression which is not criminalized is protected. As Justice Oliver Wendell Holmes has observed: "Every idea is an incitement."[38] But in the case of conflicting liberties, a balance must be struck, and speech that falls on the non-criminal side of that balance enjoys special protection. This stands in stark contrast to other non-criminal acts that have no such unique status and indeed may contribute to the aggregate circumstances a court can consider.[39] The Appeals Chamber, even without deciding whether hate speech alone can justify a conviction, nevertheless permits protected speech to serve as a basis for a conviction for persecution. Such a tack abrogates the unique status accorded to non-criminal expression and, in essence, criminalizes non-criminal speech.

4. Nexus Between Nahimana and the Widespread and Systematic Attack

17. Having discussed my objections to the legal question of what role, if any, mere hate speech may play in justifying a conviction for persecution, I turn now to a factual problem. In describing the widespread and systematic attack on a civilian population that must underpin the conviction, the Appeals Chamber takes cognizance of a campaign "characterised by acts of violence (killings, ill-treatments, rapes, . . .) and of destruction of property."[40] Nowhere in the Judgement, however, does the Appeals Chamber establish a nexus between these vile acts and Appellant Nahimana. Unless there is a causal nexus between the underlying acts committed by an accused and the systematic attack to which they contributed, a conviction for persecution would be based on guilt by association.

18. The Appeals Chamber notes that mere hate speech "contributed" to the other acts of violence and thus constituted an instigation to persecution.[41] It also observes that the hate speech

[34] Appeals Judgement, para. 1034.
[35] *See* Appeals Judgement, paras 983-88, 995-96.
[36] Appeals Judgement, para. 987. The original French text reads "les actes sous-jacents de persécution peuvent être considérés ensemble."
[37] Appeals Judgement, para. 985. The original French text reads: "il n'est pas nécessaire que ces actes sous-jacents constituent eux-mêmes des crimes en droit international."
[38] *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).
[39] *See, e.g.*, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004, paras 1049, 1067 (treating denial of employment as a factor that can contribute to persecution).
[40] Appeals Judgement, para. 988.
[41] Appeals Judgement, para. 988.

occurred in the midst of a "broad campaign of persecution against the Tutsi population."[42] While the Appeals Chamber has thus correctly recognized the necessity of establishing a causal nexus between Nahimana's actions and the widespread and systematic attack, it has marshaled no evidence to this effect. The supposed nexus rests on nothing more than *ipse dixit* declarations that Nahimana's hate speech "contributed" to a larger attack.[43]

19. It is true that Nahimana's responsibility for the post-6 April broadcasts occurred within the same temporal and geographic context as the wider Rwandan genocide. Generalizations about the atrocities that took place, though, cannot convert Nahimana's conviction for direct and public incitement to commit genocide into a conviction for persecution as well. It is quite possible that a direct link exists between Nahimana's actions and the wider attack, but a vague appeal to various killings, rapes, and other atrocities does not pass muster under norms of legality and due process.

20. The conclusion, then, is that the evidence of Nahimana's connection to a widespread attack rests on only two sources: first, certain post-6 April broadcasts, which the Appeals Chamber itself deemed insufficient when considered alone, to establish that such an attack took place; and, second, non-criminal hate speech, which I have argued should not form the basis, in whole or in part, of any conviction. Nahimana's conviction for persecution is thus left on extremely weak footing and cannot stand.

21. For the foregoing reasons, I believe that the Appeals Chamber should have reversed Nahimana's conviction for persecution.

### 5. Nahimana's Sentence

22. Because I would reverse the conviction of Appellant Nahimana for persecution, I believe that the only conviction against him that can stand is for direct and public incitement to commit genocide under Article 6(3) and based on certain post-6 April broadcasts. Despite the severity of this crime, Nahimana did not personally kill anyone and did not personally make statements that constituted incitement. In light of these facts, I believe that the sentence imposed is too harsh, both in relation to Nahimana's own culpability and to the sentences meted out by the Appeals Chamber to Barayagwiza and Ngeze, who committed graver crimes. Therefore, I dissent from Nahimana's sentence.

[42] Appeals Judgement, para. 995. The original French text reads: "une vaste campagne de violence à l'encontre de la population tutsie."
[43] Appeals Judgement, paras. 988, 995.

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

[Signed]

Theodor Meron
Judge

Signed 22 November 2007 at The Hague, The Netherlands,
and rendered 28 November 2007 at Arusha, Tanzania.

[Seal of the Tribunal]

# ANNEX A

# PROCEDURAL BACKGROUND

1. The Trial Chamber rendered its Judgement in the present case on 3 December 2003.[1] Ferdinand Nahimana ("Appellant Nahimana"), Jean-Bosco Barayagwiza ("Appellant Barayagwiza") and Hassan Ngeze ("Appellant Ngeze") lodged appeals. The main aspects of the appeal proceedings are summarized hereafter.

## A. Assignment of Judges

2. By Orders of 17 and 19 December 2003 the following Judges were assigned to hear the appeal: Judges Theodor Meron (presiding), Mohammed Shahabuddeen, Florence Mumba, Fausto Pocar and Inés Mónica Weinberg de Roca, who was designated Pre-Appeal Judge.[2] On 15 July 2005, Judge Andrésia Vaz was assigned to replace Judge Inés Mónica Weinberg de Roca, with effect from 15 August 2005;[3] Judge Andrésia Vaz was also designated Pre-Appeal Judge.[4] On 18 November 2005, Judge Liu Daqun was assigned to replace Judge Florence Mumba[5] and, on 24 November 2005, Judge Mehmet Güney was assigned to replace Judge Liu Daqun.[6]

## B. Filing of written submissions

### 1. Appellant Nahimana

3. On 19 December 2003, following a motion by Appellant Nahimana for extension of time to file his Notice of Appeal,[7] the Pre-Appeal Judge ordered the Appellant to file his Notice of Appeal and his Appellant's Brief within 30 and 75 days respectively from the communication of the French translation of the Judgement.[8] An uncertified French version of the Judgement having been made available on 5 April 2004, the Appellant filed his Notice of Appeal on 4 May 2004.[9] He filed a first Brief on 17 June 2004.[10] Since this did not comply with the applicable Practice Directions, in

[1] *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003 ("Judgement"). The English version of the Judgement (being authoritative) was filed on 5 December 2003. An uncertified French translation of the Judgement was filed on 5 April 2004. The certified French translation of the Judgement was filed on 8 March 2006.

[2] Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 17 December 2003; Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 19 December 2003, ordering that *Hassan Ngeze v. The Prosecutor* and *Ferdinand Nahimana and Jean-Bosco Barayagwiza v. The Prosecutor* be treated as a single case.

[3] Order replacing a Judge in a case before the Appeals Chamber, 15 July 2005.

[4] Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 August 2005; see also Corrigendum to the Order entitled "Order of the Presiding Judge Designating the Pre-Appeal Judge," 25 August 2005.

[5] Order Replacing a Judge in a Case before the Appeals Chamber, 18 November 2005.

[6] Order Replacing a Judge in a Case before the Appeals Chamber, 24 November 2005.

[7] Defence Motion for extension of time to file the Notice of Appeal of the Judgement delivered on 3 December 2003 against Ferdinand Nahimana (Rules 108 and 116 of the Rules of Procedure and Evidence), 12 December 2003.

[8] Decision on Motions for an Extension of Time to File Appellants' Notices of Appeal and Briefs, 19 December 2003. See also Decision on Ngeze's Motion for Clarification of the Schedule and Scheduling Order, 2 March 2004, p. 4 (ordering the three Appellants to file their Notices of Appeal and Appellant's Briefs no later than 30 and 75 days respectively from the communication of the Judgement in the French language).

[9] Notice of Appeal, 4 May 2004.

[10] *The Prosecutor v. Ferdinand Nahimana et al.,* Case No. ICTR-99-52-A, *Mémoire d'appel*, 17 June 2004. On 25 May 2004 (Decision Denying Further Extension of Time), the Pre-Appeal Judge rejected the Appellant's motion for

particular in regard to page limits, on 24 June 2004 the Pre-Appeal Judge ordered the Appellant to file a new Brief by 9 July 2004 that was consistent with the Rules and the Practice Directions.[11] On 8 July 2004, the Appellant requested the full bench of the Appeals Chamber to grant him leave to file an Appellant's Brief which, although shorter than the Brief filed on 17 June 2004, still exceeded the prescribed page limits.[12] Before the Appeals Chamber had rendered a decision on the matter, the Appellant filed this new Appellant's Brief.[13] On 31 August 2004, the Appeals Chamber dismissed the Appellant's motion and ordered him to file a new version of his Appellant's Brief consistent with the Rules and the Practice Directions.[14] The Appellant filed confidentially a new Brief with annexes on 27 September 2004.[15] A public version of this Brief was filed on 1 October 2004.

4. Following the filing of the Respondent's Brief (in English only) on 22 November 2005, the Pre-Appeal Judge instructed the Registrar to provide a French translation to Appellant Nahimana by 31 March 2006, specifying that the Appellant would then have 15 days in which to file his Reply.[16] The Appellant received the French translation of the Respondent's Brief only on 7 April 2006. He filed his Brief in Reply on 21 April 2006.[17]

### 2. Appellant Barayagwiza

5. On 19 December 2003, following a motion by Appellant Barayagwiza for extension of time to file his Notice of Appeal,[18] the Pre-Appeal Judge ordered the Appellant to file his Notice of Appeal and his Appellant's Brief within 30 and 75 days respectively from the communication of the French translation of the Judgement.[19] On 3 February 2004, the Appellant in person (and not his Counsel) filed a "notice of request for annulment" of the Judgement.[20] Counsel for the Appellant filed a Notice of Appeal on 22 April 2004[21] and the Appellant in person filed an amended Notice of

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extension of time to file his Appellant's Brief (Defence Motion for extension of time to file the Appellant's Brief and time to present additional evidence, 14 May 2004, re-filed on 18 May 2004).

[11] Decision on Ferdinand Nahimana's Motion for an Extension of Page Limits for Appellant's Brief and on Prosecution's Motion Objecting to Nahimana Appellant's Brief, 24 June 2004.

[12] *Requête de la Défense aux fins de dépôt du mémoire d'appel révisé*, 8 July 2004.

[13] *The Prosecutor v. Ferdinand Nahimana*, Appellant's Brief (Revised), 20 July 2004.

[14] Decision on Ferdinand Nahimana's Second Motion for an Extension of Page Limits for Appellant's Brief, 31 August 2004.

[15] *The Prosecutor v. Ferdinand Nahimana*, Appellant's Brief (Revised), filed confidentially on 27 September 2004.

[16] Scheduling Order Concerning the Filing of Ferdinand Nahimana's Reply to the Consolidated Respondent's Brief, 6 December 2005.

[17] Defence Reply, 21 April 2006. On 20 April 2006, the Pre-Appeal Judge rejected the Appellant's motion for leave to file his Defence Reply of 60 pages or 18,000 words, on grounds that he had failed to establish the existence of exceptional circumstances justifying his exceeding the page limits prescribed by the Practice Directions: *Décision sur la requête de Ferdinand Nahimana aux fins d'extension du nombre de pages autorisées pour la réplique de la Défense*, 20 April 2006.

[18] *Requête de la Défense aux fins de report du délai de dépôt de l'acte d'appel contre le Jugement rendu le trois décembre 2003 contre Jan Bosco (sic) Barayagwiza (articles 108 et 116 du Règlement de procédure et de preuve),* 17 December 2003.

[19] Decision on Motions for an Extension of Time to File Appellants' Notices of Appeal and Briefs, 19 December 2003. The Decision on Ngeze's Motion for Clarification of the Schedule and Scheduling Order, 2 March 2004, and the Decision on Barayagwiza's Motion for Determination of Time Limits, 5 March 2004, reconfirmed those time limits.

[20] Notice of request for annulment of the Judgement rendered on 3 December 2003 by Chamber I in "*The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, ICTR-99-52-T," 3 February 2004. On 2 March 2004, the Pre-Appeal Judge granted leave to the Appellant to amend the said notice at any time prior to the deadline for filing the Notices of Appeal: Decision on Ngeze's Motion for Clarification of the Schedule and Scheduling Order, 2 March 2004, p. 4.

[21] Notice of Appeal (pursuant to Article 24 of the Statute and Rule 108 of the Rules), 22 April 2004.

Appeal on 27 April 2004.[22] Following an order requesting him to indicate which document he intended to rely on as his Notice of Appeal,[23] the Appellant designated the Amended Notice of Appeal filed on 27 April 2004.[24]

6. On 19 May 2004, the Appeals Chamber stayed proceedings against the Appellant until various problems relating to his representation were resolved.[25] The Pre-Appeal Judge ended this stay of proceedings on 26 January 2005 and ordered the Appellant to file any Amended or New Notice of Appeal no later than 21 February 2005, and any Amended or New Appellant's Brief no later than 9 May 2005.[26] At a Status Conference held on 1 April 2005, the Pre-Appeal Judge granted leave to the Appellant to file his Appellant's Brief no later than 75 days from the assignment of a full team to defend him, while any amendment to the Notice of Appeal was to be filed within the following week.[27] The Appellant filed a new motion before the Appeals Chamber for a further extension of time.[28] On 17 May 2005, the Appeals Chamber granted leave to the Appellant to file an amended Notice of Appeal and a new Appellant's Brief not later than four months after a full Defence team had been assigned.[29] Appellant Barayagwiza filed his Notice of Appeal and Appellant's Brief on 12 October 2005.[30]

7. As noted above, the Prosecutor filed his Respondent's Brief on 22 November 2005, but this document was not communicated to Appellant Barayagwiza and his Lead Counsel until some days later.[31] On 6 December 2005, the Pre-Appeal Judge granted in part a motion of Appellant Barayagwiza, allowing him to file his Reply by not later than 15 December 2005, but dismissing his request to exceed the number of pages allowed.[32] On 12 December 2005, the Appellant filed his Brief in Reply.[33]

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[22] *Acte d'appel modifié aux fins d'annulation du jugement rendu le 03 décembre 2003 par la Chambre I dans l'affaire "Le Procureur contre Ferdinand Nahimana, Jean-Bosco Barayagwiza et Hassan Ngeze*, ICTR-99-52-T," 27 April 2004.

[23] Order Concerning Multiple Notices of Appeal, 3 May 2004

[24] *Notification sur la détermination de mon Acte d'appel*, filed in person by Appellant Barayagwiza on 5 May 2004.

[25] Decision on Jean-Bosco Barayagwiza's Motion Appealing Refusal of Request for Legal Assistance, 19 May 2004. See also *infra* I. C. 1

[26] Order Lifting the Stay of Proceedings in Relation to Jean-Bosco Barayagwiza, 26 January 2005. On 31 January 2005, the Appellant filed a "*Demande de sursis à l'application de l'Ordonnance du 26 janvier 2005*", which was dismissed on 4 February 2005 (Order Concerning Filing by Jean-Bosco Barayagwiza).

[27] T(A) Status Conference of 1 April 2005, p. 20.

[28] Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice, filed confidentially on 2 May 2005.

[29] Decision on "Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice", 17 May 2005. At the same time, the Appeals Chamber dismissed a series of requests for extension of the page limits of the Appellant's Brief, additional visits to Arusha and communication between the Appellant and the Defence team. Regarding the time limits for filing the Notice of Appeal and the Appellant's Brief, see also the Decision on Clarification of Time Limits and on Appellant Barayagwiza's Extremely Urgent Motion for Extension of Time to File his Notice of Appeal and his Appellant's Brief, 6 September 2005.

[30] Amended Notice of Appeal, 12 October 2005; Appellant's Appeal Brief, 12 October 2005. By Order of 14 November 2005 (Order Concerning Appellant Jean-Bosco Barayagwiza's Filings of 7 November 2005), the Appeals Chamber rejected the versions of Barayagwiza's Notice of Appeal and Appellant's Brief filed without leave on 7 November 2005.

[31] See Decision on Jean-Bosco Barayagwiza's and Hassan Ngeze's Urgent Motions for Extension of Page and Time Limits for their Replies to the Consolidated Prosecution Response, 6 December 2005, pp. 5-6.

[32] Decision on Jean-Bosco Barayagwiza's and Hassan Ngeze's Urgent Motions for Extension of Page and Time Limits for Their Replies to the Consolidated Prosecution Response, 6 December 2005; Corrigendum to the "Decision on Jean-Bosco Barayagwiza's and Hassan Ngeze's Urgent Motions for Extension of Page and Time Limits for their Replies to the Consolidated Prosecution Response", 7 December 2005.

[33] The Appellant Jean-Bosco Barayagwiza's Reply to the Consolidated Respondent's Brief, 12 December 2005.

8. On 17 August 2006, the Appeals Chamber dismissed Appellant Barayagwiza's motions to add seven further grounds of appeal to his Appellant's Brief and to amend his Notice of Appeal accordingly; however, it granted the Appellant's motion to correct his Appellant's Brief.[34] By Decision of 30 October 2006, the Pre-Appeal Judge granted Appellant Barayagwiza's motion to correct grammatical and typing errors in his Brief in Reply; it also accepted in part 2 of the 19 corrections proposed by the Appellant to the French translation of his Brief in Reply.[35]

### 3. Appellant Ngeze

9. On 19 December 2003, following Appellant Ngeze's motion seeking an extension of time for filing his Notice of Appeal,[36] the Pre-Appeal Judge ordered the Appellant to file this Notice by 9 February 2004 and his Appellant's Brief not later than 75 days from that date.[37] On 6 February 2004, the Pre-Appeal Judge granted leave to the Appellant to file his Notice of Appeal not later than 30 days from the communication of the French translation of the Judgement, and his Appellant's Brief not later than 75 days from such communication.[38] Counsel for Appellant Ngeze nonetheless filed a Notice of Appeal on 9 February 2004.[39] The Appellant was subsequently granted leave to amend this Notice of Appeal not later than 30 days from the communication of the French translation of the Judgement, and to file his Appellant's Brief not later than 75 days from such communication.[40] On 30 April 2004, the Appellant (and not his Counsel) filed a document apparently amending the Notice of Appeal of 9 February 2004.[41] On 5 May 2004, the Pre-Appeal Judge ordered Appellant Ngeze to indicate clearly which document he intended to rely on as his Notice of Appeal.[42] Since the Appellant's response in person did not comply with the directives he had been given,[43] the Pre-Appeal Judge ordered that the Notice of Appeal filed by the Appellant's Counsel on 9 February 2004 be considered as the Notice of Appeal.[44]

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[34] Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct his Appellant's Brief, 17 August 2006.

[35] Decision on Barayagwiza's Corrigendum Motions of 5 July 2006, 30 October 2006. The Pre-Appeal Judge noted, however, that it would have been sufficient to file a corrigendum.

[36] Motion of the Ngeze Defence Seeking an Extension of Time for Filing the Notice of Appeal (Pursuant [to] Rules 7, 108 and 116 of the Rules of Procedure and Evidence), 19 December 2003.

[37] Decision on Motions for an Extension of Time to File Appellants' Notices of Appeal and Briefs, 19 December 2003.

[38] Decision on Ngeze's Motion for an Additional Extension of Time to File his Notice of Appeal and Brief, 6 February 2004.

[39] Defence Notice of Appeal (Pursuant to [Rule] 108 of the Rules of Procedure and Evidence), 9 February 2004.

[40] Decision on Ngeze's Motion for Clarification of the Schedule and Scheduling Order, 2 March 2004, p. 4.

[41] Prisoner Hassan Ngeze 1st amendment of appeal notice. Pursuant to Rule 108 of the Rules of Procedure and Evidence, 30 April 2004.

[42] Order Concerning Ngeze's Amended Notice of Appeal, 5 May 2004, p. 3. The Pre-Appeal Judge also ordered the Appellant – in case he elected to rely jointly on the Notice of Appeal filed on 9 February 2004 and the amendment of 30 April 2004, or elected to maintain only the amendment of 30 April 2004 – to re-file, not later than 12 May 2004, a single Notice of Appeal complying with the Rules and the Practice Directions.

[43] The Appellant merely indicated that both the Notice of Appeal of 9 February 2004 and the document of 30 April 2004 formed his Notice of Appeal: The Appellant Hassan Ngeze Clarification of What Will Be his Notice of Appeal as per Appeal Order Concerning Ngeze's Amendment Notice of Appeal of May 5th 2004, Document (A) and (B) to Be Considered as a Single Notice of Appeal, 10 May 2004.

[44] Order Concerning Filings by Hassan Ngeze, 24 May 2004, pp. 3-4. By this Order, the Pre-Appeal Judge also rejected the two motions filed by the Appellant (The Appellant Motion to Compel the Registrar to Disclose Report Made by Jean Pele Fometé, with the UNDF Report Cited in Media Judgement Paragraph 84 Page 23, for the Purpose of my Appeal Notice and Brief, filed confidentially on 6 May 2004; Appellant Hassan Extremely Urgent Memorandum Requesting the Appeal Chamber to Disregard and Reject in Totality what Counsel John Floyd Filed on 10th May 2004 which he Called [*sic*] Ngeze Counsel Memorandum Regarding the Notice of Appeal, 12 May 2004), and ordered the

10. Following the dismissal of further motions filed by Appellant Ngeze seeking an extension of time to file his Brief,[45] an Appeal Brief was filed on behalf of the Appellant on 21 June 2004.[46] The assignment of the Appellant's Counsel terminated on the same day.[47] The Pre-Appeal Judge ordered a stay of proceedings against the Appellant until another Counsel was assigned, and granted leave to the Appellant to file a revised Notice of Appeal and a new Appellant's Brief following the assignment.[48] Mr. Bharat Chadha, Co-Counsel assigned to the Appellant since 6 May 2004, was eventually appointed Lead Counsel for the Appellant on 17 November 2004.[49] In response to a further motion by the Appellant for an extension of time,[50] the Pre-Appeal Judge ordered him to file any motion to amend his Notice of Appeal by 17 December 2004, and to file his Appellant's Brief by 1 March 2005.[51] Time for filing an amended Notice of Appeal and Appellant's Brief was again extended on 15 December 2004[52] and on 4 February 2005.[53] Appellant Ngeze finally filed a confidential version of his Appellant's Brief on 2 May 2005,[54] and a confidential version of his Notice of Appeal on 9 May 2005.[55]

11. Following the filing of the Prosecutor's Respondent's Brief on 22 November 2005, the Pre-Appeal Judge granted in part a motion by Appellant Ngeze, allowing him to file his Reply by 15 December 2005, but dismissing his request to exceed the page limits.[56] On 15 December 2005, the Appellant filed his Brief in Reply.[57]

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Appellant to file all documents through his Counsel. This Order was subsequently reconfirmed: Order Concerning Filings by Hassan Ngeze, 17 September 2004.

[45] Order Concerning Ngeze's Motion, 5 May 2004; Decision Denying Further Extension of Time, 25 May 2004. On 2 March 2004, the Pre-Appeal Judge rejected the Appellant Ngeze's motion seeking leave to exceed the number of pages prescribed for the Appellant's Brief: Decision on Ngeze's Motion for an Extension of Page Limits for Appeals Brief, 2 March 2004. The Pre-Appeal Judge also rejected the Appellant's motion seeking review of this decision: Decision on Ngeze's Motion for Reconsideration of the Decision Denying an Extension of Page Limits [to] his Appellant's Brief, 11 March 2004.

[46] Defence Appeal Brief (Pursuant to Rule 111 of the Rules of Procedure and Evidence), 21 June 2004.

[47] Decision of Withdrawal of Mr. John C. Floyd III as Lead Counsel for the Accused Hassan Ngeze, 21 June 2004 (Registrar's Decision).

[48] Decision on Ngeze's Motion for a Stay of Proceedings, 4 August 2004.

[49] The delay in appointing Counsel was due to the Appellant's refusal to comply with certain procedures. The Appeals Chamber, considering that further delays in the appointment of Counsel for the Appellant could affect negatively the rights of the other Appellants, ordered the Registrar to assign the person selected by the Appellant (Co-Counsel Chadha) before 18 November 2004, despite the Appellant's failure to observe the formalities: Order Concerning Appointment of Lead Counsel to Hassan Ngeze, 11 November 2004, p. 3.

[50] Appellant Hassan Ngeze's Motion for the Grant of Extension of Time to File Motion for the Amendment of Notice of Appeal and Appeal Brief, 29 November 2004.

[51] Decision on Hassan Ngeze's Motion for an Extension of Time, 2 December 2004.

[52] The Appellant was granted leave to file his amended Notice of Appeal and amended Appellant's Brief simultaneously on 1 April 2005, due to his new Co-Counsel's delay in taking up office: Oral Decision on Ngeze's Extremely Urgent Motion for Reconsideration of the Decision on Motion for Extension of Time, 15 December 2004.

[53] The Appellant was granted leave to file his Appellant's Brief by 2 May 2005, and any amendment to his Notice of Appeal by 9 May 2005: Decision on Hassan Ngeze's Motion for an Extension of Time, 4 February 2005. On 27 April 2005, the Pre-Appeal Judge rejected a new motion for extension of time: Decision Concerning Appellant Hassan Ngeze's Extremely Urgent Motion for the Extension of Time, 27 April 2005.

[54] Appellant's Brief (Pursuant to Rule 111 of the Rules of Procedure and Evidence), 2 May 2005.

[55] Amended Notice of Appeal, 9 May 2005.

[56] Decision on Jean-Bosco Barayagwiza's and Hassan Ngeze's Urgent Motions for Extension of Page and Time Limits for their Replies to the Consolidated Prosecution Response, 6 December 2005; Corrigendum to the "Decision on Jean-Bosco Barayagwiza's and Hassan Ngeze's Urgent Motions for Extension of Page and Time Limits for their Replies to the Consolidated Prosecution Response", 7 December 2005.

[57] Appellant Hassan Ngeze's Reply Brief (Rule 113 of the Rules of Procedure and Evidence), 15 December 2005.

12. On 30 August 2007, the Appeals Chamber ordered the Appellant to file within 30 days public versions of his Notice of Appeal and Appellant's Brief.[58] The Appellant filed public versions of those filings on 27 September 2007.[59] Having noted that only Annexes 4 and 5 of the public version of Appellant Ngeze's Brief contained redacted portions and that there were discrepancies, both editorial and substantive, between the public and confidential versions of the said Brief, the Appeals Chamber decided (1) to lift the confidentiality of the Appellant's Brief filed on 2 May 2005, save for Annexes 4 and 5; (2) to regard Annexes 4 and 5 of the Appellant's Brief filed on 27 September 2007 as the public version of Annexes 4 and 5; (3) to declare the remainder of the Appellant's Brief filed on 27 September 2007 inadmissible.[60]

### 4. The Prosecutor

13. On 24 June 2004, the Pre-Appeal Judge clarified the time limits applicable to the filing of the Respondent's Brief, namely 40 days from the filing of each Appellant's Brief or 40 days from the filing of the last Appellant's Brief if the Prosecution intended to file a single consolidated Respondent's Brief.[61] On 15 November 2005, the Pre-Appeal Judge granted in part the Prosecutor's motion, allowing him to file a consolidated Respondent's Brief of up to 200 pages or 60,000 words.[62] The Prosecutor filed his Respondent's Brief in English on 22 November 2005.[63] On 30 November 2005, the Pre-Appeal Judge rejected Annexures A through G of Appendix A to the Respondent's Brief.[64]

### 5. *Amicus Curiae* Brief

14. On 12 January 2007, the Appeals Chamber granted leave to the NGO, "Open Society Justice Initiative," to file an *Amicus Curiae* Brief; it also granted leave to the parties to respond to the said Brief,[65] which they did within the prescribed time limit.[66]

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[58] Order to Appellant Hassan Ngeze to File Public Versions of his Notice of Appeal and Appellant's Brief, 30 August 2007.

[59] Amended Notice of Appeal (Pursuant to the Order of the Appeals Chamber of [*sic*] dated 30 August 2007 to Appellant Hassan Ngeze to File Public Version of his Notice of Appeal and Appellant's Brief), 27 September 2007; Appeal Brief (Pursuant to the Order of the Appeals Chamber of [*sic*] dated 30 August 2007 to Appellant Hassan Ngeze to File Public Version of his Notice of Appeal and Appellant's Brief), 27 September 2007.

[60] Order Concerning Appellant Hassan Ngeze's Filings of 27 September 2007, dated 4 October 2007, but filed on 5 October 2007. The Appeals Chamber also sanctioned the Appellant's Counsel for not complying with the explicit instructions given in the Order of 30 August 2007.

[61] Decision on Ferdinand Nahimana's Motion for an Extension of Page Limits for Appellant's Brief and on Prosecution's Motion Objecting to Nahimana Appellant's Brief, 24 June 2004.

[62] Decision on the Prosecutor's Extremely Urgent Motion for Extension of Page Limits, 15 November 2005.

[63] Consolidated Respondent's Brief, 22 November 2005. The French translation of this document was filed on 4 April 2006 and communicated to the parties on 7 April 2006.

[64] Order Expunging from the Record Annexures "A" through "G" of Appendix "A" to the Consolidated Respondent's Brief Filed on 22 November 2005, 30 November 2005.

[65] Decision on the Admissibility of the *Amicus Curiae* Brief Filed by the "Open Society Justice Initiative" and on its Request to Be Heard at the Appeals Hearing, 12 January 2007.

[66] The Appellant Jean-Bosco Barayagwiza's Response to the *Amicus Curiae* [Brief] filed by "Open Society Justice Initiative," 8 February 2007; *Réponse au mémoire de l'*amicus curiae, 12 February 2007; Appellant Hassan Ngeze's Response to *Amicus* Brief Pursuance [*sic*] to the Appeal [*sic*] Chamber's Decision of 12.01.2007, 12 February 2007; Prosecutor's Response to the "*Amicus Curiae* Brief in *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor*," 12 February 2007.

### 6. Six new grounds of appeal submitted by Appellant Barayagwiza

15. On 5 March 2007, the Appeals Chamber rejected the Prosecutor's motion[67] repeating his oral request[68] that the Chamber disregard certain arguments made by Appellant Barayagwiza at the appeals hearing on 17 January 2007; however, it granted the Prosecutor leave to file a written response to the new grounds raised by Appellant Barayagwiza,[69] which he did on 14 March 2007.[70] On 21 March 2007, Appellant Barayagwiza filed his reply.[71]

## C. Representation of the Appellants

### 1. Appellant Barayagwiza's representation

16. On 25 March 2004, Appellant Barayagwiza filed a "Very urgent motion to appeal refusal of request for legal assistance," in which he made a number of complaints against Counsel Barletta-Caldarera (his Counsel at the time) and requested the Appeals Chamber to instruct the Registrar to assign new Counsel to represent him. On 19 May 2004, the Appeals Chamber decided that, although the Appellant had not clearly requested withdrawal of his Counsel Barletta-Caldarera, it had to be understood that this was what he was requesting; the Appeals Chamber then instructed the Registrar to take a decision on this request.[72] After discussions with the parties concerned,[73] the Registrar withdrew the assignment of Counsel Barletta-Caldarera on 24 June 2004.[74] On 7 September 2004, the Appellant personally filed a "*Demande d'arrêt définitif des procédures pour abus de procédure*," alleging that the Registrar's failure to assign new Counsel amounted to an abuse of process. The Registrar submitted in reply that the delay was due to the Appellant's refusal to complete certain forms.[75] On 22 October 2004, the Appeals Chamber settled the issue by ordering the Registrar to appoint Counsel for the Appellant before 29 October 2004, even though the latter had failed to complete certain forms.[76] Following new delays due mainly to the unavailability of

[67] The Prosecutor's Motion to Pursue the Oral Request for the Appeals Chamber to Disregard Certain Arguments Made by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007, 6 February 2007.
[68] T(A) 18 January 2007, pp. 15-16.
[69] Decision on the Prosecutor's Motion to Pursue the Oral Request for the Appeals Chamber to Disregard Certain Arguments made by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007, 5 March 2007.
[70] The Prosecutor's Response to the Six New Grounds of Appeal Raised by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007, 14 March 2007.
[71] The Appellant Jean-Bosco Barayagwiza's Reply to "Prosecutor's Response to the Six New Grounds of Appeal Raised by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007", 21 March 2007. On 19 March 2007, the Appeals Chamber granted a two-day extension of time for the filing of this reply: Decision on Appellant Jean-Bosco Barayagwiza's Motion for Extension of Time, 19 March 2007. Appellant Nahimana also filed a reply to the Prosecutor's Response to the Six New Grounds of Appeal (*Réponse de la Défense à* The Prosecutor's Response to the Six New Grounds of Appeal Raised by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007, filed on 20 March 2007). In footnote 830 of this Appeal Judgement, the Appeals Chamber explains that this reply was not authorized and refuses to take it into account.
[72] Decision on Jean-Bosco Barayagwiza's Motion Appealing Refusal of Request for Legal Assistance, 19 May 2004. The Appeals Chamber also stayed proceedings against the Appellant until the Registrar had taken a decision on the Appellant's representation.
[73] On 27 May 2004, Mr. Barletta-Caldarera commented in a letter on the Appellant's complaints against him. The Appellant responded in a letter of 4 June 2004.
[74] *Décision de retrait de la commission d'office de Me. Giacomo Caldarera conseil principal de l'accusé Jean Bosco Barayagwiza*, 24 June 2004.
[75] Registrar's Representation pursuant to Rule 33(B) of the Rules of Procedure and Evidence Regarding Jean Bosco Barayagwiza's Motion for a Stay of Proceedings, 17 September 2004.
[76] Decision on Jean-Bosco Barayagwiza's Motion for Appointment of Counsel or a Stay of Proceedings, 22 October 2004, corrected on 26 October 2004 (Corrigendum to Decision on Jean-Bosco Barayagwiza's Motion for Appointment of Counsel or a Stay of Proceedings of 22 October 2004).

persons initially chosen by the Appellant,[77] Mr. Peter Donald Herbert was assigned as Lead Counsel for the Appellant by the Registrar on 30 November 2004. Subsequently, the Appeals Chamber rejected the Appellant's objection to this assignment[78] and his motion for reconsideration.[79] On 23 May 2005, the Registrar assigned Ms. Tanoo Mylvaganam as Co-Counsel for the Appellant.

17. On 27 March 2006, the Registrar denied a request by the Appellant's Lead Counsel to terminate the assignment of Co-Counsel Mylvaganam. [80] The Appellant subsequently filed a motion to review this decision,[81] which was denied on 29 August 2006 by the President of the Tribunal.[82] The Appeals Chamber confirmed this decision on 23 November 2006.[83]

2. Appellant Ngeze's representation

18. By Order of 9 June 2004, the Pre-Appeal Judge requested the Registrar to file a response by 21 June 2004 to Appellant Ngeze's request for the withdrawal of his Counsel, John Floyd III.[84] On 21 June 2004, the Registrar terminated the assignment of this Counsel.[85] The Pre-Appeal Judge subsequently ordered a stay of proceedings against the Appellant until a new Counsel was assigned.[86] On 2 November 2004, in light of the delay in the appeals proceedings due to the non-assignment of Counsel for Appellant Ngeze, the Pre-Appeal Judge ordered the Registrar to file a report on this matter by 8 November 2004, and to take the necessary measures to ensure that Counsel was appointed promptly.[87] On 11 November 2004, the Appeals Chamber ordered the Registrar to appoint Mr. Chadha as Counsel,[88] which was done on 17 November 2004.

19. On 2 December 2004, the Pre-Appeal Judge requested the Registrar to expedite the appointment of Co-Counsel.[89] The issue was further discussed at a Status Conference on 15 December 2004. On 19 January 2005, as Co-Counsel had yet to be assigned, the Pre-Appeal Judge ordered the Registrar to file a report indicating the reasons for this delay and the measures

[77] See Order to Appoint Counsel to Jean Bosco Barayagwiza, 3 November 2004, and Registrar's Representation pursuant to Rule 33(B) of the Rules of Procedure and Evidence Regarding the Appeals Chamber Decision on Jean-Bosco Barayagwiza's Motion for Appointment of Counsel or a Stay of Proceedings, 2 December 2004.
[78] Decision on Jean Bosco Barayagwiza's Motion concerning the Registrar's Decision to Appoint Counsel, 19 January 2005.
[79] Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005.
[80] Decision of the Registrar Denying the Request of the Lead Counsel Mr. Peter Herbert to Terminate the Assignment of Co-Counsel Ms. Tanoo Mylvaganam Representing the Appellant Mr. Jean-Bosco Barayagwiza, 27 March 2006.
[81] The Appellant Jean-Bosco Barayagwiza's Urgent Motion for the President of the ICTR to Review the Decision of the Registrar Relating to the Continuing Involvement of Co-Counsel, filed confidentially on 3 May 2006. The Registrar filed submissions on this motion: Registrar's Submission under Rule 33(B) in Respect of the Appellant Jean-Bosco Barayagwisa's Urgent Motion for the President of the ICTR to Review the Decision of the Registrar Relating to the Continuing Involvement of Co-Counsel, 17 May 2005.
[82] Review of the Registrar's Decision Denying Request for Withdrawal of Co-Counsel, 29 August 2006.
[83] Decision on Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel, 23 November 2006.
[84] Order to the Registrar, 9 June 2004.
[85] Decision of Withdrawal of Mr. John C. Floyd III as Lead Counsel for the Accused Hassan Ngeze, 21 June 2004.
[86] Decision on Ngeze's Motion for a Stay of Proceedings, 4 August 2004.
[87] Order to Registrar, 2 November 2004. The Registrar made his representations on 8 November 2004: Registrar's Representations pursuant to Rule 33 (B) of the Rules of Procedure and Evidence regarding the order of the Appeals Chamber regarding assignment of Counsel to Hassan Ngeze.
[88] Order Concerning Appointment of Lead Counsel to Hassan Ngeze, 11 November 2004.
[89] Decision on Hassan Ngeze's Motion for an Extension of Time, 2 December 2004.

taken to ensure that Appellant Ngeze's legal team was appointed promptly.[90] The Appellant's Lead Counsel also submitted a report on this issue.[91] Co-Counsel Behram N. Shroff was finally assigned on 26 January 2005.[92]

20. On 30 January 2006, the Registrar denied a first request by Co-Counsel Shroff[93] to withdraw from the case.[94] Co-Counsel Shroff was, however, allowed to withdraw from the case on 5 January 2007 for health reasons.[95] On 9 January 2007, Mr. Dev Nath Kapoor was assigned as Co-Counsel for the Appellant.

## D. Pre-Appeal Conferences

21. A first Status Conference was held on 15 December 2004 in the presence of Appellant Ngeze and his Lead Counsel only.[96] A second conference was held on 9 March 2005,[97] in the absence of Counsel for Appellant Barayagwiza.[98] Counsel for Appellant Barayagwiza participated in the 1 April 2005 Conference by video link.[99] On 7 April 2006, a Status Conference was held in Arusha in the absence of Counsel for Appellant Barayagwiza.[100]

[90] Order to Registrar, 19 January 2005. The Registrar filed his comments on 25 January 2005: A Report by the Registrar Indicating the Reasons for the Delay in Appointing Co-Counsel for the Appellant Ngeze and the Steps Taken by the Registrar to Ensure that Appellant Ngeze's Legal Team is Appointed Promptly.
[91] Order to Registrar, 19 January 2005. Counsel for the Appellant filed his comments on 24 January 2005: Report to the Pre-Appeal Judge – The Honourable Inés Mónica Weinberg de Roca – on the Steps Taken by the Defence to Ensure that Appellant Hassan Ngeze's Legal Team is Appointed Promptly pursuant to the Order to the Registrar of Dated [*sic*] 19th January 2005.
[92] A Report by the Registrar Indicating the Reasons for the Delay in Appointing Co-Counsel for the Appellant Ngeze and the Steps Taken by the Registrar to Ensure that Appellant Ngeze's Legal Team is Appointed Promptly, 26 January 2005.
[93] E-mail from the Co-Counsel addressed to the Registry purporting to submit his resignation with effect from 30 November 2005, 27 November 2005.
[94] Decision of the Registrar Denying the Request of the Co-Counsel Mr. Behram N. Schroff to Withdraw from Representing Appellant Mr. Hassan Ngeze, 30 January 2006.
[95] Decision for the Withdrawal of Mr. Behram Shroff as Co-Counsel of the Accused Hassan Ngeze, 5 January 2007 (Decision of the Registrar).
[96] This Status Conference was held pursuant to the Order of 14 December 2004 (Scheduling Order). Delays by the parties in making their filings, problems concerning the translation of exhibits, the appointment of Co-Counsel, and the issue of Appellant Ngeze's marriage were discussed.
[97] This Status Conference was held pursuant to the Order of 8 February 2005 (Order Scheduling a Status Conference). The following issues were discussed: translation of filings by the parties and exhibits; Registry's assistance in additional investigations on appeal; budgetary constraints on the Defence; financing of travel by Counsel to Arusha; schedule of proceedings; composition of Appellant Ngeze's Defence team; outstanding motions; Appellant Ngeze's marriage; Appellant Barayagwiza's health.
[98] Order Concerning Status Conference of 9 March 2005, 18 February 2005. The Pre-Appeal Judge ordered the Registrar to provide Appellant Barayagwiza, if he so desired, with the assistance of a duty counsel during the conference.
[99] This Status Conference was held pursuant to the Order of 29 March 2005 (Order Concerning Status Conference by Video Link). The following issues were discussed: Appellant Barayagwiza's representation; transmission of documents; extension of time for filing the Notice of Appeal; communication between Appellant Barayagwiza and the Defence team members, delays in appeals proceedings due to the appointment of a new Defence team to represent Appellant Barayagwiza.
[100] This Status Conference was held pursuant to the Order of 9 March 2006. The following issues were discussed: time limit for filings and translation; health and detention conditions of the Appellants; unjustified motions.

## E. Appeals hearings

22. By Decision of 16 November 2006, the Appeals Chamber scheduled the appeals hearings for 16, 17 and 18 January 2006.[101] On 5 December 2006, the Appeals Chamber dismissed Appellant Barayagwiza's motion requesting postponement of the appeal hearings and refused to give the parties additional time for their oral submissions.[102] On 15 January 2007, the Appeals Chamber dismissed Appellant Ngeze's motion requesting postponement of the appeals hearings.[103] The hearings were held as scheduled on 16, 17 and 18 January 2007.

## F. Appellant Barayagwiza's motion for reconsideration/review

23. On 26 September 2005, Appellant Barayagwiza requested the Appeals Chamber to examine his motion of 28 July 2000 on its merits, [104] and to reconsider and set aside the Decision of 31 March 2000.[105] This request was dismissed on 23 June 2006.[106]

## G. Motions to admit additional evidence on appeal

### 1. Appellant Nahimana

24. On 14 December 2006,[107] Appellant Nahimana joined in Appellant Barayagwiza's motion for leave to present the *Ordonnance de soit-communiqué* [Disclosure Order] of the French Investigating Judge, Jean-Louis Bruguière, containing the findings of the investigation into the circumstances of President Habyarimana's assassination.[108] The Appeals Chamber dismissed the

[101] Scheduling Order for Appeals Hearing and Decision on Hassan Ngeze's Motion of 24 January 2006, 16 November 2006. The Appeals Chamber also dismissed Appellant Ngeze's request to be allowed 90 minutes to plead his case in person during appeal hearings, but it allowed each Appellant 10 minutes to address the Appeals Chamber personally at the end of the hearings.

[102] Decision on the Appellant Jean-Bosco Barayagwiza's Motion Concerning the Scheduling Order for the Appeals Hearing, 5 December 2006.

[103] Decision on the Appellant Hassan Ngeze's Motion Requesting a Postponement of the Appeal Hearing, 15 January 2007.

[104] *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, *Requête en extrême urgence de l'Appelant en révision et/ou réexamen de la décision de la Chambre d'appel rendue le 31 mars 2000 et pour sursis des procédures*, 28 July 2000.

[105] Urgent Motion Requesting Examination of the Defence Motion Dated 28 July 2000, and Remedy for Abuse of Process, 26 September 2005. See also the Prosecutor's Response to "Appellant Jean-Bosco Barayagwiza's Motion Requesting Examination of Defence Motion Dated 28 July 2000, and Remedy for Abuse of Process", 6 October 2005; Appellant's Reply to "Prosecutor's Response, dated 6th October 2005, to the Appellant Jean-Bosco Barayagwiza's Urgent Motion Requesting Examination of the Defence Motion Dated 28 July 2000, and Remedy for Abuse of Process", 14 October 2005.

[106] *Décision relative à la requête de l'Appelant Jean Bosco Barayagwiza demandant l'examen de la requête de la Défense datée du 28 juillet 2000 et réparation pour abus de procédure*, 23 June 2006; *Corrigendum à la Décision relative à la requête de l'Appelant Jean Bosco Barayagwiza demandant l'examen de la requête de la Défense datée du 28 juillet 2000 et réparation pour abus de procédure,* 28 June 2006. The Appeals Chamber also granted the Prosecutor's motion requesting the rejection of the affidavit of Mr. Justry Patrick Lumumba Nyaberi (Prosecutor's motion to have affidavit of Justry Patrick Lumumba Nyaberi rejected, 20 October 2005), filed confidentially by the Appellant on 18 October 2005.

[107] *Requête urgente de la Défense aux fins d'être autorisé* [sic] *à présenter un élément de preuve supplémentaire (article 115 RPP)*, 14 December 2006.

[108] The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115), 7 December 2006.

motion on 12 January 2007 on the ground that this document was not relevant and could not have any impact on the decision.[109]

2. Appellant Barayagwiza

25. On 29 March 2004, Counsel Barletta-Caldarera filed a motion on behalf of Appellant Barayagwiza for leave to present additional evidence.[110] Following the replacement of Counsel Barletta-Caldarera and the lifting of the stay of proceedings against the Appellant, the Pre-Appeal Judge requested Appellant Barayagwiza to notify him whether he intended to proceed with or withdraw the Motion of 29 March 2004.[111] Following the Appellant's failure to notify the Appeals Chamber of his intention within the prescribed time limits, the Chamber concluded that the motion had been withdrawn.[112]

26. The Appellant subsequently filed a number of motions for leave to present additional evidence, which were all dismissed because they did not meet the criteria set out in Rule 115 of the Rules:

- Motion of 28 December 2005,[113] dismissed on 5 May 2006;[114]
- Motions of 7 July 2006,[115] 13 September 2006[116] and 14 November 2006,[117] dismissed on 8 December 2006;[118]
- Motion of 7 December 2006,[119] dismissed on 12 January 2007.[120]

[109] Decision on Appellants Jean-Bosco Barayagwiza's and Ferdinand Nahimana's Motions for Leave to Present Additional Evidence pursuant to Rule 115, 12 January 2007.
[110] Motion for Admission of Additional Evidence for Good Cause Permitting an Extension of Time Pursuant to Rule 115 of the Rules of Procedure and Evidence (concerning the Report by French investigating Judge Jean-Louis Bruguière on the crash of the Rwandan President's plane), 29 March 2004.
[111] Order Lifting the Stay of Proceedings in Relation to Jean-Bosco Barayagwiza, 26 January 2005, ordering the Appellant to notify the Appeals Chamber of his intention to continue with or abandon the motion of 29 March 2004 no later than 21 February 2005.
[112] Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006, paras. 17, 28.
[113] The Appelant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115), filed confidentially on 28 December 2005. On 23 January 2006, the Pre-Appeal Judge granted (1) Appellant's motion for leave to present additional evidence of 40 pages; and (2) Prosecution's motion granting him leave to exceed the number of pages authorized in his response to the Appellant's motion: [Confidential] Decision on Formal Requirements Applicable to the Parties' Filings Related to the Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence, 23 January 2006. The Pre-Appeal Judge further ordered that both versions of the Appellant's Reply, together with the Prosecution's Rejoinder, be expunged from the record. Lastly she ordered the Appellant to re-file, by 30 January 2005, the annexes to his motion to present additional evidence.
[114] Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006.
[115] The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115), 7 July 2006. On 26 May 2006, the Pre-Appeal Judge granted Appellant Barayagwiza's motion for leave to present additional evidence of 15 pages or 4,500 words relating to Expert Witness Alison Des Forges: Decision on Jean-Bosco Barayagwiza's Motion for Extension of the Page Limits to File a Motion for Additional Evidence.
[116] The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115), 13 September 2006.
[117] The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115), 14 November 2006.
[118] Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006.

3. Appellant Ngeze

27. On 30 April 2004, Appellant Ngeze submitted to the Appeals Chamber a series of documents and a videotape. As explained in a letter of 4 May 2004, the purpose of these was to present additional evidence on appeal.[121] The Pre-Appeal Judge dismissed the motion on the ground that it was incompatible with Rule 115 of the Rules and the applicable Practice Directions.[122]

28. On 12 May 2004,[123] Appellant Ngeze sought to join in the motion filed on 29 March 2004 by Counsel for Appellant Barayagwiza. The Appeals Chamber dismissed his request on 24 May 2004 on the ground that the motion filed by Counsel for Appellant Barayagwiza did not contain the evidence that he sought to present on appeal; the Chamber then requested Appellant Ngeze to file a new motion in accordance with the applicable rules.[124]

29. Appellant Ngeze subsequently filed several motions for leave to present additional evidence, the majority of which were dismissed because they did not meet the criteria set out in Rule 115 of the Rules:

- Motion of 11 January 2005,[125] dismissed on 14 February 2005;[126]
- Motions of 4 and 11 April 2005,[127] dismissed on 24 May 2005;[128]
- Motions of 12 and 18 May 2005,[129] dismissed on 23 February 2006;[130]
- Motion of 4 July 2006,[131] dismissed on 27 November 2006;[132]

[119] The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115), 7 December 2006.
[120] Decision on Appellants Jean-Bosco Barayagwiza's and Ferdinand Nahimana's Motions for Leave to Present Additional Evidence pursuant to Rule 115, 12 January 2007.
[121] Appellant Hassan Ngeze Urgent Letter to the Appeals Chamber Requesting the Rescheduling Time of Appeal Brief, Until I get a New Counsel, Under Exception [*sic*] Circumstances & Good Reason, 4 May 2004.
[122] Order Concerning Ngeze's Motion, 5 May 2004. This Order was without prejudice to Appellant Ngeze's right to file a motion in accordance with the applicable rules.
[123] Ngeze Defence's Notice in Support of the Motion for Aditional [*sic*] Evidence Filed by Defence Counsel Caldarera, 12 May 2004.
[124] Order concerning Hassan Ngeze's Request to Join Co-Appellant's Motion, 24 May 2004.
[125] Appellant Hassan Ngeze's Motion for Leave to Present Additional Evidence, 11 January 2005.
[126] Decision on Appellant Hassan Ngeze's Motion for Leave to Present Additional Evidence, 14 February 2005.
[127] Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence, filed confidentially on 4 April 2005; Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence, 11 April 2005.
[128] [Confidential] Decision on Appellant Hassan Ngeze's Motions for Admission of Additional Evidence on Appeal, 24 May 2005.
[129] Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence of Witness ABQ, filed confidentially on 12 May 2005; Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence of Witness OQ, filed confidentially on 18 May 2005.
[130] [Confidential] Decision on Appellant Hassan Ngeze's Six Motions for Admission of Additional Evidence and/or further Investigation at the Appeal Stage, 23 February 2006.
[131] Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness ABC1 as per Prosecutor's Disclosure of Transcript of Defence Witness ABC1's Testimony in *The Prosecutor v. Bagosora et al.*, Filed on 22nd June 2006 Pursuant to Rule 75(F)(ii) and Rule 68 of the Rules of Procedure and Evidence, filed confidentially on 4 July 2006.
[132] Decision on Motions Relating to the Appellant Hassan Ngeze's and the Prosecution's Request for Leave to Present Additional Evidence of Witnesses ABC1 and EB, rendered on 7 November 2006 (both public and confidential versions).

- Motion of 5 January 2007,[133] dismissed on 15 January 2007.[134]

However, certain of the Appellant's motions to present additional evidence relating to Witness EB were granted, as explained below.

- Witness EB

30. On 25 April 2005, Appellant Ngeze filed a motion for leave to present a statement dated 5 April 2005, purporting to have been made by Witness EB and indicating that this witness wished to recant his Trial testimony.[135] On 24 May 2005, the Appeals Chamber requested the Prosecutor to conduct further investigations into this statement, and to report to the Appeals Chamber a month later.[136] This time limit was subsequently extended to 7 July 2005.[137] The Prosecutor submitted the results of his investigation on 7 July 2005[138] and Appellant Ngeze filed a reply on 18 July 2005.[139]

31. On 15 July 2005, Appellant Ngeze filed a confidential motion for leave to have the members of the Prosecution investigating team give evidence, and to present as additional evidence a handwriting expert's report on the statement attributed to Witness EB.[140]

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[133] Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Potential Witness Colonel Nsengiyumva as per Prosecutor's Disclosure of his Confidential Letter Dated 18th September 2005 Entitled *"Dénouncer* [*sic*] *les manoeuvres de Monsieur Hassan Ngeze*["]. Pursuant to Rule 66(B) and 75(F)(i) and (ii) of the Rules of Procedure and Evidence", filed confidentially on 5 January 2007.

[134] [Confidential] Decision on Hassan Ngeze's Motion for Leave to Present Additional Evidence of Potential Witness Colonel Nsengiyumva, 15 January 2007.

[135] Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB, filed confidentially on 25 April 2005 and corrected on 28 April 2005. The Prosecutor confidentially responded on 5 May 2005 (Prosecutor's Response to "Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB" and Request to be allowed to file additional submissions in due course [Rules 54, 107] ), and Appellant Ngeze filed his Reply on 11 May 2005 (Appellant Hassan Ngeze's Reply to the Prosecutor's Response to Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB and Request to be allowed to file additional submissions in due course [Rules 54, 107]). On 13 May 2005, the Prosecutor asked the Appeals Chamber for leave to file a Rejoinder (Prosecutor's Further Submissions to "Appellant Hassan Ngeze's Reply to the Prosecutor's Response to "Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB" and Request to be allowed to file additional submissions in due course [Rules 54, 107]"). On 24 May 2005, the Appeals Chamber held that it was unnecessary to rule on this request (Confidential Decision on Appellant Hassan Ngeze's Motions for Admission of Additional Evidence on Appeal, 24 May 2005, para. 3).

[136] [Confidential] Decision on Appellant Hassan Ngeze's Motions for Admission of Additional Evidence on Appeal, 24 May 2005, para. 43.

[137] [Confidential] Decision on Prosecution's Urgent Motion for Extension of Time to File Results of Investigation into the New Evidence of Witness EB, 28 June 2005.

[138] Prosecutor's Additional Submissions in Response to "Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB", filed confidentially on 7 July 2005.

[139] Appellant Hassan Ngeze's Reply to the Prosecution Additional Submissions In Response To "Appellant Hassan Ngeze Urgent Motion For Leave to Present Additional Evidence (Rule 115) of Witness EB'; and his Request to Grant 45 Days to File Additional Submissions in this Regard" (Rules 54, 107), filed confidentially on 18 July 2005.

[140] Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence of the Members of The Prosecution Investigation's Team Namely; Maria Warren, Chief, Information and Evidence Support, Mr. Moussa Sanogo, Mr. Ulloa Larosa, Adolphe Nyomera Investigators, Interpreter Jean-Pierre Boneza, with the Forensic Expert Mr. Antipas Nyanjwa under Rule 115, filed confidentially on 15 July 2005. The Prosecutor filed his confidential response on 25 July 2005 (Prosecutor's Response to Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence of the Members of the Prosecution Investigation's Team Namely: Maria Warren, Chief, Information and Evidence Support, Mr. Moussa Sanogo, Mr. Ulloa Larosa, Adolphe Nyomera Investigators, Interpreter Jean-Pierre Boneza, with the Forensic Expert Mr. Antipas Nyanjwa under Rule 115), and Appellant Ngeze filed his

32. On 25 July 2005, the Prosecutor sought leave of the Appeals Chamber to investigate an alleged attempt by Appellant Ngeze or persons in his entourage to suborn Witnesses AFX and EB.[141] On 6 September 2005, the Appeals Chamber ordered the Prosecutor to conduct investigations into the matter.[142]

33. By a confidential decision of 23 February 2006, the Appeals Chamber granted the motion of 25 April 2005 and, partially, that of 15 July 2005, admitting as additional evidence Witness EB's alleged statement (both the handwritten[143] and typed[144] versions) and the Report by the handwriting expert on the said statement;[145] it also decided to call Witness EB.[146] The same day, in a confidential decision, the Appeals Chamber dismissed Appellant Ngeze's motion seeking a copy of all reports by the Special Prosecutor assigned by the Prosecutor's Office to investigate the allegations of interference with the administration of justice in the case of *Kamuhanda* and in the instant case.[147]

34. Ruling on a Prosecution motion on 14 June 2006,[148] the Appeals Chamber (1) refused to order Appellant Ngeze to produce the originals of Witness EB's alleged recantation statement and to grant the Prosecution leave to conduct a forensic analysis on those documents; and (2) ordered Witness EB to appear before the Appeals Chamber to be heard as a witness of the Chamber.[149]

35. In a decision of 27 November 2006,[150] the Appeals Chamber (1) dismissed Appellant Ngeze's motion[151] to order the Prosecution to disclose all documents relating to the investigations

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Reply on 1 August 2005 (Reply to the Prosecutor's Response to Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence of the Members of the Prosecution Investigation's Team Namely: Maria Warren, Chief, Information and Evidence Support, Mr. Moussa Sanogo, Mr. Ulloa Larosa, Adolphe Nyomera Investigators, Interpreter Jean-Pierre Boneza, with the Forensic Expert Mr. Antipas Nyanjwa under Rule 115).

[141] Prosecutor's Urgent Motion Pursuant to Rules 39(iv), 54, and 107, for an Order, pursuant to Rule 77(C)(i) and Rule 91(B)(i), Directing the Prosecutor to Investigate Certain Matters, With a View to the Preparation and Submission of Indictments for Contempt and False Testimony, filed confidentially on 25 July 2005. Appellant Ngeze filed his confidential Response on 3 August 2005 (Appellant Hassan Ngeze's Response to the Prosecutor's Urgent Motion Pursuant to Rules 39(iv), 54, and 107, for an Order, pursuant to Rule 77(C)(i) and Rule 91(B)(i), Directing the Prosecutor to Investigate Certain Matters, With a View to the Preparation and Submission of Indictments for Contempt and False Testimony, Respectively), and the Prosecutor filed his confidential Reply on 8 August 2005 (Prosecutor's Reply to "Appellant Hassan Ngeze's Response to the Prosecutor's Urgent Motion Pursuant to Rules 39(iv), 54, and 107, for an Order, pursuant to Rule 77(C)(i) and Rule 91(B)(i), Directing the Prosecutor to Investigate Certain Matters, with a View to the Preparation and Submission of Indictments for Contempt and False Testimony, Respectively").

[142] Order Directing the Prosecution to Investigate Possible Contempt and False Testimony, 6 September 2005.

[143] This document is part of Confidential Exhibit CA-3D2.

[144] Confidential Exhibits CA-3D1 (in Kinyarwanda), CA-3D1(F) (in French) and CA-3D1(E) (in English).

[145] Confidential Exhibit CA-3D2.

[146] Confidential Decision on Appellant Ngeze's Six Motions for Admission of Additional Evidence on Appeal and/or Further Investigation at the Appeal Stage, 23 February 2006.

[147] *Décision [confidentielle] relative à la requête de l'Appelant Hassan Ngeze concernant la communication du rapport de l'avocat général chargé de l'enquête sur les allégations d'entrave au cours de la Justice*, 23 February 2006.

[148] Prosecutor's Urgent Motion for an Order to the Appellant Hassan Ngeze to Produce the Original Texts of the Proffered Recantation Statements of Witness EB and for Certain Directives [Rules 54, 39(iv), and 107], 8 March 2006.

[149] Confidential Decision on the Prosecutor's Motion for an Order and Directives in Relation to Evidentiary Hearing on Appeal Pursuant to Rule 115, 14 June 2006.

[150] Decision on Motions Relating to the Appellant Hassan Ngeze's and the Prosecution's Requests for Leave to Present Additional Evidence of Witnesses ABC1 and EB, rendered confidentially on 27 November 2006. A public version of this Decision was filed on 1 December 2006 ([Public Redacted Version] Decision on Motions Relating to the Appellant Hassan Ngeze's and the Prosecution's Request for Leave to Present Additional Evidence of Witnesses ABC1 and EB, 1 December 2006).

[151] [Confidential] Appellant Hassan Ngeze's Motion to Order The Prosecutor to Disclose Material and/or Statement/s of Witness EB Which Might Have Come in his Possession Subsequent to the Presentation of Forensic Expert's Report on Witness EB's Recanted Statement [*sic*], 19 June 2006.

conducted into Witness EB's purported recantation; (2) found that Appellant Ngeze's motion for leave to present on appeal Witness EB's statement before a *Gacaca* court[152] had been withdrawn by Appellant Ngeze's Counsel;[153] (3) granted Appellant Ngeze's motion[154] for leave to present as additional evidence a copy of a statement purporting to have been signed by Witness EB and confirming the recantation statement of 5 April 2005 ("Additional Statement")[155]; and (4) admitted *proprio motu*, as rebuttal evidence, copies of the envelopes in which copies of the above-mentioned statement had been received by the Prosecution.[156]

36. On 13 December 2006, the Appeals Chamber partially granted a Prosecution motion,[157] admitting as evidence in rebuttal a statement made by Investigator Moussa Sanogo on 21 November 2006,[158] a report of the mission of 16 to 18 October 2006 to Gisenyi,[159] an investigation report dated 23 August 2006[160] and statements by Witness EB dated 22 May and 23 June 2005;[161] it further directed that Investigator Moussa Sanogo appear before the Appeals Chamber on 16 January 2007.[162]

37. On 12 January 2007, the Appeals Chamber dismissed Appellant Ngeze's motion for leave to present rejoinder evidence.[163]

38. At the hearing of 16 January 2007, the Appeals Chamber admitted a series of additional evidence, one of these being the original of the Additional Statement.[164]

39. On 7 February 2007, following Appellant Ngeze's oral motion at the appeal hearings,[165] the Appeals Chamber, pursuant to Rules 54, 89(D) and 107 of the Rules, ordered a further handwriting report by Mr. Stephen Maxwell; the Appeals Chamber also granted the parties leave to file

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[152] [Confidential] Appellant Hassan Ngeze's in Person Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB as per Prosecutor's Disclosure Filed on 20th June 2006 of the Relevant Pages of the Gacaca Records Book Given Before the Gacaca on 9th February 2003, 14 July 2006.
[153] Letter from B.B. Chadha to Félicité A. Talon, dated 21 September 2006.
[154] [Confidential] Appellant Hassan Ngeze's Urgent Motion for Leave to Present Further Additional Evidence (Rule 115) of Witness EB, 28 August 2006.
[155] Confidential Exhibit CA-3D3. The original version of this document was admitted during the hearing of 16 January 2007 as confidential Exhibit CA-3D4.
[156] Confidential Exhibit CA-P5.
[157] Prosecutor's Urgent Motion for Leave to Call Rebuttal Evidence pursuant to Rules 54, 85, 89, 107 and 115, 27 November 2006; Strictly Confidential Annexes to the Prosecutor's Urgent Motion for Leave to Call Rebuttal Evidence pursuant to Rules 54, 85, 89, 107 and 115, 27 November 2006.
[158] Confidential Exhibit CA-P1.
[159] Confidential Exhibit CA-P2.
[160] Confidential Exhibit CA-P3.
[161] Confidential Exhibit CA-P4.
[162] Decision on Prosecution's Motion for Leave to Call Rebuttal Material, 13 December 2006. The Appeals Chamber further noted that the Prosecutor's failure to make timely disclosure of the investigation report and of the statements attached thereto was inconsistent with his obligations, and warned the Prosecutor that a repeat of such violations could lead to disciplinary action.
[163] Confidential Decision on Hassan Ngeze's Motion for Leave to Present Rejoinder Evidence, 12 January 2007.
[164] Confidential Exhibit CA-3D4 (see T(A) 16 January 2007, p. 3). See also T(A) 16 January 2007, pp. 22, 31, 32 (closed session), where several samples of Witness EB's handwriting (Confidential Exhibits CA-3D6 and CA-3D7) were admitted, as well as a document alleged to represent this witness' testimony before a *Gacaca* court (Confidential Exhibit CA-3D5). Immediately after the hearing of 16 January 2007, the witness gave another short sample of his handwriting and signature, which was also admitted as Confidential Exhibit CA-1. Finally, on 18 January 2007, the Appeals Chamber collected an additional sample of his handwriting, admitted as Confidential Exhibit CA-2 (T(A) 18 January 2007, p. 81. See also *Rapport à la Chambre d'appel, Recueil d'un exemplaire d'écriture et de signature du Témoin EB*, filed on 29 January 2007).
[165] T(A) 16 January 2007, p. 34 (closed session).

submissions relating to Mr. Maxwell's findings.[166] The terms of reference of the report were modified by the Appeals Chamber on 21 February[167] and 27 March 2007.[168]

40. The handwriting report by Mr. Maxwell was filed on 12 April 2007.[169] On 30 April 2007, the Prosecutor confidentially filed his submissions relating to the findings of this report.[170] On 3 May 2007, the Appeals Chamber granted Appellant Barayagwiza's motion[171] for a five-day extension of the time limit fixed for the filing of his submissions.[172] The same day, Appellant Ngeze filed his submissions on Mr. Maxwell's findings.[173] Appellant Barayagwiza followed suit on 7 May 2007.[174]

## H. Re-certification of materials filed and of court transcripts

41. On 6 December 2006, having noted discrepancies between the English and French translations of certain Kinyarwanda terms, the Pre-Appeal Judge *proprio motu* instructed the Registrar (1) to revise translations of extracts from the statements of Witnesses AAM, AFB, AGK et X; (2) to confirm the English and French translations of certain Kinyarwanda terms; and (3) to revise the translation of an extract from Appellant Nahimana's interview of 25 April 1994 on Radio Rwanda.[175] The Registry submitted its report on 4 January 2007.[176]

42. Following a motion by Appellant Barayagwiza,[177] the Appeals Chamber instructed the Registry to revise and re-certify the transcripts of the appeal hearings relating to submissions by Counsel for Appellant Barayagwiza, in both French and English.[178] The Registry submitted a first

[166] Public Order Appointing a Handwriting Expert with Confidential Annexes, 7 February 2007.
[167] Order Extending the Scope of the Examination by the Handwriting Expert Appointed by Order of 7 February 2007, 21 February 2007.
[168] Second Order Extending the Scope of the Examination by the Handwriting Expert Appointed by Order of 7 February 2007, 27 March 2007. Further, on 3 April 2007 the Appeals Chamber dismissed a motion by Appellant Ngeze (Appellant Hassan Ngezes's Urgent Motion to Order the Prosecutor and the Registry to Provide the Original Documents as Directed by the Appeals Chamber Vide its Order of 21st February 2007, 29 March 2007) and refused to order the Prosecutor and the Registry to disclose the originals of certain documents already disclosed to the handwriting expert pursuant to the Order of 21 February 2007 (Decision on Hassan Ngeze's Motion of 29 March 2007, 3 April 2007).
[169] Examination of Handwriting and Signatures Witness EB, dated 3 April 2007 but filed on 12 April 2007.
[170] Prosecutor's Submissions (Following the Rule 115 Evidentiary Hearing Pertaining to the alleged recantation of Witness EB's trial testimony), 30 April 2007.
[171] The Appellant Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Permit Extra Time to File Written Submissions in Response to the Forensic Experts Report Filed on 19th April 2007 Pursuant to the Order of the Appeal Court, 30 April 2007.
[172] Decision on Appellant Jean-Bosco Barayagwiza's Motion for Extension of Time, 3 May 2007.
[173] Appellant Hassan Ngeze's Written Submissions in connection with the conclusion of the Handwriting Expert Report and their impact on the verdict, in pursuance of Appeals Chamber's Order dated 16 January pages 66-68, 3 May 2007, title corrected by the Appellant on 6 June 2007.
[174] The Appellant Jean Bosco-Barayagwiza's Submissions Regarding the Handwriting Expert's Report Pursuant to the Appeals Chamber's Orders Dated 7th February 2007 and the 27th March 2007, 7 May 2007. The Appellant had failed to file this document confidentially. The error was immediately corrected by the Registry at the request of the Appeals Chamber.
[175] Order for Re-certification of the Record, 6 December 2006.
[176] *Supports audio pour confirmation des témoignages* [Audio Confirmation of Testimony].
[177] The Appellant Jean-Bosco Barayagwiza's Corrigendum Motion relating to the Appeal Transcript of 17th and 18th January 2007, 11 April 2007.
[178] Decision on "The Appellant Jean-Bosco Barayagwiza's Corrigendum Motion relating to the Appeal Transcript of 17th and 18th January 2007", 16 May 2007. The Appeals Chamber stated that, in case of irreconcilable differences between the French and English versions of the transcripts of the hearing with respect to the statements of Counsel for

document on 22 June 2007.[179] On 12 July 2007, re-certified versions of the transcripts of the appeals hearings of 17 and 18 January 2007 (French and English) were filed. On 23 July 2007, Appellant Barayagwiza filed a new motion on the same matter,[180] which was dismissed by the Appeals Chamber.[181]

## I. Other motions

### 1. Appellant Nahimana

43. On 6 April 2005, Appellant Nahimana filed a "Motion for Various Measures Relating to the Registry's Assistance to the Defence at the Appellate Stage", which was partially granted on 3 May 2005.[182]

44. On 12 September 2006, the Appeals Chamber dismissed Appellant Nahimana's motion[183] to order the Prosecution to explain why the recording of an interview given by the Appellant to a Radio Rwanda journalist was incomplete, or to order the Rwandan authorities to transmit to the Tribunal the said interview in its entirety.[184]

45. On 20 November 2006, the Appeals Chamber dismissed Appellant Nahimana's motion for the translation of recordings of RTLM broadcasts contained in Exhibit C7.[185]

46. On 8 December 2006, the Appeals Chamber partially granted a motion by Appellant Nahimana,[186] authorizing him to have access to the confidential plea agreement made in the *Serugendo* case.[187] By the same decision, the Appeals Chamber dismissed the Appellant's request for assistance from the Registry for the conduct of additional investigations on appeal.[188]

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Appellant Barayagwiza, the English version would take precedence, since Counsel for Appellant Barayagwiza had spoken in English.

[179] Certified verification of the transcripts of the hearing of 17 and 18 January 2007.

[180] The Appellant Jean-Bosco Barayagwiza's Motion relating to the Registrar's Submission concerning the Transcript of the Final Oral Hearing of 17th and 18th January 2007, 23 July 2007.

[181] Decision on "The Appellant Jean-Bosco Barayagwiza's Motion relating to the Registrar's Submission concerning the Transcript of the Final Oral Hearing of 17th and 18th January 2007", 29 August 2007.

[182] Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase, 3 May 2005, as corrected on 6 May 2005 (Further Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase).

[183] *Requête aux fins de communication d'éléments de preuve disculpatoires* [sic] *et d'investigations sur l'origine et le contenu de la pièce à conviction P105,* filed confidentially on 10 April 2006.

[184] *Décision sur la Requête de Ferdinand Nahimana aux fins de communication d'éléments de preuve disculpatoires* [sic] *et d'investigations sur l'origine et le contenu de la pièce à conviction P105,* 12 September 2006.

[185] Decision on Ferdinand Nahimana's Motion for the Translation of RTLM tapes in Exhibit C7, 20 November 2006.

[186] *Requête aux fins de divulgation d'éléments en possession du Procureur et nécessaires à la Défense de Appelant,* 10 July 2006.

[187] *Décision sur les requêtes de Ferdinand Nahimana aux fins de divulgation d'éléments en possession du Procureur et nécessaires à la Défense de l'Appelant et aux fins d'assistance du Greffe pour accomplir des investigations complémentaires en phase d'appel*, 8 December 2006.

[188] *Requête urgente de la Défense aux fins d'assistance du Greffe pour accomplir des investigations complémentaires en phase d'appel*, 10 October 2006.

### 2. Appellant Barayagwiza

47. On 4 October 2005, the Appeals Chamber dismissed Appellant Barayagwiza's motion[189] for leave to appoint an investigator at the expense of the Tribunal.[190]

48. On 17 August 2006, the Appeals Chamber dismissed Appellant Barayagwiza's motion[191] to allow a legal assistant to have privileged access to Appellant Barayagwiza for a limited period of time.[192]

49. On 8 December 2006, the Appeals Chamber dismissed Appellant Barayagwiza's motion[193] for clarification regarding an Appeals Chamber decision in the *Karemera* case; the Appeals Chamber also refused to grant the Appellant leave to amend his Notice of Appeal and Appellant's Brief.[194]

50. On 15 January 2007, the Appeals Chamber dismissed Appellant Barayagwiza's motion for leave to call an expert witness in the Kinyarwanda language and in political discourse.[195]

### 3. Appellant Ngeze

51. On 3 December 2004, Appellant Ngeze filed an urgent motion for the translation into English of all the issues of the journal *Kangura*.[196] On 10 December 2004, the Pre-Appeal Judge instructed the Registrar to indicate to the Chamber the number of pages that needed to be translated and approximately how long this would take.[197] The Registrar filed his report on 14 December 2004,[198] and the matter was discussed at the Status Conference of 15 December 2004. The Pre-Appeal Judge ultimately dismissed the Appellant's motion and requested him to include in

[189] Appellant Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Appoint an Investigator, filed confidentially on 12 August 2005.

[190] Decision on Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Appoint an Investigator, 4 October 2005. The Appeals Chamber also granted a motion by the Prosecution (Prosecutor's Urgent Motion for an Order that the "Appellant's Preliminary Response to Prosecution Reply [*sic*] to Appellant's Request to Appoint an Investigator" and the "Appellant's Preliminary Response to Prosecution Reply [*sic*] to Appellant's Request for Further Time to Lodge Appeal Brief dated 16th August 2005" Be Deemed as the Actual Replies of the Appellant and for Rejection of the Requests for an Extension of Time to File Additional Replies, 2 September 2005) holding the Appellant's "Preliminary Response" to the Prosecution's motion (Appellant's Preliminary Response to Prosecution Reply [*sic*] to Appellant's Request to Appoint Investigator, 29 August 2005) to be his final Reply.

[191] The Appellant Jean Bosco-Barayagwiza's [*sic*] Extremely Urgent Motion Requesting Privileged Access to the Appellant without the Attendance of Lead Counsel, 31 July 2006.

[192] Decision on Jean-Bosco Barayagwiza's Urgent Motion Requesting Privileged Access to the Appellant without Attendance of Lead Counsel, 17 August 2006.

[193] The Appellant Jean-Bosco Barayagwiza's Urgent Motion for Clarification and Guidance Following the Decision of the Appeals Chamber Date [*sic*] 16th June 2006 in *Prosecutor v. Karemera et al.*, 17 August 2006.

[194] Decision on Jean-Bosco Barayagwiza's Motion for Clarification and Guidance Following the Decision of the Appeals Chamber Dated 16 June 2006 in *Prosecutor v. Karemera et al.* Case and Prosecutor's Motion to Object the Late Filing of Jean-Bosco Barayagwiza's Reply, 8 December 2006. The Appeals Chamber also dismissed a reply filed belatedly by Appellant Barayagwiza (The Appellant Jean-Bosco Barayagwiza's Reply to the Prosecution Response to the Appellant "Urgent Motion for Clarification and Guidance Following the Decision of the Appeals Chamber Dated 16 June 2006 in '*Prosecutor v Karemera et al.*'", 18 September 2006).

[195] Decision on The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Call an Expert Witness in the Kinyarwanda Language and in Political Speech, 15 January 2007.

[196] Appellant Hassan Ngeze's Urgent Motion for Supply of English Translation of 71 Kangura News Papers Filed by the Prosecutor with the Registry During Trial, 3 December 2004.

[197] Order to Registrar, 10 December 2004.

[198] Report of the Registrar in Compliance with the Orders of the Pre-Appeal Judge dated 10 December 2004, 14 December 2004.

his Appellant's Brief those extracts from *Kangura* that he considered relevant, translated by himself; the Pre-Appeal Judge indicated that she would request the Registry to provide an official translation of the extracts selected by the Appellant.[199]

52. Appellant Ngeze also filed several motions seeking funds to conduct further investigations on appeal, all of which were dismissed:

- Motion of 21 March 2005,[200] dismissed on 3 May 2005;[201]
- Motions of 16 June and 15 September 2005,[202] dismissed on 23 February 2006;[203]
- Motions of 6 and 16 January 2006,[204] dismissed on 20 June 2006.[205]

## J. Appellant Ngeze's detention

53. By a decision of 25 April 2005, the Appeals Chamber dismissed Appellant Ngeze's motion[206] for leave to allow his Defence Counsel to communicate with him outside the prescribed periods.[207]

54. On 5 July 2005, finding that there were reasonable grounds to believe that Appellant Ngeze was involved in attempts to interfere with witnesses, the Prosecutor requested the Commander of the Tribunal's detention facility to take restrictive measures relating to Appellant Ngeze's detention.[208] On 1 August 2005, the President of the Tribunal dismissed the Appellant's objection to such measures.[209] On 20 September 2005, the Pre-Appeal Judge dismissed the Appellant's request for the holding of a status conference to allow him to challenge the restrictive measures taken against him.[210] On 24 October 2005, Appellant Ngeze requested a psychological test and treatment by independent specialists, alleging that the conditions in which he was being held were affecting

[199] T. Status Conference of 15 December 2004, p. 4.
[200] The Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage, 21 March 2005.
[201] Decision on Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage, 3 May 2005.
[202] Appellant Hassan Ngeze's Motion for the Approval of Further Investigation of the Specific Information Relating to the Additional Evidence of Witness AEU, filed confidentially on 16 June 2005, and Appellant Hassan Ngeze's Motion for the Approval of Further Investigation of the Specific Information Relating to the Additional Evidence of Witness BP and Witness AP, 15 September 2005.
[203] [Confidential] Decision on Appellant Hassan Ngeze's Motions for Admission of Additional Evidence on Appeal, 24 May 2005.
[204] Appellant Hassan Ngeze's Motion for the Approval of Further Investigation of the Specific Information Relating to the Additional Evidence of Potential Witness – Jean Bosco Barayagwiza (Co-Appellant), 6 January 2006; Appellant Hassan Ngeze's Motion for the Approval of Further Investigation of the Specific Information Relating to the Additional Evidence of Potential Witness – the then Corporal Habimana, 16 January 2006.
[205] Decision on Appellant Hassan Ngeze's Motions for Approval of Further Investigations on Specific Information Relating to the Additional Evidence of Potential Witnesses, 20 June 2006.
[206] Appellant Hassan Ngeze's Motion for Leave to Permit his Defence Counsel to Communicate with Him During Afternoon Friday, Saturday, Sunday and Public Holidays, 4 April 2005.
[207] Decision on "Appellant Hassan Ngeze's Motion for Leave to Permit his Defence Counsel to Communicate with him During Afternoon Friday, Saturday, Sunday and Public Holidays", 25 April 2005.
[208] Prosecutor's Urgent Request to the Commanding Officer of the United Nations Detention Facility, filed confidentially on 5 July 2005.
[209] Decision on Request for Reversal of the Prohibition of Contact dated 29 July 2005, but filed on 1 August 2005.
[210] Decision on Hassan Ngeze's "Request of an Extremely Urgent Status Conference Pursuant to Rule 65 *bis* of Rules of Procedure and Evidence", 20 September 2005.

his mental health.[211] The Appeals Chamber dismissed his motion on 6 December 2005.[212] On 12 December 2005, the Pre-Appeal Judge refused to grant the Appellant leave to file a complaint before the Appeals Chamber regarding, in particular, the restrictive measures taken against him.[213] On 13 December 2005, the Pre-Appeal Judge dismissed a new request by the Appellant for a status conference to challenge the restrictive measures taken against him.[214]

55. By a decision of 23 February 2006**,** the Appeals Chamber dismissed Appellant Ngeze's motion[215] to rectify the unequal treatment of detainees of ICTR and ICTY.[216] By a confidential decision of 27 February 2006, the Appeals Chamber dismissed Appellant Ngeze's motion[217] to order an investigation into the alleged falsification of the date of filing of a Prosecutor's motion[218] seeking an extension of the restrictive measures relating to his detention.[219]

56. By a confidential decision of 10 April 2006, the President of the Tribunal dismissed two motions by Appellant Ngeze[220] for reversal of the restrictive measures relating to his detention.[221] The Appellant filed a new motion to set aside that decision,[222] which was dismissed by the Appeals Chamber on 20 September 2006.[223] By the same decision, the Appellant's motions relating to the

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[211] The Appellant Hassan Ngeze's Urgent Motion to Order the Registrar to Arrange for an Urgent Pshychological [*sic*] Examination and Treatment of the Appellant Hassan Ngeze under Rule 74 *bis* of the Rules of Procedure and Evidence by Experts on Account of the Mental Torture Suffered by him at the UNDF, 24 October 2005.

[212] Decision on Hassan Ngeze's Motion for a Psychological Examination, 6 December 2005. On the same day, the Appeals Chamber dismissed the Appellant's request to "consummate" his marriage and obtain conjugal visits, on the ground that the refusal of the Registrar and of the President of the ICTR to grant such requests did not violate the Appellant's right to fair proceedings: Decision on Hassan Ngeze's Motion to Set Aside President Møse's Decision and Request to Consummate his Mariage [*sic*], 6 December 2005.

[213] Decision on Hassan Ngeze's Request to Grant Him Leave to Bring his Complaints to the Appeals Chamber, 12 December 2005.

[214] Decision on Hassan Ngeze's Request for a Status Conference, 13 December 2005.

[215] Appellant Hassan Ngeze's Request for the Appeal [*sic*] Chamber to take Appropriate Steps to Rectify the Differential and Unequal Treatment Between the ICTR and ICTY in Sentencing Policies and Other Rights, 28 November 2005.

[216] Decision on Hassan Ngeze's Motion Requesting to Rectify the Differential and Unequal Treatment between the ICTR and ICTY in Sentencing Policies and Other Rights, 23 February 2006.

[217] Appellant Hassan Ngeze's Urgent Motion Requesting for Immediate Action against the Registry Clerks(s) and Other Officer from the Office of the OTP, who Participated in Falsifying the Filing Date of the Prosecutor's Request for a Further Extension of the Urgent Restrictive Measures of 12 December, 2005, Marked with Index Numbers 615 3/A-6 150/A, Which Were Already Assigned to Another Document Titled 'The Appellant Jean-Bosco Barayagwiza's Reply to the Consolidated Respondent's Brief', filed on 12 December 2005", 19 December 2005.

[218] Prosecution's Confidential Request for a Further Extension of the Urgent Restrictive Measures in the Case *Prosecutor v. Hassan Ngeze*, pursuant to Rule 64 Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal, 12 December 2005.

[219] Decision on Hassan Ngeze's Motion Requesting Immediate Action in Respect of Alleged Falsification of the Prosecutor's Request for a Further Extension of the Restrictive Measures of 12 December 2005, 27 February 2006.

[220] The Appellant Hassan Ngeze's Extremely Urgent Motion to the Honorable President for Reversal of the Prosecutor' Request of Extension of Restrictive Measures of 13th February pursuant to Rule 64 of the Rules of Detention, filed confidentially on 24 February 2006; The Appellant Hassan Ngeze's Extremely Urgent Motion to the Honorable President for Reversal of the Prosecutor's Request of Extension of Restrictive Measures of 9th March, 06 pursuant to Rule 64 of the Rules of Detention, filed confidentially on 21 March 2006.

[221] Decision on the Request for Reversal of the Prohibition of Contact, rendered confidentially on 10 April 2006.

[222] Appellant Hassan Ngeze's Extremely Urgent Motion for Setting Aside the Decision of the President Judge Erik Mose [*sic*] on his Request for the Reversal of the Prohibition of Contact of 7th April, 2006, filed confidentially on 12 May 2006.

[223] Decision on Hassan Ngeze's Motions Concerning Restrictive Measures of Detention, rendered confidentially on 20 September 2006. The Appeals Chamber also ordered the Registry to expunge from the appeal record Appellant Ngeze's "reminder" concerning his motion (Appellant Hassan Ngeze's Reminder for Consideration of his Motion Titled: "Appellant Hassan Ngeze's Motion for Setting Aside the Decision of the President Judge Erik Mose [*sic*] on his

conditions of his detention, which had been directly submitted to the Appeals Chamber, were dismissed.[224]

57. On 25 October 2006,[225] 23 November 2006[226] and 28 May 2007,[227] the President of the Tribunal rendered further decisions upholding the restrictive measures applicable to the Appellant's detention.

58. On 13 December 2006, the Pre-Appeal Judge dismissed Appellant Ngeze's request for a status conference to discuss, *inter alia,* his physical and mental condition.[228]

Request for the Reversal of the Prohibition of Contact" of 7th April, 2006, Filed on 12th May 2006, filed confidentially on 21 August 2006).

[224] The Appellant Hassan Ngeze's Urgent Motion In Person before the Appeals Chamber Requesting Permission to Receive Phone Calls and Visits from his Mother, Sisters, Brothers, Cousins Due to Seemingly Endless Prohibition from Communicating with his Family and Relatives since July of 2005, While Awaiting the Decision of his Various Motions Pending before the Appeals Chamber and President's Office, filed confidentially on 21 August 2006; The Appellant Hassan Ngeze's Urgent Motion In Person before the Appeals Chamber Requesting to Consider What is Stated in the Newly Discovered Additional Statement of Witness EB Disclosed to the Defence by the Prosecutor on 17th & 22nd of August 2006 while Dealing with his Pending Motion Concerning Restrictive Measures, filed confidentially on 25 August 2006.

[225] Decision on Requests for Reversal of Prohibition of Contact, 25 October 2006.

[226] Decision on Request for Reversal of Prohibition of Contact, 23 November 2006.

[227] Decision on Request for Reversal of Prohibition of Contact, 28 May 2007.

[228] Decision on Hassan Ngeze's Request for a Status Conference, 13 December 2006.

# ANNEX B

# GLOSSARY AND REFERENCES

## A. Acronyms (by alphabetical order)

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| **CDR** | *Coalition pour la défense de la République* (Coalition for the Defence of the Republic) |
| **CRA** | Transcript of the Trial Chamber hearings (French version) |
| **CRA(A)** | Transcript of the appeal hearings (French version) |
| **ECHR** | European Court of Human Rights |
| **ICCPR** | International Covenant on Civil and Political Rights |
| **ICERD** | International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965 |
| **ICTR or 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 |
| **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 |
| **IMT** | International Military Tribunal established by the London Agreement of 8 August 1945 |
| **MRND** | *Mouvement révolutionnaire national pour le développement* (National Revolutionary Movement for Development) |
| **ORINFOR** | Rwandan Office of Information |
| **RPF** | Rwandan Patriotic Front |
| **RTLM** | *Radio Télévision Libre des Mille Collines* |
| **T.** | Transcript of the Trial Chamber hearings (English Version) |
| **T(A)** | Transcript of the appeal hearings (English Version) |

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| **UNAMIR** | United Nations Assistance Mission for Rwanda |

## B. Defined Terms

1. Filings of the parties on appeal (in alphabetical order)

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| ***Amicus Curiae* Brief** | *Amicus Curiae* Brief on Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor (ICTR Case No. ICTR-99-52-A), submitted for the first time on 18 December and again on 3 January 2007 to which the parties were allowed to respond by the Appeal Chamber Decision of 12 January 2007 |
| **Annex to the Prosecutor's Response to the New Grounds of Appeal** | Confidential Annexes to the Prosecutor's Response to the Six New Grounds of Appeal Raised by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007, 14 March 2007 |
| **Appellant Barayagwiza's Conclusions Following Second Expert Report** | The Appellant's Jean Bosco-Barayagwiza's submissions regarding the handwriting expert's report pursuant to the Appeals Chamber's orders dated 7th February 2007 and 27th March 2007, filed publicly on 7 May 2007 but sealed on the same day following intervention by the Appeals Chamber |
| **Appellant Ngeze's Conclusions Following Second Expert Report** | Appellant Hassan Ngeze's written submissions in connection with the conclusion of the handwriting expert report and their [sic] impact on the verdict, in pursuance of Appeals Chamber's Order dated 16 January 2007 pages 66-68, filed confidentially on 3 May 2007, the title of the document having been corrected by the Appellant on 6 June 2007 |
| **Barayagwiza Appellant's Brief** | Appellant's Appeal Brief, 12 October 2005 |
| **Barayagwiza Brief in Reply** | The Appellant Jean-Bosco Barayagwiza's Reply to the Consolidated Respondent's Brief, 12 December 2005 |
| **Barayagwiza Notice of Appeal** | Amended Notice of Appeal, 12 October 2005 (English version) |
| **Barayagwiza's Reply to the New Grounds of Appeal** | The Appellant Jean-Bosco Barayagwiza Reply to the Prosecutor Response to the Six New Grounds of Appeal raised by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007, 21 March 2007 |
| **Barayagwiza's Response to the *Amicus Curiae* Brief** | The Appellant Jean-Bosco Barayagwiza's Response to the *Amicus Curiae* [Brief] filed by "Open Society Justice Initiative", 8 February 2007 |

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| **Nahimana Appellant's Brief** | Appeal Brief (Revised), 1 October 2004 [public version] |
| **Nahimana Defence Reply** | Defence Reply, 21 April 2006 |
| **Nahimana Notice of Appeal** | Notice of Appeal, 4 May 2004 |
| **Nahimana's Response to the *Amicus Curiae* Brief** | *Réponse au Mémoire de l'amicus curiae*, 12 February 2007 |
| **Ngeze Appellant's Brief** | Appeal Brief (Pursuant to Rule 111 of the Rules of Procedure and Evidence), filed confidentially on 2 May 2005; the confidentiality was lifted following an order of the Appeals Chamber (Order concerning Appellant Hassan Ngeze's Filings of 27 September 2007, dated 4 October 2007 but filed 5 October 2007), save for Annexes 4 and 5, the public version of which was provided by the Appellant on 27 September 2007 (Appeal Brief (Pursuant to the Order of the Appeals Chamber of dated [*sic*] 30 August 2007 to Appellant Hassan to File Public Version of his Notice of Appeal and Appellant's Brief)) |
| **Ngeze Brief in Reply** | Appellant Hassan Ngeze's Reply Brief (Article [*sic*] 113 of the Rules of Procedure and Evidence), 15 December 2005 |
| **Ngeze Notice of Appeal** | Amended Notice of Appeal, filed confidentially on 9 May 2005, an identical version of this document was filed publicly on 27 September 2007: Amended Notice of Appeal (Pursuant to the Order of the Appeals Chamber of dated [*sic*] 30 August 2007 to Appellant Hassan to File Public Version of his Notice of Appeal and Appellant's Brief) |
| **Ngeze's Response to the *Amicus Curiae* Brief** | Appellant Hassan Ngeze's Response to *Amicus Curiae* Brief Pursuance [*sic*] to the Appeal [*sic*] Chamber's Decision of 12.01.2007, 12 February 2007 |
| **Respondent's Brief** | Consolidated Respondent's Brief, 22 November 2005 |
| **Prosecution's Conclusions Following Second Expert Report** | Prosecutor's submissions following the Rule 115 evidentiary hearing pertaining to the alleged recantation of Witness EB's trial testimony, filed confidentially on 30 April 2007 |
| **Prosecutor's Response to the *Amicus Curiae* Brief** | Prosecutor's Response to the "*Amicus Curiae* Brief in *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor*", 12 February 2007 |
| **Prosecutor's Response to the New Grounds of Appeal** | The Prosecutor's Response to the Six New Grounds of Appeal raised by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007, 14 March 2007 |

2. Other references related to the case (in alphabetical order)

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| **Appeal of 19 October 1999** | *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-72, Notice of Appeal, 19 October 1999 |
| **Appeal of 18 September 2000** | *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-AR72, Notice of Appeal, 18 September 2000 |
| **Application of 11 June 2001** | *The Prosecutor v. Ferdinand Nahimana et al.,* Case No. ICTR-99-52-I, Prosecutor's *Ex-Parte* Application to the Trial Chamber Sitting in Camera for Relief from Obligation to Disclose the Existence, Identity and Statements of New Witness X, 11 June 2001 |
| **Barayagwiza Indictment** | *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-I, Amended Indictment, 14 April 2000 |
| **Barayagwiza Initial Indictment** | *The Prosecutor v. Jean-Bosco Barayagwiza,* Case No. ICTR-97-19-I, Indictment, 22 October 1997 |
| **Barayagwiza's Closing Brief** | *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Closing Brief for Jean Bosco Barayagwiza, 31 July 2003 (French original), 15 August 2003 (English translation) [confidential] |
| **Decision of 3 November 1999** | *Jean-Bosco Barayagwiza v. The Prosecutor,* Case No. ICTR-97-19-AR72, Decision, 3 November 1999 |
| **Decision of 5 November 1999** | *The Prosecutor v. Hassan Ngeze*, Case No. ICTR-97-27-I, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 5 November 1999 |
| **Decision of 31 March 2000** | *Jean-Bosco Barayagwiza v. The Prosecutor,* Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000 |
| **Decision of 5 September 2000** | *Hassan Ngeze and Ferdinand Nahimana v. The Prosecutor*, Cases No. ICTR-97-27-AR72 and ICTR-96-11-AR72, *Décision sur les appels interlocutoires*, 5 September 2000 |
| **Decision of 14 September 2000** | *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision on Motion for Review and/or Reconsideration, 14 September 2000 |
| **Decision of 14 September 2000 on the Interlocutory Appeals** | *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Interlocutory Appeals against the Decisions of the Trial Chamber dated 11 April and 6 June 2000), 14 September 2000 |
| **Decision of 13 December 2000** | *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Interlocutory Appeal Filed on |

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| | 18 September 2000), 13 December 2000 |
| **Decision of 26 June 2001** | *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001 |
| **Decision of 14 September 2001** | *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001 |
| **Decision of 16 September 2002** | *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Decision on the Ngeze Defence's Motion to Strike the Testimony of Witness FS, 16 September 2002 |
| **Decision of 24 January 2003** | *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Decision on the Expert Witness for the Defence, 24 January 2003 |
| **Decision of 10 April 2003** | *The Prosecutor v. Ferdinand Nahimana et al.,* Case No. ICTR-99-52-T*,* Decision on the Defence Request to Hear the Evidence of Witness Y by Deposition, 10 April 2003 |
| **Decision of 3 June 2003** | *The Prosecutor v. Ferdinand Nahimana et al.,* Case No. ICTR-99-52-T, Decision on the Prosecution's Application to admit Translations of RTLM Broadcasts and *Kangura* Articles, 3 June 2003 |
| **Decision of 3 June 2003 on the Appearance of Witness Y** | *The Prosecutor v. Ferdinand Nahimana et al.,* Case No. ICTR-99-52-T, Decision on the Defence *Ex Parte* Motion for the Appearance of Witness Y, 3 June 2003 |
| **Decision of 5 June 2003** | *The Prosecutor v. Ferdinand Nahimana et al.,* Case No. ICTR-99-52-T*,* Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana, 5 June 2003 |
| **Decision of 16 June 2003** | *The Prosecutor v. Ferdinand Nahimana et al.,* Case No. ICTR-99-52-T, Decision on the Defence *Ex Parte* Request for Certification of Appeal Against the Decision of 3 June 2003 with regard of the Appearance of Witness Y (Confidential and *Ex Parte*), 16 June 2003 |
| **Decision of 23 February 2006** | *The Prosecutor v. Ferdinand Nahimana et al.,* Case No. ICTR-99-52-A, [Confidential] Decision on Appellant Hassan Ngeze's Six Motions for Admission of Additional Evidence on Appeal and/or further Investigation at the Appeal Stage, 23 February 2006 |
| **Decision of 12 September 2006** | *The Prosecutor v. Ferdinand Nahimana et al.,* Case No. ICTR-99-52-A, *Décision sur la requête de Ferdinand Nahimana aux fins de communication d'éléments de preuve disculpatoires* |

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| | [sic] *et d'investigations sur l'origine et le contenu de la pièce à conviction P105*, 12 September 2006 |
| **Decision of 8 December 2006** | *The Prosecutor v. Ferdinand Nahimana et al.,* Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006 |
| **Decision of 13 December 2006** | *The Prosecutor v. Ferdinand Nahimana et al.,* Case No. ICTR-99-52-A, [Confidential] Decision on Prosecution's Motion for Leave to call Rebuttal Material, 13 December 2006 |
| **Decision of 12 January 2007** | *The Prosecutor v. Ferdinand Nahimana et al.,* Case No. ICTR-99-52-A, Decision on the Admissibility of the *Amicus Curiae* Brief Filed by the "Open Society Justice Initiative" and on its Request to Be Heard at the Appeals Hearing, 12 January 2007 |
| **Decision of 5 March 2007** | *The Prosecutor v. Ferdinand Nahimana et al.,* Case No. ICTR-99-52-A, Decision on the Prosecutor's Motion to Pursue the Oral Request for the Appeals Chamber to Disregard certain Arguments made by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007, 5 March 2007 |
| **Expert Report of Chrétien, Dupaquier, Kabanda et Ngarambe** | *The Prosecutor v. Ferdinand Nahimana et al.,* Case No. ICTR-99-52-T, Expert Report of Jean-Pierre Chrétien and Jean-François Dupaquier, Marcel Kabanda, Joseph Ngarambe dated 15 December 2001, filed on 18 December 2001 (French version) |
| **First Expert Report** | *The Prosecutor v. Ferdinand Nahimana et al.,* Case No. ICTR-99-52-A, Report of the Forensic Document Examiner, Inspector Antipas Nyanjwa, dated 20 June 2005 and joined as Annex 4 of the Prosecution's Additional Conclusions |
| **Judgement** | *The Prosecutor v. Ferdinand Nahimana et al.,* Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003 (Original English version) [filed on 5 December 2003] |
| **Judgement (Certified French Translation)** | *The Prosecutor v. Ferdinand Nahimana et al.,* Case No. ICTR-99-52-T, *Jugement et sentence*, 3 December 2003 (Certified French translation of 2 March 2006) |
| **Judgement (Provisional French Translation)** | *The Prosecutor v. Ferdinand Nahimana et al.,* Case No. ICTR-99-52-T, *Jugement et sentence*, 3 December 2003 (Provisional French translation of 5 April 2004) |
| **Motion for Withdrawal of 18 October 1999** | *The Prosecutor v. Jean-Bosco Barayagwiza,* Case No. ICTR-97-19-I, Extremely Urgent Application for Disqualification of Judges Laïty Kama and Navanethem Pillay, 18 October 1999 |

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| **Motion of 25 April 2005** | *The Prosecutor v. Ferdinand Nahimana et al.,* Case No. ICTR-99-52-A, Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB, filed confidentially on 25 April 2005 |
| **Nahimana's Closing Brief** | *The Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-99-52-T, Defence Closing Brief, 1 August 2003 [confidential] |
| **Nahimana Indictment** | *The Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-96-11-I, Amended Indictment, 15 November 1999 |
| **Ngeze's Closing Brief** | *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Defence Closing Brief (Rule 86 of the Rules of Procedure and Evidence), 1 August 2003 [confidential] |
| **Ngeze Indictment** | *The Prosecutor v. Hassan Ngeze*, Case No. ICTR-97-27-I, Amended Indictment, 10 November 1999 |
| **Objection on Defects in the Indictment of 19 July 2000** | *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-T, Objection Based on Defects in the Indictment (Rule 72 of the RPE), 19 July 2000 |
| **Opening Statement** (of the Prosecutor) | T. 23 October 2000 |
| **Oral Decision of 18 October 1999** | *Jean-Bosco Barayagwiza v. The Prosecutor,* Case No. ICTR-97-19, T. 18 October 1999, p. 82-88 |
| **Oral Decision of 11 September 2000** | *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-I, Oral Decision, 11 September 2000 [T. 11 September 2000, pp. 94-101 (closed session)] |
| **Oral Decision of 26 September 2000 (Barayagwiza)** | *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-I, Oral Decision, 26 September 2000 [T. 26 September 2000 (Decisions), pp. 14 *et seq.*] |
| **Oral Decision of 26 September 2000 (Ngeze)** | *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-I, Oral Decision, 26 September 2000 [T. 26 September 2000 (Decisions), pp. 2 *et seq.*] |
| **Order of 25 November 1999** | *Jean-Bosco Barayagwiza v. The Prosecutor,* Case No. ICTR-97-19-AR72, Order of 25 November 1999 |
| **Order of 8 December 1999** | *Jean-Bosco Barayagwiza v. The Prosecutor,* Case No. ICTR-97-19-AR72, Order, 8 December 1999 |
| **Order of 6 December 2006** | *The Prosecutor v. Ferdinand Nahimana et al.,* Case No. ICTR-99-52-A, Order for Re-Certification of the Record, 6 December 2006 |
| **Prosecution's Additional** | Prosecutor's Additional Submissions in Response to Hassan |

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| **Conclusions** | Ngeze's Motion for Leave to Present Additional Evidence of Witness EB, confidentially filed on 7 July 2005 |
| **Prosecutor's Brief in Reply (Trial)** | *The Prosecutor v. Ferdinand Nahimana et al.,* Case No. ICTR-99-52-T, The Prosecutor's Reply Brief, Filed under Rule 86(B) and (C) of the Rules of Procedures and Evidence, 15 August 2003 [confidential] |
| **Prosecutor's Final Trial Brief** | *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, The Prosecutor's Closing Brief filed under Rule 86(B) and (C) of the Rules of Procedure and Evidence, 25 June 2003 [confidential] |
| **Prosecutor's Pre-Trial Brief** | *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Prosecutor's Pre-Trial Brief Pursuant to Rule 73 *bis* B) i), 9 September 2000 |
| **Request for Leave to File an Amended Indictment** | *The Prosecutor v. Hassan Ngeze*, Case No. ICTR-97-27-I, Prosecutor's Request for Leave to File an Amended Indictment, 1 July1999, and Brief in Support of the Prosecutor's Request for Leave to File an Amended Indictment, 14 October 1999 |
| **Request by Rwanda for leave to appear as *Amicus Curiae*** | *The Prosecutor v. Jean-Bosco Barayagwiza,* Case No. ICTR-97-19-A, Request by the Government of the Republic of Rwanda for Leave to Appear as *Amicus Curiae* pursuant to Rule 74, filed on 19 November 1999 |
| **Second Expert Report** | Report of Stephen Maxwell, Case No. 1640/07, Examination of Handwriting and Signatures Witness EB dated 3 April 2007 and confidentially filed on 19 April 2007 |
| **Summary of the Anticipated Testimonies of 25 September 2000** | *The Prosecutor v. Ferdinand Nahimana et al.,* Case No. ICTR-99-52-A, Pretrial Summary of Anticipated Prosecution Witnesses, 25 September 2000 |
| **Supporting material of 22 October 1997** | *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-T, Summary of Supporting Material, 22 October 1997 |
| **Supporting material of 28 June 1999** | *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-T, Supporting Material, 28 June 1999 |
| **Supporting material of 14 April 2000** | *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-T, Supporting Material, filed in English on 14 April 2000 and in French on 15 April 2000 |

3. Other references (in alphabetical order)

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| **Additional Protocol II** | Protocol Additional to the Geneva Conventions of |

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| | 12 August 1949 relating to the Protection of the Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977 (entered into force on 7 December 1978), 1125 UNTS 609 |
| **African Charter on Human and Peoples' Rights** | African Charter on Human and Peoples' Rights, 27 June 1981 |
| **American Convention on Human Rights** | American Convention on Human Rights, "Pact of San José", 22 November 1969 |
| **Code of Professional Conduct** | Code of Professional Conduct for Defence Counsel, annexed to the Decision of the Registrar of 8 June 1998 |
| **Directive on the Assignment of Defence Counsel** | Directive on the Assignment of Defence Counsel, Directive 1/96 adopted on 9 January 1996, as amended on 6 June1997, 8 June 1998, 1 July 1999, 27 May 2003 and 15 May 2004 |
| **Draft Code of Crimes against the Peace and Security of Mankind** | Draft Code of Crimes against the Peace and Security of Mankind and the comments relating thereto, 1996, Report of the International Law Commission on the deliberations of its forty eighth meeting, 51 U.N. ORGA Supp. (No. 10), reproduced in the Yearbook of International Law Commission, 1996, vol. II (Part Two) |
| **Elements of Crimes under the Statute of the International Criminal Court** | Elements of Crimes under the Statute of the International Criminal Court, ICC-ASP/1/3 |
| **European Convention on Human Rights** | European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, as amended by Protocol No. 11 |
| **Geneva Conventions** | Geneva Conventions (I to IV) of 12 August 1949, 75 UNTS 31, 85, 135 and 287 |
| **Genocide Convention** | Convention on the Prevention and Punishment of the Crime of Genocide adopted by resolution 260 (III) A of the UN General Assembly, 9 December 1948 |
| **ICTY Rules** | Rules of Procedure and Evidence of the ICTY |
| **IMT Statute** | Statute of the International Military Tribunal adopted pursuant to London Agreement, 8 August 1945 |
| **Nuremberg Judgement** | "Nazi Conspiracy and Aggression, Opinion and Judgment", Office of the United States Chief of Counsel for Prosecution of Axis Criminality, United States Government Printing Office, Washington, 1947 |
| **Practice Direction on Formal Requirements for Appeals from** | Practice Direction on Formal Requirements for Appeals from |

| | |
|---|---|
| **Judgement** | Judgement, 4 July 2005 |
| **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa** | Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa prepared by the African Human Rights Commission in 2001 |
| **Rules** | Rules of Procedure and Evidence of the Tribunal |
| **Secretary-General's Report of 3 May 1993** | Report of the Secretary-General pursuant to paragraph 2 of the Security Council Resolution 808 (1993), 3 May 1993 (U.N. Doc S/25704) |
| **Secretary-General's Report of 13 February 1995** | Report of the Secretary-General pursuant to paragraph 5 of Security Council Resolution 955 (1994), 13 February 1995 (U.N. Doc S/1995/134) |
| **Security Council Resolution 827** | Resolution 827 (1993), 25 May 1993, (S/RES/827(1993)) |
| **Security Council Resolution 955** | Resolution 955 (1994), 8 November 1994, (S/RES/955(1994)) |
| **Statute** | Statute of the International Criminal Tribunal adopted by Security Council Resolution 955 (1994), as amended |
| **Statute of the International Criminal Court** | Rome Statute of the International Criminal Court, 17 July 1998 |
| **Universal Declaration on Human Rights** | Universal Declaration on Human Rights, A/RES/217, 10 December 1948 |

## B. Jurisprudence

### 1. ICTR

**AKAYESU**

*The Prosecutor v. Jean-Paul* A*kayesu*, Case No. ICTR-96-4-T Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness, 9 March 1998

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

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

**BAGILISHEMA**

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

*The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, Reasons of the Appeal Judgement of 3 July 2002, 13 December 2002 ("*Bagilishema* Appeal Judgement")

**BAGOSORA et al.**

*Aloys Ntabakuze v. The Prosecutor*, Case No. ICTR-97-34-A, *Arrêt sur l'Appel interlocutoire de la Décision du 13 avril 2000 de la Chambre de première instance III,* dated 13 November 2000 but filed on 14 November 2000

*The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Case No. ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003

*Aloys Ntabakuze v. The Prosecutor*, Case No. ICTR-98-41-AR72(C), Decision (Appeal of the Trial Chamber I "Decision on Motions by Ntabakuze for severance and to establish a reasonable schedule for the presentation of prosecution witnesses" of 9 September 2003), 28 October 2003

*The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-AR93 and ICTR-98-41-AR93.2, Decision on Prosecutor's Interlocutory Appeals regarding the Exclusion of Evidence, 19 December 2003

*The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision of Motion for Exclusion of Expert Witness Statement of Filip Reyntjens, 28 September 2004

*The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva,* Case No. ICTR-98-41-T, Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C), 14 October 2004

*The Prosecutor v. Théoneste Bagosora et al.,* Case No. ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence*,* 18 September 2006

**BIKINDI**

*The Prosecutor v. Simon Bikindi*, Case No. ICTR-2001-72-I, Decision on the Defence Motion Challenging the Temporal Jurisdiction of the Tribunal and Objecting to the Form of the Indictment and on the Prosecutor's Motion Seeking Leave to file an Amended Indictment, 22 September 2003

**BIZIMANA et al.**

*The Prosecutor v. Augustin Bizimana, Édouard Karemera, Mathieu Ngirumpatse, Calixte Nzabonimana, Joseph Nzirorera, André Rwamakuba*, Case No. ICTR-98-44-I, Decision on Severance of André Rwamakuba and Amendments of the Indictment, 8 October 2003

**BIZIMUNGU et al.**

*The Prosecutor v. Prosper Mugiraneza*, Case No. ICTR-99-50-AR73, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, 27 February 2004

*The Prosecutor v. Casimir Bizimungu et al.,* Case No. ICTR-99-50-T, Oral Ruling on Qualification of Expert Witness Mbonyinkebe, 2 May 2005

*The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision of the Admissibility of the Expert Testimony of Dr. Binaifer Nowrojee, 8 July 2005

*The Prosecutor v. Casimir Bizimungu et al.,* Case No. ICTR-99-50-T, Decision on Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Déo Sebahire Mbonyinkebe (Rule 89(C)), 2 September 2005

**GACUMBITSI**

*The Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-T, Decision on Expert Witnesses for the Defence, Articles 54, 73, 89 and 94 *bis* of the Rules of Procedure and Evidence, 11 November 2003 ("*Gacumbitsi* Decision of 11 November 2003")

*The Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-T, Judgement, 17 June 2004 ("*Gacumbitsi* Trial Judgement")

*Sylvestre Gacumbitsi v. The Prosecutor*, Case No. CTR-2001-64-A, Judgement, 7 July 2006, ("*Gacumbitsi* Appeal Judgement")

**KAJELIJELI**

*Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-T [*sic*], Appeal Judgement *(Appel de la Décision du 13 mars 2001 rejetant la* "Defence Motion Objecting to the Jurisdiction of the Tribunal"), 16 November 2001

*The Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T, Judgement and Sentence, 1 December 2003 ("*Kajelijeli* Trial Judgement")

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

**KAMBANDA**

*The Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-S, Judgement and Sentence, 4 September 1998 ("*Kambanda* Trial Judgement")

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

**KAMUHANDA**

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

**KAREMERA et al.**

*The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003

*The Prosecutor v. Édouard Karemera Matthieu Ngirumpatse, Joseph Nzirorera, André Rwamakuba*, Case No. ICTR-98-44-T, Decision on Severance of André Rwamakuba and Amendments of the Indictments, 7 December 2004

*The Prosecutor v. Édouard Karemera et al.,* Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision of Judicial Notice, 16 June 2006
*The Prosecutor v. Édouard Karemera et al.,* Case No. ICTR-98-44-AR73.10, Decision on Nzirorera's Interlocutory Appeal Concerning his Right to be Present at Trial, 5 October 2007

**KAYISHEMA and RUZINDANA**

*The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgement, 21 May 1999 ("*Kayishema and Ruzindana* Trial Judgement")

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

**MUHIMANA**

*The Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-IB-T, Judgement and Sentence, 28 April 2005 ("*Muhimana* Trial Judgement")

*Mikaeli Muhimana v. The Prosecutor*, Case No. ICTR-95-IB-A, Judgement, 21 May 2007 ("*Muhimana* 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, Appeal Judgement, 16 November 2001 ("*Musema* Appeal Judgement")

**MUVUNYI**

*The Prosecutor v. Tharcisse Muvunyi,* Case No. ICTR-2000-55A-T, Judgement and Sentence, 12 September 2006 ("*Muvunyi* Trial Judgement")

**NDINDABAHIZI**

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

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

**NIYITEGEKA**

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

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

**NTAGERURA et al.**

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

**NTAKIRUTIMANA**

*The Prosecutor v. Élizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases Nos. ICTR-96-10-T and ICTR-96-17-T, Judgement, delivered on 19 February 2003 but filed on 21 February 2003 ("*Ntakirutimana* Trial Judgement")

*The Prosecutor v. Élizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004 ("*Ntakirutimana* Appeal Judgement")

**NYIRAMASUHUKO et al.**

*The Prosecutor v. Pauline Nyiramasuhuko et al.,* Case No. ICTR-98-42-T, Oral Decision on the Qualification of Mr. Edmond Babin as Defence Expert Witness, 13 April 2005

*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeal against the Decision of Trial Chamber II of 21 March 2007 Concerning the Dismissal of Motions to Vary his Witness List, 21 August 2007

**RUGGIU**

*The Prosecutor v. Georges Ruggiu*, Case No. ICTR-97-32-I, Judgement and Sentence, 1 June 2000 ("*Ruggiu* Trial Judgement")

**RUTAGANDA**

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

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

**RUTAGANIRA**

*The Prosecutor v. Vincent Rutaganira*, Case No. ICTR-1995-1C-T, Judgement and Sentence, 14 March 2005 ("*Rutaganira* Trial Judgement")

**RUKUNDO**

*Emmanuel Rukundo v. The Prosecutor*, Case No. ICTR-2001-70-AR72, *Décision (Acte d'appel relatif à la décision du 26 février 2003 relative aux exceptions préjudicielles)*, 17 October 2003

**RWAMAKUBA**

*The Prosecutor v. André Rwamakuba,* Case No. ICTR-98-44C-PT, Decision on Defence Motion for Stay of Proceedings, 3 June 2005

*The Prosecutor v. André Rwamakuba,* Case No. ICTR-98-44C-T, Judgement, 20 September 2006 ("*Rwamakuba* Trial Judgement")

*The Prosecutor v. André Rwamakuba,* Case No. ICTR-98-44C-A, Decision on Appeal against Decision on Appropriate Remedy, 13 September 2007 ("*Rwamakuba* Decision")

**SEMANZA**

*Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision, 31 May 2000

*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, Appeal Judgement, 20 May 2005 ("*Semanza* Appeal Judgement")

**SEROMBA**

*The Prosecutor v. Athanase Seromba*, Case No. ICTR-01-66-AR, Decision on the Interlocutory Appeal against the Decision of the Bureau, 22 May 2006

**SERUSHAGO**

*The Prosecutor v. Omar Serushago*, Case No. ICTR-98-39-S, Sentence, 5 February 1999 ("*Serushago* Trial Judgement")

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

**SIMBA**

*Aloys Simba v. The Prosecutor,* Case No. ICTR-01-76-AR72.2*,* Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, 29 July 2004

**ZIGIRANYIRAZO**

*Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006

2. ICTY

**ALEKSOVSKI**

*Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's appeal on admissibility of evidence, 16 February 1999

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

*Zlatko Aleksovski v. The Prosecutor,* 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* Appeal Judgement")

**BLAGOJEVIĆ and JOKIĆ**

*Prosecutor v. Vidoje Blagojević, Dragan Obrenović, Dragan Jokić, Momir Nikolić*, Case No. IT-02-60, Decision on Blagojević's Application Pursuant to Rule 15(B), 19 March 2003

*Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-AR73.4, Public and Redacted Version of the Reasons for the Decision on the Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003

*Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Decision on Vidoje Blagojević's Oral Request, 30 July 2004

*Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Judgement, 17 January 2005 ("*Blagojević and Jokić* Trial Judgement")

*Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Judgement, 9 May 2007 ("*Blagojević and Jokić* Appeal Judgement")

**BLAŠKIĆ**

*Tihomir Blaškić v. The Prosecutor,* Case No. IT-95-14-AR108*bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997

*Prosecutor v. Tihomir Blaškić,* Case No. IT-95-14-T, Judgement, 3 March 2000 ("*Blaškić* Judgement")

*Prosecutor v. Tihomir Blaškić,* Case No. IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in the *Prosecutor v. Blaškić*, 16 May 2002

*Tihomir Blaškić v. The Prosecutor*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement")

**BRALO**

*Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Judgement on Sentencing Appeal, 2 April 2007 ("*Bralo* Appeal Judgement")

**BRĐANIN**

*Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, 3 June 2003

*Prosecutor v. Radoslav Brđanin,* Case No. IT-99-36-A, Judgement, 1 September 2004 ("*Brđanin* Trial Judgement")

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

**ČELEBI]I / DELALIĆ et al. / MUCIĆ et al.**

*Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-T, Judgement, 16 November 1998 ("*Čelebići* Trial Judgement")

*Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo v. The Prosecutor*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement")

**DERONJIĆ**

*Prosecutor v. Miroslav Deronjić,* Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005 ("*Deronjić* Appeal Judgement")

**FURUNDŽIJA**

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

*Anto Furundžija v. The Prosecutor*, Case No. IT-95-17/1-A, Appeal Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement")

**GALIĆ**

*Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002

*Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision on the Expert Witness Statement Submitted by the Defence, 27 January 2003

*Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR54, Decision on Appeal from Refuse of Application for Disqualification and Withdrawal of Judge, 13 March 2003

*Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgement and Opinion, 5 December 2003 ("*Galić* Trial Judgement")

*Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006 ("*Galić* Appeal Judgement")

**GOTOVINA et al.**

*Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač,* Case No. IT-06-90-AR73.2, Decision on Ivan Čermak's Interlocutory Appeal against Trial Chamber's Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković, 29 June 2007

*Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač,* Case No. IT-06-90-AR73.1, Decision on Miroslav Šeparović's Interlocutory Appeal against Trial Chamber's Decisions on Conflict of Interest and Finding of Misconduct*,* 4 May 2007

**HALILOVIĆ**

*Prosecutor v. Sefer Halilović,* Case No. IT-01-48-T, Decision on Motion for Exclusion of Statement of Accused, 8 July 2005

*Prosecutor v. Sefer Halilović,* Case No. IT-01-48-A, Decision on Defence Motion for Prompt Scheduling of Appeal Hearing, 27 October 2006 ("*Halilović* Decision")

*Prosecutor v. Sefer Halilović,* Case No. IT-01-48-A, Judgement, 16 October 2007 ("*Halilović* Appeal Judgement")

**JELISIĆ**

*Prosecutor v. Goran Jelisić,* Case No. IT-95-10-T, Judgement, 14 December 1999 ("*Jelisić* Trial Judgement")

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

**JOKIĆ**

*Prosecutor v. Miodrag Jokić,* Case No. IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005 ("*Jokić* Appeal Judgement")

**KORDIĆ and ČERKEZ**

*Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-PT, Bureau Decision on Participation of Trial Chamber I Judges in the Case of the Prosecutor v. Bla{kić, 4 May 1998

*Prosecutor v. Dario Kordić and Mario Čerkez,* Case No. IT-95-14/2-T*,* Judgement*,* 26 February 2001 ("*Kordić and Čerkez* Trial Judgement")

*Dario Kordić and Mario Čerkez v. The Prosecutor*, Case No. IT-95-14/2-A, Decision on the Application by Mario Čerkez for Extension of Time to File his Respondent's Brief, 11 September 2001

*Dario Kordić and Mario Čerkez v. The Prosecutor,* Case No. IT-95-14/2-A*,* Appeal Judgement*,* 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement")

**KOVAČEVIĆ**

*Prosecutor v. Milan Kovačević*, Case No. IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998

**KRAJIŠNIK**

*Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-AR73.2, Report to the Vice-President Pursuant to Rule 15(B)(ii) Concerning Decision on Defence Motion that Judge Meron Not Sit on an Appeal, 1 September 2006

**KRNOJELAC**

*Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgement, 15 March 2002 ("*Krnojelac* Trial Judgement")

*Milorad Krnojelac v. The Prosecutor,* Case No. IT-95-14/2-A*,* Appeal Judgement*,* 17 September 2003 ("*Krnojelac* Appeal Judgement")

**KRSTIĆ**

*Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001 ("*Krstić* Trial Judgement")

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

**KUNARAC et al.**

*Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23-T and IT-96-23/1-T, Judgement, 22 February 2001 ("*Kunarac et al.* Trial Judgement")

*Dragoljub Kunarac, Radomir Kovač and Zoran Vuković v. The Prosecutor*, Case No. IT-96-23 and IT-96-23/1-A, Appeal Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement")

**KUPREŠKIĆ et al.**

*Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić, alias "Vlado" v. The Prosecutor,* Case No. IT-95-16-AR73.3, Decision on Appeal by Dragan Papić against Ruling to Proceed by Deposition, 15 July 1999

*Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić*, *alias "Vlado"*, Case No. IT-95-16-T, Judgement, 14 January 2000 ("*Kupreškić et al.* Trial Judgement")

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

**KVOČKA et al.**

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

**LIMAJ et al.**

*Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-T, Judgement, 30 November 2005 ("*Limaj et al.* Trial Judgement")

*Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-A, Judgement, 27 September 2007 ("*Limaj et al.* Appeal Judgement")

**LUKIĆ and LUKIĆ**

*Milan Lukić and Sredoje Lukić v. The Prosecutor,* Case No. IT-98-32/1-AR11*bis*.1, Order on Second Motion to Disqualify President and Vice-President from Appointing Judges to Appeal Bench and to Disqualify President and Judge Meron from Sitting on Appeal*,* 11 May 2007

**MARTIĆ**

*Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Defence's Submission of the Expert Report of Professor Smilja Avramov Pursuant to Rule 94 *bis*, 9 November 2006 ("*Martić* Decision of 9 November 2006")

*Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Defense's Submission of the Expert Report of Milisav Selukić Pursuant to Rule 94 *bis*, and on Prosecution's Motion to Exclude Certain Sections of the Military Expert Report of Milisav Selukić, and on Prosecution Motion to Reconsider Order of 7 November 2006, 13 November 2006 ("*Martić* Decision of 13 November 2006")

**MILOŠEVIĆ Dragomir**

*Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 February 2007 ("*D. Milošević* Decision of 15 February 2007")

**NALETILIĆ and MARTINOVIĆ**

*Prosecutor v. Mladen Naletilić, alias "Tuta" and Vinko Martinović, alias "Štela",* Case No. IT-98-34-T, Judgement, 31 March 2003 ("*Naletilić and Martinović* Trial Judgement")

*Mladen Naletilić, alias "Tuta" and Vinko Martinović, alias "Štela" v. The Prosecutor,* Case No. IT-98-34-A, Appeal Judgement, 3 May 2006 ("*Naletilić and Martinović* Appeal Judgement")

**NIKOLIĆ Dragan**

*Prosecutor v. Dragan Nikolić,* Case No. IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005 ("*D. Nikolić* Appeal Judgement")

**NIKOLIĆ Momir**

*Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Public Redacted Version of Decision on Motion to Admit Additional Evidence, 9 December 2004

*Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Judgement on Sentencing Appeal, 8 March 2006 ("*M. Nikolić* Appeal Judgement")

**ORIĆ**

*Naser Orić v. The Prosecutor*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005

*Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Decision on the Motion to Strike Defence Reply Brief and Annexes *A-D*, 7 June 2007

**PRLIĆ et al.**

*Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić v. The Prosecutor*, Case No. IT-04-74-AR73.1, Decision on Appeal by Bruno Stojić against Trial Chamber Decision on Request for Appointment of Counsel, 24 November 2004

*Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić v. The Prosecutor*, Case No. IT-04-74-AR73.5, Decision on Praljak's Appeal of the Trial Chamber's 10 May 2007 Decision on the Mode of Interrogating Witnesses, 24 August 2007

**SIMIĆ Blagoje**

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

**SIMIĆ Milan**

*Prosecutor v. Milan Simić*, Case No. IT-95-9/2-S, Sentencing Judgement, 17 October 2002

**STAKIĆ**

*Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003 ("*Stakić* Trial Judgement")

*Milomir Stakić v. The Prosecutor*, Case No. IT-97-24-A, Appeal Judgement, 22 March 2006 ("*Stakić* Appeal Judgement")

**TADIĆ Duško**

*Prosecutor v. Duško Tadić, alias "Dule"*, Case No. IT-94-1-T, Judgement, 7 May 1997 ("*Tadić* Trial Judgement")

*Duško Tadić v. The Prosecutor,* Case No. IT-94-1-A, Decision on Appellant's Motion for Extension of Time-Limit and Admission of Additional Evidence, 15 October 1998

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

*Prosecutor v. Duško Tadić,* Case No. IT-94-1-A and IT-94-1-A *bis*, Judgement in Sentencing Appeals, 26 January 2000 ("*Tadić* Sentencing Appeal Judgement")

**VASILJEVIĆ**

*Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002 ("*Vasiljević* Trial Judgement")

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

**ZELENOVIĆ**

*Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-A, Judgement, 31 October 2007 ("*Zelenović* Appeal Judgement")

3. ECHR (Court and Commission)

*Battisti v. France*, European Court of Human Rights (Second Section), Case No. 28796/05, *Décision sur la recevabilité,* 12 December 2006

*Brozicek v. Italy*, European Court of Human Rights, Case No. 10964/84, Judgement, 19 December 1989

*C. v. Italy*, European Commission of Human Rights, Case No. 10889/84, Decision on the Admissibility of the Application, 11 May 1988

*Colozza v. Italy*, European Court of Human Rights, Case No. 9024/80, Judgement, 12 February 1985

*Craxi v. Italy,* European Court of Human Rights (First Section), Case No. 34896/97, Judgement, 5 December 2002

*Håkansson and Sturesson v. Sweden*, European Court of Human Rights, Case No. 11855/85, Judgement, 21 February 1990

*Kamasinski v. Austria*, European Court of Human Rights, Case No. 9783/82, Judgement, 19 December 1989

*Krombach v. France*, European Court of Human Rights, Case No. 29731/96, Judgement, 13 February 2001

*Kwiatkowska v. Italy*, European Court of Human Rights, Case No. 52868/99, Admissibility Decision, 30 November 2000

*Medenica v. Switzerland*, European Court of Human Rights, Case No. 20491/92, Judgement, 14 June 2001

*Naletilić v. Croatia,* European Court of Human Rights, Decision as to the Admissibility of Application No. 51891/99, 4 May 2000

*Poitrimol v. France*, European Court of Human Rights, Case No. 14032/88, Judgement, 23 November 1993

*R.R. v. Italy*, European Court of Human Rights, Case No. 42191/02, Judgement, 9 June 2005

*Sannino v. Italy*, European Court of Human Rights, Case No. 30961/03, Judgement, 27 April 2006

*Sejdovic v. Italy*, European Court of Human Rights, Case No. 56581/00, Judgement, 10 November 2004

*Somogyi v. Italy*, European Court of Human Rights, Case No. 67972/01, Judgement, 18 May 2004

*Van Geyseghem v. Belgium*, European Court of Human Rights, Case No. 26103/95, Judgement, 21 January 1999

*Vaturi v. France*, European Court of Human Rights (First Section), Case No. 75699/01, Judgement, 13 April 2006

4. Inter-American Commission on Human Rights

Report No. 50/00, Case 11.298, *Reinaldo Figueredo Planchart v. Venezuela*, 13 April 2000

5. Human Rights Committee

*Aston Little v. Jamaica*, Communication No. 283/1988, UN Doc. CCPR/C/43/D/283/1988, 19 November 1991

*Daniel Monguya Mbenge et al. v. Democratic Republic of the Congo*, Communication No. 16/1997, UN Doc. CCPR/C/18/D/16/1977, 25 September (*sic*) [March] 1983

*Lubuto v. Zambia,* Communication No. 390/1990, UN Doc. CCPR/C/55/D/390/1990, 17 November 1995

*Paul Kelly v. Jamaica*, Communication No. 253/1987, UN Doc. CCPR/C/41/D/253/1987, 10 April 1991

General Comment No. 13, UN Doc. HRI/GEN/1/Rev.1, 13 April 1984

6. Other decisions

(a) Canada

*Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 R.C.S. 100, 2005 CSC 40

*Mugesera* v. *Canada (Minister of Citizenship and Immigration)*, [2004] 1 R.C.F. 3, 2003 CAF 325
*R. v. Gagnon*, [1956] R.C.S. 635

(b) United States

*Direct Sales Co. v. United States*, 319 U.S. 703 (1943)

*Glasser v. United States*, 315 U.S. 60, 80 (1942)

*Iannelli v. United States*, 420 U.S. 770 (1975)

(c) United Kingdom

*R. v. Anderson*, [1986] A.C. 27

## C. Other material

### 1. United Nations Documents

(a) General Assembly Resolutions

*Questions relating to the programme budget for the biennium 1998-1999*, UN Doc. A/RES/53/214, section VIII, 11 February 1999

(b) Verbatim Records

UN ORGA, Sixth Committee, Third Session, 84th Meeting, UN Doc. A/C.6/3/CR. 84, 26 October 1948

UN ORGA, Sixth Committee, Third Session, 85th Meeting, UN Doc. A/C.6/3/CR. 85, 27 October 1948

UN ORGA, Sixth Committee, Third Session, 86th Meeting, UN Doc. A/C.6/3/CR. 86, 28 October 1948

UN ORGA, Sixth Committee, Third Session, 87th Meeting, UN Doc. A/C.6/3/CR. 87, 29 October 1948

Provisional Verbatim Record of the 3217th Meeting of the Security Council, UN Doc. S/PV.3217, 25 May 1993

UN Doc. S/PV.3453 (8 November 1994)

(c) Reports

Final Report by the Special Rapporteur, L.M. Singhvi, *The administration of justice and the human rights of detainees: study on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers*, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 38th Session, Item 9(c) of the provisional agenda, UN Doc.E/CN.4/Sub/2/1985/18/Add.1, 31 July 1985

Draft Code of Crimes against the Peace and Security of Mankind and the comments relating thereto, 1996, Report of the International Law Commission on the deliberations of its forty eighth

meeting, 51 U.N. ORGA Supp. (No. 10), reproduced in the Yearbook of International Law Commission, 1996, vol. II (Part Two) ("Draft Code of Crimes Against the Peace and Security of Mankind")

2. Doctrine

Bryan A. Garner, Ed., Black's Law Dictionary, 8th Edition (Saint Paul, Minnesota: Thomson West Publishing Company, 2004)

Roger Merle and André Vitu, *Traité de droit criminel*, 7th Edition, Vol. 1 (Paris, 1997)

Salvatore Zappala, Human Rights in International Criminal Proceedings (Oxford: Oxford University Press, 2003)

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