Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Patrick Robinson
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun

Registrar: **Mr. Adama Dieng**

Judgement of: **14 December 2011**

Théoneste BAGOSORA
Anatole NSENGIYUMVA
v.

THE PROSECUTOR

Case No. ICTR-98-41-A

JUDGEMENT

Counsel for Théoneste Bagosora

Raphaël Constant
Richard Perras

Counsel for Anatole Nsengiyumva

Kennedy Ogetto
Gershom Otachi Bw'Omanwa

Office of the Prosecutor

Hassan Bubacar Jallow
James J. Arguin
George W. Mugwanya
Inneke Onsea
Renifa Madenga
Abubacarr Tambadou
Evelyn Kamau
William Mubiru
Aisha Kagabo
Ndeye Marie Ka

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of appeals by Anatole Nsengiyumva ("Nsengiyumva") and Théoneste Bagosora ("Bagosora") against the Judgement rendered on 18 December 2008 by Trial Chamber I of the Tribunal ("Trial Chamber") in the case of *The Prosecutor v. Théoneste Bagosora et al.*[1]

I. INTRODUCTION

A. Anatole Nsengiyumva and Théoneste Bagosora

2. Nsengiyumva was born on 4 September 1950 in Santinsyi commune, Gisenyi prefecture, Rwanda.[2] In 1971, he graduated from the *École d'officiers de Kigali*, later renamed *École supérieure militaire* ("ESM").[3] In 1973, he was appointed Second Lieutenant in the Rwandan army and Sub-Commissioner in the police.[4] He rose to the rank of Lieutenant-Colonel in 1988.[5] Throughout his career, Nsengiyumva held several posts, most notably serving as Head of the Intelligence Bureau (G-2) of the army General Staff.[6] From June 1993 to July 1994, he served as Commander of the Gisenyi Operational Sector.[7] Nsengiyumva was arrested in Cameroon on 27 March 1996 and was transferred to the Tribunal's detention facility on 23 January 1997.[8]

3. Bagosora was born on 16 August 1941 in Giciye commune, Gisenyi prefecture, Rwanda.[9] In 1964, he graduated from the *École d'officiers de Kigali*, later renamed ESM, as a Second Lieutenant and rose to the rank of Colonel in October 1989.[10] Bagosora was appointed *directeur de cabinet* for the Ministry of Defence in June 1992.[11] He served in that position until he fled to Goma

[1] *The Prosecutor v. Théoneste Bagosora*, *Gratien Kabiligi*, *Aloys Ntabakuze*, *Anatole Nsengiyumva*, Case No. ICTR-98-41-T, Judgement and Sentence, delivered in public and signed 18 December 2008, filed 9 February 2009 ("Trial Judgement").
[2] Trial Judgement, para. 64.
[3] Trial Judgement, para. 64.
[4] Trial Judgement, para. 64.
[5] Trial Judgement, para. 64.
[6] Nsengiyumva served as Head of G-2 in the General Staff of the Rwandan army from December 1976 to August 1981, from October 1984 to April 1988, and from June 1988 to June 1993. *See* Trial Judgement, paras. 65-69.
[7] Trial Judgement, paras. 70, 71.
[8] Trial Judgement, paras. 71, 2307, 2308.
[9] Trial Judgement, para. 43.
[10] Trial Judgement, paras. 43, 45.
[11] Trial Judgement, para. 49.

in the former Zaire on 14 July 1994.[12] Bagosora was arrested in Cameroon on 9 March 1996 and was transferred to the Tribunal's detention facility in Arusha, Tanzania, on 23 January 1997.[13]

B. Joinder of Cases and Trial Judgement

4. The cases against Nsengiyumva and Bagosora were originally undertaken separately. On 29 June 2000, Trial Chamber III of the Tribunal granted the Prosecution's motion to join the cases of Nsengiyumva, Bagosora, Aloys Ntabakuze ("Ntabakuze"), and Gratien Kabiligi (together, "co-Accused").[14] Ntabakuze was the Commander of the Para-Commando Battalion of the Rwandan army from June 1988 to July 1994, and Gratien Kabiligi was the Head of the Operations Bureau (G-3) of the Rwandan army General Staff from September 1993 to 17 July 1994.[15]

5. The Trial Chamber rendered its Judgement on the basis of three separate indictments.[16]

6. The Trial Chamber found Nsengiyumva guilty of genocide, crimes against humanity (murder, extermination, persecution, and other inhumane acts), and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (violence to life) pursuant to Article 6(1) of the Statute of the Tribunal ("Statute").[17] It held that Nsengiyumva ordered killings in Gisenyi town on 7 April 1994, including the killing of Alphonse Kabiligi, as well as at Mudende University on 8 April 1994 and at Nyundo Parish between 7 and 9 April 1994. It also found that Nsengiyumva aided and abetted killings in the Bisesero area of Kibuye prefecture in the second half of June 1994 by sending militiamen to participate in them.[18] For the crimes committed in Gisenyi town, including the killing of Alphonse Kabiligi, at Mudende University, and at Nyundo Parish, the Trial Chamber found that Nsengiyumva could also be held responsible as a superior pursuant to Article 6(3) of the Statute and took this into account in sentencing.[19] The Trial Chamber sentenced Nsengiyumva to life imprisonment.[20]

7. The Trial Chamber found Bagosora guilty of genocide, crimes against humanity (murder, extermination, persecution, other inhumane acts, and rapes), and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (violence to life and outrages

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[12] Trial Judgement, paras. 49, 53. *See also ibid*., para. 50.
[13] Trial Judgement, paras. 53, 2285, 2290.
[14] *See* Trial Judgement, para. 2312. Ntabakuze's case was initially joined to that of Kabiligi.
[15] Trial Judgement, paras. 56, 60-63.
[16] *The Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze*, Cases Nos. ICTR-97-34-I & ICTR-97-30-I, Amended Indictment, 13 August 1999; *The Prosecutor v. Anatole Nsengiyumva*, Case No. ICTR-96-12-I, Amended Indictment, 12 August 1999; *The Prosecutor v. Théoneste Bagosora*, Case No. ICTR-96-7-I, Amended Indictment, 12 August 1999.
[17] Trial Judgement, para. 2258.
[18] Trial Judgement, paras. 2142, 2148, 2152, 2157, 2161, 2184, 2189, 2197, 2216, 2227, 2248.
[19] Trial Judgement, paras. 2161, 2189, 2197, 2216, 2248, 2272.

upon personal dignity) pursuant to Articles 6(1) and 6(3) of the Statute.[21] It held him responsible pursuant to Article 6(1) of the Statute for ordering the murder of Augustin Maharangari and the crimes committed between 7 and 9 April 1994 at Kigali area roadblocks.[22] It further found Bagosora responsible as a superior under Article 6(3) of the Statute for the killings of Prime Minister Agathe Uwilingiyimana, Joseph Kavaruganda, Frédéric Nzamurambaho, Landoald Ndasingwa, Faustin Rucogoza, ten Belgian peacekeepers, and Alphonse Kabiligi, as well as killings committed at *Centre Christus*, Kibagabaga Mosque, Kabeza, the Saint Josephite Centre, Karama Hill, Kibagabaga Catholic Church, Gikondo Parish, Gisenyi town, Mudende University, and Nyundo Parish.[23] The Trial Chamber also found Bagosora responsible as a superior for the rapes committed at the Kigali area roadblocks, the sexual assault of the Prime Minister, the torture of Alphonse Kabiligi, the rapes and stripping of female refugees at the Saint Josephite Centre, the rapes at Gikondo Parish, and the "sheparding" of refugees to Gikondo Parish where they were killed, and on these bases convicted him of rape and other inhumane acts as crimes against humanity, as well as outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[24] The Trial Chamber sentenced Bagosora to life imprisonment.[25]

8. The Trial Chamber found Ntabakuze guilty of genocide, crimes against humanity (murder, extermination, persecution, and other inhumane acts), and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (violence to life) pursuant to Article 6(3) of the Statute.[26] It held him responsible for the crimes committed against Tutsi civilians in the Kabeza area of Kigali on 7 and 8 April 1994, at Nyanza hill on 11 April 1994, and at the *Institut africain et mauricien de statistiques et d'économie* in the Remera area of Kigali around 15 April 1994.[27] The Trial Chamber sentenced Ntabakuze to life imprisonment.[28]

9. The Trial Chamber acquitted Gratien Kabiligi on all counts.[29]

[20] Trial Judgement, para. 2279.
[21] Trial Judgement, para. 2258.
[22] Trial Judgement, paras. 2158, 2186, 2194, 2213, 2245. The Trial Chamber was satisfied that Bagosora was also liable as a superior under Article 6(3) of the Statute for the crime of genocide and the killings committed at Kigali area roadblocks and took it into account in sentencing. *See* Trial Judgement, paras. 2158, 2186, 2194, 2213, 2245, 2272.
[23] Trial Judgement, paras. 2040, 2158, 2186, 2194, 2203, 2213, 2224, 2245.
[24] Trial Judgement, paras. 2203, 2224, 2254.
[25] Trial Judgement, para. 2277.
[26] Trial Judgement, para. 2258.
[27] Trial Judgement, paras. 926, 927, 1427-1429, 2062-2067, 2226.
[28] Trial Judgement, para. 2278.
[29] Trial Judgement, para. 2258.

C. The Appeals

10. Nsengiyumva, Bagosora, and Ntabakuze filed appeals against the Trial Judgement. The case of Ntabakuze was severed from that of Nsengiyumva and Bagosora in the course of the appeal proceedings.[30]

11. Nsengiyumva presents fifteen grounds of appeal challenging his convictions and sentence.[31] He requests that the Appeals Chamber set aside his convictions and enter a judgement of acquittal.[32]

12. Bagosora presents six grounds of appeal containing numerous sub-grounds challenging his convictions and sentence.[33] He requests that the Appeals Chamber reverse his convictions and enter a judgement of acquittal or, in the alternative, order a retrial.[34]

13. The Prosecution responds that the appeals of Nsengiyumva and Bagosora should be dismissed.[35]

14. The Appeals Chamber heard oral submissions regarding these appeals on 30 March, 31 March, and 1 April 2011. The Appeals Chamber also heard the additional evidence of Marcel Gatsinzi, a witness of the Appeals Chamber, in relation to Bagosora's appeal.[36]

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[30] *See* Annex A, Procedural History.
[31] Nsengiyumva Notice of Appeal, paras. 4-46 (pp. 4-28); Nsengiyumva Appeal Brief, paras. 11-303.
[32] Nsengiyumva Notice of Appeal, para. 46 (p. 28); Nsengiyumva Appeal Brief, paras. 10, 303.
[33] Bagosora Notice of Appeal, pp. 5-14; Bagosora Appeal Brief, paras. 8-334.
[34] Bagosora Notice of Appeal, p. 14; Bagosora Appeal Brief, p. 49.
[35] Prosecution Response Brief (Nsengiyumva), para. 324; Prosecution Response Brief (Bagosora), paras. 7, 254.
[36] AT. 30 March 2011 pp. 4-47.

II. STANDARDS OF APPELLATE REVIEW

15. The Appeals Chamber recalls the applicable standards of appellate review pursuant to Article 24 of the Statute. The Appeals Chamber reviews only errors of law which have the potential to invalidate the decision of the Trial Chamber and errors of fact which have occasioned a miscarriage of justice.[37]

16. Regarding errors of law, the Appeals Chamber has stated:

> Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant's arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[38]

17. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.[39] In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding may be confirmed on appeal.[40]

18. Regarding errors of fact, it is well established that the Appeals Chamber will not lightly overturn findings of fact made by the Trial Chamber:

> Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.[41]

19. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the Trial Chamber's rejection of those arguments constituted an error warranting

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[37] *See*, *e.g.*, *Munyakazi* Appeal Judgement, para. 5; *Muvunyi* Appeal Judgement of 1 April 2011, para. 7; *Renzaho* Appeal Judgement, para. 7.

[38] *Ntakirutimana* Appeal Judgement, para. 11 (internal citation omitted). *See also*, *e.g.*, *Munyakazi* Appeal Judgement, para. 6; *Setako* Appeal Judgement, para. 8; *Muvunyi* Appeal Judgement of 1 April 2011, para. 8.

[39] *See*, *e.g.*, *Munyakazi* Appeal Judgement, para. 7; *Setako* Appeal Judgement, para. 9; *Muvunyi* Appeal Judgement of 1 April 2011, para. 9.

[40] *See*, *e.g.*, *Munyakazi* Appeal Judgement, para. 7; *Setako* Appeal Judgement, para. 9; *Muvunyi* Appeal Judgement of 1 April 2011, para. 9.

[41] *Krstić* Appeal Judgement, para. 40 (internal citations omitted). *See also Munyakazi* Appeal Judgement, para. 8; *Setako* Appeal Judgement, para. 10; *Muvunyi* Appeal Judgement of 1 April 2011, para. 10.

the intervention of the Appeals Chamber.[42] Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[43]

20. In order for the Appeals Chamber to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.[44] Moreover, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.[45] Finally, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and it will dismiss arguments which are evidently unfounded without providing detailed reasoning.[46]

[42] *See*, *e.g.*, *Munyakazi* Appeal Judgement, para. 9; *Setako* Appeal Judgement, para. 11; *Muvunyi* Appeal Judgement of 1 April 2011, para. 11.
[43] *See*, *e.g.*, *Munyakazi* Appeal Judgement, para. 9; *Setako* Appeal Judgement, para. 11; *Muvunyi* Appeal Judgement of 1 April 2011, para. 11.
[44] Practice Direction on Formal Requirements for Appeals from Judgement, 15 June 2007, para. 4(b). *See also*, *e.g.*, *Munyakazi* Appeal Judgement, para. 10; *Setako* Appeal Judgement, para. 12; *Muvunyi* Appeal Judgement of 1 April 2011, para. 12.
[45] *See*, *e.g.*, *Munyakazi* Appeal Judgement, para. 10; *Setako* Appeal Judgement, para. 12; *Muvunyi* Appeal Judgement of 1 April 2011, para. 12.
[46] *See*, *e.g.*, *Munyakazi* Appeal Judgement, para. 10; *Setako* Appeal Judgement, para. 12; *Muvunyi* Appeal Judgement of 1 April 2011, para. 12.

III. APPEAL OF ANATOLE NSENGIYUMVA

A. Alleged Invalidity of the Trial Judgement (Ground 1)

21. Nsengiyumva submits that the Trial Judgement is void for violating Article 22 of the Statute because by the time the Trial Chamber issued the reasoned opinion required to accompany its judgement, the mandate of one of the Judges had terminated.[47] He provides a letter from the Registrar confirming that Judge Jai Reddy resigned from the Tribunal with effect from 31 December 2008,[48] and contends that this Judge was therefore not capable of signing the written judgement when it was issued on 9 February 2009, notwithstanding its backdating to 18 December 2008.[49] He submits that the Trial Chamber specified during the oral pronouncement of its verdict on 18 December 2008 that the summary it read out was neither binding nor authoritative.[50] He claims that the authoritative written judgement could only have been ready for signing after that date, likely on or about 9 February 2009, when it was filed.[51]

22. The Prosecution responds that the filing date of the written judgement does not necessarily imply that it was the date of signature, and that Nsengiyumva offers no evidence that the written judgement was signed by the Judges after the mandate of one Judge had terminated.[52] It argues that all three Judges took part in the trial process, deliberated on the charges against the co-Accused, and rendered the judgement on these charges on 18 December 2008 when they read the verdicts aloud in open court.[53]

23. The Appeals Chamber recalls that, pursuant to Article 22 of the Statute, "[t]he judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended". Similarly, Rules 88(A) and (C) of the Rules of Procedure and Evidence of the Tribunal ("Rules") provide that "[t]he judgement shall be pronounced in public", "rendered by a majority of the Judges", and "accompanied or followed as soon as possible by a reasoned opinion in writing".

24. In the present case, the Trial Judgement was rendered unanimously and delivered in public on 18 December 2008. It was followed by a written reasoned opinion on 9 February 2009. On the

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[47] Nsengiyumva Notice of Appeal, para. 4; Nsengiyumva Appeal Brief, para. 11.
[48] Nsengiyumva Appeal Brief, Annex A, Letter from the Registrar dated 20 January 2010.
[49] Nsengiyumva Notice of Appeal, para. 4; Nsengiyumva Appeal Brief, para. 11.
[50] Nsengiyumva Notice of Appeal, para. 4; Nsengiyumva Appeal Brief, para. 11.
[51] Nsengiyumva Notice of Appeal, para. 4; Nsengiyumva Appeal Brief, para. 11.
[52] Prosecution Response Brief (Nsengiyumva), para. 10.

day of the delivery of the Trial Judgement, the Trial Chamber pronounced its verdict and sentence, and provided an oral summary of the judgement, highlighting key findings. It specified that:

> The judgement amounts to several hundred pages. The Chamber will now read out its summary. Only the key findings can be highlighted here. The full text of the judgement will be available in the coming days after the conclusion of the editorial process. It contains many incidents where the Prosecution did not prove its case. A French translation will be provided in due course. This summary is not binding. Only the written judgement is authoritative.[54]

25. While the oral summary of the Trial Chamber's findings was not authoritative, the verdicts and sentences pronounced on 18 December 2008 were. The reasoned opinion which followed was simply a written version of the judgement. The Appeals Chamber considers it to be clear from the statement noted above that the written reasoned opinion was complete at the time of the delivery of the judgement on 18 December 2008 and that what followed was merely the completion of the editorial process.[55] Nsengiyumva does not demonstrate that Judge Reddy failed to fulfil his judicial duties in this case prior to the expiration of his mandate on 31 December 2008.

26. The Appeals Chamber therefore finds that Nsengiyumva has failed to demonstrate a violation of Article 22 of the Statute, or that the Trial Judgement is void. Nsengiyumva's First Ground of Appeal is accordingly dismissed.

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[53] Prosecution Response Brief (Nsengiyumva), para. 11. *See also ibid.*, para. 12.
[54] T. 18 December 2008 pp. 2, 3.
[55] *See also* Trial Judgement, fn. 1, para. 2368.

B. Alleged Errors Relating to the Fairness of the Proceedings (Ground 12)

27. Nsengiyumva submits that the Trial Chamber committed numerous errors of law and fact which violated his right to a fair trial and caused him prejudice.[56] Specifically, he alleges that his right to an initial appearance without delay, his right to be tried without undue delay, his right to be present at trial, and his right to have relevant and material evidence disclosed to him during trial were violated.[57] He also asserts that the Trial Chamber erred in relation to the admission of evidence.[58]

1. Alleged Violation of the Right to an Initial Appearance Without Delay

28. Nsengiyumva was arrested on 27 March 1996 and transferred to the Tribunal on 23 January 1997.[59] His initial appearance was held on 19 February 1997.[60] In the Trial Judgement, the Trial Chamber considered that Nsengiyumva noted the delay between his transfer and his initial appearance in his submissions on notice in his Closing Brief, but did not "specifically claim that his rights were violated".[61]

29. Nsengiyumva submits that his right to an initial appearance without delay was violated due to the delay of nearly ten months between his arrest and transfer to Arusha, and the 27 days between his transfer and plea.[62] He argues that the Trial Chamber erroneously stated that he did not raise the issue of his rights being violated by these delays.[63] He contends that these delays were comparable to those faced by his co-accused Gratien Kabiligi, and since the Trial Chamber found that Kabiligi's rights were violated by such delays, it ought to have made the same finding in his case.[64]

30. The Prosecution responds that Nsengiyumva failed to expressly challenge any delay between his transfer to the Tribunal and his initial appearance either during trial or in his Closing

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[56] Nsengiyumva Notice of Appeal, paras. 37-41 (pp. 22, 23); Nsengiyumva Appeal Brief, paras. 232-260.
[57] Nsengiyumva Notice of Appeal, paras. 38-41 (pp. 22, 23); Nsengiyumva Appeal Brief, paras. 232-238, 241-260.
[58] Nsengiyumva Notice of Appeal, para. 37 (p. 22); Nsengiyumva Appeal Brief, paras. 239, 240.
[59] *See* Trial Judgement, para. 71.
[60] *See* Trial Judgement, para. 86.
[61] Trial Judgement, para. 86, *referring to The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Nsengiyumva Defence Confidential Unredacted Final Brief Pursuant to Rule 86(B) of the Rules of Procedure and Evidence, confidential, 23 April 2007, *as corrected by* Corrigendum to the[] Nsengiyumva Defence Confidential Unredacted Final Brief Pursuant to Rule 86(B) of the Rules of Procedure and Evidence Filed on 23rd April 2007, confidential, 25 May 2007 ("Nsengiyumva Closing Brief"), para. 21.
[62] Nsengiyumva Notice of Appeal, para. 39 (p. 23); Nsengiyumva Appeal Brief, paras. 232, 233.
[63] Nsengiyumva Appeal Brief, para. 232.
[64] Nsengiyumva Appeal Brief, para. 233.

Brief, and that, in any event, he does not establish that there was undue delay or that he suffered prejudice.[65]

31. The Trial Chamber did not err in finding that Nsengiyumva made no specific submission that his rights were violated by the delay between his transfer and initial appearance but merely referred to such delay in the context of his submissions on notice in his Closing Brief.[66] In contrast, Nsengiyumva made detailed submissions on the alleged violation of his fair trial rights with respect to notice.[67] Nsengiyumva fails to point to any other instance on the trial record demonstrating that he raised this issue during trial. The Appeals Chamber recalls that if a party raises no objection to a particular issue before the Trial Chamber, in the absence of special circumstances, the Appeals Chamber will find that the party has waived its right to adduce the issue as a valid ground of appeal.[68] The Appeals Chamber accordingly finds that Nsengiyumva has waived his right to raise this issue on appeal.[69]

2. Alleged Violation of the Right to Be Tried Without Undue Delay

32. Nsengiyumva submits that his right to be tried without undue delay has been "consistently violated".[70] He contends that the Trial Chamber erred in finding that he failed to expressly challenge the delay in the trial in his Closing Brief[71] and that "there [was] no undue delay in the proceedings as a whole that [was] specifically attributable to any party or the Tribunal".[72] Nsengiyumva notes that the Trial Chamber acknowledged that some of the individual cases could have started earlier had the Prosecution not requested a joint trial and amendment of the indictments, and he argues that the Trial Chamber erred in dismissing his claims of error and prejudice arising from the joinder process and in asserting that the delay was not attributable to any party.[73] He further claims that he was prejudiced by the delays in the filing of the Prosecution's

[65] Prosecution Response Brief (Nsengiyumva), paras. 244, 245.
[66] Trial Judgement, para. 86. *See also* Nsengiyumva Closing Brief, paras. 18-33.
[67] *See*, *e.g.*, Nsengiyumva Closing Brief, paras. 31, 33-38, 44, 48, 50.
[68] *See Musema* Appeal Judgement, para. 127; *Akayesu* Appeal Judgement, paras. 361, 370, 375, 376; *Čelebići* Appeal Judgement, paras. 640, 649, 650; *Kambanda* Appeal Judgement, paras. 25, 28; *Tadi}* Appeal Judgement, para. 55.
[69] *See Boškoski and Tarčulovski* Appeal Judgement, para. 244 ("The Appeals Chamber recalls that a party is required to raise formally any issue of contention before the Trial Chamber either during trial or pre-trial; failure to do so may result in the complainant having waived his right to raise the issue on appeal." (internal citation omitted)).
[70] Nsengiyumva Notice of Appeal, para. 38 (p. 22).
[71] Nsengiyumva Appeal Brief, para. 234. Nsengiyumva argues that this finding resulted from a misunderstanding of his submissions, and emphasises that he protested the delay at the start of the trial by way of motion. *See idem*.
[72] Nsengiyumva Appeal Brief, para. 235.
[73] Nsengiyumva Appeal Brief, paras. 235, 236. Nsengiyumva submits that the Prosecution's efforts for joinder substantially contributed to the delay of over four years from the date initially set for trial and of over five years from the date of plea to trial. *See ibid*., para. 236.

motions for joinder and amendment of the indictment, and by the Trial Chamber's belated issuance of important decisions.[74]

33. The Prosecution responds that the Trial Chamber was cognisant of issues relating to delay in reaching its findings, and that Nsengiyumva's remaining submissions are unsubstantiated and do not demonstrate that the delay was undue.[75]

34. Having carefully reviewed Nsengiyumva's Closing Brief, the Appeals Chamber considers that the Trial Chamber did not err in finding that Nsengiyumva failed to expressly claim therein that his right to be tried without undue delay was violated.[76] However, the Trial Chamber explicitly noted that Nsengiyumva raised the issue of delay in his trial in his Closing Brief in the context of his submissions on notice,[77] and included Nsengiyumva in its consideration of whether there had been undue delay in the proceedings with respect to all four co-Accused.[78]

35. The Trial Chamber acknowledged that the proceedings had been lengthy, but considered that, in view of the size and complexity of the trial, there had been no undue delay in their conduct.[79] In making this determination, the Trial Chamber acknowledged that "some of the individual cases" could have commenced earlier had the Prosecution not requested amendment of the indictments and joinder.[80] However, it considered that "these procedures are provided for in the Rules and were warranted in order to reflect the full scope and joint nature of [the co-Accused's] alleged criminal conduct".[81] Accordingly, it concluded that there was no undue delay in the proceedings as a whole that was attributable to any party or the Tribunal.[82]

36. The Appeals Chamber considers that Nsengiyumva merely repeats on appeal objections which the Trial Chamber already addressed.[83] He fails to demonstrate that the Trial Chamber erred in its consideration of these submissions. Similarly, Nsengiyumva's submission that he was

[74] Nsengiyumva Appeal Brief, paras. 236-238, *referring to The Prosecutor v. Anatole Nsengiyumva*, Case No. ICTR-96-12-I, Decision on the Defence Motion on Defects in the Form of the Indictment, dated 15 May 2000, filed 16 May 2000 ("Decision Ordering the Filing of Particulars"); *The Prosecutor v. Anatole Nsengiyumva*, Case No. ICTR-96-12-I, Decision on the Defence Motion to Strike out the Indictment, 24 May 1999. Nsengiyumva points out that these decisions were issued 8 and 16 months after the filing of the relevant motions, respectively. *See* Nsengiyumva Appeal Brief, fn. 475.
[75] Prosecution Response Brief (Nsengiyumva), paras. 246, 247.
[76] Trial Judgement, para. 73, fn. 42.
[77] *See* Trial Judgement, fn. 42. The Trial Chamber also acknowledged that it had heard submissions from the parties, including Nsengiyumva, with respect to alleged prejudice and delay during the trial. *See ibid.*, para. 82, fn. 52.
[78] *See* Trial Judgement, paras. 73-84.
[79] Trial Judgement, paras. 78, 84.
[80] Trial Judgement, para. 82.
[81] Trial Judgement, para. 82.
[82] Trial Judgement, para. 82.
[83] *See* Trial Judgement, para. 82.

prejudiced by the Trial Chamber's delay in rendering key decisions amounts to a mere assertion without demonstrating how he was prejudiced, and is therefore summarily dismissed.

37. The Appeals Chamber observes that the Trial Chamber considered numerous factors in deciding that Nsengiyumva's right to a fair trial had not been infringed. These factors included: the number of accused; the number of indictments; the scope, number, and gravity of the crimes charged against the co-Accused; the vast amount of evidence; the "massive amounts" of disclosure and the subsequent need for intervals between the trial segments to allow the parties to prepare; the need for translation; the securing of witnesses and documents located around the world; and the complexity of the case.[84] Nsengiyumva fails to discuss these factors or to challenge the Trial Chamber's reliance upon them.

38. The Appeals Chamber recognises that the substantial length of the proceedings in this case resulted in a long period of pre-judgement detention for Nsengiyumva. However, it finds that Nsengiyumva has failed to demonstrate that the Trial Chamber erred in finding that the proceedings had not been *unduly* delayed. Nsengiyumva's submissions in this regard are therefore dismissed.

3. Alleged Violation of the Right to Be Present at Trial

39. Nsengiyumva was not present at his trial on 8, 9, 10, and 13 November 2006 and, while he attended the proceedings on 14 November 2006, he was absent for the remainder of the trial session which concluded on 12 December 2006.[85] The Trial Chamber found that his absence was justified by his medical condition until 13 November 2006 but that, after that date, he was absent without justification.[86] Applying the proportionality principle relating to the restriction of fundamental rights, it held that there was no violation of Nsengiyumva's right to be present at trial between 8 and 13 November 2006.[87] Subsequently, the Trial Chamber denied Nsengiyumva's request to recall eight witnesses heard in his absence reasoning that his case was closed, that none of the witnesses was adverse to him, and that the witnesses heard had limited significance to his case.[88]

[84] *See* Trial Judgement, paras. 78-84.
[85] *See* Trial Judgement, para. 130.
[86] *See* Trial Judgement, para. 130, *referring to The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Nsengiyumva Motion for Adjour[n]ment Due to Illness of the Accused, 17 November 2006 ("Decision Denying Adjournment"); *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Nsengiyumva Motions to Call Doctors and to Recall Eight Witnesses, 19 April 2007 ("Decision Denying Recall of Witnesses"), paras. 1-10, 19.
[87] Trial Judgement, paras. 131, 132.
[88] Decision Denying Recall of Witnesses, paras. 21, 22, p. 8; Trial Judgement, para. 133.

40. Nsengiyumva submits that his right to be present at trial was violated.[89] He contends that the Trial Chamber erred in finding that he was not prejudiced by the continuation of his trial in his absence and in denying his request to recall witnesses who testified in his absence.[90] In support of his claims, he argues that the Trial Chamber erred in: (i) finding that his absence was not justified after 13 November 2006; (ii) finding that his Defence case was closed; and (iii) misapplying the principle of proportionality.[91]

41. The Prosecution responds that Nsengiyumva fails to show any error or abuse of discretion on the part of the Trial Chamber, or to explain how he was prejudiced by the continuation of the trial in his absence.[92] It also submits that Nsengiyumva attempts to re-litigate on appeal submissions which were unsuccessful during trial and that he waived his right to appeal the Decision Denying Recall of Witnesses by not challenging it at trial.[93]

42. The Appeals Chamber notes that Nsengiyumva made clear in his Closing Brief that the Trial Chamber's decision to continue the trial in his absence and deny the recall of witnesses were issues of contention.[94] It therefore considers that Nsengiyumva did not waive his right to raise the issue on appeal and turns to consider it.[95]

43. Before doing so, the Appeals Chamber emphasises that the accused's right to be tried in his presence provided under Article 20(4)(d) of the Statute is not absolute. An accused can waive or forfeit his right to be present at trial.[96] The Appeals Chamber further recalls that in determining whether to restrict any statutory right of an accused, the Trial Chamber must take into account the proportionality principle, pursuant to which any restriction of a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective.[97]

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[89] Nsengiyumva Notice of Appeal, para. 40 (p. 23).
[90] Nsengiyumva Appeal Brief, para. 241.
[91] Nsengiyumva Appeal Brief, paras. 241-252.
[92] Prosecution Response Brief (Nsengiyumva), para. 252.
[93] Prosecution Response Brief (Nsengiyumva), para. 253.
[94] Nsengiyumva Closing Brief, paras. 3306-3341. *See also* Trial Judgement, para. 128.
[95] *See Boškoski and Tarčulovski* Appeal Judgement, para. 244.
[96] *Prosecutor v. Jovica Staniši} and Franko Simatovi}*, Case No. IT-03-69-AR73.2, Decision on Defence Appeal of the Decision on Future Course of Proceedings, 16 May 2008 ("*Staniši} and Simatovi}* Appeal Decision of 16 May 2008"), para. 6; *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 ("*Karemera et al.* Appeal Decision of 5 October 2007"), para. 11; *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-AR73, Decision on Interlocutory Appeal, 30 October 2006 ("*Zigiranyirazo* Appeal Decision of 30 October 2006"), para. 14.
[97] *Staniši} and Simatovi}* Appeal Decision of 16 May 2008, para. 6; *Karemera et al.* Appeal Decision of 5 October 2007, para. 11; *Zigiranyirazo* Appeal Decision of 30 October 2006, para. 14.

(a) Justification for the Absence

44. Nsengiyumva submits that the Trial Chamber erroneously found that, after 13 November 2006, he was absent from his trial without justification.[98] He argues that the Trial Chamber erred in declining to call the three doctors engaged by the Tribunal to report on his health for cross-examination as their reports that he was fit to attend trial were contradicted by "a detailed and reasoned report [from his family doctor] of his inability to attend trial".[99]

45. The Trial Chamber denied Nsengiyumva's request to hear oral evidence on his medical condition from the three Tribunal doctors on the grounds that the medical reports filed by them and by Nsengiyumva's family doctor "were detailed and self-explanatory".[100] As such, it "did not see a need for additional evidence through live testimony".[101] In making this determination, the Trial Chamber duly took into account the medical report submitted by the Defence on 11 December 2006, which stated that Nsengiyumva was unfit to stand trial.[102] In weighing "the differences in opinion between the three medical doctors engaged by the Tribunal, on the one hand, and [Nsengiyumva]'s family doctor, on the other" and considering that the Defence's medical report was filed when "less than two days remained in the trial session", the Trial Chamber decided to proceed with the conclusion of the trial session.[103]

46. The Appeals Chamber recalls that decisions regarding the conduct of trial, including the right of the accused to be present, are discretionary.[104] Nsengiyumva has failed to show that the Trial Chamber's refusal to hear oral evidence on the medical reports amounted to an abuse of the Trial Chamber's discretion in light of its finding that the reports were detailed and self-explanatory.

47. Furthermore, Nsengiyumva fails to demonstrate that the Trial Chamber erred in concluding that, after 13 November 2006, his absence had not been substantiated by the Tribunal's medical section.[105] He provides no arguments in support of his contention beyond the assertion that the doctors should have given oral testimony. This argument is accordingly dismissed.

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[98] Nsengiyumva Appeal Brief, para. 244.
[99] Nsengiyumva Appeal Brief, para. 244, *referring to* Decision Denying Recall of Witnesses.
[100] T. 12 December 2006 pp. 7, 11; Decision Denying Recall of Witnesses, para. 13.
[101] T. 12 December 2006 pp. 7, 11; Decision Denying Recall of Witnesses, para. 13.
[102] *See* Decision Denying Recall of Witnesses, paras. 7, 12, 13.
[103] Decision Denying Recall of Witnesses, para. 13. *See also* T. 12 December 2006 pp. 7, 11; Decision Denying Recall of Witnesses, para. 19; Trial Judgement, para. 130.
[104] *See*, *e.g.*, *Kalimanzira* Appeal Judgement, para. 14; *Rukundo* Appeal Judgement, para. 147; *Karemera et al.* Appeal Decision of 5 October 2007, para. 7.
[105] Trial Judgement, para. 130.

48. In light of the foregoing, the Appeals Chamber finds that Nsengiyumva has failed to demonstrate that the Trial Chamber erred in finding that his absence after 13 November 2006 was not justified by good cause. The Appeals Chamber considers that, by voluntarily absenting himself from the courtroom without medical justification accepted by the Trial Chamber, Nsengiyumva forfeited his right to be tried in his presence under Article 20(4)(d) of the Statute. In these circumstances, Nsengiyumva cannot claim prejudice from the continuation of the trial in his absence from 15 November to 12 December 2006.

(b) Close of Nsengiyumva's Defence Case

49. Nsengiyumva contends that the Trial Chamber erred in justifying its decision to continue the trial despite his absence and challenges its view that his Defence case was closed.[106] He argues that his Defence case could not have been considered closed since: (i) Luc Marchal was a joint Defence witness for both Nsengiyumva and Gratien Kabiligi;[107] and (ii) it was a joint trial and the Trial Chamber had accepted that each co-Accused would call witnesses based upon their availability.[108]

50. A review of the trial record reveals that the presentation of evidence by Nsengiyumva's Defence team concluded on 13 October 2006, with the exception of a pending application to admit 75 documents, and the further re-examination of Nsengiyumva for the purpose of tendering the documents which were the subject of his pending application.[109] The final trial session was used exclusively to hear Gratien Kabiligi's Defence case, with the exception of four witnesses called by Bagosora, one witness called by Ntabakuze, and the further re-examination of Nsengiyumva.[110]

51. The Appeals Chamber notes that Nsengiyumva initially intended to call Luc Marchal as his witness jointly with the other co-Accused.[111] However, Luc Marchal appeared in court only as Gratien Kabiligi's witness.[112]

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[106] Nsengiyumva Appeal Brief, para. 242, *referring to* Trial Judgement, para. 131.
[107] Nsengiyumva Appeal Brief, para. 242. *See also ibid*., para. 252(c).
[108] Nsengiyumva Appeal Brief, para. 242, *citing* T. 28 February 2005 p. 7; T. 1 March 2005 p. 8.
[109] *See* Status Conference, T. 13 October 2006 pp. 9, 10 (closed session). *See also* Decision Denying Adjournment, para. 1. *See also* Trial Judgement, para. 2359 (Annex A: Procedural History). Nsengiyumva's testimony finished on 13 October 2006. *See* Nsengiyumva, T. 13 October 2006 pp. 11, 12. However, the Defence sought to examine him further on the basis of three binders of documents with the view of tendering the documents as exhibits. *See* Status Conference, T. 13 October 2006 p. 7; Nsengiyumva, T. 12 December 2006 p. 7. *See also The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Nsengiyumva Motion to Admit Documents as Exhibits, 26 February 2007 ("Decision Denying Admission of Evidence"), paras. 1, 2.
[110] *See* Decision Denying Adjournment, para. 1; Trial Judgement, para. 2359; T. 6, 8-10, 13-17, 20-22, 27-30 November 2006; T. 1, 4-7 December 2006; T. 15, 16, 18 January 2007.
[111] *The Prosecutor v. Anatole Nsengiyumva*, Case No. ICTR-98-41-T, List of Defence Witnesses to be Called During the Trial, confidential, 3 January 2005 ("Nsengiyumva Witness List"), p. 52.
[112] T. 30 November 2006 p. 2; T. 4 December 2006 p. 3. Counsel for Nsengiyumva did not examine the witness due to Nsengiyumva's absence. *See* T. 4 December 2006 p. 3.

52. The Appeals Chamber further notes that at the Status Conference of 13 October 2006, Nsengiyumva took the position that his case was not closed. He argued that in a joint trial a case is closed only once all evidence is presented, not merely evidence in respect of each accused separately.[113] However, Nsengiyumva conceded that this position "may have no practical consequences".[114]

53. Nonetheless, at the time of Nsengiyumva's absence from trial in November 2006, the Trial Chamber was aware of the possibility that Nsengiyumva would return to the stand to give further testimony as part of his Defence case.[115] The Appeals Chamber considers that in these circumstances no reasonable Trial Chamber could have concluded that Nsengiyumva's Defence case was closed. The Trial Chamber therefore erred in relying on this factor to justify its decision to continue the trial in his absence. The Appeals Chamber will consider the impact, if any, of this error in the context of the following sub-section, which addresses the other factors the Trial Chamber relied upon in reaching its decision.

(c) Application of the Proportionality Principle

54. On 8 November 2006, Nsengiyumva's Counsel advised the Trial Chamber that Nsengiyumva was ill and unable to attend the proceedings.[116] He requested a suspension of the proceedings as his client did not wish to waive his right to be present.[117] He simultaneously filed a written motion to the same effect.[118] After an adjournment of two hours, a medical report by the Tribunal doctor, Dr. Epee, was produced, stating that "[o]ne week [of] rest is recommended for [Nsengiyumva's] condition to improve".[119] The Trial Chamber ruled that it would proceed in Nsengiyumva's absence.[120]

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[113] Status Conference, T. 13 October 2006 p. 10 (closed session). *See also The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Col. Anatole Nsengiyumva's Submissions on the Timing of Accused's Testimony, confidential, 15 June 2006, paras. 36-42.
[114] Status Conference, T. 13 October 2006 p. 10 (closed session).
[115] *See* Status Conference, T. 13 October 2006 pp. 7, 8 (closed session). Nsengiyumva testified on 4-6, 9, 11-13 October 2006 and continued his testimony on 15 and 18 January 2007.
[116] T. 8 November 2006 p. 1.
[117] T. 8 November 2006 p. 2.
[118] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Urgent Nsengiyumva Defence Motion Requesting Suspension of Trial on Medical Grounds (Pursuant to Article (20)(4)(d) of the Statute and Rule 82(a) of the Rules), confidential, 8 November 2006.
[119] Exhibit DNS229A (Dr. Epee's Medical Report dated 7 November 2006); T. 8 November 2006 p. 7 (closed session). *See also The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, The Registrar's Submissions in Respect of "Urgent Nsengiyumva Defence Motion Requesting Suspension of Trial on Medical Grounds", confidential, 13 November 2006 ("Registrar's Submissions on Nsengiyumva's Request for Suspension of Trial").
[120] T. 8 November 2006 pp. 3, 10 (closed session).

55. On 17 November 2006, the Trial Chamber denied Nsengiyumva's written motion requesting a suspension of the proceedings. It recalled the proportionality principle whereby "any restriction on a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective".[121] It considered that Nsengiyumva's case was closed and that none of the witnesses called during his absence was adverse or even relevant to him.[122] It further noted that it had taken measures to address concerns raised by Nsengiyumva, including deferring the cross-examination of witnesses.[123] It considered the potential impact of an adjournment on the rights of Gratien Kabiligi, including the risk of losing witnesses, and concluded that there was "a much greater threat of prejudice to the Accused Kabiligi than the speculative and remote prejudice to the Accused Nsengiyumva".[124] On 19 April 2007, the Trial Chamber reaffirmed its reasoning in its Decision Denying Recall of Witnesses.[125]

56. In his Closing Brief, Nsengiyumva again alleged that his right to be present at trial was violated.[126] In the Trial Judgement, the Trial Chamber concluded that there was no violation of Nsengiyumva's right to be present between 8 and 13 November 2006, reasoning that:

> [Nsengiyumva's] Defence case had closed; measures had been taken to address all reasonable concerns raised by the Defence; there was no showing of the relevance to the Accused of any testimony heard in his absence; and the risk of losing witnesses due to an adjournment posed a much greater threat of prejudice to Kabiligi than the speculative and remote prejudice to Nsengiyumva. In imposing its narrow four day restriction on Nsengiyumva's right to be present at trial, the Chamber considered more than just the relevance of the evidence to him, for example the real threat of prejudice to his co-accused. In the Chamber's view, this was in conformity with the proportionality principle, pursuant to which any restriction on a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective. Finally, it should be noted that this case was in a different procedural stage than in others [*sic*] cases where the Appeals Chamber has found a violation of the right to be present.[127]

57. Nsengiyumva submits that the Trial Chamber erred in applying the "proportionality test".[128] He argues that the Trial Chamber erred in: (i) failing to recognise that the rights of an accused in a joint trial are the same as those of an accused in a single accused trial; (ii) failing to consider alternative solutions, such as a short adjournment, particularly in light of the length of the period in dispute and the fact that nothing suggested that witnesses might not remain available; (iii) failing to advance any compelling reason outweighing his fundamental right to be present; (iv) conditioning his right to be present on whether the witnesses were to testify about his acts and conduct because

[121] Decision Denying Adjournment, para. 7, *referring to Zigiranyirazo* Appeal Decision of 30 October 2006, para. 14.
[122] Decision Denying Adjournment, paras. 9, 11, 12.
[123] Decision Denying Adjournment, para. 10.
[124] Decision Denying Adjournment, para. 12.
[125] Decision Denying Recall of Witnesses, paras. 18, 19.
[126] Nsengiyumva Closing Brief, paras. 3308-3341.
[127] Trial Judgement, para. 131 (internal references omitted).
[128] Nsengiyumva Appeal Brief, paras. 243, 245-252.

evidence that impeaches Prosecution witnesses is key to rebutting charges and, as such, of no less relevance than evidence going to his acts and conduct; and (v) concluding that the risk of losing witnesses due to an adjournment posed a much greater threat of prejudice to Kabiligi.[129] He reiterates that the witnesses he was not authorised to recall could have provided favourable testimony upon matters about which the Trial Chamber ultimately made adverse findings.[130]

58. One of the principal factors which led the Trial Chamber to deny the adjournment was that none of the witnesses due to testify during Nsengiyumva's absence was adverse or particularly relevant to him.[131] The Appeals Chamber recalls that, in a decision in the *Karemera et al.* case rendered on 5 October 2007, it held that "[i]n the circumstances of a joint trial, it is irrelevant for the purpose of [determining whether to continue trial in absence of an accused due to no fault of his own] whether or not the witness's testimony was likely to concern the alleged acts and conduct of a co-accused only".[132] However, the Appeals Chamber considers that cogent reasons exist for departing from this particular aspect of the *Karemera et al*. Appeal Decision of 5 October 2007. The Appeals Chamber is of the view that, contrary to its statement in the *Karemera et al*. case, the relevance of a witness's testimony to an accused is a factor which can be considered by the Trial Chamber in determining whether to continue trial in the absence of that accused. It considers that the statement in the *Karemera et al*. Appeal Decision of 5 October 2007 constitutes an unnecessary restriction on a Trial Chamber's discretion to regulate the conduct of proceedings at trial depending on the needs and circumstances of each case. Accordingly, the Appeals Chamber considers that the Trial Chamber did not err in relying on this factor in reaching its initial Decision Denying Adjournment.

59. Nevertheless, the Appeals Chamber accepts Nsengiyumva's submission that the Trial Chamber failed to consider alternative solutions in deciding to proceed with hearing the witnesses in his absence.[133] Although the Trial Chamber did seek to mitigate the prejudice to him by suggesting that it would be possible to recall the witnesses, it does not appear to have seriously considered the option of adjourning the trial.[134] The Appeals Chamber notes that the medical report

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[129] Nsengiyumva Appeal Brief, paras. 243, 245-252.

[130] Nsengiyumva Appeal Brief, para. 252. Nsengiyumva refers as examples to Witnesses FB-25, André Ntagerura, Luc Marchal, and Jacques Duvivier.

[131] Decision Denying Adjournment, paras. 9, 11, 12.

[132] *Karemera et al*. Appeal Decision of 5 October 2007, para. 15.

[133] *See Staniši} and Simatovi}* Appeal Decision of 16 May 2008, para. 19 ("[…] derogation [to the right to be present] is not appropriate when reasonable alternatives exist.").

[134] *See* T. 8 November 2006 pp. 3 ("Meanwhile, we do not think that these proceedings should be suspended. We are at a very early stage of a new witness's testimony; he is about to commence his examination-in-chief. There is no suggestion that the information that this witness will come up with is against the Accused."), 7, 8 (closed session); Decision Denying Adjournment, para. 10.

provided on 8 November 2006 clearly stated that Nsengiyumva needed one week's rest.[135] Accordingly, the information before the Trial Chamber at that time made clear that Nsengiyumva's absence would not be prolonged.

60. The Appeals Chamber notes that the Trial Chamber also premised its decision to continue with the trial in part on the ground that the risk of Gratien Kabiligi losing his witnesses due to an adjournment posed a greater risk than the speculative prejudice to Nsengiyumva.[136] While the Appeals Chamber considers that this could have been a legitimate concern, it notes that at no point was it actually argued that there was a risk that Kabiligi's witnesses would be unable to attend if the proceedings were adjourned. The Trial Chamber appears to have speculated that there was a risk that Gratien Kabiligi's witnesses would have been unable to testify at a later stage.

61. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in relying on the alleged close of Nsengiyumva's Defence case. It also finds that the risk of Gratien Kabiligi losing witnesses was not established and that the Trial Chamber failed to properly consider the limited length of Nsengiyumva's expected absence. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in its application of the proportionality test. In the circumstances of this complex and lengthy case, the Appeals Chamber is not satisfied that the expected one week delay to the trial was sufficient to outweigh Nsengiyumva's statutory right to be present at his own trial when his absence was due to no fault of his own. The Appeals Chamber finds that the Trial Chamber erred in continuing the trial during Nsengiyumva's justified absence between 8 and 13 November 2006.

62. The Appeals Chamber is not, however, persuaded that Nsengiyumva suffered any prejudice as a result of the violation of his right to be present at trial.[137] During Nsengiyumva's medically justified absence between 8 and 13 November 2006, the Trial Chamber heard the evidence of Gratien Kabiligi Defence Witnesses ALL-42, YC-03, LAX-2, and FB-25.[138] Gratien Kabiligi Defence Witness Bernard Lugan began his testimony on 13 November 2006 and continued it on 14 November 2006, when Nsengiyumva was present, and on 15 and 16 November 2006, when Nsengiyumva was absent without justification.

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[135] Registrar's Submissions on Nsengiyumva's Request for Suspension of Trial; Exhibit DNS229A (Dr. Epee's Medical Report dated 7 November 2006), para. 7.

[136] *See* Decision Denying Adjournment, para. 12; Decision Denying Recall of Witnesses, para. 3; Trial Judgement, para. 31.

[137] The Appeals Chamber recalls that when a party alleges on appeal that the right to a fair trial has been infringed, it must prove that the violation caused prejudice that amounts to an error of law invalidating the judgement. *See Renzaho* Appeal Judgement, para. 196; *Haradinaj et al.* Appeal Judgement, para. 17; *Gali}* Appeal Judgement, para. 21.

[138] T. 8-10, 13 November 2006.

63. The Appeals Chamber recalls that, in the Trial Judgement, the Trial Chamber concluded that Nsengiyumva had not suffered any prejudice by not having been given the opportunity to examine these witnesses when it considered whether he had suffered any prejudice as a result of its decision not to allow him to recall the witnesses.[139] In a footnote, it reasoned:

> It follows from the Nsengiyumva Recall Motion, […] that the Defence wished to recall Witness ALL-42 on matters related to RPF infiltration. The Chamber notes that the alleged infiltration of Rwanda by the RPF has no bearing on Nsengiyumva's specific crimes. In relation to Witness[es] LAX-2 and FB-25, they were supposed mainly to impeach Prosecution Witness XXQ. The Chamber observes that it has not relied on this witness in relation to Nsengiyumva. Witness FB-25 would also testify about the duties of operational sector commanders and its relationship with other authorities. The Chamber recalls that Witness FB-25 previously appeared during the trial as Ntabakuze Defence Witness DM-190, when Nsengiyumva was present. Finally, the Defence wanted to question Berhard [*sic*] Lugan about clandestine organisations and communication networks. However, the Chamber has not accepted the allegations against the Accused concerning the various clandestine organisations or his role in planning.[140]

64. A review of Nsengiyumva's Motion to Recall Witnesses shows that the topics on which Nsengiyumva wished to examine the witnesses were not issues that related to crimes for which he was ultimately convicted.[141] Furthermore, Nsengiyumva did not seek to recall Witness YC-03 in his Motion to Recall Witnesses, which the Appeals Chamber takes to indicate that he did not consider his testimony to be relevant.[142] The Appeals Chamber therefore finds that the Trial Chamber did not err in finding that Nsengiyumva was not prejudiced by the continuation of the trial in his absence or by the Trial Chamber's refusal to recall the witnesses heard during that time.

65. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber's violation of Nsengiyumva's right to be present at trial did not result in any prejudice to him and, consequently, does not amount to an error of law invalidating the Trial Chamber's decision.

4. Alleged Errors Relating to the Admission of Evidence

66. On 26 February 2007, the Trial Chamber denied Nsengiyumva's oral motion to recall Witness DO in order to put a number of documents directly to him, as well as his request for the

[139] Trial Judgement, para. 134.
[140] Trial Judgement, fn. 123.
[141] *See The Prosecutor v. Théoneste Bagosora et al.*, Case No. 98-41-T, Nsengiyumva Confidential Defence Motion for the Recall of Witness's [*sic*] ALL-42, LAX02, FB25, Bernard Lugan, Delta, Andrew Ntagerura, Luc Marchal and Duvivier All Who Testified in the Session Beginning 10th November to 13th December 2006 in View of the Material Prejudice Arising in the Absence of the Accused During their Testimony, confidential, 23 January 2007 ("Nsengiyumva Motion to Recall Witnesses"), paras. 9-15, 21.
[142] The Appeals Chamber notes that Witness YC-03 testified about a security meeting held in Kigali prefecture at the end of April 1994 in relation to which Nsengiyumva was neither charged nor convicted. *See* Trial Judgement, paras. 1546, 1551.

admission of 19 documents, most of which were witness statements or *pro justitia* statements given to Rwandan authorities.[143]

67. Nsengiyumva submits that the Trial Chamber erred in dismissing his requests to admit the 19 documents and to recall Prosecution Witness DO on the basis that these requests were made after the evidentiary phase of the trial had been completed, which was too late for their admission to be considered.[144] In support of his contention, Nsengiyumva asserts that the Trial Chamber failed to consider that his late requests resulted from the Prosecution's failure to disclose the documents in a timely manner and that he "had no other remedy at that late stage other than a recall of the witness or admission of evidence".[145] Recalling that he was found guilty of killings in Gisenyi town on the basis of Witness DO's testimony, Nsengiyumva argues that his own testimony on the proffered documents was no substitute for not admitting them and considering their content.[146] He contends that the Trial Chamber failed to consider the prejudice caused to him by not admitting the proffered documents or by not recalling Witness DO, and that the rejection of key aspects of Witness DO's testimony in the absence of corroboration was an insufficient remedy to the prejudice he suffered.[147]

68. The Prosecution responds that Nsengiyumva merely repeats arguments which failed at trial without demonstrating that appellate intervention is warranted.[148] It submits that Nsengiyumva waived his right to appeal the Decision Denying Admission of Evidence as he did not seek certification to appeal it during trial.[149]

69. The Appeals Chamber notes that Nsengiyumva had made clear in his Closing Brief that the Trial Chamber's decision to deny the admission of the 19 documents and the recall of Witness DO was an issue of contention.[150] It therefore considers that Nsengiyumva did not waive his right to raise the issue on appeal.[151]

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[143] Decision Denying Admission of Evidence, para. 9 (*referring to* T. 15 January 2007 p. 15 (closed session)), p. 7.
[144] Nsengiyumva Appeal Brief, para. 239. The Appeals Chamber notes that, in his Appeal Brief, Nsengiyumva does not develop any arguments in relation to a number of alleged erroneous decisions concerning admission of evidence cited in footnote 74 of his Notice of Appeal. In these circumstances, the Appeals Chamber considers that Nsengiyumva has abandoned his allegations of error pertaining to these decisions.
[145] Nsengiyumva Appeal Brief, para. 239. Nsengiyumva challenges the Trial Chamber's finding that he did not seek certification to appeal the Decision Denying Admission of Evidence. He argues that he did not do so because by the time this decision was issued, he had to comply with the deadline for filing his Closing Brief. *See idem*.
[146] Nsengiyumva Appeal Brief, para. 240.
[147] Nsengiyumva Appeal Brief, para. 240.
[148] Prosecution Response Brief (Nsengiyumva), paras. 248, 250, fn. 539.
[149] Prosecution Response Brief (Nsengiyumva), para. 249.
[150] Nsengiyumva Closing Brief, paras. 3342-3367. *See also* Trial Judgement, paras. 135-137.
[151] *See Boškoski and Tarčulovski* Appeal Judgement, para. 244. *Cf. also Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004, para. 5.

70. The Trial Chamber denied the admission of the 19 documents on the basis that the documents tendered were either duplicative of other evidence, or because Nsengiyumva had failed to make a timely request to call the witnesses who authored the statements or recall the relevant Prosecution witnesses for further cross-examination.[152] The Appeals Chamber finds no error in the Trial Chamber's exercise of its discretion. The Trial Chamber's refusal to admit the 19 documents was based on a careful consideration of their nature, of the circumstances in which they were obtained by Nsengiyumva, as well as on his failure to provide relevant information and make timely requests.[153] Nsengiyumva does not make any submissions regarding the duplicative nature of some of the evidence proffered, nor does he challenge the dates when he received a number of the documents or effectively demonstrate that he received the documents belatedly.[154] Apart from referring to his motion at trial, Nsengiyumva does not show how the Prosecution's alleged violation of its disclosure obligations invalidates the Trial Chamber's conclusion.

71. The Trial Chamber also denied Nsengiyumva's oral motion to recall Witness DO on the ground that "the motion came too late, as the evidentiary phase of the trial had been completed with the exception of three remaining witnesses to be heard by video-link".[155] It stated that "[t]he Defence had the possibility of making the motion earlier, immediately upon discovering or receiving the documents, and failed to do so".[156] Again, Nsengiyumva does not demonstrate that the Trial Chamber erred. While he claimed at trial that he had received the documents belatedly as a result of the Prosecution's failure to comply with its disclosure obligations,[157] Nsengiyumva failed to point to any evidence suggesting that he had obtained the documents so late that he could not have sought their admission earlier. He similarly fails to do so on appeal.

72. In the Trial Judgement, the Trial Chamber further noted that it had considered Nsengiyumva's testimony about the relevant proffered documents in assessing Witness DO's credibility, along with other evidence and submissions attempting to impeach the witness.[158] The Trial Chamber noted that it had rejected a number of key aspects of Witness DO's testimony in the absence of corroboration, but had nonetheless relied on the corroborated and credible part of the

[152] Decision Denying Admission of Evidence, paras. 2, 9-20. *See also* Trial Judgement, para. 136.
[153] *See* Decision Denying Admission of Evidence, paras. 2, 9-20.
[154] Nsengiyumva refers to transcripts in support of his claim that the Trial Chamber failed to consider that documents had been obtained belatedly. However, the Appeals Chamber notes that the transcripts cited do not specify when his Defence obtained the relevant documents. *See* Nsengiyumva Appeal Brief, para. 239, *referring to* T. 15 January 2007 pp. 10-15; T. 18 January 2007 pp. 13, 14, 16, 17.
[155] Decision Denying Admission of Evidence, para. 9.
[156] Decision Denying Admission of Evidence, para. 9.
[157] *See* T. 15 January 2007 pp. 10-15; T. 18 January 2007 pp. 13, 14, 16, 17.
[158] Trial Judgement, para. 137, *referring to ibid.*, Section III.3.6.1.

witness's testimony regarding his participation in killings in Gisenyi town on 7 April 1994.[159] The Appeals Chamber finds no error in this approach. It was open to the Trial Chamber, as the primary trier of fact, to consider Nsengiyumva's testimony about these documents alongside other evidence in order to reach its conclusion on Witness DO's credibility. Nsengiyumva's general submission that his testimony was "no substitute" for consideration of the content of these documents does not in itself identify any particular error on the part of the Trial Chamber warranting appellate intervention.

73. Furthermore, contrary to Nsengiyumva's contention, the Trial Chamber did consider the potential prejudice caused to him by not admitting the 19 documents or recalling Witness DO.[160] It concluded that, since the proffered documents would not have called into question its findings as to the involvement of Witness DO in the killings in Gisenyi town, Nsengiyumva suffered no prejudice from its decision not to admit them or to recall Witness DO.[161] The Appeals Chamber finds no error in this approach.

74. Accordingly, Nsengiyumva's submissions alleging errors relating to the admission of evidence are dismissed.

5. Alleged Errors Relating to Disclosure

75. Nsengiyumva submits that his right to have relevant and material evidence disclosed to him during trial was violated.[162] Specifically, he alleges that the Trial Chamber erred in relation to the disclosure of the identity of protected Prosecution witnesses and their unredacted statements, in particular in relation to Witness ZF.[163]

(a) Disclosure Relating to Protected Prosecution Witnesses

76. Following the joinder of the case of Gratien Kabiligi and Ntabakuze to the cases of Bagosora and Nsengiyumva, the Prosecution moved the Trial Chamber to harmonise the time-frame within which it had to disclose to the Defence unredacted statements and identification data of protected Prosecution witnesses.[164] In its Decision on Protective Measures of 29 November 2001, the Trial Chamber granted the harmonisation of the existing orders concerning protective measures

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[159] Trial Judgement, para. 137. In so doing, the Trial Chamber took into account that this finding was consistent with the conviction of Witness DO before the Rwandan courts. *See idem*.
[160] *See* Trial Judgement, para. 137.
[161] Trial Judgement, para. 137.
[162] Nsengiyumva Notice of Appeal, para. 41.
[163] Nsengiyumva Appeal Brief, paras. 253-259.

and ordered that all existing protective measures in the joined case be covered by that decision, but deferred ordering a specific deadline for disclosure.[165] On 5 December 2001, the Trial Chamber ordered the Prosecution to disclose the identity of its protected victims and witnesses, as well as their unredacted statements, no later than 35 days before the protected witness was expected to testify at trial, "or until such time as the said protected victims or witnesses [were] brought under the protection of the Tribunal, whichever [was] earlier".[166] The co-Accused filed a joint motion seeking reconsideration of the Decisions on Protective Measures of 29 November 2001 and 7 December 2001,[167] which was denied.[168]

77. Nsengiyumva submits that the Trial Chamber erred in requiring the Prosecution to disclose the identity of protected victims and witnesses and their unredacted statements no later than 35 days before the expected date of their testimony, rather than 60 days before trial, as provided by the Rules.[169] He argues that the Decision on Protective Measures of 7 December 2001 violated his right to timely disclosure and caused him prejudice because: (i) it varied prior decisions on protective measures, which were in conformity with the Rules; (ii) the resulting disclosure on a rolling basis impaired his understanding of the nature of the charges against him and his investigations, especially since the trial was ongoing; and (iii) without full knowledge of all the witnesses' statements, his defence was handicapped in cross-examination.[170] Nsengiyumva further submits that the Trial Chamber failed to specify the exceptional circumstances related to the witness protection requirements that justified this violation of his fair trial rights.[171]

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[164] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-I, Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, 10 July 2001, paras. 3-12.

[165] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-I, Decision on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, 29 November 2001 ("Decision on Protective Measures of 29 November 2001"), para. 43.

[166] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-I, Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, dated 5 December 2001, filed 7 December 2001 ("Decision on Protective Measures of 7 December 2001"), para. 27.

[167] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-I, Defence Motion for Reconsideration of the Trial Chamber's Decisions Rendered on 29 November 2001, "*Decision on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses*" and 5 December 2001, "*Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses,*" and for a Declaration of Lack of Jurisdiction, 13 March 2002.

[168] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-I, Decision on Defence Motion for Reconsideration of the Decisions Rendered on 29 November 2001 and 5 December 2001 and for a Declaration of Lack of Jurisdiction, 28 March 2002.

[169] Nsengiyumva Notice of Appeal, para. 41; Nsengiyumva Appeal Brief, para. 253.

[170] Nsengiyumva Appeal Brief, paras. 254, 255, *referring to* Decision on Protective Measures of 29 November 2001; *The Prosecutor v. Anatole Nsengiyumva*, Case No. ICTR-96-12-I, Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses, delivered orally 26 June 1997, signed 17 November 1997, filed 3 December 1997 ("*Nsengiyumva* Decision on Protective Measures of 26 June 1997").

[171] Nsengiyumva Appeal Brief, para. 255.

78. The Prosecution responds that Nsengiyumva has not demonstrated how he was prejudiced in his material ability to prepare his defence.[172] It also argues that Nsengiyumva impermissibly reiterates arguments which he already raised at trial, and which the Trial Chamber dismissed.[173]

79. The Appeals Chamber recalls that the conduct of trial proceedings, including decisions on protective measures and disclosure, is a matter which falls within the discretion of Trial Chambers.[174] This discretion encompasses the ability of a Trial Chamber to revisit its previous decisions. In this regard, it recalls that Rule 69(A) of the Rules explicitly provides that the Trial Chamber may order the non-disclosure of the identity of a victim or witness "until the Chamber decides otherwise". Accordingly, the fact that there was already an existing protective measures order in Nsengiyumva's case which the Trial Chamber replaced does not in itself amount to an error. Nonetheless, the Appeals Chamber will now consider whether the Decision on Protective Measures of 7 December 2001 was in conformity with the Rules.

80. Rule 66(A)(ii) of the Rules provides that, subject to Rules 53 and 69, the Prosecution shall disclose to the Defence "[n]o later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial". At the time the Decision on Protective Measures of 7 December 2001 was issued, Rule 69 of the Rules provided that:

> (A) In exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.
>
> […]
>
> (C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the prosecution and the defence.[175]

Rule 75(A) of the Rules provided that "[a] Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Support Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused".

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[172] Prosecution Response Brief (Nsengiyumva), para. 258.
[173] Prosecution Response Brief (Nsengiyumva), para. 259.
[174] *See*, *e.g.*, *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence, dated 25 September 2006 and filed 26 September 2006, para. 6; *The Prosecutor v. Théoneste Bagosora et al.*, Cases Nos. ICTR-98-41-AR73 & ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005, para. 3.
[175] Rule 69(C) of the Rules was amended at the 12th Plenary Session held on 5 and 6 July 2002 to read: "Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by Trial Chamber to allow adequate time for preparation of the prosecution and the defence". This remains the operative language of Rule 69(C) of the Rules.

81. In its Decision on Protective Measures of 7 December 2001, the Trial Chamber acknowledged that the plain language of Rule 69(C) of the Rules required the Prosecution to disclose all protected witnesses' identifying data prior to the commencement of trial.[176] Nevertheless, it concluded that a departure from the plain language of the Rule was justified by the objective of providing meaningful protection for victims and witnesses.[177] Following consultation with the Witnesses and Victims Support Section of the Prosecution ("WVSS-P"), it found that this unit was unable to place under its protection all the witnesses in the case at the same time.[178] It considered that neither the mandate of witness protection nor the necessity of ensuring that the accused had sufficient time to prepare his defence could be sacrificed and reasoned that "a proper balance must be struck to determine what amount of advance disclosure is strictly necessary to serve the twin aims of Rule 69".[179] The Trial Chamber concluded that to require the Prosecution to disclose unredacted witness statements and protected witnesses' identifying data prior to the commencement of trial was "ill advised because it would unnecessarily tax any real notion of witness protection without advancing the Accused's right to effective cross-examination in any meaningful way".[180]

82. Although the disclosure requirements under Rule 66 of the Rules are subject to Rule 69, the Appeals Chamber recalls that while a Trial Chamber may order the non-disclosure of the identity of a victim or witness who may be in danger or at risk pursuant to Rule 69(A) of the Rules, it must first establish the existence of exceptional circumstances. In the Decision on Protective Measures of 7 December 2001, the Trial Chamber referred to "the existence of the exceptional circumstance",[181] without elaborating on what it considered to amount to the exceptional circumstance justifying the non-disclosure of the victims' and witnesses' identity. The Appeals Chamber notes, however, that the Trial Chamber recalled that it had consulted with WVSS-P[182] and considered that WVSS-P had informed the Trial Chamber that it lacked the capacity and resources to place all the witnesses under protection at the same time.[183] The Appeals Chamber understands that the Trial Chamber considered that this inability to provide protection to all the witnesses at the same time amounted to an exceptional circumstance warranting the delayed disclosure of the identity of the witnesses. The Appeals Chamber does not find error in this approach.

[176] Decision on Protective Measures of 7 December 2001, paras. 4, 6.
[177] Decision on Protective Measures of 7 December 2001, para. 25. *See also ibid*., paras. 6, 9.
[178] Decision on Protective Measures of 7 December 2001, paras. 18, 19.
[179] Decision on Protective Measures of 7 December 2001, para. 6.
[180] Decision on Protective Measures of 7 December 2001, para. 9.
[181] Decision on Protective Measures of 7 December 2001, para. 9.
[182] Decision on Protective Measures of 7 December 2001, p. 2.
[183] Decision on Protective Measures of 7 December 2001, para. 18.

83. Nevertheless, the Appeals Chamber considers that the Trial Chamber erred in ordering the Prosecution to disclose the identity of protected victims and witnesses and their unredacted statements no later than 35 days before the expected date of their testimony. While a Trial Chamber has discretion pursuant to Rule 69(A) of the Rules regarding the ordering of protective measures where it has established the existence of exceptional circumstances, the Appeals Chamber recalls that this discretion is still constrained by the scope of the Rules. In this regard, it notes that at the time of the decision, Rule 69(C) of the Rules provided that "the identity of the victim or witness shall be disclosed in sufficient time *prior to the trial* to allow adequate time for preparation of the prosecution and the defence".[184]

84. Furthermore, the Appeals Chamber does not consider that, as stated by the Trial Chamber, such disregard for the explicit provision of the Rules was necessary for the protection of witnesses.[185] It notes that in the previous witness protection decision in the *Nsengiyumva* case prior to the joinder, the Trial Chamber had ordered the temporary redaction of identifying information until witnesses were brought under the protection of the Tribunal, but had nonetheless required that the Defence be provided with unredacted witnesses statements "within sufficient time prior to the trial in order to allow the Defence a sufficient amount of time to prepare itself".[186] At no point did the Trial Chamber indicate that any problems had arisen from this previous arrangement justifying a more restrictive disclosure schedule.

85. In light of the foregoing, the Appeals Chamber considers that the Trial Chamber erred in ordering the Prosecution to disclose the identity of protected victims and witnesses and their unredacted statements no later than 35 days before the expected date of their testimony, rather than prior to the trial, as then provided by the Rules. The Appeals Chamber therefore turns to consider whether Nsengiyumva has demonstrated that he suffered prejudice as a result of this error.

86. The Appeals Chamber observes that beyond asserting generally that such disclosure on a rolling basis prejudiced him in his investigations and in his understanding of the totality of the case against him, Nsengiyumva does not substantiate his claim except in relation to Witness ZF,

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[184] Emphasis added.
[185] *See* Decision on Protective Measures of 7 December 2001, para. 20. *See also ibid*., para. 21.
[186] *Nsengiyumva* Decision on Protective Measures of 26 June 1997, p. 4. *See also ibid*., p. 3. *See also The Prosecutor v. Théoneste Bagosora*, Case No. ICTR-96-7-I, Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses, delivered orally 31 October 1997, dated 26 November 1997, filed 3 December 1997, pp. 3, 4. The Appeals Chamber notes that the *Kabiligi and Ntabakuze* Decision on Protective Measures of 19 May 2000 contained more restrictive disclosure requirements, requiring "the Prosecutor to make such a disclosure, including of any material provided earlier to the Defence in a redacted form, not later than twenty-one (21) days before the protected witness is to testify at trial". *See The Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze*, Case No. ICTR-97-34-I, Decision on

discussed in the following sub-section. He fails to show specifically how the time-limit for disclosure imposed by the Trial Chamber materially prejudiced him in his ability to prepare his defence in relation to any particular charge, allegation, or evidence. In this regard, the Appeals Chamber notes the Trial Chamber's finding that "[i]n the final analysis, the Defence teams' ability to prepare their case is amply demonstrated by their ultimate success in impeaching much of the Prosecution's evidence against them, through cross-examination, argumentation and evidence. A careful consideration of the Defence conduct during the course of trial and in their final submissions plainly reflects that they have mastered the case".[187] In these circumstances, the Appeals Chamber is not satisfied that Nsengiyumva has established that he was prejudiced by the Decision on Protective Measures of 7 December 2001.

(b) Disclosure of Witness ZF's Particulars

87. Nsengiyumva submits that he was materially prejudiced by the Trial Chamber's reliance on the testimony of Prosecution Witness ZF in relation to the Bisesero events since the manner in which the material and information relating to this witness was disclosed denied him the opportunity to prepare his defence.[188] The Prosecution responds that the Trial Chamber did not rely only on Witness ZF in entering convictions, and that Nsengiyumva does not demonstrate any error in the Trial Chamber's approach.[189]

88. The Appeals Chamber has determined in Section III.C.7 of this Judgement that the Trial Chamber erred in convicting Nsengiyumva for aiding and abetting the killing of Tutsi refugees in Bisesero as that charge was not pleaded in his indictment. It has accordingly reversed Nsengiyumva's convictions based on the Bisesero incident.[190] In this context, the Appeals Chamber considers that any possible prejudice suffered by Nsengiyumva in the preparation of his defence with respect to Bisesero resulting from disclosure problems would be remedied by the reversal of his convictions in relation to Bisesero. Nsengiyumva's submissions in this regard are therefore dismissed as moot.

Motion by the Office of the Prosecutor for Orders for Protective Measures for Victims and Witnesses, 19 May 2000 ("*Kabiligi and Ntabakuze* Decision on Protective Measures of 19 May 2000"), p. 4.

[187] Trial Judgement, para. 126.

[188] Nsengiyumva Appeal Brief, paras. 256-260.

[189] Prosecution Response Brief (Nsengiyumva), para. 258.

[190] *See infra,* para. 187.

6. Conclusion

89. In light of the foregoing, the Appeals Chamber finds that Nsengiyumva has waived his right to raise the issue of violation of his right to an initial appearance without delay and failed to demonstrate that the Trial Chamber violated his right to be tried without undue delay. Nsengiyumva has also failed to show that the Trial Chamber erred in relation to the admission of evidence. The Appeals Chamber finds that although the Trial Chamber violated his right to be tried in his presence by continuing the trial during his medically justified absence on 8, 9, 10, and 13 November 2006, it has not been shown that Nsengiyumva suffered prejudice as a result. Finally, while the Trial Chamber erred in setting the deadlines for the Prosecution to complete its disclosure of unredacted witness statements, the Appeals Chamber finds that Nsengiyumva suffered no prejudice as a result. Accordingly, the Appeals Chamber dismisses Nsengiyumva's Twelfth Ground of Appeal in its entirety.

C. Alleged Errors Relating to the Indictment (Grounds 2, 4, and 6-10 in part)

90. The Trial Chamber found that Nsengiyumva was criminally responsible pursuant to Article 6(1) of the Statute for ordering the killings perpetrated by soldiers and civilian assailants in Gisenyi town on 7 April 1994, including the killing of Alphonse Kabiligi, at Nyundo Parish between 7 and 9 April 1994, and at Mudende University on 8 April 1994.[191] The Trial Chamber also found him responsible for aiding and abetting killings in Bisesero in the second half of June 1994.[192] It was further satisfied that Nsengiyumva could be held responsible as a superior for the crimes committed in Gisenyi town, including Alphonse Kabiligi's killing, at Mudende University, and at Nyundo Parish, and took this into account as an aggravating factor in sentencing.[193]

91. Nsengiyumva submits that the Trial Chamber erred in convicting him of charges of which he had no proper notice in his Indictment.[194] He contends that the Trial Chamber erred in failing to appreciate the primacy of the indictment as a charging document, finding that he was put on notice by post-indictment communications, and failing to find that his ability to prepare his defence was materially impaired by the lack of notice.[195]

92. The Prosecution responds that the Trial Chamber did not convict Nsengiyumva based on new charges or a mode of liability outside the Indictment and that it correctly applied the principles of notice.[196] It asserts that Nsengiyumva suffered no material prejudice.[197]

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[191] Trial Judgement, paras. 2161, 2189, 2197, 2216, 2227, 2248, 2258.
[192] Trial Judgement, paras. 2161, 2189, 2197, 2216, 2248, 2258.
[193] Trial Judgement, paras. 2161, 2189, 2197, 2216, 2223, 2248, 2272. *See also ibid*., paras. 2072-2083.
[194] Nsengiyumva Notice of Appeal, paras. 5, 15, 23-27; Nsengiyumva Appeal Brief, paras. 41, 68, 103, 123, 145, 176, *referring to The Prosecutor v. Anatole Nsengiyumva*, Case No. ICTR-96-12-I, Amended Indictment, 12 August 1999 ("Nsengiyumva Indictment" or "Indictment" in the present chapter).
[195] Nsengiyumva Notice of Appeal, paras. 5-7, 14-16, 23-27; Nsengiyumva Appeal Brief, paras. 12-22, 40, 41, 48, 55, 68-79, 102-105, 123-127, 145-157, 176-184, 223. *See also* Nsengiyumva Reply Brief, paras. 2, 11(i), 21-34, 37-40, 46-51, 58-61, 65-71.
[196] Prosecution Response Brief (Nsengiyumva), paras. 13-20, 22-27, 31, 59-63, 75, 80, 82-90, 96, 97, 100, 112-119, 130-135, 146-163, 179-185.
[197] Prosecution Response Brief (Nsengiyumva), paras. 21, 136, 147, 163, 186, 187.

1. Preliminary Considerations and Applicable Law

93. Under his Second and Fourth Grounds of Appeal, Nsengiyumva submits that the Trial Chamber erred in law in convicting him of charges that were not pleaded in the Indictment, and that the defects therein were neither curable nor cured.[198] He contends that the Trial Chamber failed to address the specific defects in his Indictment but instead made broad and irrelevant statements in respect of all the co-Accused's indictments.[199] He claims that the Trial Chamber generally concluded that all defects in the indictments had been cured without providing a reasoned opinion concerning the Indictment against him.[200] He argues that the resultant prejudice to him is underscored by the fact that all crimes and material facts in relation to which he had some reasonable notice were either dismissed or successfully defended against, but then replaced with unpleaded ones against which he could not mount an effective defence, rendering futile his successful defence against those for which he did have notice.[201]

94. The Appeals Chamber will consider these contentions together with Nsengiyumva's specific arguments in relation to each incident for which he was convicted. The issue of prejudice will be addressed subsequently.

95. Under his Fourth Ground of Appeal, Nsengiyumva also submits that other charges which were not pleaded included: (i) his involvement in the civil defence forces;[202] (ii) the preparation of lists;[203] and (iii) his meeting with military officers during the night of 6 to 7 April 1994 and his communication with the General Staff in Kigali.[204] The Appeals Chamber will address Nsengiyumva's submissions in respect of these matters before turning to those specific to crimes of which he was convicted.

96. The Appeals Chamber recalls that the charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide

[198] Nsengiyumva Notice of Appeal, paras. 5, 7; Nsengiyumva Appeal Brief, paras. 12-22, 78. *See also* Nsengiyumva Reply Brief, para. 2; AT. 30 March 2011 pp. 50-53.
[199] Nsengiyumva Appeal Brief, para. 14, *referring to* Trial Judgement, para. 125.
[200] Nsengiyumva Appeal Brief, para. 15.
[201] Nsengiyumva Notice of Appeal, para. 15; Nsengiyumva Appeal Brief, paras. 13, 41, fn. 30.
[202] Nsengiyumva Notice of Appeal, para. 16; Nsengiyumva Appeal Brief, paras. 21, 41, 59, 77. *See also* Nsengiyumva Reply Brief, para. 32.
[203] Nsengiyumva Appeal Brief, paras. 41, 115-117.
[204] Nsengiyumva Appeal Brief, paras. 41, 72. *See also ibid*., para. 224; Nsengiyumva Reply Brief, para. 40. Nsengiyumva's specific argument under his Fourth Ground of Appeal that the Trial Chamber erred in convicting him for a form of ordering not pleaded in the Indictment is addressed under the sub-section discussing notice of the charges relating to the Gisenyi town killings. *See* Nsengiyumva Notice of Appeal, para. 14; Nsengiyumva Appeal Brief, para. 40; *infra*, para. 123.

notice to the accused.[205] An indictment which fails to set forth the specific material facts underpinning the charges against the accused is defective.[206] The defect may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charge.[207] However, a clear distinction has to be drawn between vagueness in an indictment and an indictment omitting certain charges altogether.[208] While it is possible to remedy the vagueness of an indictment, omitted charges can be incorporated into the indictment only by a formal amendment pursuant to Rule 50 of the Rules.[209] The Appeals Chamber will address Nsengiyumva's specific arguments with these principles in mind.

2. Alleged Lack of Notice Concerning Civil Defence Forces, Preparation of Lists, Meeting with Commanders, and Communication with Kigali

(a) Civil Defence Forces

97. The Trial Chamber found that "Nsengiyumva played a role in the arming and training of civil defence forces in Gisenyi prefecture in 1993", that "he participated in [the] training of these forces between April and June 1994, and dispatched them to Kibuye prefecture and Kigali in the second half of June 1994".[210] It stated that it would "consider in the context of specific events whether he bears responsibility for these and other events involving civil defence forces and party militia".[211]

98. Nsengiyumva submits that the subject of the civil defence system falls outside the scope of the Indictment, which does not charge him with training civil defence forces, but rather *Mouvement révolutionnaire national pour la démocratie et le développement* ("MRND") *Interahamwe* and *Coalition pour la défense de la République* ("CDR") *Impuzamugambi* militia groups.[212] He argues

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[205] *See*, *e.g.*, *Munyakazi* Appeal Judgement, para. 36; *Renzaho* Appeal Judgement, para. 53; *Muvunyi* Appeal Judgement of 1 April 2011, para. 19; *Kalimanzira* Appeal Judgement, para. 46. Whether a fact is "material" depends on the nature of the Prosecution's case. *See*, *e.g.*, *Renzaho* Appeal Judgement, para. 53; *Karera* Appeal Judgement, para. 292; *Ntagerura et al*. Appeal Judgement, para. 23.
[206] *See*, *e.g.*, *Kalimanzira* Appeal Judgement, para. 46; *Rukundo* Appeal Judgement, para. 29; *Kupreškić et al.* Appeal Judgement, para. 114.
[207] *See*, *e.g.*, *Munyakazi* Appeal Judgement, para. 36; *Kalimanzira* Appeal Judgement, para. 46; *Rukundo* Appeal Judgement, para. 29; *Kupreškić et al.* Appeal Judgement, para. 114.
[208] *See*, *e.g.*, *Rukundo* Appeal Judgement, para. 29; *Karera* Appeal Judgement, para. 293; *Ntagerura et al.* Appeal Judgement, para. 32.
[209] *See*, *e.g.*, *Rukundo* Appeal Judgement, para. 29; *Karera* Appeal Judgement, para. 293; *Ntagerura et al.* Appeal Judgement, para. 32.
[210] Trial Judgement, para. 506. *See also ibid*., para. 482.
[211] Trial Judgement, para. 506.
[212] Nsengiyumva Appeal Brief, fn. 104.

that the Trial Chamber therefore erred by "shifting goal posts at judgment stage" and entering a conviction for his involvement in the training of civil defence forces, a conduct never charged.[213]

99. The Prosecution responds that Nsengiyumva's allegations about findings regarding his involvement in arming and training civilians in 1993 are unmeritorious since no convictions were entered on the basis of those events.[214]

100. The Appeals Chamber observes that the Trial Chamber did not convict Nsengiyumva for his role in the training of civil defence forces,[215] or for dispatching civil defence forces to Kigali or Kibuye prefecture. Nsengiyumva was only convicted for dispatching militiamen to Kibuye prefecture and for ordering soldiers and militiamen to commit crimes.[216] The Trial Chamber did not base any of Nsengiyumva's convictions on his involvement with the civil defence forces but relied on his role in the arming and training of militiamen as circumstantial evidence of his authority over the civilian assailants implicated in the killings.[217]

101. As the Trial Chamber did not find that Nsengiyumva was criminally responsible in relation to his role in training civil defence forces, and as the Trial Chamber's findings in this respect did not impact any of his convictions or his sentence, the Appeals Chamber will not consider his arguments further.

(b) Preparation of Lists

102. The Trial Chamber was satisfied that, in 1992, Nsengiyumva was involved in the preparation and maintenance of lists of suspected Rwandan Patriotic Front ("RPF") accomplices given his position at the time as Head of the Intelligence Bureau (G-2) of the army General Staff as well as his admission that he would have been tasked with this function if it had been ordered.[218] One list which was found in the vehicle of Déogratias Nsabimana, the army Chief of Staff, after an

[213] Nsengiyumva Appeal Brief, para. 77. *See also ibid*., paras. 20-22, 35, 41, 59; AT. 30 March 2011 pp. 52, 53.
[214] Prosecution Response Brief (Nsengiyumva), para. 31.
[215] *See* Trial Judgement, paras. 2109, 2110.
[216] Trial Judgement, paras. 1065, 1166, 1203, 1252, 1824, 2155, 2157, 2161, 2189, 2197, 2216, 2248. The Appeals Chamber considers that the Trial Chamber erred in using the term "civil defence forces" in relation to Bisesero at paragraphs 482 and 506 of the Trial Judgement where it clearly found that Nsengiyumva sent "militiamen" from Gisenyi prefecture to participate in an operation in the Bisesero area of Kibuye prefecture. *See* Trial Judgement, paras. 1824, 2155. The Appeals Chamber also notes that the letter sent by the Minister of the Interior, Édouard Karemera, relied upon by the Trial Chamber did not request the dispatch to Bisesero of "civil defence forces" *per se* and that the evidence discussed by the Trial Chamber relates only to the dispatch of locally recruited and trained youth. *See* Trial Judgement, paras. 1818, 1821 *and* Exhibit P50 (Letter of Édouard Karemera, Minister of the Interior, undated). However, the Appeals Chamber finds that this mischaracterisation by the Trial Chamber of its own findings has no bearing on the Trial Chamber's ultimate findings regarding the deployment of militiamen to Bisesero.
[217] *See* Trial Judgement, paras. 2078, 2080, 2152.
[218] Trial Judgement, paras. 404, 405, 425, 453, fn. 1300. *See also ibid*., para. 2101.

accident in February 1993, contained the names of several individuals, including Alphonse Kabiligi, who were ultimately killed after 6 April 1994 ("Nsabimana List").[219] The Trial Chamber considered that there was reason to believe that this list was generated by or for members of the Rwandan army.[220]

103. Nsengiyumva submits that the charges in respect of the preparation of lists of which he had some reasonable notice were dismissed, and then replaced with unpleaded charges for which he had no proper notice.[221] In particular, he submits that having dismissed paragraph 5.26 of the Indictment,[222] which he contends "is the foundational charge on lists"[223] and the only charge to specifically implicate him in the preparation of lists on the instructions of Bagosora,[224] the Trial Chamber had no basis on which to conclude that "he must have prepared the Nsabimana list on which Kabiligi's name appeared".[225]

104. The Prosecution responds that paragraphs 5.1 and 5.25 through 5.29 of the Indictment charged Nsengiyumva with participating in the compilation of lists of people identified as Tutsi and members of the opposition to eliminate.[226]

105. The Appeals Chamber observes that the Trial Chamber did not convict Nsengiyumva for his involvement in the preparation of lists of suspected RPF accomplices, including the list found in Nsabimana's car containing Alphonse Kabiligi's name. In particular, the Trial Chamber was not convinced that the Nsabimana List was prepared with the intention to kill the individuals on it.[227] Nsengiyumva's conviction for ordering the killing of Alphonse Kabiligi was not based on his alleged involvement in the preparation or maintenance of lists. The Trial Judgement reflects that what was material to the Trial Chamber's findings was that Kabiligi's name was on a list of suspected RPF accomplices generated by or for members of the Rwandan army and found in the vehicle of the army Chief of Staff, which demonstrated that the military singled out Kabiligi as having ties with the RPF.[228] This was in turn used as circumstantial evidence that the military was involved in the killing of Alphonse Kabiligi and that Nsengiyumva must have ordered it.[229]

[219] Trial Judgement, paras. 421, 1165.
[220] Trial Judgement, para. 423.
[221] Nsengiyumva Appeal Brief, para. 41.
[222] Nsengiyumva Appeal Brief, para. 116. *See also ibid*., fn. 105.
[223] Nsengiyumva Appeal Brief, para. 117.
[224] Nsengiyumva Appeal Brief, para. 115.
[225] Nsengiyumva Appeal Brief, para. 117.
[226] Prosecution Response Brief (Nsengiyumva), para. 113.
[227] Trial Judgement, para. 424.
[228] Trial Judgement, paras. 423, 1160, 1165. The Trial Chamber mentioned in a footnote that Nsengiyumva would have been responsible for maintaining and updating lists as Head of the Intelligence Bureau (G-2) of the army General Staff

106. As the Trial Chamber did not find that Nsengiyumva was criminally responsible for his role in the preparation of lists, and as Nsengiyumva has not demonstrated how the Trial Chamber's findings impact any of his convictions or his sentence, the Appeals Chamber will not consider his arguments further.

(c) Meeting with Commanders and Communication with Kigali

107. The Trial Chamber found that during the night of 6 to 7 April 1994, Nsengiyumva "met with the military commanders in his operational sector and was in communication with the general staff in Kigali".[230] The Trial Chamber took these factors into account in concluding that Nsengiyumva ordered the killings in Gisenyi town, the murder of Alphonse Kabiligi, and the killings at Mudende University.[231]

108. Nsengiyumva submits that neither the meeting nor his communication with Kigali was pleaded,[232] and that "[e]vidence of the only pleaded meeting at the camp on the night of 6-7 April is dismissed at paragraph 1060 of the Judgement".[233] He contends that given the prejudicial conclusions the Trial Chamber drew from the "unpleaded non-criminal meeting", its error in relying upon it invalidates the Trial Judgement.[234]

109. The Prosecution responds that the Trial Chamber did not attach a decisive role to the meeting when it inferred Nsengiyumva's *mens rea*, but rather properly considered the meeting as one of several factors establishing that he must have ordered or authorised the crimes.[235]

110. The Appeals Chamber notes that Nsengiyumva's communication with Kigali and his meeting with military officers during the night of 6 to 7 April 1994 "in order to discuss the situation after the death of President Habyarimana"[236] were not found to be criminal and did not constitute material facts underpinning his convictions.[237] Instead, these facts were used as circumstantial evidence to support the finding that Nsengiyumva must have ordered the killings in Gisenyi town, at Nyundo Parish, and at Mudende University.[238] As such, they did not constitute material facts

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and did not draw any conclusion as to Nsengiyumva's personal responsibility for the Nsabimana List. *See ibid*., fn. 1300.

[229] *See* Trial Judgement, paras. 1160, 1161, 1165, 1166.
[230] Trial Judgement, para. 1065.
[231] Trial Judgement, paras. 1065, 2142, 2148, 2184.
[232] Nsengiyumva Appeal Brief, para. 41. *See also* Nsengiyumva Reply Brief, para. 40.
[233] Nsengiyumva Appeal Brief, fn. 102.
[234] Nsengiyumva Appeal Brief, para. 72. *See also ibid*., para. 224; Nsengiyumva Reply Brief, para. 40.
[235] Prosecution Response Brief (Nsengiyumva), paras. 100, 101.
[236] Trial Judgement, para. 2142. *See also ibid*., paras. 2148, 2184.
[237] *See* Trial Judgement, paras. 1051-1060.
[238] Trial Judgement, paras. 2142, 2148, 2184.

which the Prosecution was required to plead in the Indictment to put Nsengiyumva on notice of the charges against him. Nsengiyumva's submissions in this respect are accordingly dismissed.

3. Alleged Lack of Notice Concerning Gisenyi Town

111. Relying on the evidence of Prosecution Witness DO, the Trial Chamber found that, on 7 April 1994, civilian attackers supported by soldiers from the Gisenyi military camp conducted targeted killings of Tutsi civilians and Hutus viewed as sympathetic to the RPF in Gisenyi town.[239] The Trial Chamber found that Nsengiyumva exercised authority over "all the attackers", and that he ordered the attacks.[240] It convicted him pursuant to Article 6(1) of the Statute for genocide (Count 2), murder, extermination, and persecution as crimes against humanity (Counts 5, 6, and 8, respectively), and for violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 10).[241] The Trial Chamber was also satisfied that Nsengiyumva could be held responsible as a superior pursuant to Article 6(3) of the Statute for these crimes, and considered this to be an aggravating factor in sentencing.[242]

112. In his Closing Brief, Nsengiyumva argued that the killings in Gisenyi town discussed by Witness DO were not pleaded in the Indictment.[243] In this respect, the Trial Chamber stated:

> The Chamber is also satisfied that the Indictment, when read in its totality and in conjunction with the Pre-Trial Brief, provided adequate notice of Nsengiyumva's role in the crime, the identity of the assailants and the victims. The Indictment and Pre-Trial Brief refer to Nsengiyumva ordering the crimes. The assailants are described as soldiers from Gisenyi military camp, including Bizumuremyi as well as those in plain clothes, and *Interahamwe*, some of whom are named in the summary of Witness DO's testimony in the Pre-Trial Brief. The victims are also referred to as Tutsis and moderate Hutus in different parts of Gisenyi town. While his evidence mentioned specific victims, the allegation concerns a mass killing operation throughout the area, which would make it impractical to identify specific individuals. In particular, Witness DO's testimony indicated that 10 groups of assailants participated in the operation.[244]

113. Nsengiyumva submits that the Trial Chamber erred in failing to find that the alleged killings of 7 April 1994 testified to by Witness DO and for which he was convicted fell outside the scope of his Indictment.[245] He contends that the Trial Chamber based its findings on paragraphs 6.11, 6.13 through 6.16, and 6.36 of the Indictment, but that the only paragraphs providing him with notice of his conduct for the period between 6 and 7 April 1994 were paragraphs 6.13 through 6.17 pleaded

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[239] Trial Judgement, paras. 1061-1064, 2140, 2141.
[240] Trial Judgement, para. 1065.
[241] Trial Judgement, paras. 2161, 2189, 2197, 2216, 2248, 2258.
[242] Trial Judgement, paras. 2161, 2189, 2197, 2216, 2248, 2272. *See also ibid*., paras. 2072-2083.
[243] *See* Nsengiyumva Closing Brief, para. 688.
[244] Trial Judgement, para. 1066 (internal references omitted).
[245] Nsengiyumva Notice of Appeal, para. 23; Nsengiyumva Appeal Brief, para. 68.

under the heading "Gisenyi".[246] He argues that the Prosecution failed to plead the specific mode of liability for which he was charged, as well as the involvement of soldiers in the Gisenyi town killings.[247] He also asserts that the Trial Chamber convicted him of an unpleaded form of ordering,[248] and that he lacked notice that he would be charged with superior responsibility for these attacks.[249] According to Nsengiyumva, the Trial Chamber's reliance on vague and general paragraphs in the Indictment to convict him was impermissible,[250] and these defects were such that they could not be cured.[251] He contends that the defects prejudiced his ability to effectively prepare his defence.[252]

114. Nsengiyumva further submits that the defects were, in any event, not cured.[253] He argues that the Trial Chamber erred in relying on the summary of Witness DO's anticipated testimony appended to the Prosecution Pre-Trial Brief as a purported cure given that it rejected relevant aspects of the witness's testimony which were also mentioned in his summary.[254] He also contends that neither the Prosecution Pre-Trial Brief nor the Opening Statement made reference to the victims identified by Witness DO during his testimony.[255] Further, he asserts that the Prosecution Pre-Trial Brief referred to mass killings, while the killings in Gisenyi town for which he was convicted were very limited in scope.[256] Pointing out that Witness DO's testimony was recorded long before trial, he asserts that there was no legitimate reason for not expressly pleading the killings to which Witness DO testified.[257]

115. The Prosecution responds that the events described by Witness DO fell within the scope of the Indictment, and that paragraphs 6.11, 6.13 through 6.17, and 6.32 through 6.37 of the Indictment referred to soldiers under his authority.[258] It submits that post-indictment submissions provided further particulars regarding the involvement of soldiers in the killings.[259] It further

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[246] Nsengiyumva Appeal Brief, para. 68.
[247] Nsengiyumva Appeal Brief, paras. 68, 70, 74. *See also* Nsengiyumva Reply Brief, para. 31.
[248] Nsengiyumva Notice of Appeal, para. 14; Nsengiyumva Appeal Brief, para. 71. *See also* Nsengiyumva Appeal Brief, paras. 40, 68; Nsengiyumva Reply Brief, paras. 11(i), 37-39; AT. 30 March 2011 pp. 50, 54.
[249] Nsengiyumva Appeal Brief, paras. 75, 76. *See also ibid*., para. 68; Nsengiyumva Reply Brief, para. 29.
[250] Nsengiyumva Appeal Brief, para. 69. *See also* Nsengiyumva Reply Brief, paras. 22-28.
[251] Nsengiyumva Notice of Appeal, para. 23; Nsengiyumva Appeal Brief, paras. 16, 68; Nsengiyumva Reply Brief, paras. 21, 33, 34.
[252] Nsengiyumva Appeal Brief, paras. 68, 73. *See also ibid*., para. 13.
[253] Nsengiyumva Appeal Brief, paras. 78, 79.
[254] Nsengiyumva Appeal Brief, para. 78.
[255] Nsengiyumva Appeal Brief, para. 79.
[256] Nsengiyumva Appeal Brief, para. 79.
[257] Nsengiyumva Appeal Brief, paras. 15, 79.
[258] Prosecution Response Brief (Nsengiyumva), para. 89.
[259] Prosecution Response Brief (Nsengiyumva), para. 90.

contends that it was sufficient to plead "ordering" as a mode of Nsengiyumva's liability for the Gisenyi killings,[260] and that his superior responsibility for these attacks was clearly pleaded.[261]

116. In summarising the Prosecution's case against Nsengiyumva for the events at the Gisenyi military camp and in Gisenyi town on 6 and 7 April 1994, the Trial Chamber referred to paragraphs 6.11, 6.13 through 6.16, and 6.36 of the Indictment.[262] Paragraphs 6.11 and 6.36 allege that, as of 6 or 7 April 1994, massacres of the Tutsi population and of moderate Hutus and political opponents were perpetrated throughout Rwanda by the military and militiamen with Nsengiyumva's knowledge or on his orders. Paragraphs 6.13 and 6.14 specify that during the night of 6 to 7 April 1994, Nsengiyumva summoned local leaders and militiamen to the Gisenyi military camp and ordered them to kill all RPF accomplices and Tutsis. Paragraphs 6.15 and 6.16 further specify that on 7 April 1994, Nsengiyumva received a telegram ordering him to commence the massacres, and that he chaired meetings on that day at which he ordered militiamen to kill Tutsis and that he subsequently distributed weapons to the militiamen.[263]

117. The Trial Chamber was unable to conclude that Nsengiyumva held meetings on 6 or 7 April 1994 where he addressed militiamen and distributed weapons to them.[264] The charges set out in paragraphs 6.13 through 6.16 were therefore dismissed. As such, Nsengiyumva's convictions for the killings in Gisenyi town on 7 April 1994 could only have been entered pursuant to paragraphs 6.11 and 6.36.

118. Paragraphs 6.11 and 6.36 are very broad in scope. They plead the involvement of the military and militiamen in massacring the Tutsi population, political opponents, and moderate Hutus on the orders or with the knowledge of Nsengiyumva. However, they do not specify the dates and locations of the massacres alleged. Although the targeted killings perpetrated on 7 April 1994 in Gisenyi town for which Nsengiyumva was convicted clearly fall within the scope of paragraphs

[260] Prosecution Response Brief (Nsengiyumva), paras. 96, 97.
[261] Prosecution Response Brief (Nsengiyumva), para. 83.
[262] Trial Judgement, para. 1007, fn. 1121.
[263] Paragraph 6.16 adds that at one of these meetings, Nsengiyumva "gave the order to start the massacres, designating a specific location where a Tutsi family had sought refuge. In the minutes that followed that order, the militiamen executed the members of the family in Anatole Nsengiyumva's presence". The Trial Chamber described the particulars of this allegation as being that "Nsengiyumva led a meeting at the house of Barnabé Samvura, a senior official within the CDR party. There he allegedly distributed weapons and singled out Tutsis, including the Gasake family and Mbungo, who were subsequently killed by the *Interahamwe*". *See* Trial Judgement, para. 1096, fn. 1221.
[264] Trial Judgement, para. 1060. *See also ibid.*, para. 1094. The Trial Chamber was also "not convinced beyond reasonable doubt that Nsengiyumva chaired a meeting at Barnabé Samvura's house, where he identified victims from a list to be attacked and distributed weapons to attackers". *See* Trial Judgement, para. 1126.

6.11 and 6.36, there is in fact no specific reference to them in the Indictment.[265] The Appeals Chamber therefore finds that the Indictment is defective in that it does not set forth all relevant material facts underpinning the charges set out in paragraphs 6.11 and 6.36.

119. However, the Appeals Chamber considers that Nsengiyumva was provided with timely, clear, and consistent information concerning the Gisenyi town killings of 7 April 1994 which remedied the Prosecution's failure to give appropriate notice in the Indictment.

120. In relevant part, the summary of Witness DO's anticipated testimony annexed to the Prosecution Pre-Trial Brief reads: "The meeting was on the 7th April 1994 at about 7h00 or 8h00 at the military camp in Gisenyi in the office of Nsengiyumva, the most powerful person in Gisenyi at the time. After the meeting [the witness] heard Nsengiyumva order[] the distribution of arms to the *Interahamwe* leaders. [The witness] saw this being done. Soldiers in civilian dress also got weapons. After [the] weapons distribution, the *Interahamwe* and civilians divided into groups, went to different parts of [the] city and started killing Tutsis and moderate Hutus on a mass scale".[266] This summary was marked as relevant to Nsengiyumva,[267] and the Prosecution indicated that it intended to rely on Witness DO's evidence in support of, *inter alia*, paragraphs 6.11 and 6.36 of the Indictment in the Supplement to its Pre-Trial Brief.[268] Both the Prosecution Pre-Trial Brief and its Supplement were filed several months before the appearance of the first Prosecution witness.[269]

121. The Appeals Chamber therefore finds that, by reading the Indictment together with the Prosecution Pre-Trial Brief and its Supplement, Nsengiyumva was put on adequate notice that the Prosecution intended to hold him responsible for the killings of Tutsi civilians and moderate Hutus perpetrated by soldiers and militiamen throughout Gisenyi town on 7 April 1994 on his orders or with his knowledge. As to the identification of the victims, the Appeals Chamber agrees with the Trial Chamber that the scope and nature of the alleged killings made it impracticable for the

[265] There is nonetheless mention of specific killings perpetrated in Nsengiyumva's presence on 7 April 1994 in Gisenyi prefecture in paragraphs 6.16 and 6.17 of the Nsengiyumva Indictment. Nsengiyumva was not found guilty on the basis of these allegations. *See* Trial Judgement, paras. 1126, 1149.
[266] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-I, Prosecutor's Pre-Trial Brief, 21 January 2002 ("Prosecution Pre-Trial Brief"), Appendix A, Witness DO, p. 59.
[267] Prosecution Pre-Trial Brief, Appendix A, Witness DO, p. 59, at which the box for "Nsengiyumva" is checked.
[268] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-I, The Prosecutor's Pre-Trial Brief Revision in Compliance with the Decision on Prosecutor's Request for an Extension of the Time Limit in the Order of 23 May, 2002, and with the Decision on the Defence Motion Challenging the Pre-Trial Brief, Dated 23 May, 2002, 7 June 2002 ("Supplement to the Prosecution Pre-Trial Brief" or "Supplement"), pp. 16, 17.
[269] The Prosecution Pre-Trial Brief was filed on 21 January 2002, its Supplement was filed on 7 June 2002. While the trial started on 2 April 2002 with the Prosecution's Opening Statement, the first Prosecution witness was only called to testify on 2 September 2002. After the hearing of only two witnesses, the trial was adjourned on 5 December 2002 to recommence with the Prosecution case on 16 June 2003. *See* Trial Judgement, paras. 2314-2321.

Prosecution to identify the victims by name.[270] The Appeals Chamber considers that, in this case, the fact that Nsengiyumva was ultimately convicted for killings of a more limited scope does not go to notice but to evidence.[271]

122. The Appeals Chamber notes that, of the counts of which Nsengiyumva was convicted, Witness DO's summary was linked to Count 2, but not to Counts 5, 6, 8, or 10.[272] However, as noted above, the Supplement to the Prosecution Pre-Trial Brief lists Witness DO in connection with, *inter alia*, paragraphs 6.11 and 6.36, which are invoked in the Indictment as supporting Counts 2, 5, 6, 8, and 10.[273] As such, the Appeals Chamber considers that the Prosecution made clear as early as 7 June 2002 that it intended to rely on Witness DO's evidence to prove that Nsengiyumva was criminally liable for genocide, murder, extermination, and persecution as crimes against humanity, as well as for violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. In this respect, the Appeals Chamber considers that it was reasonable for the Trial Chamber to find that differences between the Prosecution Pre-Trial Brief and its Supplement did not amount to inconsistent notice.[274] The Supplement was filed after the Prosecution Pre-Trial Brief to correct deficiencies[275] and to indicate which paragraphs in the indictments each of the witnesses listed would testify to.[276] Consequently, it was unequivocally controlling to the extent that there were any inconsistencies between it and the original Pre-Trial Brief.

123. The involvement of soldiers and Nsengiyumva's role in ordering the massacres were clearly pleaded in paragraphs 6.11 and 6.36 of the Indictment, and further reiterated in part in Witness DO's summary. As such, the Appeals Chamber rejects Nsengiyumva's contention that he was unaware of the allegation of soldiers' involvement in these killings and that he lacked notice that he was charged with ordering them. How such ordering is proven at trial, and whether or not the testimony adduced at trial supports the allegations, are matters of evidence which need not be

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[270] *See* Trial Judgement, para. 1066.
[271] *Cf. Munyakazi* Appeal Judgement, para. 37.
[272] *See* Prosecution Pre-Trial Brief, Appendix A, Witness DO, p. 59, at which the boxes for "Nsengiyumva" and "Genocide/Complicity" are checked, but the boxes for "CAH-Extermination", "CAH-Murder", "CAH-Persecution", "War Crimes-Violence", and/or "War Crimes-Killing" are not checked.
[273] Nsengiyumva Indictment, pp. 37, 39-42; Supplement to the Prosecution Pre-Trial Brief, pp. 16, 17.
[274] Trial Judgement, para. 117.
[275] Such deficiencies include the pleading of the crime of direct and public incitement to commit genocide with respect to Gratien Kabiligi and Ntabakuze who were not charged with this crime in their indictment. *See The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Defence Motions of Nsengiyumva, Kabiligi, and Ntabakuze Challenging the Prosecutor's Pre-Trial Brief and on the Prosecutor's Counter-Motion, 23 May 2002 ("Decision Relating to the Pre-Trial Brief"), para. 13.
[276] Decision Relating to the Pre-Trial Brief, paras. 12, 19.

pleaded.[277] The Indictment states in relevant part that paragraphs 6.11 and 6.36 support Counts 2, 5, 6, 8, and 10 pursuant to both Articles 6(1) and 6(3) of the Statute.[278] Accordingly, the Appeals Chamber also rejects Nsengiyumva's contention that he lacked notice that he was charged with superior responsibility for these killings.

124. Although the Indictment was defective in relation to the Gisenyi town killings, its defects were subsequently cured by the provision of timely, clear, and consistent information. The Appeals Chamber therefore dismisses Nsengiyumva's allegations that he lacked notice that he could be held responsible for ordering or as a superior under Article 6(3) of the Statute in relation to the killings perpetrated in Gisenyi town on 7 April 1994.

4. Alleged Lack of Notice Concerning the Killing of Alphonse Kabiligi

125. The Trial Chamber found that on the evening of 7 April 1994, Alphonse Kabiligi, a Hutu civil servant and member of the *Parti social démocrate* ("PSD"), was mutilated and killed at his home in Gisenyi town by a group of civilian militiamen and one Rwandan army soldier.[279] The Trial Chamber's finding was based on the first-hand evidence of Prosecution Witness AS.[280] The Trial Chamber found that Nsengiyumva had authority over the soldier and the civilian assailants, and that he ordered the killing.[281] The Trial Chamber convicted Nsengiyumva pursuant to Article 6(1) of the Statute for murder, extermination, persecution, and other inhumane acts as crimes against humanity (Counts 5, 6, 8, and 9, respectively), as well as violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 10).[282] The Trial Chamber was also satisfied that Nsengiyumva could be held responsible as a superior pursuant to Article 6(3) of the Statute for these crimes, and considered this to be an aggravating factor in sentencing.[283]

126. Nsengiyumva submits that the killing of Alphonse Kabiligi fell outside the scope of the Indictment, and that it was only in the Trial Judgement that he became aware that he was alleged to

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[277] *See*, *e.g.*, *Nahimana et al.* Appeal Judgement, para. 347; *Ntagerura et al.* Appeal Judgement, para. 21; *Ntakirutimana* Appeal Judgement, para. 470.
[278] Nsengiyumva Indictment, pp. 37, 39-42.
[279] Trial Judgement, paras. 1151, 1159, 1162, 1163, 1165. *See also ibid*., para. 2183.
[280] Trial Judgement, paras. 1159-1167.
[281] Trial Judgement, paras. 1166, 2184.
[282] Trial Judgement, paras. 2184, 2189, 2197, 2216, 2223, 2227, 2248, 2258. While the Trial Chamber did not explicitly refer to the killing of Alphonse Kabiligi in paragraph 2216 of the Trial Judgement, which contained its legal finding on Nsengiyumva's responsibility for persecution as a crime against humanity, the Appeals Chamber understands from the Trial Chamber's reference to this specific killing in its deliberations section that its reference to the killings in Gisenyi town at paragraph 2216 encompassed Alphonse Kabiligi's killing. *See ibid*., paras. 2210-2212.
[283] Trial Judgement, paras. 2189, 2197, 2216, 2223, 2248, 2272.

have ordered this killing and to be responsible as a superior.[284] He contends that the Trial Chamber erred in failing to find that the Prosecution was required to comply with a strict pleading standard for his direct participation in this killing, particularly as the killings of less prominent individuals were expressly pleaded.[285] He argues that although the Prosecution Pre-Trial Brief mentions the killing of Kabiligi, it does not contain information that would have clearly informed him that he could be held liable for this killing.[286] He further contends that the Trial Chamber obfuscated the situation in its Decision on Motion to Recall Witness OAB[287] when it indicated that new evidence on the killing of Alphonse Kabiligi did not constitute evidence against Nsengiyumva and was thus not prejudicial to him warranting the recall of the witness.[288]

127. The Prosecution responds that the Indictment provided Nsengiyumva with adequate notice of the killing of Alphonse Kabiligi, and of his responsibility for it.[289] It further contends that even if failure to specify Kabiligi's name in the Indictment were considered a defect, such defect was cured through post-indictment communications.[290] It adds that Nsengiyumva does not demonstrate that his ability to prepare his case was materially impaired, and that his understanding of the case regarding the killing of Kabiligi can be observed from the conduct of his defence.[291]

128. In reply, Nsengiyumva disagrees that the defect was cured by post-indictment communications and contests the Prosecution's claim that he did not object to the introduction of evidence pertaining to this killing.[292] He argues that the inclusion of the names of two individuals who could potentially testify as to this killing in his list of witnesses and his extensive examination of Witness AS did not constitute indication that he was not prejudiced.[293]

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[284] Nsengiyumva Notice of Appeal, para. 24; Nsengiyumva Appeal Brief, paras. 103-105; Nsengiyumva Reply Brief, para. 46.
[285] Nsengiyumva Appeal Brief, para. 103. *See also* Nsengiyumva Reply Brief, para. 46.
[286] Nsengiyumva Appeal Brief, para. 104; Nsengiyumva Reply Brief, paras. 47, 48.
[287] *The Prosecutor v. Théoneste Bagosora et al*., Case No. ICTR-98-41-T, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination, 19 September 2005 ("Decision on Motion to Recall Witness OAB").
[288] Nsengiyumva Appeal Brief, para. 104. Nsengiyumva argues that the Trial Chamber erred in dismissing the motion only to convict him on the very issue he wanted clarified. *See idem.*
[289] Prosecution Response Brief (Nsengiyumva), para. 113. The Prosecution submits that Nsengiyumva was charged with participating in establishing lists of people identified as Tutsi and members of the opposition to eliminate. It argues that, given the sheer number of names on those lists, it was impracticable to include them in the Indictment. *See ibid*., paras. 113, 114.
[290] Prosecution Response Brief (Nsengiyumva), para. 114.
[291] Prosecution Response Brief (Nsengiyumva), para. 115.
[292] Nsengiyumva Reply Brief, paras. 47-50. Nsengiyumva also asserts that it was his legitimate belief that he would not be expected to testify or defend himself against the killing of Alphonse Kabiligi. He claims that this is why he did not investigate the identity of Kabiligi's assailants to show that he had no authority over them. *See idem.*
[293] Nsengiyumva Reply Brief, paras. 49, 50.

129. The Trial Chamber noted Nsengiyumva's submission in his Closing Brief that the killing of Alphonse Kabiligi was not pleaded in the Indictment,[294] but did not address this submission in the Trial Judgement. However, the Trial Chamber indicated as a preliminary matter in the Trial Judgement that, in many instances, it would not revisit renewed challenges to notice which had already been dealt with in prior decisions and oral rulings, in particular where the Prosecution did not prove its case.[295] A review of the trial record does not reveal any prior instance in which Nsengiyumva challenged notice of the Kabiligi killing, or any decision or ruling in which the Trial Chamber previously addressed the matter. The Appeals Chamber therefore considers that the Trial Chamber should have addressed Nsengiyumva's submission in this regard.

130. In summarising the Prosecution's case against Nsengiyumva with respect to the killing of Alphonse Kabiligi, the Trial Chamber referred to paragraphs 5.1, 5.25, 5.29, 6.36, and 6.37 of the Indictment.[296] Paragraph 5.1 alleges that Nsengiyumva conspired with his co-Accused and with others starting in late 1990 to exterminate the Tutsi population and eliminate members of the opposition by, *inter alia*, preparing lists of persons to be executed. This allegation is more broadly iterated in paragraph 5.25. Paragraph 5.29 also alleges that "[f]rom 7 April to late July, military and *Interahamwe* massacred members of the Tutsi population and moderate Hutu by means of pre-established lists, among other things". Paragraphs 6.36 and 6.37 allege that the massacres of Tutsis and Hutu moderates alleged throughout the Indictment were committed by Nsengiyumva personally, or by members of the Rwandan Armed Forces or militiamen acting as his subordinates on his orders or with his knowledge or consent. The Indictment also states, in relevant part, that these allegations were pursued under Counts 5, 6, 8, 9, and 10 pursuant to Article 6(1) of the Statute in relation to paragraphs 5.1, 6.36, and 6.37, and also pursuant to Article 6(3) of the Statute in relation to paragraph 6.36.[297]

131. The Appeals Chamber considers that paragraphs 5.1, 5.25, 5.29, 6.36, and 6.37, read together, put Nsengiyumva on notice that he was accused of conspiring or planning to kill Tutsis and Hutu political opponents or moderates by preparing lists of names, and of subsequently ordering, consenting to, or knowing of the killings of those listed by his subordinates. However, nothing in the Indictment put Nsengiyumva on notice that he was accused of having ordered the killing of Alphonse Kabiligi in particular.

[294] Trial Judgement, para. 1152.
[295] Trial Judgement, paras. 108, 109.
[296] Trial Judgement, para. 1151, fn. 1283.
[297] Nsengiyumva Indictment, pp. 39-43.

132. The Appeals Chamber recalls that a decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct charged.[298] The Trial Chamber correctly stated that where an accused "is alleged to have given precise orders for the killing of specific individuals, the obligation to provide precisions as to the circumstances thereof is as its highest".[299] In the present case, the Prosecution was, at the time of the filing of the Indictment,[300] in a position to provide information that was obviously valuable to the preparation of Nsengiyumva's defence by naming the victim, and should have done so.[301] The Indictment was therefore defective in respect of the identity of this victim, as well as the time and place of this particular event.

133. Nsengiyumva concedes in his Appeal Brief that "the Pre-Trial Brief mentions the killing of Kabiligi".[302] Indeed, the summary of Witness AS's anticipated testimony annexed to the Prosecution Pre-Trial Brief describes the torture and killing of an individual "affiliated to the Gisenyi PSD party" at his house in Gisenyi around 8.00 p.m. on 7 April 1994 by *Interahamwe* and one "uniformed soldier".[303] While no reference to Nsengiyumva is explicitly made in relation to this incident, the summary indicates that Witness AS was expected to testify in relation to Nsengiyumva only.[304] In addition, the Supplement to the Prosecution Pre-Trial Brief indicates that Witness AS was expected to testify in relation to the allegations pleaded under paragraphs 5.1, 5.25, 5.29, 6.36, and 6.37 of the Indictment.[305]

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[298] *Kamuhanda* Appeal Judgement, para. 17; *Ntakirutimana* Appeal Judgement, para. 25; *Kupreškić et al.* Appeal Judgement, para. 89. *See also Nahimana et al*. Appeal Judgement, para. 324; *Ntagerura et al.* Appeal Judgement, para. 23.

[299] *The Prosecutor v. Théoneste Bagosora et al*., Case No. ICTR-98-41-T, Decision on Nsengiyumva Motion for Exclusion of Evidence Outside the Scope of the Indictment, 15 September 2006 ("Decision on Exclusion of Evidence"), para. 69.

[300] *See* Prosecution Response Brief (Nsengiyumva), para. 114, *referring to* Witnesses AS's and ZF's Written Statements disclosed on 20 July 1998 and 12 July 1999, respectively.

[301] *Ntakirutimana* Appeal Judgement, para. 25; *Kupreškić et al.* Appeal Judgement, para. 90.

[302] Nsengiyumva Appeal Brief, para. 104. *See also* Nsengiyumva Reply Brief, para. 47.

[303] It is also indicated that the individual was "mentioned on a list in a KANGURA edition relating to his origin". *See* Prosecution Pre-Trial Brief, Appendix A, Witness AS, pp. 10, 11. The summary does not identify the targeted individual by name, and a review of the trial record reveals that his identity as Kabiligi could not have been ascertained until Witness AS's unredacted statement was disclosed to Nsengiyumva on 5 June 2003. *See The Prosecutor v. Théoneste Bagosora et al*., Case No. ICTR-98-41-T, Interoffice Memorandum, Subject: Additional unredacted disclosure in the matter of Prosecutor v. Théoneste Bagosora, Anatole Nsengiyumva, Gratien Kabiligi and Aloys Ntabakuze (Case Number ICTR-98-41-T), 5 June 2003. The Appeals Chamber observes that contrary to the Prosecution's contention, there is no mention of Alphonse Kabiligi or his killing in the summary of Witness ZF's anticipated testimony annexed to the Prosecution Pre-Trial Brief. A review of Witness ZF's statement (disclosed to Nsengiyumva in redacted form on 13 July 1999 and unredacted form on 1 August 2002) reveals no mention of Kabiligi either. *See* Prosecution Response Brief (Nsengiyumva), para. 114; Prosecution Pre-Trial Brief, Appendix A, Witness ZF, p. 161; *The Prosecutor v. Théoneste Bagosora et al*., Case No. ICTR-98-41-T, Interoffice Memorandum, Subject: Statement of Witness Subject to Special Protective Measures, 1 August 2002.

[304] Prosecution Pre-Trial Brief, Appendix A, Witness AS, p. 10, at which the box for "Nsengiyumva" is checked.

[305] Supplement to the Prosecution Pre-Trial Brief, pp. 14, 15, 17.

134. The contents of Witness AS's statement essentially mirror her testimony on the stand, which took place three months later.[306] Nsengiyumva cross-examined Witness AS on his alleged responsibility for the killing of Kabiligi, the circumstances thereof, and the credibility of her testimony.[307] Following this, nearly two years passed before the commencement of the Defence case.[308] Although Nsengiyumva presented no witnesses in defence of the allegation that he ordered Kabiligi's killing, his Witness List shows that he intended to do so.[309]

135. As to Nsengiyumva's submissions in respect of the Trial Chamber's Decision on Motion to Recall Witness OAB, the Appeals Chamber notes that it was rendered months after the Defence case had commenced. The Appeals Chamber also considers that the Trial Chamber's declaration that "[n]ew allegations in [Witness OAB's] four post-testimony statements do not […] constitute evidence against [Nsengiyumva]"[310] cannot be reasonably interpreted as a decision to exclude *all* evidence against Nsengiyumva of Kabiligi's killing, as opposed to simply stating the fact that Witness OAB's post-testimony statements did not form part of the trial record.

136. Moreover, although Nsengiyumva correctly points out that the Prosecution did not refer to the killing of Kabiligi at paragraphs 103 through 109 of its Closing Brief,[311] this cannot be reasonably understood as an indication that he was not prosecuted for Kabiligi's killing as it is clearly referred to elsewhere in the Prosecution Closing Brief.[312]

137. In light of the foregoing, the Appeals Chamber considers that the failure of the Prosecution to adequately plead Nsengiyumva's responsibility for the killing of Alphonse Kabiligi in the Indictment was remedied by the provision of clear, timely, and consistent information. The Appeals Chamber finds that Nsengiyumva was made aware that he could be held liable for the killing of Kabiligi, and that he was afforded the opportunity to defend himself in this respect.

138. As for Nsengiyumva's conviction under Count 9 of the Indictment for other inhumane acts as a crime against humanity for the brutal way in which Kabiligi was killed, the Appeals Chamber notes that although the summary of Witness AS's anticipated testimony refers to his torture, it was

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[306] Witness AS testified before the Tribunal on 2 and 3 September 2003.
[307] Witness AS, T. 3 September 2003 pp. 16-22.
[308] The Defence case commenced on 11 April 2005 and finished on 18 January 2007. *See* Trial Judgement, para. 2342.
[309] *See* Nsengiyumva Witness List, Witnesses CF1 *and* BD2, pp. 25, 26.
[310] Decision on Motion to Recall Witness OAB, para. 7.
[311] Nsengiyumva Appeal Brief, para. 103, fn. 245.
[312] *See*, *e.g.*, *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Prosecutor's Final Trial Brief, public redacted version, dated 1 March 2007, filed 2 March 2007 ("Prosecution Closing Brief"), paras. 207, 208.

not linked to this count.[313] The Trial Chamber dealt with this apparent problem in a footnote in the Trial Judgement, where it stated that, in the Supplement to the Prosecution Pre-Trial Brief, Witness AS "is listed under a relevant paragraph in the [Indictment] which is charged as other inhumane acts".[314] Indeed, Witness AS is listed as expected to testify in relation to both paragraphs 6.36 and 6.37 in the Supplement to the Prosecution Pre-Trial Brief,[315] and both paragraphs were among those determined to be relevant to Count 9 in the Indictment.[316] As such, the Appeals Chamber considers that the Prosecution made clear as early as 7 June 2002 that it intended to rely on Witness AS's evidence to prove that Nsengiyumva was criminally liable for other inhumane acts as a crime against humanity. In this respect, the Appeals Chamber reiterates that the Supplement to the Prosecution Pre-Trial Brief was unequivocally controlling to the extent that there were any inconsistencies between it and the original Pre-Trial Brief.[317]

139. Based on the above, the Appeals Chamber finds that the Indictment was impermissibly vague with respect to the identity of the victim, as well as the time and place of this particular event. However, the Appeals Chamber considers that these defects were subsequently cured and that Nsengiyumva has failed to demonstrate that he lacked adequate notice in relation to the killing of Alphonse Kabiligi.

5. Alleged Lack of Notice Concerning Nyundo Parish

140. The Trial Chamber found that Nsengiyumva was criminally responsible for ordering the killings of Tutsi refugees perpetrated by *Interahamwe* militiamen at Nyundo Parish, between 7 and 9 April 1994.[318] The Trial Chamber accordingly convicted Nsengiyumva pursuant to Article 6(1) of the Statute for genocide (Count 2), murder, extermination, and persecution as crimes against humanity (Counts 5, 6, and 8, respectively), as well as for violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 10).[319] It found that Nsengiyumva could also have been held responsible as a superior pursuant to Article 6(3) of the Statute, and considered this to be an aggravating factor in sentencing.[320]

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[313] Prosecution Pre-Trial Brief, Appendix A, Witness AS, p. 11, at which the box for "CAH-Inhumane Acts" is not checked.
[314] Trial Judgement, fn. 2374.
[315] Supplement to the Prosecution Pre-Trial Brief, p. 17.
[316] Nsengiyumva Indictment, p. 42.
[317] *See supra*, para. 122.
[318] Trial Judgement, paras. 1192-1206, 2079, 2150-2154.
[319] Trial Judgement, paras. 2161, 2189, 2197, 2216, 2248, 2258.
[320] Trial Judgement, paras. 2161, 2189, 2197, 2216, 2248, 2272.

141. This finding of guilt was entered on the basis of paragraphs 6.18 through 6.20 of the Indictment.[321] Paragraph 6.18 alleges that as early as 7 April 1994 "men, women and children, the majority of whom were Tutsi, sought refuge at [Nyundo Parish]". Paragraph 6.19 alleges Nsengiyumva's role in relation to the attempted killing of Bishop Kalibushi from Nyundo. Most specifically, paragraph 6.20 reads as follows:

> 6.20. From 8 April to June 1994, the refugees at Nyundo parish were repeatedly attacked by soldiers and militiamen on the orders of Anatole Nsengiyumva. On at least one occasion, Anatole Nsengiyumva was present.

The Indictment states in relevant part that these allegations were pursued under Counts 2, 5, 6, 8, and 10 pursuant to Article 6(1) of the Statute in relation to paragraphs 6.19 and 6.20, and also pursuant to Article 6(3) of the Statute in relation to paragraph 6.20.[322]

142. On 16 May 2000, in response to Nsengiyumva's challenge to the form of the Indictment, the Trial Chamber ordered the Prosecution to provide further particulars in relation to paragraph 6.20 of the Indictment.[323] While the Trial Chamber considered that the allegation of repeated attacks on refugees at Nyundo Parish between 8 April and June 1994 on the orders of Nsengiyumva was sufficiently specific, it found that the Prosecution should have given an approximate date for the occasion on which Nsengiyumva was alleged to have been present at Nyundo Parish and the specifics of his alleged orders.[324] On 25 May 2000, the Prosecution provided the following particulars in relation to paragraph 6.20 of the Indictment:

> 6.20 From <u>about</u> 8 April to <u>about 30</u> June 1994, the refugees at Nyundo parish were repeatedly attacked by soldiers and militiamen on the orders of Anatole Nsengiyumva <u>to kill Tutsis and deplaced [*sic*] Hutus</u>. <u>From 10 April 1994 to about 15 May 1994</u>, on at least one occasion, Anatole Nsengiyumva was present <u>and accompanied by many soldiers and militiamen who participated in the massacres. Asked by a subordinate why the people who killed his relative should be allowed to live, Anatole Nsengiyumva responded that he had his authorization to "clean the dirt"</u>.[325]

143. In his Closing Brief, Nsengiyumva argued that the allegations pertaining to Nyundo Parish were vague and that the Prosecution's case at trial exceeded the scope of the Indictment.[326] While the Trial Chamber noted Nsengiyumva's argument in the Trial Judgement,[327] it did not proceed to consider whether it had merit. As already stated, the Trial Chamber had indicated as a preliminary

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[321] Trial Judgement, para. 1168, fn. 1303.
[322] Nsengiyumva Indictment, pp. 36, 37, 39-43.
[323] Decision Ordering the Filing of Particulars, paras. 22, 28.
[324] Decision Ordering the Filing of Particulars, para. 22.
[325] *The Prosecutor v. Anatole Nsengiyumva*, Case No. ICTR-96-12-I, Particulars [Pursuant to the Decision on the Defence Motion on Defects in the Form of the Indictment Dated 15 May 2000], 25 May 2000 ("Particulars"), para. 6.20 (emphasis in original). Underlined portions indicate changes or additions to the actual wording of the paragraph in the Indictment.
[326] Nsengiyumva Closing Brief, paras. 941-943.
[327] Trial Judgement, para. 1169.

matter in the Trial Judgement that, in many instances, it would not revisit renewed challenges to notice which had already been dealt with in prior decisions and oral rulings.[328] In this case, the Appeals Chamber recalls that the Trial Chamber had already found in its Decision Ordering the Filing of Particulars that the allegation of repeated attacks on refugees at Nyundo Parish between 8 April and June 1994 on the orders of Nsengiyumva was sufficiently specific.[329]

144. Nsengiyumva submits that paragraph 6.20 of the Indictment is overly broad and that it failed to provide him with the specification necessary to allow him to effectively prepare his defence.[330] He argues that the Indictment pleads an overly broad period of time from 8 April to June 1994 whereas the events in Nyundo Parish only lasted a couple of days.[331] He contends that this defect is compounded by the allegation that he was present on at least one occasion between 10 April and 15 May 1994.[332]

145. Nsengiyumva further submits that the Trial Chamber erred in convicting him for the conduct of a group of attackers when he had no notice of their actions.[333] He asserts that the Indictment only charged him with responsibility for the activities of the MRND political party militia (*Interahamwe*) and the CDR political party militia (*Impuzamugambi*).[334] He argues that the Prosecution failed to prove that those who attacked Nyundo Parish were *Interahamwe* militia as charged.[335] In this regard, he contends that after 7 April 1994, all those involved in the killings were referred to as "*Interahamwe*" even though they were not specifically members of the MRND youth wing.[336] Furthermore, in relation to the attack on Nyundo Parish, Nsengiyumva notes that the Trial Chamber dismissed allegations regarding a meeting between him and the *Interahamwe* at the Gisenyi bus station as there was no evidence that these were the same individuals who attacked Nyundo Parish.[337] Nsengiyumva also argues that he had no notice that he would be held liable as a superior for the attacks on Nyundo Parish.[338] He asserts that the defects in his Indictment were not cured.[339]

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[328] Trial Judgement, paras. 108, 109.
[329] Decision Ordering the Filing of Particulars, para. 22.
[330] Nsengiyumva Notice of Appeal, para. 25; Nsengiyumva Appeal Brief, para. 123. *See also* Nsengiyumva Reply Brief, para. 51.
[331] Nsengiyumva Appeal Brief, para. 123.
[332] Nsengiyumva Appeal Brief, para. 123.
[333] Nsengiyumva Appeal Brief, para. 125.
[334] Nsengiyumva Appeal Brief, para. 124. *See also ibid*., paras. 20-22, 56.
[335] Nsengiyumva Appeal Brief, para. 125.
[336] Nsengiyumva Appeal Brief, para. 57.
[337] Nsengiyumva Appeal Brief, para. 126.
[338] Nsengiyumva Appeal Brief, para. 127. Nsengiyumva also argues that the Prosecution failed to plead the material elements of superior responsibility in the Indictment. *See idem*. This argument will be addressed in the Superior Responsibility section of this Judgement. *See infra*, Section III.C.8.
[339] Nsengiyumva Appeal Brief, paras. 123, 127.

146. The Prosecution responds that Nsengiyumva's claims are without merit.[340] With respect to the pleading of the dates in particular, it submits that paragraphs 6.18 through 6.20 of the Indictment clearly alleged that Nsengiyumva was responsible for repeated attacks on Nyundo Parish throughout the period.[341] It further argues that even if the Indictment was vague with respect to the dates, this defect was cured by the Prosecution Pre-Trial Brief.[342]

147. The Appeals Chamber dismisses Nsengiyumva's argument that he had no notice that he could be held liable as a superior for the attack on Nyundo Parish. While paragraph 6.20 of the Indictment only referred to "ordering", as mentioned above, the Indictment clearly states that Nsengiyumva was being charged under Counts 2, 5, 6, 8, and 10 in relation to the allegations set out in paragraph 6.20 pursuant to both Articles 6(1) and 6(3) of the Statute.[343]

148. As to whether paragraph 6.20 identified the attackers at Nyundo Parish with sufficient particularity, the Appeals Chamber finds no defect in this respect. The Trial Chamber found that "the attacks between 7 and 9 April were perpetrated only by militiamen".[344] Paragraph 6.20 clearly pleads that "the refugees at Nyundo parish were repeatedly attacked by soldiers and militiamen". Nsengiyumva was therefore clearly on notice that the alleged attackers included militiamen. In this regard, the Appeals Chamber refers to its discussion in the sub-section below addressing the pleading of superior responsibility, where it concludes that the term "militiamen" as used in the Indictment was not necessarily limited to denoting members of the youth wings of the MRND and CDR political parties.[345]

149. With respect to the alleged defect in the pleading of the attacks' time-frame, the Appeals Chamber recalls that, while the Trial Chamber noted that it had heard evidence that refugees at Nyundo Parish were killed in May 1994, it concluded that it did "not have sufficient detail concerning this attack to make any findings".[346] Accordingly, it only convicted Nsengiyumva for the killing of Tutsi refugees perpetrated by *Interahamwe* militiamen at Nyundo Parish between 7 and 9 April 1994.[347] Meanwhile, paragraph 6.20 of the Indictment provides a broad date range for the attacks as being "[f]rom 8 April to June 1994".

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[340] Prosecution Response Brief (Nsengiyumva), paras. 131-135.
[341] Prosecution Response Brief (Nsengiyumva), para. 133.
[342] Prosecution Response Brief (Nsengiyumva), para. 134.
[343] Nsengiyumva Indictment, pp. 36, 37, 39-43.
[344] Trial Judgement, paras. 1203, 2079. In its legal findings, the Trial Chamber also referred to the attackers as *Interahamwe*. *See ibid*., para. 2150.
[345] *See infra*, Section III.C.8(a), para. 198.
[346] Trial Judgement, para. 1202.
[347] Trial Judgement, paras. 1203, 2150-2152.

150. The Appeals Chamber recalls that a broad date range, in and of itself, does not invalidate a paragraph of an indictment.[348] A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct with which the accused is charged.[349] Obviously, there may be instances where the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes.[350]

151. Nonetheless, in the present case, given that the Nyundo Parish attacks occurred during three specific consecutive days at the beginning of April 1994, the Appeals Chamber considers that by pleading a time-frame of almost three months, the Indictment was vague and overly broad with respect to the dates of the attacks. The Appeals Chamber therefore considers that the Indictment was defective in relation to the allegations pertaining to Nyundo Parish. It therefore turns to consider whether this defect in the Indictment was cured.

152. The Appeals Chamber notes that the Particulars to the Indictment specified that the attack on Nyundo Parish occurred "[f]rom about 8 April to about 30 June 1994".[351] This does not provide a more specific time-frame than the Indictment. Similarly, the Prosecution's Opening Statement did not provide a time-frame in relation to the attack on Nyundo Parish.[352]

153. However, the summaries of anticipated witness testimonies in the Prosecution Pre-Trial Brief did provide more specific dates for the attacks on Nyundo Parish. The summary of Witness EB's anticipated testimony stated that "On the 7th April 1994 – at about 9h00 *Interahamwe* assembled in front of [the] home of […] Barnabe Samvura – CDR President. Nsengiyumva arrived and witness heard him tell the *Interahamwe* to kill every Tutsi in Gisenyi. […] Witness will state that later Nsengiyumva was escorted by soldiers to Nyundo parish to kill refugees there".[353] Furthermore, the summary of Witness OAE's anticipated testimony specified that the "Witness will state that on the 9th April 1994 the *Interahamwe* killed some Tutsi at Nyundo Parish".[354]

[348] *Rukundo* Appeal Judgement, para. 163.
[349] *Kamuhanda* Appeal Judgement, para. 17; *Ntakirutimana* Appeal Judgement, para. 25; *Kupre{ki} et al.* Appeal Judgement, para. 89. *See also Nahimana et al*. Appeal Judgement, para. 324; *Ntagerura et al*. Appeal Judgement, para. 23.
[350] *Muvunyi* Appeal Judgement of 29 August 2008, para. 58; *Muhimana* Appeal Judgement, paras. 79, 197; *Kupre{ki} et al.* Appeal Judgement, para. 89.
[351] Particulars, para. 6.20, p. 3 (emphasis omitted).
[352] Opening Statement, T. 2 April 2002 p. 188.
[353] Prosecution Pre-Trial Brief, Appendix A, Witness EB, p. 69.
[354] Prosecution Pre-Trial Brief, Appendix A, Witness OAE, p. 106. The Appeals Chamber notes, that, contrary to the Prosecution's submissions, the summaries of anticipated testimony for Witnesses Sagahutu (ON), OF, OP, OW, and ZD do not provide any dates for the attacks on Nyundo Parish. *See ibid*., pp. 110, 113, 114, 116, 157.

Accordingly, the Appeals Chamber finds that Nsengiyumva was put on notice that the attacks on Nyundo Parish were alleged to have occurred around 7 and 9 April 1994 and that the vagueness of paragraph 6.20 of the Indictment regarding the time-frame of the killing of Tutsi refugees at Nyundo Parish was cured by the provision of timely, clear, and consistent information.

154. For the foregoing reasons, the Appeals Chamber finds that the Indictment was vague and overly broad with respect to the dates of the alleged attacks at Nyundo Parish. However, the Appeals Chamber concludes that this defect was subsequently cured and that Nsengiyumva has failed to demonstrate that he was not provided with the notice necessary to allow him to effectively prepare his defence in relation to the killing of Tutsi refugees at Nyundo Parish between 7 and 9 April 1994.

6. Alleged Lack of Notice Concerning Mudende University

155. The Trial Chamber found that on the morning of 8 April 1994, militiamen supported by at least two Rwandan army soldiers attacked and killed Tutsis who had sought refuge at the Central African Adventist University in Mudende in Gisenyi prefecture.[355] The Trial Chamber found that Nsengiyumva had authority over the soldiers and civilian assailants, and that he ordered the attack.[356] The Trial Chamber convicted Nsengiyumva pursuant to Article 6(1) of the Statute for genocide (Count 2), murder, extermination, and persecution as crimes against humanity (Counts 5, 6, and 8, respectively), as well as violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 10).[357] The Trial Chamber also found that Nsengiyumva could be held responsible as a superior pursuant to Article 6(3) of the Statute for these crimes, and considered this to be an aggravating factor in sentencing.[358]

156. These convictions were entered on the basis of paragraphs 6.11 and 6.22 of the Indictment,[359] which read as follows:

> 6.11 As from 7 April 1994, massacres of the Tutsi population and the murder of numerous political opponents were perpetrated throughout the territory of Rwanda. These crimes, which had been planned and prepared for a long time by prominent civilian and military figures who shared the extremist Hutu ideology, were carried out by militiamen, military personnel, and gendarmes on the orders and directives of some of these authorities, including Lt. Colonel Anatole Nsengiyumva.
>
> 6.22 Between 8 April and mid July 1994, Anatole Nsengiyumva ordered militiamen and soldiers to exterminate the civilian Tutsi population and its "accomplices". Among the groups of

[355] Trial Judgement, paras. 1248-1251, 2146.
[356] Trial Judgement, para. 1252.
[357] Trial Judgement, paras. 2161, 2189, 2197, 2216, 2248, 2258.
[358] Trial Judgement, paras. 2161, 2189, 2197, 2216, 2248, 2272.
[359] Trial Judgement, para. 1207, fn. 1343.

militiamen which executed Anatole Nsengiyumva's orders, the most active were led by Bernard Munyagishari, Omar Serushago, Mabuye and Thomas Mugiraneza.

In relevant parts, the Indictment states that these allegations were pursued under Counts 2, 5, 6, 8, and 10, pursuant to Article 6(1) of the Statute for paragraph 6.11, and pursuant to both Articles 6(1) and 6(3) of the Statute for paragraph 6.22.[360]

157. The Trial Chamber considered Nsengiyumva's assertion that he was not reasonably informed of the material facts concerning his role in the Mudende University attack.[361] It determined that the Prosecution's motion to add Witnesses XBM and XBG as well as the summary of Witness HV's testimony annexed to the Prosecution Pre-Trial Brief cured the Indictment's failure to specifically plead this attack.[362]

158. Nsengiyumva reiterates on appeal that his alleged involvement in the 8 April 1994 attack at Mudende University fell outside the scope of his Indictment, and that the Trial Chamber should have found that the defects in pleading this event were neither cured nor curable.[363] In particular, he submits that paragraphs 6.11 and 6.22 of the Indictment are overly general and vague, and that the particulars subsequently supplied by the Prosecution related only to other specific incidents concerning Gisenyi town and solely involved militiamen.[364] He adds that the statements and summaries of Prosecution Witnesses HV, XBM, and XBG were too contradictory and untimely to provide adequate notice as to the charges against him.[365] He further submits that the Prosecution Pre-Trial Brief fails to indicate that Witness HV intended to testify against him.[366] Nsengiyumva contends that he consistently raised the Prosecution's failure to specifically plead the killings at Mudende University and the attendant mode of liability, if any.[367] He argues that the evidence at trial concerning this event radically transformed the case against him, causing him prejudice.[368]

159. The Prosecution responds that post-indictment communications provided further relevant particulars in a clear, consistent, and timely manner to the generally worded allegations at

[360] Nsengiyumva Indictment, pp. 36, 37, 39-43.
[361] Trial Judgement, paras. 1255-1257.
[362] Trial Judgement, para. 1256.
[363] Nsengiyumva Notice of Appeal, para. 26; Nsengiyumva Appeal Brief, paras. 145-157.
[364] Nsengiyumva Appeal Brief, paras. 145, 146, *referring to* Particulars.
[365] Nsengiyumva Appeal Brief, paras. 147-157. *See also* Nsengiyumva Reply Brief, paras. 58, 64. In particular, Nsengiyumva points out that the summary of Witness HV's anticipated evidence referred to soldiers wearing caps coming to Mudende, which suggests that he was referring to gendarmes. *See* AT. 30 March 2011 p. 54; AT. 31 March 2011 p. 30.
[366] Nsengiyumva Appeal Brief, para. 148. *See also* Nsengiyumva Reply Brief, paras. 59, 60.
[367] Nsengiyumva Appeal Brief, para. 149.
[368] Nsengiyumva Notice of Appeal, para. 26. *See also* Nsengiyumva Reply Brief, para. 61.

paragraphs 6.11 and 6.22 of the Indictment.[369] In its view, the conduct of Nsengiyumva's defence shows that he fully understood the case against him with respect to the attack on Mudende University.[370]

160. While paragraphs 6.11 and 6.22 of the Indictment clearly plead that Nsengiyumva is alleged to have ordered militiamen and soldiers to exterminate the Tutsi population, there is no dispute that these paragraphs are overly broad as regards the date and location of the alleged massacres. The Appeals Chamber observes that the date and location of the Mudende University killings are not specified therein or anywhere else in the Indictment. The Indictment is therefore clearly defective in respect of this incident.

161. The primary point of contention is whether the defects were curable. The Appeals Chamber notes that, with respect to the vagueness of paragraph 6.22 of the Indictment, the Trial Chamber ordered the Prosecution to "specify the occasions, if known, or approximate dates on which these orders were given if the exact dates are not known".[371] On 25 May 2000, the Prosecution provided the following particulars to paragraph 6.22 of the Indictment:

> 6.22 From about 8 April to about 31 July 1994, Anatole Nsengiyumva ordered militiamen and soldiers to exterminate the civilian Tutsi population and its "accomplices". Some of the particulars of his orders included ordering militiamen, during the middle of April 1994, to abduct and bring approximately twenty Tutsis (who took refuge in a house in Gisenyi) to the "*commune rouge*" to be executed; ordering militiamen, during the middle of June 1994, to abduct a Tutsi woman and to bring her to the "*commune rouge*" to be executed. All those people were killed on the orders of Anatole Nsengiyumva. Furthermore, he ordered militiamen, in a continuous and ongoing fashion, to eliminate Tutsis at roadblocks and to track them down and exterminate them. Among the groups of militiamen which executed Anatole Nsengiyumva's orders, the most active were led by Bernard Munyagishari, Omar Serushago, Mabuye and Thomas Mugiraneza.[372]

162. Rather than being more specific as to the occasions or dates on which the alleged orders were issued, the Prosecution expanded the time-frame pleaded in the Indictment. Moreover, nothing in these particulars could serve to provide Nsengiyumva with notice that the Mudende University attack on 8 April 1994 formed part of the Prosecution's case against him. While the Prosecution did not acquire the statements of Witnesses XBG and XBM until 29 August 2002 and 28 February 2003, respectively,[373] it was in possession of Witness HV's statement as early as

[369] Prosecution Response Brief (Nsengiyumva), paras. 147-162. The Prosecution also argues that the wording used in the Particulars shows that they did not limit Nsengiyumva's responsibility only to killings in Gisenyi town. *See ibid*., para. 151.
[370] Prosecution Response Brief (Nsengiyumva), para. 163.
[371] Decision Ordering the Filing of Particulars, para. 23.
[372] Particulars, p. 3 (emphasis in original). Underlined portions indicate changes or additions to the actual wording of the paragraph in the Indictment.
[373] *See The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73*bis* (E), 26 June 2003 ("Decision to Add Witnesses XBG and XBM"), para. 4.

28 November 1995.[374] The Appeals Chamber notes that Witness HV's redacted statement was disclosed to Nsengiyumva in August 1999, and clearly specified the circumstances, date, location, and participants in the Mudende University attack.[375] However, this statement, which was alone in referring to the incident, was disclosed among hundreds of other statements and documents. A review of the trial record also shows that this was the first time the Mudende incident was specifically mentioned. As previously held, mere service of witness statements is insufficient to inform the Defence of material facts that the Prosecution intends to prove at trial.[376] As such, if the Mudende University attack formed part of the Prosecution case against Nsengiyumva, the Prosecution should have pleaded it with greater specificity in the Indictment, or at least in the Particulars.

163. The Appeals Chamber, Judge Güney dissenting, is nonetheless of the view that the Prosecution's failure to specifically plead the Mudende University attack does not establish that it was not part of its case at the time the Indictment was issued and the Particulars were provided. The language used to present the Particulars in respect of paragraph 6.22 of the Indictment indicates that the particulars provided were not exhaustive.[377] In addition, the Appeals Chamber is not persuaded by Nsengiyumva's argument that the reference to "Gisenyi" in the Particulars limited the allegations therein to crimes committed in Gisenyi town, as opposed to the whole prefecture.[378] Paragraph 6.22 is pleaded under a section entitled "Gisenyi", which evidently refers to the prefecture, and the reference to "Gisenyi" within the paragraph provided in the Particulars only refers to one particular incident.

164. The fact that Witness HV's statement concerning the events at the university was disclosed to Nsengiyumva in August 1999 shows that the Mudende University killings formed part of the Prosecution case against Nsengiyumva at the time when the Indictment was issued.[379] In addition, the Mudende University killings fall within the broad scope of paragraphs 6.11 and 6.22. The Appeals Chamber therefore considers, Judge Güney dissenting, that the defects in respect of the Mudende University attack were curable. The question remains as to whether they were cured.

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[374] *See* Exhibit DNS60C (Witness HV's Statement of 28 November 1995).
[375] *The Prosecutor v. Anatole Nsengiyumva*, Case No. ICTR-96-12-I, *Communication des pièces* Disclosure of Evidence (confidential), dated 31 July 1999 and filed 10 August 1999. On page 8 of the document, Witness HV's statement is indicated as having been disclosed on 5 August 1999. A review of the statement disclosed on 5 August 1999 reveals that, while the witness referred to "soldiers wearing red caps" visiting the university on 7 April 1994, the witness clearly incriminated "soldiers" as opposed to gendarmes in the 8 April 1994 killings.
[376] *Ntagerura et al.* Appeal Judgement, para. 139; *Simi}* Appeal Judgement, para. 24; *Ntakirutimana* Appeal Judgement, para. 27. *See also* Decision on Exclusion of Evidence, para. 3.
[377] *See* Particulars, p. 3 ("Some of the particulars of his orders included […]").
[378] Nsengiyumva Appeal Brief, para. 146.

165. In this regard, the Trial Chamber found that "the Prosecution's motion to add Witnesses XBM and XBG as well as the summary of Witness HV's testimony annexed to the Pre-Trial Brief cured the Indictment's failure to specifically plead this attack".[380]

166. The summary of Witness HV's anticipated testimony annexed to the Prosecution Pre-Trial Brief stated:

> Witness will state that following the announcement of the President's death, smoke engulfed the entire campus and the witness saw villagers running to take [refuge] at campus. On 8th April 1994 the witness saw soldiers armed with guns and wearing red caps and multicolored but predominantly green clothes together with villagers armed with machetes, sticks, clubs and sharp bamboo, storm into classes where Tutsi had taken refuge and massacred all of them. The soldiers collected all the female students and began separating them according to ethnic origin and nationality: Tutsi, Hutu and Burundians. Some Tutsi were killed but witness escaped when it began raining. Helped by gendarmes.[381]

167. Contrary to the Prosecution's contention, this summary did not clearly refer to "Mudende University", but rather a "campus".[382] Only when the summary is read together with Witness HV's actual statement disclosed in 1999 is it clear that the "campus" referred to is Mudende University. Similarly, only when the summary is read with the statement is it clear that the ambiguous reference to "soldiers wearing red caps" relates to soldiers as opposed to gendarmes.[383] Although Witness HV's summary was not linked to Nsengiyumva in the Prosecution Pre-Trial Brief,[384] the Appeals Chamber considers that Nsengiyumva should nevertheless have been prompted to re-examine the contents of Witness HV's statement upon reading the Supplement to the Prosecution Pre-Trial Brief. In this Supplement, the Prosecution indicated that Witness HV was expected to testify about several issues in the Indictment, including paragraph 6.22.[385] Despite the Prosecution's initial failure to signal to Nsengiyumva that Witness HV, and, therefore, the events at Mudende University, were relevant to his case, the Appeals Chamber considers that the Supplement to the Prosecution Pre-Trial Brief gave him notice that the witness's allegations related to him.

[379] *The Prosecutor v. Anatole Nsengiyumva*, Case No. ICTR-96-12-I, Disclosure of Evidence, Witness HV, dated 31 July 1999 and filed 10 August 1999, p. 8.
[380] Trial Judgement, para. 1256.
[381] Prosecution Pre-Trial Brief, Appendix A, Witness HV, p. 87.
[382] Prosecution Response Brief (Nsengiyumva), para. 149. Further contrary to the Prosecution's assertion, the summary did not refer to "civilian assailants" but rather "villagers". *See idem*.
[383] *See supra*, fn. 375.
[384] *See* Prosecution Pre-Trial Brief, Appendix A, Witness HV, p. 87, at which the boxes for "Nsengiyumva" and "ALL" in respect of the Accused are not checked. *See also* Trial Judgement, para. 1257. The Appeals Chamber further notes that whereas Witness HV's summary was linked to genocide (Count 2), murder (Count 5), and persecution (Count 8), for which he was convicted, it was not linked to extermination (Count 6) or violence to life (Count 10), for which he was also convicted. *See* Prosecution Pre-Trial Brief, Appendix A, Witness HV, p. 87, at which the boxes for "Genocide/Complicity", "CAH-Murder", and "CAH-Persecution" are checked, whereas the boxes for "CAH-Extermination" and "War Crimes-Violence" and/or "War Crimes-Killing" are not checked.
[385] Witness HV is specifically listed in correspondence with paragraphs 5.14, 5.15, 5.18, 5.25, 5.29, 6.07, 6.12 through 6.14, 6.21 through 6.24, 6.36, and 6.37 of the Nsengiyumva Indictment. It is also indicated that all Prosecution

This is particularly so given that the university's location in Gisenyi prefecture and the alleged involvement of soldiers were clearly pleaded in the Indictment and clearly appeared in the witness's redacted statement which was in Nsengiyumva's possession since 1999.

168. In the circumstances, the Appeals Chamber finds that at the time of the filing of the Supplement to the Prosecution Pre-Trial Brief on 7 June 2002, Nsengiyumva was on notice that Witness HV's evidence pertained to several paragraphs of the Indictment in relation to which the witness was expected to testify, including paragraphs 6.11 and 6.22.[386] Notice of the material facts that on 8 April 1994, Tutsis were attacked and massacred at Mudende University by "soldiers" and "villagers" and that Nsengiyumva was alleged to incur criminal responsibility for this event were therefore provided through the Prosecution Pre-Trial Brief and the Supplement thereto.

169. Further notice was provided when the Prosecution disclosed the unredacted statements of Witnesses XBG and XBM on 7 May 2003,[387] and then sought leave to add these witnesses, among others, to its witness list on 13 June 2003.[388] Witness XBG's statement described an attack at Mudende University in May 1994,[389] while Witness XBM's statement alleged Nsengiyumva's physical presence and personal participation in an attack against Tutsis at Mudende University on 9 April 1994 involving soldiers and civilians.[390] The Prosecution argued that the witnesses' evidence was clearly material to its case.[391] Despite Nsengiyumva's objections to the hearing of these witnesses,[392] the Trial Chamber granted the Prosecution's motion.[393] Three years later, Nsengiyumva sought to exclude the evidence of Witnesses XBG and XBM on the Mudende

witnesses are anticipated to testify with respect to paragraph 6.11 of the Nsengiyumva Indictment. *See* Supplement to the Prosecution Pre-Trial Brief, pp. 14-17.

386 Supplement to the Prosecution Pre-Trial Brief, pp. 16, 17.

387 *See The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Interoffice Memorandum, Subject: Unredacted Disclosure in OTP v. Theoneste Bagosora, Anatole Nsengiyumva, Aloys Ntabakuze and Gratien Kabiligi, ICTR-98-41-T, 7 May 2003 ("7 May 2003 Disclosure"). The Appeals Chamber notes that Witness XBG's redacted statement was disclosed as early as 14 September 2002, and that no redacted version of Witness XBM's statement was ever disclosed. *See* Decision to Add Witnesses XBG and XBM, para. 4.

388 *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Confidential Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73*bis*(E) of the Rules of Procedure and Evidence, confidential, 13 June 2003 ("Prosecution Motion to Add Witnesses XBG and XBM").

389 *See* 7 May 2003 Disclosure, p. 13190 (Registry pagination). *See also* Exhibit DNS32B (Witness XBG's statement of 28 and 29 August 2002), p. 7.

390 *See* 7 May 2003 Disclosure, pp. 13286, 13287 (Registry pagination). *See also* Exhibit DB26B (Witness XBM's statement of 26 and 27 February 2003), pp. 13, 14.

391 Prosecution Motion to Add Witnesses XBG and XBM, para. 4. *See also ibid*., paras. 7, 9.

392 *See The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Defence Response to Confidential Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E) of the Rules of Procedure and Evidence, 18 June 2003. *See also The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Extremely Urgent Motion by the Defence for an Order Requiring the Prosecutor to Specify the Sequence in which Witnesses Will Testify in the Session Commencing 9 June 2003 and Ending 18 July 2003, a Further Order for the Prosecutor to Comply with the Trial Chamber's Order of 8 April 2003 and a Request to the Trial Chamber to Strike Out Witnesses Added to the Prosecutor's Final List in Violation of Rule 73 *bis* (E), 15 May 2003, paras. 7-10 (p. 5).

393 Decision to Add Witnesses XBG and XBM, p. 8.

University killings on the ground that it fell outside the scope of the Indictment.[394] In deciding Nsengiyumva's motion, the Trial Chamber stated:

> The Prosecution motion for leave to add Witnesses XBG and XBM to the witness list makes specific reference to their expected testimony concerning the Accused's role in massacres at Mudende University. This provided clear and unequivocal notice that the Prosecution intended to rely on these material facts as proof of the allegations in paragraphs 6.11 and 6.22 of the Indictment concerning the Accused's involvement in killing civilian Tutsis, and that he gave orders to militias to carry out such killings. On this basis, the Chamber finds this evidence to be admissible.[395]

The Appeals Chamber finds no error in the Trial Chamber's reasoning. It considers that the differences as regards the date and specifics of the attack between Witnesses XBG's and XBM's statements, or with Witness HV's summary, did not constitute inconsistent notice as alleged by Nsengiyumva as they clearly described the same events in substance. These differences were only relevant to the Prosecution's ability to prove its case.[396]

170. The Appeals Chamber considers that the conduct of Nsengiyumva's defence at trial confirms that he was adequately and timely informed that he was charged with the crimes committed at Mudende University on 8 April 1994 and was able to prepare a meaningful defence.

171. In this regard, the Appeals Chamber notes that Nsengiyumva did cross-examine Witnesses XBG, XBM, and HV on the events at Mudende University.[397] Seven months after Witness HV testified, Nsengiyumva called Defence Witness LK-2 to testify on the Mudende University killings.[398] Defence Witnesses LT-1, YD-1, and BZ-1 also testified to this incident.[399] On 15 December 2005, Nsengiyumva requested that Witnesses MAR-1 and WY be added to his witness list so that they could testify about the Mudende University attacks,[400] which they did in May 2006.[401]

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[394] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Anatole Nsengiyumva Motion For the Exclusion of Evidence of Allegations Falling Outside the Indictment Pursuant to Articles 17 and 18 of the Statute of the International Tribunal and Rules 47, 50, 53bis and 62 of the Rules of Procedure and Evidence, 9 May 2006 ("Nsengiyumva Motion for Exclusion of Evidence"), paras. 54, 55.
[395] Decision on Exclusion of Evidence, para. 14.
[396] *See* Trial Judgement, para. 1256.
[397] Witness XBG, T. 9 July 2003 pp. 20-30; Witness XBM, T. 15 July 2003 pp. 51-54; Witness HV, T. 24 September 2004 pp. 1-25. The Appeals Chamber observes that objections were raised to the introduction of evidence on the attack at Mudende University for lack of notice during Witness XBG's testimony, but that the Trial Chamber stated that the question of whether there was sufficient notice would be dealt with at a later stage. *See* Witness XBG, T. 8 July 2003 pp. 55-67.
[398] Witness LK-2, T. 19 April 2005 pp. 21-27.
[399] On 26 April 2005, 12 December 2005, and 22 February 2006, respectively.
[400] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Anatole Nsengiyumva's Urgent Motion for Leave to Amend the List of Defence Witnesses, confidential, 15 December 2005, paras. 38, 40.
[401] On 29 May 2006 and 31 May 2006, respectively.

172. It is also noteworthy that in his Closing Brief, Nsengiyumva expressly challenged the coherence and credibility of Witnesses XBG, XBM, and HV.[402] He referred to his cross-examination of Prosecution Witness XBG,[403] and relied on the evidence of Defence Witnesses LK-2, LT-1, YD-1, BZ-1, MAR-1, and WY-1, as well as his own, to deny ever going to Mudende during the events.[404] He urged the Trial Chamber to "disregard the testimonies on the Mudende […] killings for […] being incredible, unbelievable and lacking in any probative value".[405] He also relied on the Defence witnesses whose testimonies, he argued, were "not effectively challenged by the prosecution [and] ought to be accepted as credible and reliable".[406] The Appeals Chamber considers that Nsengiyumva's assertion that his witnesses were more credible than the Prosecution's implies that he felt he had presented a full and meaningful defence.

173. For the foregoing reasons, the Appeals Chamber considers, Judge Güney dissenting, that the Prosecution provided the material facts underpinning the charge at paragraphs 6.11 and 6.22 of the Indictment in a clear, consistent, and timely manner, and that Nsengiyumva was able to prepare a meaningful defence against allegations of his role in the killings at Mudende University on 8 April 1994. Nsengiyumva's submissions that he lacked adequate notice that he was charged with these killings are accordingly dismissed.

7. Alleged Lack of Notice Concerning Bisesero

174. The Trial Chamber found that, in the second half of June 1994, Nsengiyumva sent militiamen from Gisenyi prefecture to participate in an operation in the Bisesero area of Kibuye prefecture to kill Tutsis on orders of the government.[407] This factual finding was based on the testimony of Witnesses ABQ, KJ, ZF, Omar Serushago, and on documentary evidence.[408] The Trial Chamber concluded that Nsengiyumva was criminally responsible pursuant to Article 6(1) of the Statute for aiding and abetting the killing of Tutsi refugees in Bisesero by making resources available to the local authorities in Kibuye prefecture for this purpose.[409] It convicted him of genocide (Count 2), murder, extermination, and persecution as crimes against humanity (Counts 5,

[402] Nsengiyumva Closing Brief, paras. 713-723.
[403] Nsengiyumva Closing Brief, para. 722.
[404] Nsengiyumva Closing Brief, paras. 724-735.
[405] Nsengiyumva Closing Brief, para. 723.
[406] Nsengiyumva Closing Brief, para. 723.
[407] Trial Judgement, para. 1824. *See also ibid.*, para. 2155.
[408] Trial Judgement, paras. 1818-1824.
[409] Trial Judgement, paras. 2157, 2161, 2189, 2197, 2216, 2248.

6, and 8, respectively), as well as of violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 10).[410]

175. In summarising the Prosecution's case against Nsengiyumva with respect to the killings in Bisesero, the Trial Chamber referred to paragraphs 6.27 and 6.30 of the Indictment.[411] Paragraph 6.30 alleges that from April to June 1994, Nsengiyumva chaired meetings at the Umuganda Stadium in Gisenyi during which he incited and encouraged the militiamen in attendance to continue the massacre of the Tutsi population. Paragraph 6.27 reads as follows:

> In June 1994, Interior Minister Edouard Karemera ordered the Commander in Gisenyi, Anatole Nsengiyumva, to send troops into the Bisesero area, in Kibuye *préfecture*, supposedly to combat the enemy, although the RPF was in fact never in Bisesero. There was only of [*sic*] a group of Tutsis [*sic*] refugees who had gathered in that region, fleeing the massacres.

The Indictment states, in relevant part, that these allegations were pursued under Counts 2, 5, 6, 8, and 10 pursuant to Article 6(1) of the Statute.[412]

176. Nsengiyumva submits that the crimes for which he was convicted in relation to Bisesero fell outside the scope of his Indictment.[413] He contends that paragraph 6.27 of the Indictment "does not disclose an offence" since there is no allegation that he reacted to the communication from Karemera, sent anybody to Bisesero, or took any action.[414] He claims that he had no notice of his alleged criminal conduct, in particular that he was charged with aiding and abetting.[415] Further, he argues that even if an offence could be inferred, the allegations were too vague with regard to what is alleged to be his criminal conduct, when it took place, and where.[416] He adds that the Trial Chamber's reliance on paragraph 6.30 of the Indictment was erroneous since it does not relate to the Bisesero events and sets out allegations which were not proven by the Prosecution.[417] Nsengiyumva further submits that neither the Supporting Material, nor the Prosecution Pre-Trial Brief provided him adequate notice,[418] and that he suffered prejudice from the lack of notice of this charge.[419]

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[410] Trial Judgement, paras. 2161, 2189, 2197, 2216, 2248, 2258.
[411] Trial Judgement, para. 1791, fn. 1945.
[412] Nsengiyumva Indictment, pp. 36, 37, 39-42.
[413] Nsengiyumva Notice of Appeal, para. 27; Nsengiyumva Appeal Brief, para. 176.
[414] Nsengiyumva Appeal Brief, para. 176. *See also* AT. 30 March 2011 pp. 59, 63.
[415] Nsengiyumva Appeal Brief, paras. 176, 223; Nsengiyumva Reply Brief, para. 66. Nsengiyumva points out that he raised these issues at trial. *See* Nsengiyumva Appeal Brief, para. 177.
[416] Nsengiyumva Appeal Brief, para. 178.
[417] Nsengiyumva Appeal Brief, para. 183.
[418] Nsengiyumva Appeal Brief, paras. 177, 179, *referring to The Prosecutor v. Anatole Nsengiyumva,* Case No. ICTR-98-41-I, Supporting Material, confidential, 3 August 1998 ("Supporting Material"). *See also* AT. 30 March 2011 pp. 58, 59.
[419] Nsengiyumva Appeal Brief, para. 184.

177. The Prosecution responds that paragraph 6.27 adequately informed Nsengiyumva that, in June 1994, Karemera ordered him to send troops to the Bisesero area, supposedly to combat the RPF, although there were no RPF troops there, but Tutsi refugees who had fled killings.[420] It submits that the Indictment clearly indicates that Article 6(1) of the Statute applied to the allegations in paragraph 6.27, thus sufficiently informing Nsengiyumva that he was charged with the killings in Bisesero, including aiding and abetting those killings.[421] The Prosecution further argues that if there was any ambiguity in paragraph 6.27, it was cured by post-indictment communications.[422] According to the Prosecution, Nsengiyumva's claim that he suffered prejudice is ill-founded.[423]

178. Nsengiyumva replies, *inter alia*, that his alleged compliance with Karemera's order to send reinforcements, which could have amounted to criminal conduct, is not pleaded in the Indictment and is not set out in the particulars provided thereafter.[424]

179. The Appeals Chamber considers that paragraph 6.30 of the Indictment could not constitute the basis for Nsengiyumva's convictions in relation to Bisesero insofar as it alleges a distinct set of material facts which are not relevant to the Trial Chamber's findings concerning the Bisesero events.

180. In his motion for a judgement of acquittal, Nsengiyumva raised the contention that no offence was disclosed in paragraph 6.27 of the Indictment.[425] The Trial Chamber denied the motion without addressing this specific claim.[426] Later during trial, Nsengiyumva sought the exclusion of the testimonies of Witnesses Serushago and ABQ concerning the allegations that he had sent *Interahamwe* to the Bisesero hills in Kibuye prefecture to attack Tutsi refugees on the basis that these allegations fell outside the scope of the Indictment.[427] In its Decision on Exclusion of Evidence, the Trial Chamber determined that the document entitled "Supporting Material" which accompanied the "Indictment", together with the summary of Witness Serushago's anticipated

[420] Prosecution Response Brief (Nsengiyumva), para. 179. *See also* AT. 31 March 2011 pp. 1, 2.
[421] Prosecution Response Brief (Nsengiyumva), para. 179. The Prosecution responds that Nsengiyumva's claim that he protested the attempt of confusion during Witness ABQ's testimony is unfounded as Nsengiyumva's Counsel admitted in Court that he "probably had the wrong interpretation". *See* Prosecution Response Brief (Nsengiyumva), para. 190.
[422] Prosecution Response Brief (Nsengiyumva), paras. 180-186. *See also* AT. 31 March 2011 pp. 2-5.
[423] Prosecution Response Brief (Nsengiyumva), para. 186. *See also* AT. 31 March 2011 pp. 4, 5.
[424] Nsengiyumva Reply Brief, para. 68. *See also* AT. 30 March 2011 pp. 58, 59.
[425] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Motion for Acquittal of Anatole Nsengiyumva pursuant to Rule 98bis of the Rules of Procedure and Evidence, 21 October 2004, p. 50.
[426] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motions for Judgement of Acquittal, 2 February 2005.
[427] Nsengiyumva Motion for Exclusion of Evidence, paras. 58-60, 113-116.

testimony appended to the Prosecution Pre-Trial Brief, provided Nsengiyumva with a clear indication of the material facts which the Prosecution would present at trial.[428]

181. The Appeals Chamber notes that paragraph 6.27 of the Indictment does not allege that Nsengiyumva engaged in any criminal conduct. The allegation in this paragraph that Nsengiyumva was ordered by the Minister of the Interior to send troops to the Bisesero area does not say anything about whether or not he was alleged to have complied with the order.

182. The Appeals Chamber recalls, however, that in determining whether an accused was adequately put on notice of the nature and cause of the charges against him, the indictment must be considered as a whole.[429] In the instant case, the Appeals Chamber notes that the Indictment specifically charged Nsengiyumva pursuant to Article 6(1) of the Statute for Counts 1, 2, 3, 5, 6, 8, and 10 on the basis of paragraph 6.27.[430] Nsengiyumva was therefore put on notice that he incurred criminal responsibility on the basis of the allegations set out in that paragraph. This, however, did not provide him with notice of the crime that he allegedly committed or of the mode of participation therein. Given that a number of paragraphs containing only background information were also cited in support of these counts,[431] it was unclear whether the allegations set out in paragraph 6.27 constituted a separate charge or background information relating to charges pleaded elsewhere in the Indictment.

183. The Trial Chamber considered that the Supporting Material which accompanied the Indictment provided Nsengiyumva "with a clear indication of the material facts which the Prosecution would present at trial" concerning Bisesero.[432] The material provided in relation to paragraph 6.27 of the Indictment consisted of: (i) a copy of the letter sent by Karemera to Nsengiyumva requesting that he "back up the Gendarmerie unit in Kibuye, with the support of the people, in conducting the search operation in Bisesero *secteur*, Gishyita *commune*, which has become an RPF sanctuary"; (ii) a reference to "*Pro Justicia* No.37/95, P.V. No.24.772: The Advance of the FPR in Rwanda"; and (iii) a statement from Witness FF referring to the chasing of refugees in the Bisesero hills by *Interahamwe* and soldiers, and describing a specific incident

[428] Decision on Exclusion of Evidence, para. 18, *referring to* Supporting Material, p. 112 *and* Prosecution Pre-Trial Brief, Appendix A, Witness Serushago (ZD/GHK), p. 157.
[429] *Seromba* Appeal Judgement, para. 27; *Simba* Appeal Judgement, fn. 158; *Gacumbitsi* Appeal Judgement, para. 123.
[430] Nsengiyumva Indictment, pp. 36, 37, 39-42.
[431] *See*, *for instance*, Nsengiyumva Indictment, pp. 36-42, *referring to* paras. 4.2-4.4, 5.5, 5.9, 6.5.
[432] Decision on Exclusion of Evidence, para. 18.

during which a boy spotted about one thousand people who had sought refuge in a cave and shouted to *Interahamwe* that he had found *Inyenzi*.[433]

184. Even assuming that the Supporting Material could be construed as part of the Indictment, the Appeals Chamber considers that this material did not clarify the charge allegedly disclosed in paragraph 6.27 of the Indictment. While the copy of Karemera's letter substantiates the allegation that Nsengiyumva was asked to support an operation against the RPF in Bisesero, it does not provide any information as to the criminal conduct imputed to Nsengiyumva. The reference to the *pro justitia*, in itself, did not provide notice of anything. As to the quoted part of Witness FF's statement, the Appeals Chamber observes that it does not refer to Nsengiyumva, Gisenyi, Gisenyi soldiers, or soldiers or *Interahamwe* dispatched by Nsengiyumva, but refers to the participation of "*Interahamwe* and soldiers" in the chasing of refugees in Bisesero hills. Whereas Witness FF's description of the chasing of refugees could reasonably have put Nsengiyumva on notice that it was alleged that Tutsi refugees fleeing the massacres were killed by *Interahamwe* and soldiers in Bisesero hills, it did not give him clear notice that he was charged with aiding and abetting these killings by dispatching militiamen recruited in Gisenyi prefecture to Bisesero.

185. The Appeals Chamber considers that Nsengiyumva was not charged with the conduct for which he was found criminally responsible in relation to Bisesero. As to whether the allegation that Nsengiyumva complied with the government's order and dispatched troops to Bisesero was implied in paragraph 6.27 in the Indictment, the Appeals Chamber stresses that an accused is entitled to be informed clearly of the charges against him and cannot be required to infer the charges brought against him. The Prosecution was in possession of material relating to Nsengiyumva's role in the Bisesero killings when it filed the Indictment;[434] if its intention was to prosecute Nsengiyumva for dispatching militiamen to Bisesero to participate in an operation against Tutsi civilians, it should have informed Nsengiyumva by saying so explicitly. Instead, it merely alleged that Nsengiyumva was required to send troops to Bisesero where there were no RPF troops but Tutsis refugees. This allegation does not constitute a criminal charge.

186. It is possible that the Prosecution may have, in the course of this long trial, collected evidence which shed more light on the circumstances of the Bisesero killings of June 1994 and Nsengiyumva's role therein. Such a situation required the Prosecution to request permission to amend the indictment for the purpose of adding the relevant charge. It did not. The Appeals

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[433] Supporting Material, p. 112.

[434] *See The Prosecutor v. Anatole Nsengiyumva,* Case No. ICTR-96-12-I, Witness ZF's statement dated 24 June 1998 (French), redacted, disclosed confidentially on 13 July 1999, p. 14.

Chamber therefore finds that Nsengiyumva was not charged with aiding and abetting the killings in Bisesero.

187. The Appeals Chamber recalls that in reaching its judgement, a Trial Chamber can only convict the accused of crimes that are charged in the indictment.[435] Accordingly, the Appeals Chamber concludes that the Trial Chamber erred in finding that Nsengiyumva was criminally responsible pursuant to Article 6(1) of the Statute for aiding and abetting the killing of Tutsi refugees in Bisesero by sending militiamen from Gisenyi as that charge was not pleaded in the Indictment. The Appeals Chamber grants Nsengiyumva's Second, Fourth, and Tenth Grounds of Appeal in part and reverses his convictions under Counts 2, 5, 6, 8, and 10 of the Indictment based on the crimes committed at Bisesero in the second half of June 1994. As a result, the Appeals Chamber will not examine Nsengiyumva's remaining arguments relating to the Bisesero events. The Appeals Chamber will discuss the impact, if any, of this finding on Nsengiyumva's sentence in the appropriate section of this Judgement.

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[435] *See*, *e.g.*, *Munyakazi* Appeal Judgement, para. 36; *Muvunyi* Appeal Judgement of 1 April 2011, para. 19; *Kalimanzira* Appeal Judgement, para. 46; *Ntagerura et al.* Appeal Judgement, para. 28.

8. Alleged Lack of Notice of Elements of Superior Responsibility

188. The Trial Chamber found that Nsengiyumva could be held responsible as a superior pursuant to Article 6(3) of the Statute under Counts 2, 5, 6, 8, 9, and 10 of the Indictment for the crimes committed in Gisenyi town, including against Alphonse Kabiligi, at Nyundo Parish, and at Mudende University, but, having found him guilty under Article 6(1) of the Statute, did not convict him of these crimes as a superior.[436] The Trial Chamber did, however, consider his role as a superior in these crimes as an aggravating factor in sentencing.[437]

189. Nsengiyumva submits that the Trial Chamber erred in failing to properly apply the pleading principles for Article 6(3) liability.[438] He argues that as no material facts for superior responsibility were pleaded and as this defect was never cured, the Trial Chamber erroneously found him liable as a superior for these crimes.[439] He contends that he was charged with ordering crimes, not with superior responsibility over their perpetrators.[440]

190. The Prosecution responds that all elements of Nsengiyumva's superior responsibility were adequately pleaded.[441]

191. The Appeals Chamber recalls that when an accused is charged with superior responsibility pursuant to Article 6(3) of the Statute, the indictment must plead the following material facts:

> (i) that the accused is the superior of sufficiently identified subordinates over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible;
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> (ii) the criminal conduct of those others for whom the accused is alleged to be responsible;
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> (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 the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[442]

[436] Trial Judgement, paras. 2161, 2189, 2197, 2216, 2223, 2248. *See also ibid*., para. 2272.
[437] Trial Judgement, para. 2272. *See also ibid*., paras. 2161, 2189, 2197, 2216, 2248.
[438] Nsengiyumva Notice of Appeal, para. 6. *See also* AT. 30 March 2011 p. 58.
[439] Nsengiyumva Appeal Brief, para. 17. *See also ibid*., paras. 75, 76, 105, 127.
[440] Nsengiyumva Appeal Brief, para. 18. *See also ibid*., paras. 76, 127; Nsengiyumva Reply Brief, para. 11(i).
[441] Prosecution Response Brief (Nsengiyumva), paras. 22-29. *See also ibid*., para. 49.
[442] *See*, *e.g*., *Muvunyi* Appeal Judgement of 29 August 2008, para. 19; *Nahimana et al.* Appeal Judgement, para. 323.

(a) Identification of Subordinates

192. The Trial Chamber found that the crimes in Gisenyi town and at Mudende University were perpetrated by soldiers and militiamen, who were found to be Nsengiyumva's subordinates.[443] In addition, the Trial Chamber found that the killings at Nyundo Parish were perpetrated only by militiamen, whom it also found to have been Nsengiyumva's subordinates.[444] With regard to whether Nsengiyumva was given proper notice of the identity of his alleged criminal subordinates, the Trial Chamber considered that:

> The Indictment adequately identifies Nsengiyumva's subordinates alleged to have committed the crimes. Some are named in various paragraphs throughout the Indictment in connection with the attacks. In most cases, the participants who physically perpetrated the crimes are identified in the Indictment and the Pre-Trial Brief dealing with the specific crimes by broad category, such as *Interahamwe* or soldiers, and then further identified with geographic and temporal details. In the context of this case, it is clear that the references to soldiers are those within the Gisenyi operational sector. Given the nature of the attacks, the Chamber is satisfied that the Prosecution provided an adequate identification.[445]

193. Nsengiyumva submits that the Trial Chamber erred in concluding that his Indictment was sufficiently specific as to the superior-subordinate relationship.[446] In particular, he submits that the Trial Chamber erred in failing to specify whether his alleged subordinates were civilians, civil defence forces, bandits, *Interahamwe*, or party militias, and that it erred in using the terms interchangeably.[447] He argues that the Indictment only charges him with giving orders to identified, well-structured, political party militiamen, namely the MRND *Interahamwe* and the CDR *Impuzamugambi*, a charge which was never proven.[448]

194. The Prosecution responds that Nsengiyumva's subordinates were identified in the Indictment as the soldiers of the Gisenyi Operational Sector and "militias".[449]

195. The Appeals Chamber notes that paragraphs 4.2 and 4.4 of the Indictment allege that during the period relevant to the Indictment, Nsengiyumva was the "Commander of Military Operations for Gisenyi sector", in which capacity he exercised authority over the military in Gisenyi sector. Paragraph 4.5 of the Indictment alleges that he also held authority over the MRND militia (*Interahamwe*) and the CDR militia (*Impuzamugambi*). In addition, paragraph 6.36 of the

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[443] Trial Judgement, paras. 1065, 1166, 1252, 2077, 2078.
[444] Trial Judgement, paras. 1203, 2079.
[445] Trial Judgement, para. 2071 (internal references omitted).
[446] Nsengiyumva Appeal Brief, paras. 18, 19. *See also* AT. 30 March 2011 p. 58.
[447] Nsengiyumva Notice of Appeal, para. 6. *See also ibid*., para. 18.
[448] Nsengiyumva Appeal Brief, paras. 20, 22, 77, 124, 125, fn. 193. *See also* Nsengiyumva Reply Brief, para. 32.
[449] Prosecution Response Brief (Nsengiyumva), paras. 26, 29. *See also ibid*., paras. 84, 85, 126, 135, 162.

Indictment alleges that, from April to July 1994, Nsengiyumva exercised authority over "members of the *Forces Armées Rwandaises*, their officers and militiamen".

196. Paragraph 6.36 was relied upon in support of all counts of which Nsengiyumva was found guilty. Paragraphs 4.2 and 4.4 were only relied upon for Counts 7 and 11, of which Nsengiyumva was acquitted, and paragraph 4.5 was not specifically referred to in support of any count in the Indictment. Nevertheless, since they are contained in the section describing the accused and merely provide information on Nsengiyumva's professional background and military authority during the period of the events alleged,[450] the Appeals Chamber considers that paragraphs 4.2, 4.4, and 4.5 unambiguously applied to all counts charged pursuant to Article 6(3) of the Statute; although they contain material facts supporting elements of crimes pleaded elsewhere in the Indictment, they do not plead allegations that may be separately charged as a crime. As such, the Appeals Chamber considers that it was not necessary to plead these paragraphs under each of the counts in the charging section of the Indictment. Consequently, the Appeals Chamber finds that the Indictment clearly identified soldiers from the Rwandan army in Gisenyi sector and militiamen as Nsengiyumva's subordinates. In this regard, the Appeals Chamber recalls that a superior need not necessarily know the exact identity of his subordinates who perpetrate crimes in order to incur liability under Article 6(3) of the Statute,[451] and that physical perpetrators of the crimes can be identified by category in relation to a particular crime site.[452]

197. As to whether the perpetrators for whose crimes Nsengiyumva was convicted were specifically identified in relation to each crime, the Appeals Chamber notes that paragraphs 6.20, 6.22, and 6.36[453] were invoked pursuant to Article 6(3) of the Statute, and specifically identified soldiers and militiamen as the perpetrators of the crimes. By virtue of paragraphs 4.2, 4.4, 4.5, and 6.36, soldiers and militiamen were identified as Nsengiyumva's subordinates for the purposes of superior responsibility.

198. The Appeals Chamber notes that, in its factual and legal findings, the Trial Chamber used the term "militiamen" interchangeably with others such as "militia groups", "civilian militiamen", "civilian assailants", "civilian militia", "civilian attackers", and "*Interahamwe*",[454] whereas the

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[450] Nsengiyumva Indictment, Section 4 "The Accused".
[451] *Renzaho* Appeal Judgement, para. 64; *Muvunyi* Appeal Judgement of 29 August 2008, para. 55, *referring to Blagojevi} and Joki}* Appeal Judgement, para. 287.
[452] *Cf. Renzaho* Appeal Judgement, para. 64; *Muvunyi* Appeal Judgement of 29 August 2008, paras. 55, 56; *Ntagerura et al.* Appeal Judgement, paras. 140, 141, 153.
[453] The Appeals Chamber recalls that Nsengiyumva was convicted on the basis of, *inter alia*, paragraphs 6.20 (Nyundo Parish), 6.22 (Mudende University), and 6.36 (Gisenyi town, Alphonse Kabiligi) of the Indictment. *See supra,* Sections III.C.3-6.
[454] *See*, *e.g.*, Trial Judgement, paras. 1063-1066, 2033, 2063, 2078, 2081, 2127-2133, 2136, 2137, 2150, 2152.

Indictment only identifies "militiamen" as perpetrators of crimes and Nsengiyumva's subordinates.[455] The Appeals Chamber finds it clear that the Trial Chamber's choice of words was intended to denote the militiamen's non-military nature, as distinct from the regular army under Nsengiyumva's command.[456] Moreover, the Appeals Chamber is not persuaded that the term "militiamen" as used in the Indictment was necessarily limited to denote members of the youth wings of the MRND and CDR political parties. Indeed, reference is also made to "carefully selected" civilians who were armed and participated in hostilities.[457] As such, the Appeals Chamber rejects Nsengiyumva's suggestion that the Indictment distinguished between "civilian" and "political" militiamen.

199. Accordingly, the Appeals Chamber finds that with respect to the killings in Gisenyi town, including the killing of Alphonse Kabiligi, and the killings at Nyundo Parish and at Mudende University, the Indictment sufficiently identified Nsengiyumva's subordinates for whose acts he was alleged to be responsible.

(b) Criminal Conduct of Subordinates

200. The issue of notice of the crimes allegedly committed by soldiers and militiamen in Gisenyi town, including the murder of Alphonse Kabiligi, at Nyundo Parish, and at Mudende University has been addressed in the sections of this Judgement addressing the alleged lack of pleading of the material facts underpinning each of the specific incidents. There, the Appeals Chamber has found that Nsengiyumva was put on notice that soldiers and/or militiamen were alleged to have killed Tutsi civilians, Hutu moderates, and/or political opponents in Gisenyi town on 7 April 1994, including Alphonse Kabiligi, at Nyundo Parish between 7 and 9 April 1994, and at Mudende University on 8 April 1994.[458]

(c) Knowledge of the Subordinates' Crimes

201. The Trial Chamber was satisfied that Nsengiyumva had actual knowledge that his subordinates were about to commit crimes or had in fact committed them.[459] In a general section of the Trial Judgement which addressed issues relating to notice of the charges, the Trial Chamber

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[455] *See*, *e.g.*, Nsengiyumva Indictment, paras. 4.5 (*referring to* "MRDN militia, the *Interahamwe*, and the CDR militia, the *Impuzamugambi*"), 6.16, 6.20, 6.22, 6.36.
[456] As highlighted by the Trial Chamber, "civilians involved in the killings in Rwanda from 7 April were commonly referred to as *Interahamwe* even if they were not specifically members of the MRND youth wing". *See* Trial Judgement, para. 459. *See also infra*, para. 365.
[457] *See* Nsengiyumva Indictment, paras. 1.19, 5.19. *See also ibid*., paras. 1.15, 5.30, 6.9.
[458] *See supra*, Sections III.C.3-6.
[459] Trial Judgement, para. 2082.

found that "[k]nowledge of the crimes has flowed mainly from their open and notorious or wide-spread and systematic nature" and that "[n]otice of [the co-Accused's] knowledge as well as their participation in the crimes follow[s] from reading the Indictments as a whole".[460]

202. Nsengiyumva submits that the Trial Chamber erred in failing to find that there was notice in the Indictment of his knowledge of the crimes of his alleged subordinates.[461] In particular, he submits that it was not pleaded, nor can it be presumed, that he had knowledge of crimes because they were open and notorious or widespread and systematic in nature.[462] He contends that the Trial Chamber's reliance on the Indictment as a whole was erroneous, and its interpretation so tenuous that no accused person should be expected to discern the nature of the charges against him.[463]

203. The Prosecution responds that Nsengiyumva's knowledge is contained in allegations of his own participation in the crimes and their widespread and systematic nature.[464]

204. The Appeals Chamber notes that paragraph 6.36 of the Indictment, upon which the Trial Chamber specifically relied in support of Nsengiyumva's superior responsibility under the relevant counts, explicitly alleges that the military and militiamen committed massacres throughout Rwanda starting on 6 April 1994 with Nsengiyumva's knowledge. The Appeals Chamber further notes that several other paragraphs in the Indictment charged pursuant to Article 6(3) of the Statute allege the role and frequent participation of the military and militiamen in killings throughout Rwanda, and, in particular, in Gisenyi prefecture,[465] often on the orders of Nsengiyumva.[466] Taken together, these paragraphs clearly plead that Nsengiyumva knew or had reason to know that his subordinates were about to or had committed the crimes alleged in the Indictment, as well as the conduct by which he may be found to have known or had reason to know.

(d) Failure to Prevent or Punish

205. The Trial Chamber found that Nsengiyumva failed in his duty to prevent the crimes because "he in fact participated in them" and that "[t]here is absolutely no evidence that the perpetrators were punished afterwards".[467]

[460] Trial Judgement, para. 125.
[461] Nsengiyumva Notice of Appeal, para. 6. *See also* AT. 30 March 2011 p. 58.
[462] Nsengiyumva Appeal Brief, para. 19.
[463] Nsengiyumva Appeal Brief, para. 19.
[464] Prosecution Response Brief (Nsengiyumva), paras. 27, 86.
[465] *See* Nsengiyumva Indictment, paras. 5.31, 5.32, 6.16, 6.17, 6.20, 6.22-6.24, 6.29, 6.32, 6.34, 6.36.
[466] *See* Nsengiyumva Indictment, paras. 6.16, 6.20, 6.22, 6.23, 6.29.
[467] Trial Judgement, para. 2083.

206. While Nsengiyumva made no specific submissions in respect of this element of superior responsibility in his written submissions, at the appeal hearing, he argued that the conduct by which he was alleged to have failed to prevent his subordinates' criminal conduct was not set out in the Indictment.[468]

207. A review of the Indictment reflects a failure on the part of the Prosecution to explicitly plead the failure to prevent or punish in relation to the crimes for which Nsengiyumva was convicted.[469] However, the paragraphs relied upon by the Trial Chamber as a basis for Nsengiyumva's convictions charged pursuant to Article 6(3) of the Statute either allege that the crimes were committed on Nsengiyumva's orders,[470] or with his authorisation.[471] This, in the Appeals Chamber's opinion, gave sufficient notice to Nsengiyumva of the conduct by which he was alleged to have failed to take the necessary measures to prevent or punish the crimes.

208. The Appeals Chamber is therefore satisfied that, read as a whole, the Indictment put Nsengiyumva on adequate notice that the Prosecution was alleging that he had failed to prevent or punish his subordinates' crimes. The Appeals Chamber further notes that, in its Opening Statement, the Prosecution clearly re-affirmed its intention to prove that Nsengiyumva, along with his co-Accused, had failed to discharge his duty as a superior. [472]

(e) Conclusion

209. For the foregoing reasons, the Appeals Chamber finds no merit in Nsengiyumva's submission that he was not properly charged as a superior pursuant to Article 6(3) of the Statute for the crimes perpetrated in Gisenyi town, including the killing of Alphonse Kabiligi, at Nyundo Parish, and, Judge Güney dissenting, at Mudende University.

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[468] AT. 30 March 2011 p. 58.

[469] This element of superior responsibility is pleaded at paragraph 6.17 of the Nsengiyumva Indictment in respect of a specific incident in the afternoon of 7 April 1994 which allegedly resulted in the killing of a Tutsi man and the wounding of his son in the presence of Nsengiyumva, who allegedly "did nothing to prevent or to stop this attack".

[470] *See* Nsengiyumva Indictment, paras. 6.16, 6.20, 6.22, 6.36.

[471] *See* Particulars, para. 6.20.

[472] Opening Statement, T. 2 April 2002 pp. 189, 190:

> Your Honours, the defendants' responsibilities, we need to touch on a little while before proceeding. As officers, they had a responsibility to prevent their soldiers from carrying out attacks against civilians. They had a responsibility to punish those who – those or [*sic*] their soldiers who did such things, and they had a responsibility to make their best efforts in carrying out these obligations.
>
> Your Honours will hear evidence that the Defendants never lifted a finger to do this, to prevent these things or punish those who did them, but their criminal liability does not stop there. You will hear evidence that the Defendants positively gave their subordinates and other genociders [*sic*] the guidance and leadership in these deeds.

9. Alleged Errors in Considering Prejudice

210. In its preliminary considerations on notice issues in the Trial Judgement, the Trial Chamber recalled the Appeals Chamber's holding that even if a Trial Chamber finds that the defects in an indictment have been cured by post-indictment submissions, it should consider whether the extent of these defects materially prejudiced the accused's right to a fair trial by hindering the preparation of a proper defence.[473] The Trial Chamber then engaged in an analysis to that effect.[474] It stated that "[a] careful consideration of the Defence conduct during the course of trial and in their final submissions plainly reflects that they have mastered the case".[475] It concluded that the trial had not been rendered unfair due to the number of defects in the co-Accused's indictments which had been cured.[476]

211. Nsengiyumva contends that the Trial Chamber erred in its assessment of the cumulative effect of the defects in his Indictment by failing to find that the numerous defects, even if found to be cured, caused him irreparable prejudice.[477] He argues that the accumulation of a large number of material facts not pleaded in the Indictment impacted his ability to know the case he had to meet and hampered the preparation of his defence.[478] In this regard, he points out that apart from the Nyundo killings, none of the other four crimes for which he was convicted was pleaded in the Indictment.[479] In his submission, the significance of the defects is underscored by the fact that he effectively and successfully defended himself against all the crimes adequately pleaded in the Indictment, while he was convicted on the basis of the unpleaded ones because his ability to mount a defence was impaired.[480] He submits that the Trial Chamber failed to consider this prejudice and instead made broad and general statements which do not address the specific defects in his Indictment and the resultant cumulative prejudice.[481]

212. The Prosecution responds that Nsengiyumva has not demonstrated any error in the Trial Chamber's approach to prejudice and that he failed to show that he suffered prejudice.[482]

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[473] Trial Judgement, para. 123, *referring to 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, para. 48.
[474] Trial Judgement, paras. 124-127.
[475] Trial Judgement, para. 126.
[476] Trial Judgement, para. 127.
[477] Nsengiyumva Appeal Brief, para. 12; Nsengiyumva Reply Brief, para. 2.
[478] Nsengiyumva Appeal Brief, para. 12; Nsengiyumva Reply Brief, para. 2.
[479] Nsengiyumva Appeal Brief, para. 13. *See also* T. 30 March 2011 p. 50.
[480] Nsengiyumva Appeal Brief, para. 13.
[481] Nsengiyumva Appeal Brief, para. 14; Nsengiyumva Reply Brief, para. 2.
[482] Prosecution Response Brief (Nsengiyumva), paras. 14-21.

213. The Appeals Chamber recalls its findings above that, save for his convictions relating to Bisesero, Nsengiyumva was convicted on the basis of charges which, though vague, were pleaded in his Indictment and for which adequate notice was subsequently provided, curing the defects in the Indictment. Nsengiyumva's claim that he suffered prejudice from the fact that he was convicted on the basis of unpleaded charges is therefore without merit. As regards the charge relating to Bisesero, the Appeals Chamber recalls that it has reversed Nsengiyumva's convictions entered on this basis.[483]

214. While addressing this issue in a general section dealing with all co-Accused, the Trial Chamber did examine whether the cumulative effect of the defects in their indictments prejudiced their ability to prepare their defence, and found that the trial had not been rendered unfair. In so finding, the Trial Chamber considered a number of factors,[484] none of which is specifically challenged by Nsengiyumva in the present appeal. The Appeals Chamber considers that Nsengiyumva's argument regarding the fact that he successfully defended against "pleaded charges" is a *non sequitur.* It does not demonstrate that his ability to prepare a defence against the charges for which he was ultimately convicted was impaired.

215. The Appeals Chamber does not minimise the extent of the Prosecution's failure to provide adequate notice in the Indictment; in respect of the five crimes of which Nsengiyumva was found guilty, one was not charged and none of the other four was adequately pleaded in the Indictment. The record of the case also reflects that the Indictment suffered from a number of other defects.[485]

216. However, Nsengiyumva does not demonstrate that his ability to prepare his defence was materially impaired. As underscored by the Trial Chamber, "where defects have been cured, they relate to more generally worded paragraphs and do not add new elements to the case".[486] It added that "[t]he curing for the most part was based on the Pre-Trial Brief and its revision filed nearly a year before the Prosecution began presenting the majority of its witnesses in June 2003".[487] Finally, it noted that "there have been a number of breaks throughout the proceedings which have allowed the parties to conduct investigations and prepare for evidence in upcoming trial sessions".[488]

217. As a result, the Appeals Chamber finds that Nsengiyumva has failed to demonstrate that the defects in his Indictment materially hampered the preparation of his defence. The Appeals Chamber

[483] *See supra,* Section III.C.7.
[484] Trial Judgement, paras. 124-126.
[485] Decision on Exclusion of Evidence, paras. 10, 12, 15, 16, 22-28, 36-37, 46-50, 60-67.
[486] Trial Judgement, para. 124.
[487] Trial Judgement, para. 124.
[488] Trial Judgement, para. 124.

considers that the Trial Chamber did not err in concluding that the trial had not been rendered unfair due to the number of defects in Nsengiyumva's Indictment which had been cured.

10. Conclusion

218. In light of the foregoing, the Appeals Chamber finds, Judge Güney partially dissenting, that Nsengiyumva has failed to demonstrate that he was not charged with the crimes committed in Gisenyi town, at Nyundo Parish, at Mudende University, and with the killing of Alphonse Kabiligi, or that he lacked adequate notice of the material facts underpinning these charges. However, the Appeals Chamber finds that the Trial Chamber erred in convicting Nsengiyumva for crimes committed in Bisesero as they were not charged in the Indictment.

219. As a result, the Appeals Chamber reverses Nsengiyumva's convictions for the crimes committed in Bisesero, and dismisses the remainder of Nsengiyumva's submissions relating to lack of notice.

D. Alleged Errors Relating to the Burden of Proof and the Assessment of Evidence (Ground 11)

220. Nsengiyumva submits that the Trial Chamber erred in failing to find that the Prosecution had the obligation to prove its case beyond reasonable doubt.[489] He also submits that the Trial Chamber erred in its assessment of circumstantial and hearsay evidence, and in its approach to corroboration.[490]

221. The Appeals Chamber notes that most of Nsengiyumva's submissions directly relate to his convictions for the killing of Alphonse Kabiligi and the attacks in Gisenyi town, at Nyundo Parish, and at Mudende University.[491] These submissions have been addressed in the sections of this Judgement dealing with the particular events to which they relate.[492] The Appeals Chamber also considers that Nsengiyumva's remaining arguments relating to the Bisesero events have become moot as a result of its findings that this charge was not pleaded in the Nsengiyumva Indictment.[493]

222. Nsengiyumva's remaining submissions under this ground of appeal concern the assessment of circumstantial and hearsay evidence and shall be addressed in turn.

223. Nsengiyumva submits that the Trial Chamber misapplied the principle that where a finding rests upon circumstantial evidence, it must be the only reasonable inference available.[494] However,

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[489] Nsengiyumva Notice of Appeal, paras. 12, 28; Nsengiyumva Appeal Brief, paras. 224, 225.
[490] Nsengiyumva Notice of Appeal, paras. 29, 33, 35, 36 (pp. 20-22); Nsengiyumva Appeal Brief, paras. 226-231. In his Notice of Appeal, Nsengiyumva further argued that the Trial Chamber: (i) often mischaracterised his testimony; (ii) failed to accord appropriate weight to his testimony and to Defence testimonial evidence; and (iii) failed to treat evidence with proper caution especially with regard to the witnesses' credibility. *See* Nsengiyumva Notice of Appeal, paras. 30-32 (pp. 20, 21). As Nsengiyumva fails to reiterate and elaborate upon these contentions in his Appeal Brief, the Appeals Chamber considers that he has abandoned them as part of his Eleventh Ground of Appeal. The Appeals Chamber notes that these contentions were developed in other grounds of Nsengiyumva's appeal and have therefore been addressed elsewhere in this Judgement.
[491] For instance, Nsengiyumva challenges the Trial Chamber's conclusions on the origin of lists of suspected accomplices of the enemy and on his role in their preparation, which were relevant to the Trial Chamber's findings concerning his responsibility for the murder of Alphonse Kabiligi. *See* Nsengiyumva Appeal Brief, paras. 224, 229, *referring to* Trial Judgement, paras. 425, 453. *See also* Nsengiyumva Notice of Appeal, para. 24. Nsengiyumva also contends that the Trial Chamber drew prejudicial conclusions regarding an alleged meeting during the night of 6 to 7 April 1994, which it relied upon in relation to the Gisenyi town and Mudende University incidents. *See* Nsengiyumva Appeal Brief, para. 224; Trial Judgement, paras. 2142, 2148. He also takes issue with the Trial Chamber's assessment of the evidence regarding his responsibility for ordering, its approach to corroboration concerning the evidence on the Gisenyi town killings, as well as its conclusion on his alleged failure to fulfil his duty to prevent and punish. *See* Nsengiyumva Appeal Brief, paras. 225, 227, 228, fn. 457.
[492] *See infra*, Sections III.F-I.
[493] *See supra*, para. 187.
[494] Nsengiyumva Notice of Appeal, para. 29; Nsengiyumva Appeal Brief, paras. 226, 227.

Nsengiyumva does not provide any argument in support of his assertion.[495] The Appeals Chamber therefore summarily dismisses this submission.[496]

224. As regards the assessment of hearsay evidence, Nsengiyumva contends that the Trial Chamber erroneously relied on the hearsay testimony of expert Witness Des Forges which went beyond the scope of her expertise regarding the establishment of the civil defence system.[497] The Prosecution responds that Nsengiyumva's contentions are without merit.[498]

225. The Appeals Chamber observes that the Trial Chamber based its findings regarding the establishment of the civil defence system on a rich body of evidence, including an extensive number of documents, video footage, and witness testimonies.[499] Among other evidence, the Trial Chamber relied on expert Witness Des Forges's testimony.[500] In this regard, the Appeals Chamber recalls that expert witnesses are ordinarily afforded significant latitude to offer opinions within their expertise; their views need not be based upon first-hand knowledge or experience.[501] In general, an expert witness lacks personal familiarity with the particular case and offers a view based on his or her specialised knowledge regarding a technical, scientific, or otherwise discrete set of ideas or concepts that is expected to lie outside the lay person's ken.[502]

226. The Appeals Chamber also reiterates that hearsay evidence from an expert witness is admissible as long as it has probative value and remains within the proper purview of expert evidence.[503] Witness Des Forges provided testimony as an expert on, *inter alia*, the historical and political developments leading up to the genocide.[504] The Appeals Chamber considers that her testimony on the civil defence system fell within the ambit of her professional expertise on the historical and political framework of the crimes committed in 1994 in Rwanda. The relevant section

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[495] The Appeals Chamber notes that Nsengiyumva merely enumerates in a footnote all paragraphs of the Trial Judgement which relate to his criminal responsibility without any further elaboration. *See* Nsengiyumva Appeal Brief, para. 226, fn. 454.

[496] The Appeals Chamber notes, however, that Nsengiyumva's contentions regarding the Trial Chamber's erroneous assessment of circumstantial evidence are considered in this Judgement where Nsengiyumva provides the required specifications. *See infra*, Sections III.F-I.

[497] Nsengiyumva Notice of Appeal, para. 36 (p. 22); Nsengiyumva Appeal Brief, para. 230, *referring to* Trial Judgement, paras. 473-480.

[498] Prosecution Response Brief (Nsengiyumva), paras. 236, 237, 240.

[499] *See* Trial Judgement, paras. 488-495, fns. 553-560.

[500] *See* Trial Judgement, paras. 490, 494, 496, 499, fns. 553, 554, 560, 561, 567.

[501] *Renzaho* Appeal Judgement, para. 287; *Nahimana et al.* Appeal Judgement, para. 198; *Semanza* Appeal Judgement, para. 303.

[502] *Renzaho* Appeal Judgement, para. 287; *Nahimana et al.* Appeal Judgement, para. 198; *Semanza* Appeal Judgement, para. 303.

[503] *See Nahimana et al.* Appeal Judgement, para. 509. 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. *See idem.*

of the Trial Judgement reflects that her evidence was used by the Trial Chamber as such.[505] Further, as is usual for the establishment of historical facts, Witness Des Forges relied on a variety of sources for her conclusions.[506] This may include hearsay information.

227. Apart from his general claim that the Trial Chamber erred in considering Witness Des Forges's hearsay testimony on the establishment of the civil defence system, Nsengiyumva fails to explain how the Trial Chamber allegedly erred. The Appeals Chamber therefore rejects his submission.

228. Based on the foregoing, the Appeals Chamber dismisses Nsengiyumva's arguments under his Eleventh Ground of Appeal pertaining to the assessment of circumstantial and hearsay evidence.

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[504] *See* Alison Des Forges, T. 17 September 2002, 24 September 2002, 25 September 2002, 18 November 2002, 19 November 2002. *See also* Exhibit P2A (Expert Report of Alison Des Forges), confidential.
[505] *See* Trial Judgement, paras. 490-494.
[506] *See* Exhibit P2A (Expert Report of Alison Des Forges), confidential.

E. Alleged Errors Relating to the Elements of Criminal Responsibility (Grounds 3 and 5)

229. Nsengiyumva submits that there was insufficient proof that he ordered the crimes in Gisenyi town, including the killing of Alphonse Kabiligi, at Nyundo Parish, and at Mudende University,[507] or that he exercised any authority over the unidentified soldiers or civilian assailants who committed the crimes.[508] He argues that the Trial Chamber erred in linking the crimes in Gisenyi with killings committed in Kigali and in concluding that the attacks were centralised, coordinated military operations ordered by him.[509] He also posits that there is insufficient evidence to hold him responsible as a superior for these crimes.[510] He asserts that the Trial Chamber erred in: (i) failing to properly identify his alleged subordinates; (ii) applying a strict liability standard for superiors; (iii) holding that superior responsibility can be incurred for crimes of perpetrators that the superior's subordinates aided and abetted; and (iv) implying that the Defence had the burden of showing that Nsengiyumva prevented or punished crimes by his subordinates.[511]

230. The Prosecution responds that, based on the totality of the evidence, the Trial Chamber properly articulated and applied the elements of ordering and superior responsibility, and correctly established his authority over soldiers and other assailants who were adequately identified.[512] It argues that the form of liability of ordering was proven based on circumstantial evidence and that Nsengiyumva's allegation of an "attenuated" superior responsibility is incorrect.[513]

231. The Appeals Chamber notes that most of Nsengiyumva's arguments regarding lack of proof that he either ordered Rwandan army soldiers or civilian attackers to commit crimes in Gisenyi town, including the killing of Alphonse Kabiligi, at Nyundo Parish, and at Mudende University, or that he incurred responsibility as a superior for these crimes, are also raised under his Sixth to Ninth Grounds of Appeal, which address each incident in detail. The Appeals Chamber will therefore discuss these arguments where relevant in the sections discussing Nsengiyumva's submissions relating to the assessment of the evidence.

232. The Appeals Chamber will consider here Nsengiyumva's contention that the Trial Chamber erred in holding that superior responsibility can be incurred for crimes of perpetrators that the superior's subordinates aided and abetted. In this regard, the Trial Chamber found that:

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[507] Nsengiyumva Notice of Appeal, para. 8; Nsengiyumva Appeal Brief, paras. 23-25, 32.
[508] Nsengiyumva Notice of Appeal, paras. 8, 17; Nsengiyumva Appeal Brief, paras. 23-34, 43, 45, 46, 53-55, 59-61, 63, 64.
[509] Nsengiyumva Notice of Appeal, para. 17; Nsengiyumva Appeal Brief, paras. 30, 32, 33, 46-54.
[510] Nsengiyumva Notice of Appeal, para. 9; Nsengiyumva Appeal Brief, paras. 35-38.
[511] Nsengiyumva Notice of Appeal, paras. 10-12, 18-22; Nsengiyumva Appeal Brief, paras. 35-38, 225.
[512] Prosecution Response Brief (Nsengiyumva), paras. 4, 33, 34, 40-54, 57, 58, 65-79.
[513] Prosecution Response Brief (Nsengiyumva), paras. 35-39, 55, 56.

> […] even if the civilian assailants could not be considered as subordinates of Nsengiyumva, the cooperation, presence and active involvement of military personnel alongside their civilian counterparts rendered substantial assistance to the crimes perpetrated by the militiamen. The soldiers and gendarmes present at the scenes of attacks or in their vicinity would have clearly encouraged these operations with full knowledge of the crimes being committed. Nsengiyumva therefore would still remain liable for the crimes of these militiamen since subordinates under his effective control would have aided and abetted them in addition to their own direct participation in the criminal acts.[514]

The Appeals Chamber notes that Nsengiyumva concedes that a superior can be held liable "for the crime of his subordinate who aids and abets a crime"; however, he argues that the superior cannot be held liable for the commission of crimes by the principal perpetrators who were not his subordinates.[515] The Appeals Chamber considers that Nsengiyumva misapprehends the Trial Chamber's finding that "Nsengiyumva therefore would still remain liable for the crimes of these militiamen since subordinates under his effective control would have aided and abetted them in addition to their own direct participation in the criminal acts".[516] When the sentence is read as a whole, it is clear that Nsengiyumva was only held liable in this paragraph for the role of his subordinates in aiding and abetting the crimes, not for the commission of the crimes by the militiamen.

233. With respect to Nsengiyumva's argument that the Trial Chamber reversed the burden of proof, requiring Nsengiyumva to show that he prevented or punished the crimes of his subordinates, the Appeals Chamber notes that Nsengiyumva fails to support his argument beyond referring to the paragraph of the Trial Judgement in which the Trial Chamber found that he failed to prevent the crimes of his subordinates.[517] The Appeals Chamber considers that nothing in the language of the Trial Chamber's finding suggests that it reversed the burden of proof and required the Defence to demonstrate that Nsengiyumva failed to fulfil his duty to prevent his culpable subordinates.[518] Rather it recalled that it had found that the crimes were organised and authorised or ordered at the highest level and concluded on this basis that Nsengiyumva had failed in his duty to prevent the crimes of his subordinates.[519]

234. Moreover, the Appeals Chamber observes that the Trial Chamber did not expressly conclude whether Nsengiyumva failed in his duty to punish his culpable subordinates.[520] The Trial Chamber's finding that the perpetrators were not punished afterwards cannot in itself amount to a

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[514] Trial Judgement, para. 2081.
[515] Nsengiyumva Appeal Brief, para. 38.
[516] Trial Judgement, para. 2081.
[517] Nsengiyumva Notice of Appeal, para. 12, *referring to* Trial Judgement, para. 2083.
[518] Trial Judgement, para. 2083.
[519] Trial Judgement, para. 2083.
[520] *See* Trial Judgement, para. 2083.

finding that Nsengiyumva failed to discharge his duty to take necessary and reasonable measures to punish the perpetrators of the crimes.[521] In the absence of the necessary finding, the Appeals Chamber considers that the Trial Chamber did not hold Nsengiyumva responsible pursuant to Article 6(3) of the Statute for failing to punish his culpable subordinates. In contrast, the Trial Chamber clearly found that Nsengiyumva failed to prevent the crimes committed by his subordinates.[522] The Appeals Chamber therefore dismisses Nsengiyumva's argument that the Trial Chamber shifted the burden of proof to the Defence to demonstrate that Nsengiyumva failed to fulfil his duty to punish his culpable subordinates.

235. For the foregoing reasons, the Appeals Chamber dismisses these parts of Nsengiyumva's Third and Fifth Grounds of Appeal.

[521] In certain circumstances, although all necessary and reasonable measures may have been taken, the result may fall short of the punishment of the perpetrators. *See Bo{koski and Tar~ulovski* Appeal Judgement, paras. 230, ("The Trial Chamber correctly held that the relevant question for liability for failure to punish is whether the superior took the necessary and reasonable measures to punish under the circumstances and that the duty to punish may be discharged, under some circumstances, by filing a report to the competent authorities."), 231; *Halilovi}* Appeal Judgement, para. 182 ("[…] the duty to punish includes at least an obligation to investigate possible crimes or have the matter investigated, to establish the facts, and *if the superior has no power to sanction, to report them to the competent authorities.*" (emphasis in original)).
[522] Trial Judgement, para. 2083.

F. Alleged Errors Relating to Gisenyi Town (Ground 6 in part)

236. Based primarily on Prosecution Witness DO's testimony, the Trial Chamber found that, on 7 April 1994, civilian attackers supported by soldiers from the Gisenyi military camp, conducted targeted killings of Tutsi civilians and Hutus viewed as sympathetic to the RPF in Gisenyi town.[523] It found that Nsengiyumva exercised authority over all the attackers, and that "the systematic nature of attacks by civilians and soldiers, which occurred in various areas in Gisenyi, almost immediately after President Habyarimana's death, leads to the only reasonable conclusion that they were ordered by the highest regional authority, Nsengiyumva".[524] Accordingly, the Trial Chamber found Nsengiyumva guilty pursuant to Article 6(1) of the Statute for ordering these killings.[525] The Trial Chamber was also satisfied that Nsengiyumva could be held responsible as a superior under Article 6(3) of the Statute for the crimes committed in Gisenyi town, which it took into account as an aggravating factor in sentencing.[526]

237. Nsengiyumva submits that the Trial Chamber erred in law and in fact in convicting him for these killings.[527] He argues that the Trial Chamber erred in: (i) finding that he was on notice that he was being charged with these crimes; (ii) its assessment of Witness DO's testimony; (iii) failing to consider the testimony of Defence witnesses; and (iv) finding that he incurred criminal responsibility for these killings.[528]

238. The Appeals Chamber recalls that it has already addressed and dismissed Nsengiyumva's submissions relating to lack of notice in previous sections.[529] Accordingly, the Appeals Chamber will now examine Nsengiyumva's submissions pertaining to the assessment of the evidence relating to the killings of 7 April 1994 in Gisenyi town, as well as his submissions regarding his criminal responsibility.

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[523] Trial Judgement, paras. 1061-1064, 2140, 2141.
[524] Trial Judgement, para. 1065. *See also ibid.*, para. 2142.
[525] Trial Judgement, paras. 2161, 2189, 2197, 2216, 2248, 2258.
[526] Trial Judgement, paras. 2161, 2189, 2197, 2216, 2248, 2272.
[527] Nsengiyumva Notice of Appeal, para. 23; Nsengiyumva Appeal Brief, para. 66.
[528] Nsengiyumva Notice of Appeal, para. 23; Nsengiyumva Appeal Brief, paras. 65-101. In his Notice of Appeal, Nsengiyumva also contends that the Trial Chamber: (i) failed to admit relevant documentary evidence impacting the credibility of Witness DO; (ii) erred in refusing the Defence motion to recall Witness DO for further cross-examination; and (iii) erroneously dismissed the Defence motions for false testimony and perjury in respect of Witness DO. *See* Nsengiyumva Notice of Appeal, para. 23. Nsengiyumva does not, however, mention these allegations in the relevant section of his Appeal Brief. The Appeals Chamber notes that the allegations pertaining to the admission of documentary evidence and the recall of Witness DO were also raised and developed under his Twelfth Ground of Appeal, where they have been addressed. *See supra*, Section III.B.4. Nsengiyumva's remaining allegations, however, were not pursued or substantiated anywhere in his Appeal Brief. The Appeals Chamber therefore considers that Nsengiyumva has abandoned these allegations.
[529] *See supra*, Sections III.C.3 *and* 8.

1. Alleged Errors in the Assessment of Evidence

(a) Assessment of Witness DO's Testimony

239. Nsengiyumva submits that the Trial Chamber erred in relying on the uncorroborated accomplice testimony of Witness DO.[530] In particular, he argues that: (i) it was unreasonable for the Trial Chamber to rely on Witness DO's account of the involvement of soldiers from the Gisenyi military camp in the attacks as it had rejected the witness's testimony on preparatory events at the camp; (ii) the Trial Chamber erred in finding that Witness DO's evidence regarding the involvement of soldiers in the killings was corroborated; and (iii) the nature and scope of contradictions in Witness DO's testimony were such that no reasonable trier of fact could have relied on his testimony.[531]

(i) Rejection of Parts of Witness DO's Testimony

240. Nsengiyumva submits that it was unreasonable for the Trial Chamber to accept Witness DO's testimony that soldiers from the Gisenyi military camp accompanied civilian attackers during the killings on 7 April 1994 while rejecting the witness's evidence about events that allegedly took place at the Gisenyi military camp prior to the killings.[532] He argues that Witness DO's testimony on the involvement of soldiers in the killings is an inseparable aspect of the chronology of events as presented by the witness.[533] He claims that the Trial Chamber "apparently acknowledge[d]" this fact when it referred to "the earlier events occurring at the camp" as the "triggering event for the attacks" in the witness's testimony before the Tribunal.[534] He avers that, "[h]aving dismissed these 'triggering events'", no reasonable trier of fact would have relied on Witness DO's evidence that soldiers from the Gisenyi camp accompanied the attackers during the killings in Gisenyi on 7 April 1994.[535] Similarly, Nsengiyumva asserts that the Trial Chamber erroneously relied on Witness DO's implication of Lieutenant Bizumuremyi in these killings given that it stemmed from his evidence about an alleged meeting at the camp in the morning of 7 April 1994, which the Trial Chamber had previously rejected.[536]

241. According to Nsengiyumva, the Trial Chamber failed to reconcile the fact that it accepted Witness DO's testimony of the killings as a direct observer with its refusal to accept his account of

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[530] Nsengiyumva Notice of Appeal, para. 23; Nsengiyumva Appeal Brief, paras. 66, 82-100.
[531] Nsengiyumva Notice of Appeal, para. 23; Nsengiyumva Appeal Brief, paras. 82-100.
[532] Nsengiyumva Notice of Appeal, para. 23; Nsengiyumva Appeal Brief, paras. 82-85.
[533] Nsengiyumva Appeal Brief, para. 82.
[534] Nsengiyumva Appeal Brief, para. 83, *citing* Trial Judgement, para. 1057.
[535] Nsengiyumva Appeal Brief, paras. 83, 84.
[536] Nsengiyumva Appeal Brief, para. 94.

the preparatory stage of the killings which he also claimed to have witnessed directly.[537] He argues that the Trial Chamber's approach is identical to that adopted in the first *Muvunyi* trial with respect to Witness YAQ, which was overruled by the Appeals Chamber.[538]

242. The Prosecution responds that the Trial Chamber committed no error in accepting a part of Witness DO's testimony and rejecting other parts in accordance with established jurisprudence.[539] It argues that, by rejecting Witness DO's testimony in relation to the "triggering events" of the killings, the Trial Chamber merely excluded the portions of the witness's testimony regarding the "earlier events occurring at the camp" which he had failed to mention during his trial in Rwanda.[540]

243. The Appeals Chamber recalls that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony.[541] In this regard, the Appeals Chamber does not consider the involvement of soldiers in the killings on 7 April 1994 to be an inseparable aspect of the chronology of events recounted by Witness DO. The Appeals Chamber notes that the Trial Chamber clearly differentiated between Witness DO's testimony about the events at Gisenyi military camp on the morning of 7 April 1994 prior to the attacks and his testimony about the ensuing killings.[542] The Trial Chamber also explicitly provided a number of reasons for its partial rejection of Witness DO's testimony.[543]

244. In rejecting Witness DO's account of the earlier events occurring at the camp on the morning of 7 April 1994 and of Nsengiyumva's participation in meetings that day in the absence of corroboration, the Trial Chamber discussed at length differences between Witness DO's account before the Tribunal and in his own trial in Rwanda.[544] Notably, the Trial Chamber considered his evidence concerning the meeting that allegedly took place at the Gisenyi military camp on the morning of 7 April 1994, which he had failed to mention during his trial in Rwanda despite it being the "triggering event" for the attacks in his testimony before the Tribunal.[545] It concluded that Witness DO's failure to mention this event and his explanation for the omission, raised "questions

[537] Nsengiyumva Appeal Brief, para. 95.
[538] Nsengiyumva Appeal Brief, para. 95*, referring to Muvunyi* Appeal Judgement of 29 August 2008, paras. 125-133, 144.
[539] Prosecution Response Brief (Nsengiyumva), para. 103. The Prosecution argues that the comparison with the Appeals Chamber's approach to Witness YAQ's testimony in the *Muvunyi* case is ill-founded. *See ibid.*, paras. 106, 107.
[540] Prosecution Response Brief (Nsengiyumva), para. 105.
[541] *See*, *e.g*., *Setako* Appeal Judgement, para. 48; *Munyakazi* Appeal Judgement, para. 103; *Muvunyi* Appeal Judgement of 1 April 2011, para. 44; *Renzaho* Appeal Judgement, para. 425; *Haradinaj et al.* Appeal Judgement, paras. 201, 226.
[542] *See* Trial Judgement, para. 1062.
[543] *See* Trial Judgement, paras. 1055-1058, 1062, 1063.
[544] Trial Judgement, paras. 1056, 1057. The Appeals Chamber notes that Witness DO reappeared for further cross-examination on this issue. *See* Witness DO, T. 14 October 2004 p. 23.
[545] Trial Judgement, paras. 1056, 1057.

about *this aspect* of his evidence".[546] Moreover, the Trial Chamber underscored that the testimonies of a number of witnesses raised further questions as to the veracity of Witness DO's testimony about this event.[547]

245. In contrast, the Trial Chamber noted that Witness DO was consistent in his testimony on the attacks implicating soldiers in Gisenyi town on 7 April 1994, both before the Trial Chamber, Tribunal investigators, and the Rwandan court.[548] The Trial Chamber also noted circumstantial evidence corroborating Witness DO's account regarding the cooperation between soldiers in civilian attire and militia groups in Gisenyi.[549] In these circumstances, the Appeals Chamber considers that it was not unreasonable for the Trial Chamber to rely on Witness DO's evidence of the involvement of soldiers in civilian clothing in the attacks while, in the absence of corroboration, rejecting his testimony about alleged meetings that took place at the Gisenyi military camp, including the meeting held in the morning, the departure of soldiers from Gisenyi camp after that meeting, and the meeting allegedly held in the afternoon.[550]

246. Likewise, the Appeals Chamber finds no error in the Trial Chamber's reliance on Witness DO's evidence implicating Lieutenant Bizumuremyi[551] who was, according to Witness DO and Nsengiyumva a Rwandan army soldier assigned to Gisenyi.[552] Whereas Witness DO did not refer to the meetings that allegedly took place on 7 April 1994 at the Gisenyi camp in the Rwandan proceedings, he consistently implicated Bizumuremyi in the events of that day.[553] Contrary to Nsengiyumva's assertion, Witness DO's implication of Bizumuremyi did not exclusively stem from his evidence on the events occurring at the camp that was rejected by the Trial Chamber.[554]

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[546] Trial Judgement, para. 1057 (emphasis added).
[547] Trial Judgement, para. 1058.
[548] Trial Judgement, para. 1063. *See also ibid*., para. 137.
[549] Trial Judgement, para. 1063. *See also ibid*., para. 137. The Trial Chamber also relied on a broader pattern of soldiers accompanying and assisting militiamen in attacks on Tutsi civilians and suspected accomplices in the days immediately following President Habyarimana's death. *See* Trial Judgement, para. 1063. However, as will be discussed below, the Appeals Chamber finds that the Trial Chamber erred in relying on the existence of a broader pattern of soldiers assisting civilians in Gisenyi. *See infra*, paras. 256, 280, 313.
[550] *See* Trial Judgement, paras. 1014-1017. *See also infra*, fn. 681.
[551] Trial Judgement, para. 1064.
[552] *See* Exhibit DNS26 (Witness DO Statement dated 9 October 1997), confidential; Exhibit DNS27 (Witness DO Statement dated 30 July 1997), confidential; Exhibit DNS29 (Witness DO Statement dated 28 February 2003), confidential; Exhibit P398 (Witness DO *Pro Justitia* Statement of 25 March 1997), confidential; Nsengiyumva, T. 4 October 2006 pp. 38, 39. The Appeals Chamber notes that Bizumuremyi is also referred to at times in the evidence as "Bizimuremyi", "Bizimuremye", or "Buzimuremyi".
[553] *See* Exhibit DNS26 (Witness DO Statement dated 9 October 1997), confidential; Exhibit DNS27 (Witness DO Statement dated 30 July 1997), confidential; Exhibit DNS29 (Witness DO Statement dated 28 February 2003), confidential; Exhibit P398 (Witness DO *Pro Justitia* Statement of 25 March 1997), confidential; Exhibit DNS107 (Rwandan Trial Judgement), confidential, pp. 7, 8.
[554] *See* Exhibit DNS26 (Witness DO Statement dated 9 October 1997), confidential; Exhibit DNS27 (Witness DO Statement dated 30 July 1997), confidential; Exhibit DNS29 (Witness DO Statement dated 28 February 2003),

247. Finally, the Appeals Chamber finds that the Trial Chamber's assessment and findings pertaining to Witness DO's testimony cannot be compared to the situation regarding Prosecution Witness YAQ's testimony in the *Muvunyi* case. The Trial Chamber in the *Muvunyi* case rejected a part of Witness YAQ's evidence not because of a "specific feature of that part of his testimony, but rather on his general motive to enhance Muvunyi's role in the crimes and to diminish his own".[555] In that case, the Appeals Chamber held that, as the Trial Chamber had concluded that Witness YAQ was not a credible and reliable witness on matters incriminating Tharcisse Muvunyi in general, it could not rely on uncorroborated parts of his testimony.[556] In the present case, however, the Trial Chamber did not call into question Witness DO's motives for testifying and explicitly found that only a part of his testimony was unreliable due to his failure to mention it previously.[557] The Appeals Chamber therefore concludes that Nsengiyumva's comparison with the *Muvunyi* case is without merit.

248. Accordingly, the Appeals Chamber finds no error in the Trial Chamber's partial acceptance of Witness DO's evidence.

(ii) Corroboration of Witness DO's Testimony

249. Nsengiyumva submits that the Trial Chamber concluded that, "[a]s an accomplice of the accused", it could not rely on Witness DO's testimony on Nsengiyumva's alleged participation in meetings without corroboration.[558] He argues that the reasons advanced for requiring corroboration in this instance should have applied to the entirety of Witness DO's testimony.[559] He further submits that the Trial Chamber erred in finding that there was circumstantial corroboration of Witness DO's testimony regarding the involvement of soldiers in the killings.[560] In this respect, Nsengiyumva asserts that the Trial Chamber erred in considering that the testimonies of Witnesses ZF, XBG, and Serushago corroborated Witness DO's testimony on the grounds that: (i) Witness ZF's testimony partly falls outside the Indictment period and relates to events not linked to the issue of soldiers as discussed by Witness DO; (ii) having found that Serushago's testimony could not be relied upon without corroboration, the Trial Chamber could not attempt to corroborate "the incredible evidence of witness DO with the equally incredible testimony of Serushago"; (iii) there was no link between the soldiers in civilian clothes discussed by Serushago and

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confidential; Exhibit P398 (Witness DO *Pro Justitia* Statement of 25 March 1997), confidential; Witness DO, T. 30 June 2003 p. 38 *and* T. 1 July 2003 p. 52.

[555] *See Muvunyi* Appeal Judgement of 29 August 2008, para. 130.

[556] *Muvunyi* Appeal Judgement of 29 August 2008, paras. 130, 131.

[557] Trial Judgement, paras. 1055-1058, 1062.

[558] Nsengiyumva Appeal Brief, para. 87.

[559] Nsengiyumva Appeal Brief, para. 87.

Nsengiyumva; and (iv) the reliance on Witness XBG's testimony about attacks involving soldiers was improper due to the lack of notice and credibility of the witness, as acknowledged by the Trial Chamber.[561] He adds that neither the killing of Alphonse Kabiligi nor the events at Mudende University could serve to corroborate Witness DO's testimony as it has not been established that the soldiers allegedly involved in these killings were under his authority or effective control.[562] Moreover, he argues that the Trial Chamber erroneously concluded that Witness DO consistently implicated soldiers in the attacks in his statements before the Tribunal and Rwandan authorities.[563]

250. The Prosecution responds that even in the absence of corroboration, the Trial Chamber would have committed no error in relying on Witness DO's accomplice testimony where his evidence is credible.[564]

251. The Appeals Chamber recalls that nothing in the Statute or the Rules prevents a Trial Chamber from relying on uncorroborated evidence; it has the discretion to decide in the circumstances of each case whether corroboration is necessary and whether to rely on uncorroborated, but otherwise credible, witness testimony.[565] This discretion applies equally to the evidence of accomplice witnesses provided that the trier of fact applies the appropriate caution in assessing such evidence.[566]

252. When assessing the reliability and credibility of Witness DO's evidence, the Trial Chamber recalled that he was serving a life sentence based on a genocide conviction for the same killings in Gisenyi that are at issue in this case and that he had provided, albeit on facts unrelated to his account of the events of 7 April 1994, incorrect and contradictory testimony.[567] It stated that, "[a]s an alleged accomplice of Nsengiyumva, [it] view[ed] the witness's testimony with caution".[568]

253. The Appeals Chamber is not persuaded that the specific reasons advanced by the Trial Chamber for requiring corroboration of Witness DO's account of Nsengiyumva's participation in meetings on 7 April 1994 applied equally to the entirety of his testimony. The Appeals Chamber

[560] Nsengiyumva Notice of Appeal, para. 23; Nsengiyumva Appeal Brief, paras. 88, 89.
[561] Nsengiyumva Appeal Brief, paras. 89-92, 228. Nsengiyumva also submits that the events discussed by Witness XBG cannot be corroborative of Witness DO's testimony since they do not support the Trial Chamber's conclusion that he ordered the killings. *See idem*.
[562] Nsengiyumva Appeal Brief, para. 93.
[563] Nsengiyumva Appeal Brief, para. 96.
[564] Prosecution Response Brief (Nsengiyumva), para. 104.
[565] *See*, *e.g.*, *Nchamihigo* Appeal Judgement, para. 42; *Milošević* Appeal Judgement, para. 215; *Karera* Appeal Judgement, para. 45.
[566] *Muvunyi* Appeal Judgement of 1 April 2011, paras. 37, 38; *Renzaho* Appeal Judgement, para. 263; *Nchamihigo* Appeal Judgement, paras. 42, 48.
[567] Trial Judgement, para. 1055.
[568] Trial Judgement, para. 1055.

reiterates that it is within a Trial Chamber's discretion as the primary trier of fact to evaluate the credibility of separate portions of a witness's testimony differently if the circumstances of the case so require.[569] The Trial Judgement reflects that the Trial Chamber did not require corroboration for parts of Witness DO's testimony merely because he was an alleged accomplice.[570] Rather, the Trial Chamber emphasised that Witness DO did not testify about a meeting in the morning of 7 April 1994 and Nsengiyumva's involvement therein during his trial in Rwanda.[571] Further, in addition to his questionable explanation as to why such a "triggering event" had been left unmentioned during his trial in Rwanda,[572] the Trial Chamber noted evidence of other witnesses putting Witness DO's account on this point further into question, if not contradicting it.[573] In contrast, Witness DO's testimony regarding the various attacks on Tutsi civilians on 7 April 1994 implicating soldiers was consistent with his previous statements to Tribunal investigators as well as during his trial in Rwanda.[574] The Trial Chamber further noted that it had "no doubt that the witness was a direct observer of the killings",[575] particularly in light of his conviction before a Rwandan court for the same crimes he testified about before the Tribunal.[576]

254. The Appeals Chamber accepts the Trial Chamber's detailed explanation as to why Witness DO's testimony on the events of the morning of 7 April 1994 raised particular concerns about the credibility of his testimony on Nsengiyumva's participation in meetings. It also considers that the Trial Chamber correctly concluded that the reasons for such concerns did not necessarily call Witness DO's entire testimony into question.[577] The Appeals Chamber further finds that the Trial Chamber applied the necessary caution in assessing Witness DO's testimony, as illustrated by its decision not to accept his testimony about Nsengiyumva's participation in meetings without corroboration.[578] Accordingly, the Appeals Chamber does not find any error in the Trial Chamber's acceptance of Witness DO's evidence regarding the killings perpetrated in Gisenyi town on 7 April 1994 without explicitly requiring corroboration.

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[569] *Cf., e.g.*, *Boškoski and Tarčulovski* Appeal Judgement, para. 59; *Bikindi* Appeal Judgement, para. 68; *Karera* Appeal Judgement, para. 88.
[570] *See* Trial Judgement, paras. 1056-1058.
[571] Trial Judgement, para. 1056.
[572] *See* Trial Judgement, para. 1057.
[573] Trial Judgement, para. 1058 ("[…] their evidence, while not dispositive, raises some further questions concerning Witness DO's testimony about this event when considered in light of the concerns noted above.").
[574] Exhibit DNS26 (Witness DO Statement dated 9 October 1997), confidential; Exhibit DNS27 (Witness DO Statement dated 30 July 1997), confidential; Exhibit DNS29 (Witness DO Statement dated 28 February 2003), confidential; Exhibit DNS107 (Rwandan Trial Judgement), confidential, pp. 7-10. The Appeals Chamber considers that while Witness DO is not completely clear in his statement dated 9 October 1997 that the soldiers in civilian attire were among the group carrying out killings, it is a reasonable reading of the witness's statement.
[575] Trial Judgement, para. 1062.
[576] *See* Trial Judgement, para. 1062.
[577] *See* Trial Judgement, paras. 1057, 1058, 1062.

255. The Appeals Chamber further notes that the Trial Chamber considered that the practice of soldiers providing firepower to assist civilian assailants provided "circumstantial corroboration" of Witness DO's testimony.[579] In this respect, the Appeals Chamber considers that the Trial Chamber's reference to the testimony of Witnesses ZF and Omar Serushago in support of its finding that Witness DO was not alone in testifying that soldiers in civilian clothes worked closely with militia groups in Gisenyi[580] was not inappropriate. This evidence serves to describe a general pattern of cooperation which supports Witness DO's testimony on the involvement of soldiers in civilian attire in the commission of crimes in Gisenyi.[581] While the fact that the evidence of Witnesses ZF and Serushago does not cover the Nsengiyumva Indictment period and does not directly concern the incidents of 7 April 1994 limits its probative value, it does not render their evidence irrelevant.[582] The Appeals Chamber also considers that the Trial Chamber's finding that Witness Serushago's evidence was to be viewed with caution and could not be accepted without corroboration[583] did not preclude the Trial Chamber from relying on his evidence as circumstantial corroboration of a part of a witness's testimony which was deemed credible and reliable by itself. Nsengiyumva thus fails to show that the Trial Chamber abused its discretion in relying on the evidence of Witnesses ZF and Serushago as circumstantial corroboration of Witness DO's testimony.

256. The Trial Chamber also relied on the evidence relating to the killing of Alphonse Kabiligi and the attack at Mudende University as demonstrating a broader pattern of soldiers accompanying and assisting civilian assailants in Gisenyi immediately after President Habyarimana's death.[584] In this regard, the Appeals Chamber refers to its findings below that the Trial Chamber erred in finding that it was proven beyond reasonable doubt that soldiers assisted civilian assailants in those incidents.[585] As a result, such evidence could not be used as circumstantial corroboration of Witness DO's evidence.

257. In addition, the Trial Chamber referred in a footnote to Witness XBG's testimony about attacks in Mutura commune on 7 April 1994 in support of its finding that the practice of soldiers

[578] *See* Trial Judgement, para. 1058, *relating to* Nsengiyumva's participation in the meeting allegedly held in the Gisenyi military camp on the morning of 7 April 1994.
[579] Trial Judgement, para. 1063.
[580] Trial Judgement, para. 1063, fn. 1184.
[581] *See Bikindi* Appeal Judgement, para. 81; *Karera* Appeal Judgement, para. 173; *Nahimana et al.* Appeal Judgement, para. 428.
[582] *See* Witness ZF, T. 28 November 2002 pp. 10-16, 35, 36; Omar Serushago, T. 18 June 2003 p. 7 *and* T. 19 June 2003 p. 30.
[583] *See* Trial Judgement, fn. 1179, paras. 1645, 1715, 1731.
[584] Trial Judgement, para. 1063.
[585] *See infra,* Sections III.G.1 *and* I.1.

providing firepower to assist civilian attackers provided circumstantial corroboration to Witness DO's testimony.[586] The Trial Chamber specified that this aspect of Witness XBG's evidence was only considered as background evidence due to the fact that the Prosecution had failed to give due notice that the witness would give evidence concerning these attacks.[587] The Trial Chamber noted that it had previously questioned certain aspects of Witness XBG's testimony, but emphasised that the witness had consistently implicated soldiers as participants in the killings that day in his own criminal proceedings.[588] The Appeals Chamber finds no error in the Trial Chamber's decision to consider that aspect of Witness XBG's testimony as background evidence despite the Defence's lack of notice.[589] Nonetheless, the Appeals Chamber observes that the Trial Chamber not only questioned and rejected certain aspects of Witness XBG's testimony, but also expressed clear concerns about Witness XBG's general credibility and reliability.[590] The Appeals Chamber further notes that, whilst Witness XBG indeed consistently implicated soldiers as participating in killings with civilians on 7 April 1994, his accounts of the circumstances of the soldiers' involvement and role in the killings differ significantly between his prior statements to the Rwandan judiciary and his testimony in this case.[591] In these circumstances, the Appeals Chamber considers that a reasonable trier of fact would not have relied on Witness XBG's evidence of soldiers assisting civilians and playing a supporting role as Tutsis were sought out and killed, even as mere background evidence.

258. However, a review of the Trial Judgement reveals that this circumstantial corroboration was not decisive for the Trial Chamber, which was in any event convinced by the reliability and credibility of Witness DO's testimony concerning the involvement of soldiers in civilian attire in the killings.[592] The Appeals Chamber reiterates that it was within the Trial Chamber's discretion to accept Witness DO's testimony on the killings perpetrated on 7 April 1994 without requiring corroborative evidence.[593] As such, while the Trial Chamber erred in finding that there was circumstantial corroboration of this part of the witness's testimony in the form of evidence of soldiers accompanying and assisting civilian assailants in the killing of Alphonse Kabiligi, at

[586] Trial Judgement, para. 1063, fn. 1185.
[587] Trial Judgement, para. 1063, fn. 1185.
[588] Trial Judgement, fn. 1185.
[589] *See Arsène Shalom Ntahobali and Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-97-21-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 2 July 2004, paras. 14-16.
[590] Trial Judgement, paras. 1243, 1244, 1254.
[591] *See* Witness XBG, T. 8 July 2003 pp. 36-43, 45-48, 88-92 *and* T. 9 July 2003 pp. 1-20, 78, 79; Exhibit P71 (Letter from Witness XBG to the Rwandan Public Prosecutor, undated); Exhibit P72 (Witness XBG *Pro Justitia* Statement of 10 March 1999); Exhibit P73 (Witness XBG *Pro Justitia* Statement of 26 May 2000).
[592] Trial Judgement, para. 1063.
[593] *See supra*, paras. 251-257.

Mudende University, and in Mutura commune, this error had no impact on the Trial Chamber's finding that soldiers were present during the killings of 7 April 1994 in Gisenyi town.

(iii) Contradictions in Witness DO's Evidence

259. Nsengiyumva submits that no reasonable trier of fact would have relied on Witness DO's testimony in view of the material and unexplained contradictions in his evidence.[594] He argues that the Trial Chamber underrated the prejudicial effect of Witness DO's contradictory and confusing testimony, excusing contradictions and inconsistencies by reference to the passage of time and the witness's desire to distance himself from the crimes without explaining how these factors could legitimately excuse the different versions of the witness's testimony on the different occasions he testified.[595] In his view, no reasonable trier of fact could have relied on this witness, having established his motivation to distance himself from the crimes.[596] Nsengiyumva also alleges that the Trial Chamber: (i) erred in concluding that the witness consistently referred to soldiers before the Tribunal and before Rwandan authorities;[597] (ii) failed to consider "the witness's own confession that whatever he had stated before the Rwandan authority was not necessarily truthful";[598] and (iii) failed to provide a reasoned opinion explaining Witness DO's conflicting accounts of the killings of Gilbert and Kajanja.[599]

260. The Prosecution responds that the Trial Chamber's explanations regarding contradictions in Witness DO's testimony constitute no error.[600] It also asserts that the Trial Chamber is presumed to have taken into account Witness DO's contradictory accounts of Gilbert's killing.[601]

261. The Appeals Chamber notes the Trial Chamber's finding that "Witness DO's testimony regarding his participation in the killings was, if not contradictory, confusing" and that "[h]is evidence also varied as to the timing of events".[602] The Trial Chamber also noted Nsengiyumva's

[594] Nsengiyumva Appeal Brief, paras. 96-100.
[595] Nsengiyumva Appeal Brief, paras. 96, 98, *referring to* Witness DO's trial in Rwanda, his first appearance before the Trial Chamber, his recall, and his appearance before another Trial Chamber in another case before the Tribunal.
[596] Nsengiyumva Appeal Brief, paras. 97, 98.
[597] Nsengiyumva Appeal Brief, para. 96.
[598] Nsengiyumva Appeal Brief, para. 96.
[599] Nsengiyumva Appeal Brief, para. 99. Nsengiyumva purports that, while Witness DO stated during his initial testimony that he directly witnessed Gilbert being shot by one Mabuye and having died, during his recall testimony he stated that he did not witness that particular killing. Nsengiyumva adds that, likewise, the witness confirmed during his initial testimony that he personally saw the attack and murder of Kajanja but denied any knowledge of the circumstances of the killing at the beginning of his recall testimony, only to state at a later point that he had witnessed the killing but that he was not the killer. *See idem*.
[600] Prosecution Response Brief (Nsengiyumva), para. 108.
[601] Prosecution Response Brief (Nsengiyumva), para. 109.
[602] Trial Judgement, para. 1061.

contention that Witness DO's accounts of the killings were inconsistent with other evidence.[603] Nonetheless, the Trial Chamber accepted that these inconsistencies "likely resulted from a passage of time or an interest in distancing himself from the crimes".[604] While the use of the term "likely" is unfortunate in that it suggests speculation or uncertainty, the Appeals Chamber understands from a contextual reading of the finding that the Trial Chamber was in fact convinced that the inconsistencies resulted from the passage of time or an interest in distancing himself from the crimes.

262. The Appeals Chamber observes that the Trial Chamber clearly considered Witness DO's contradictory accounts of his presence during the killings of Gilbert and Kajanja but concluded that the inconsistencies resulted from a passage of time or an interest in distancing himself from the crimes.[605] The Appeals Chamber notes that the portions of Witness DO's testimony containing the inconsistencies indeed pertain to the level of his involvement in the crimes as they concern the question of whether he directly witnessed the killings of Gilbert and Kajanja.[606] The Appeals Chamber also notes that during cross-examination in the recall hearing,[607] Witness DO first denied, and later confirmed his initial testimony about having directly witnessed both killings,[608] underlining that he was not the one who killed either victim.[609] The witness's contradictory accounts of the killings of Gilbert and Kajanja bear clear indicia of the witness's attempt to distance himself from the crimes, as noted by the Trial Chamber.[610] Mindful of the discretion with which a Trial Chamber is endowed in the assessment and evaluation of evidence as the primary trier of fact, and in light of the circumstances of the present case, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to accept that Witness DO's inconsistent accounts of his proximity to the crimes resulted from the passage of time or an interest in distancing himself from the crimes and did not affect the reliability of his overall account of the killings.

263. As to Witness DO's disparate accounts regarding the timing of certain killings on 7 April 1994,[611] the Appeals Chamber considers that Nsengiyumva fails to substantiate how the

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[603] Trial Judgement, para. 1061.
[604] Trial Judgement, para. 1061.
[605] Trial Judgement, para. 1061, fn. 1180.
[606] Witness DO, T. 30 June 2003 pp. 30, 35, 36 *and* T. 17 October 2005 pp. 16, 19, 29-32 (closed session).
[607] Witness DO testified before the Trial Chamber on 30 June 2003, as well as on 1 and 2 July 2003. He reappeared for further cross-examination on 14 and 17 October 2005.
[608] Witness DO, T. 30 June 2003 pp. 30, 35, 36 *and* T. 17 October 2005 pp. 16, 19, 29-32 (closed session).
[609] Witness DO, T. 17 October 2005 pp. 31, 32 (closed session).
[610] Trial Judgement, para. 1061. The Appeals Chamber notes that Witness DO's inclination to distance himself from the crimes became apparent during his testimony on 17 October 2005, where the witness confirmed his initial testimony only after Defence Counsel confronted him with his prior testimony of 30 June 2003. *See* Witness DO, T. 17 October 2005 pp. 30-32 (closed session).
[611] *See* Trial Judgement, para. 1061, fn. 1181.

witness's diverging estimates of the timing of particular events within a four-hour range during the day affect the credibility of his account on the merits. This is particularly so considering that nine years had passed between his testimony and the attacks about which he testified.[612] The Appeals Chamber is satisfied that the Trial Chamber was reasonable in considering that Witness DO's varying accounts of the timing of the events resulted from the passage of time.

264. The Appeals Chamber observes that the Trial Chamber relied partly on Witness DO's statements and conviction before a Rwandan court in assessing his evidence.[613] Contrary to Nsengiyumva's contention, Witness DO did not "confess" that "whatever he had stated before the Rwandan authority was not necessarily truthful",[614] but instead testified that "[t]here were omissions" and that he "did not say everything" for fear of reprisal.[615] The Trial Chamber duly took this into consideration when it assessed Witness DO's account of the meeting and distribution of weapons in the morning of 7 April 1994 and declined to accept his testimony in this regard without corroboration.[616] However, while Witness DO did omit this "key event" when pleading guilty before the Rwandan court, he clearly referred to the involvement of soldiers in the killings perpetrated in Gisenyi on 7 April 1994.[617] The witness explained the discrepancy in his testimony by the fact that he was no longer afraid to tell the truth.[618] In these circumstances, the Appeals Chamber considers that the Trial Chamber applied the necessary caution in assessing Witness DO's evidence by comparing his statements before the Rwandan court with his testimony before the Tribunal.[619]

265. Having reviewed the relevant evidence, the Appeals Chamber also finds that the Trial Chamber did not err in observing that Witness DO consistently implicated soldiers in his testimony before the Tribunal as well as in statements to Tribunal investigators and to the Rwandan court.[620] Nsengiyumva does not substantiate his adverse contention, which is summarily dismissed.

266. In light of the foregoing, the Appeals Chamber does not find any error in the Trial Chamber's attributing the inconsistencies in Witness DO's testimony to the passage of time or the

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[612] The Trial Chamber referred to Witness DO's testimony before it on 30 June, 1 and 2 July 2003. *See* Trial Judgement, fn. 1181.
[613] *See* Trial Judgement, paras. 1062, 1063.
[614] Nsengiyumva Appeal Brief, para. 96.
[615] Witness DO, T. 14 October 2005 pp. 17, 18. *See also ibid*., p. 21.
[616] Trial Judgement, paras. 1057, 1058.
[617] Exhibit DNS107 (Rwandan Trial Judgement), confidential, pp. 7-10.
[618] *See* Witness DO, T. 14 October 2005 p. 18.
[619] *See* Trial Judgement, para. 1062. *See also* Witness DO, T. 14 October 2005 p. 18.
[620] *See* Exhibit DNS26 (Witness DO Statement dated 9 October 1997), confidential; Exhibit DNS27 (Witness DO statement dated 30 July 1997), confidential; Exhibit DNS29 (Witness DO Statement dated 28 February 2003), confidential; Exhibit DNS107 (Rwandan Trial Judgement), confidential, pp. 7-10. *See also supra*, fn. 574.

witness's interest in distancing himself from the crimes. The Trial Chamber provided satisfactory reasoning for its acceptance of aspects of Witness DO's evidence despite, and mindful of, its inconsistencies. The Appeals Chamber finds that Nsengiyumva has failed to demonstrate that the Trial Chamber erred in this respect.

(b) Alleged Failure to Consider Defence Testimonies

267. Nsengiyumva asserts that the Trial Chamber failed to consider the corroborated testimonies of Defence witnesses that there were no killings in Gisenyi town on the morning of 7 April 1994, instead relying on the uncorroborated accomplice testimony of Witness DO.[621]

268. The Prosecution responds that the Trial Chamber properly assessed Defence evidence on the killings in Gisenyi town on 7 April 1994, and even partly relied on it.[622]

269. The Appeals Chamber observes that the Trial Chamber explicitly took into account the testimony of a number of Defence witnesses when assessing Witness DO's evidence.[623] It further notes that the Trial Chamber accepted Witness DO's evidence that the killings occurred on 7 April 1994 "notwithstanding the conflicting second-hand evidence from the Defence regarding the timing of certain deaths".[624] This evidentiary assessment, as well as the previous reference to a number of Defence witnesses' testimonies, amply demonstrate that the Trial Chamber was alive to the possibility of Defence evidence contradicting Witness DO's account of the events, and that it duly considered the limited value of second-hand evidence against direct and credible first-hand testimony. The Appeals Chamber recalls that while a Trial Chamber has to provide a reasoned opinion, it is not required to set out in detail why it accepted or rejected a particular testimony.[625]

270. The Appeals Chamber further notes that the testimony of Defence witnesses referred to by Nsengiyumva,[626] while describing relative calm in Gisenyi town in the morning of 7 April 1994, do not contradict Witness DO's account of killings in the course of the day. It observes that none of the

[621] Nsengiyumva Notice of Appeal, para. 23; Nsengiyumva Appeal Brief, para. 101.
[622] Prosecution Response Brief (Nsengiyumva), para. 111.
[623] *See* Trial Judgement, para. 1058, where the Trial Chamber relied on the testimonies of, *inter alia*, Defence Witnesses ZDR-1, ZR, HQ-1, CF-2, CF-4, Willy Biot, LSK-1, and Aouili Tchemi-Tchambi, in declining to rely on Witness DO's evidence regarding Nsengiyumva's participation in meetings on 7 April 1994 in the absence of corroboration.
[624] *See* Trial Judgement, para. 1061.
[625] *See*, *e.g.*, *Nchamihigo* Appeal Judgement, para. 165; *Krajišnik* Appeal Judgement, para. 139; *Musema* Appeal Judgement, paras. 18, 20. The Appeals Chamber recalls that there is a presumption that a Trial Chamber has evaluated all the evidence presented to it, provided that there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. *See idem*.
[626] Nsengiyumva Appeal Brief, para. 101, *referring to* Witness LSK-1, T. 19 June 2006 pp. 42, 43; Witness LK-2, T. 19 April 2005 pp. 4-10; Aouili Tchemi-Tchambi, T. 6 March 2006 p. 35; Willy Biot, T. 21 September 2006 pp. 79, 80.

witnesses upon whom Nsengiyumva relies explicitly testified that there were no killings in Gisenyi town on the morning of 7 April 1994.[627]

271. The Appeals Chamber finds that Nsengiyumva has failed to demonstrate that the Trial Chamber disregarded relevant Defence evidence.

(c) Conclusion

272. For the foregoing reasons, the Appeals Chamber concludes that Nsengiyumva has failed to demonstrate that the Trial Chamber erred in its assessment of Witness DO's evidence or disregarded relevant Defence evidence.

2. Alleged Errors Regarding Nsengiyumva's Criminal Responsibility

273. Nsengiyumva submits that the Trial Chamber erred in finding that he ordered killings in Gisenyi town on 7 April 1994 and that he could be held responsible as a superior for these crimes.[628]

(a) Ordering

274. In its discussion of Nsengiyumva's responsibility for the killings in Gisenyi town, the Trial Chamber recalled that, at the time, Nsengiyumva was the Gisenyi Operational Sector Commander with authority over all soldiers within that sector and, under certain circumstances, *de facto* authority over civilian militiamen.[629] The Trial Chamber was convinced that, given the coordination between soldiers and civilians described by Witness DO, Nsengiyumva exercised authority over "all the attackers".[630] It concluded that the systematic nature of the assaults, which occurred in various areas of Gisenyi almost immediately after the death of the President, viewed in connection

[627] *See* Witness LK-2, T. 19 April 2005 p. 10; Aouili Tchemi-Tchambi, T. 6 March 2006 p. 35; Willy Biot, T. 21 September 2006 p. 79. The Appeals Chamber notes that Witness LK-2 testified that "at about midday on the 7th of April 1994, the situation in Gisenyi started changing, […] we heard that groups of young persons had started assaulting people in town". *See* Witness LK-2, T. 19 April 2005 p. 10. While Witness LSK-1 testified that he was with Witness DO until midday on 7 April 1994, he does not account for Witness DO's activity during the rest of the day. *See* Witness LSK-1, T. 19 June 2006 pp. 41-43 (closed session).
[628] Nsengiyumva Notice of Appeal, para. 23; Nsengiyumva Appeal Brief, paras. 66, 80, 81. *See also* Nsengiyumva Notice of Appeal, paras. 8, 9, 11, 17, 19, 22; Nsengiyumva Appeal Brief, paras. 23-37, 42-61.
[629] Trial Judgement, para. 1065. *See also ibid*., paras. 2072-2078. In paragraph 1065 of the Trial Judgement, the Trial Chamber refers to Section III.2.6.2 of its judgement in support of its statement that it has "determined that under certain circumstances, Nsengiyumva could have *de facto* authority over civilian militiamen"; however, the Appeals Chamber notes that in Section III.2.6.2 of the Trial Judgement, the Trial Chamber merely stated that "in assessing whether civil defence forces or party militiamen were acting under the authority of the Rwandan military, the Chamber must carry out a concrete evaluation of each specific event, considering the actual facts on the ground", without actually concluding that Nsengiyumva could at times have had *de facto* authority over civilian militiamen. *See ibid*., para. 495.
[630] Trial Judgement, para. 1065.

with the participation of soldiers and militiamen in the killing of Alphonse Kabiligi and the massacre at Mudende University, as well as the involvement of soldiers under Nsengiyumva's command, led to the only reasonable conclusion that the killings in Gisenyi town on 7 April 1994 were ordered by the highest military authority in the area, Nsengiyumva.[631] The Trial Chamber specified that, in reaching its conclusion, it had taken into account that Nsengiyumva met with military officers during the night of 6 to 7 April 1994 in order to discuss the situation after the death of President Habyarimana and that he was in communication with the General Staff in Kigali.[632] The Trial Chamber viewed the events "in the context of the other parallel crimes being committed in Kigali by elite units and other soldiers in the wake of the death of President Habyarimana, which were also ordered or authorised by the highest military authority".[633]

275. Nsengiyumva submits that his convictions for ordering the killings in Gisenyi town are based on the Trial Chamber's erroneous interpretation of circumstantial evidence, which was open to multiple reasonable inferences consistent with his innocence.[634] He argues that there is no proof beyond reasonable doubt that the soldiers and civilians involved in the killings were under his authority, that he was involved in any way in the attacks or had the requisite *mens rea*.[635] He further submits that the Trial Chamber erred in relying on a consistent pattern of attacks and in concluding that the mere presence of three soldiers was sufficient to conclude that the assaults in Gisenyi town were coordinated and military in nature.[636] In his opinion, the Trial Chamber also erroneously relied on the "non-criminal meeting" he had with military officers during the night of 6 to 7 April 1994 and on the killings perpetrated in Kigali.[637] He contends that there were other authorities over whom he had no control, such as the prefect, the gendarmerie, or militia leaders, who could have sanctioned the attacks.[638]

276. The Prosecution responds that the Trial Chamber committed no error in holding Nsengiyumva responsible for ordering the killings perpetrated in Gisenyi town on 7 April 1994.[639] It submits that the totality of the evidence pointed to the only reasonable conclusion that the killings

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[631] Trial Judgement, paras. 1065, 2142.
[632] Trial Judgement, paras. 1065, 2142.
[633] Trial Judgement, para. 2142. *See also ibid*., para. 1065.
[634] Nsengiyumva Notice of Appeal, para. 23; Nsengiyumva Appeal Brief, paras. 24, 25, 32, 81; Nsengiyumva Reply Brief, paras. 4, 5, 11, 20. *See also* AT. 31 March 2011 p. 27.
[635] Nsengiyumva Notice of Appeal, para. 23; Nsengiyumva Appeal Brief, paras. 26, 27, 30, 34, 43-46, 53, 54, 59-61, 64, 80, 81; Nsengiyumva Reply Brief, paras. 11-20.
[636] Nsengiyumva Appeal Brief, paras. 31, 49.
[637] Nsengiyumva Appeal Brief, paras. 47-52, 72; Nsengiyumva Reply Brief, para. 40. Nsengiyumva submits that the meeting was "a normal occurrence after the death of the president" and points out that the Trial Chamber's findings on the Kigali killings reflect a pattern of massive presence of identified soldiers taking a leading role while the killings at Gisenyi were primarily by civilians. *See idem*.
[638] Nsengiyumva Appeal Brief, paras. 33, 53.

for which he was convicted were not sporadic but systematic, well organised and coordinated military operations following a striking pattern, and must have been ordered by the highest regional military authority.[640] It further argues that the Trial Chamber properly considered Nsengiyumva's meeting with his officers during the night of 6 to 7 April 1994, as well as parallel killings in Kigali as factors establishing that he must have ordered the crimes in Gisenyi.[641]

277. The Appeals Chamber recalls that ordering under Article 6(1) of the Statute requires that a person in a position of authority instruct another person to commit an offence.[642] As previously held, "the *actus reus* of ordering cannot be established in the absence of a prior positive act because the very notion of 'instructing', pivotal to the understanding of the question of 'ordering', requires 'a positive action by the person in a position of authority'".[643]

278. The Trial Chamber did not find any direct evidence that Nsengiyumva issued instructions that killings be perpetrated in Gisenyi town on 7 April 1994[644] but, as noted above, reached its conclusion on the basis of circumstantial evidence.[645] Nsengiyumva does not dispute that the *actus reus* and *mens rea* of ordering can be established through inferences drawn from circumstantial evidence, but correctly points out that, in such a case, the inference drawn must be the only reasonable one that could be drawn from the evidence.[646]

279. The Appeals Chamber considers that the evidence before the Trial Chamber could not lead a reasonable trier of fact to conclude that the only reasonable inference was that Nsengiyumva, as the highest military authority in Gisenyi prefecture, must have ordered the killings.

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[639] Prosecution Response Brief (Nsengiyumva), paras. 35, 36, 137.
[640] Prosecution Response Brief (Nsengiyumva), paras. 38-46, 69, 71-73, 98, 99. The Prosecution refers, *inter alia*, to Witness ZF's evidence that Nsengiyumva gave general orders to Lieutenant Bizumuremyi on the night of 6 April 1994 to kill all Tutsis. *See ibid*., para. 98(xi); AT. 31 March 2011 p. 16. The Prosecution also emphasises that at the time, Nsengiyumva had full control of the entire zone. *See* Prosecution Response Brief (Nsengiyumva), paras. 43, 67, 68.
[641] Prosecution Response Brief (Nsengiyumva), paras. 74, 101.
[642] *See*, *e.g*., *Setako* Appeal Judgement, para. 240; *Kalimanzira* Appeal Judgement, para. 213; *Milo{evi}* Appeal Judgement, para. 290; *Nahimana et al*. Appeal Judgement, para. 481. The Appeals Chamber recalls that 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 order, and if that crime is effectively committed subsequently by the person who received the order. *See Renzaho* Appeal Judgement, para. 315; *Nahimana et al*. Appeal Judgement, para. 481. *See also Bo{koski and Tarčulovski* Appeal Judgement, para. 68.
[643] *Milo{evi}* Appeal Judgement, para. 267, *citing Gali}* Appeal Judgement, para. 176. *See also Nahimana et al.* Appeal Judgement, para. 481; *Gacumbitsi* Appeal Judgement, para. 182.
[644] The Trial Chamber dismissed a number of charges describing Nsengiyumva's direct involvement in crimes. *See* Trial Judgement, paras. 1060, 1094, 1126, 1149, 1285, 1647, 1660, 1676, 1686-1689, 1720.
[645] *See supra*, para. 274.
[646] *Rukundo* Appeal Judgement, para. 235; *Nchamihigo* Appeal Judgement, para. 80, *citing Stakić* Appeal Judgement, para. 219. *See also Karera* Appeal Judgement, para. 34; *Čelebići* Appeal Judgement, para. 458.

280. In this respect, the Appeals Chamber notes that the Trial Chamber relied on similar joint attacks by civilians and soldiers against Alphonse Kabiligi and at Mudende University.[647] However, as will be discussed in the following sections of this Judgement, the Appeals Chamber considers that the participation of soldiers in these attacks was not proven beyond reasonable doubt.[648] These incidents could therefore not be considered as circumstantial evidence of a pattern of attacks by civilians and soldiers ordered by the highest regional military authority.

281. The Appeals Chamber further considers that the fact that mass killings were contemporaneously being perpetrated in Kigali on orders of military authorities in itself says nothing about Nsengiyumva's personal involvement in the killings committed in Gisenyi prefecture.[649] In the same vein, the Appeals Chamber finds that Nsengiyumva's meeting with military commanders in his operational sector during the night of 6 to 7 April 1994 "in order to discuss the situation after the death of President Habyarimana",[650] and the fact that he was in communication with the General Staff in Kigali do not provide evidence that he must have ordered the Gisenyi town killings.

282. In support of its finding, the Trial Chamber also considered the systematic nature of the attacks which occurred almost immediately after President Habyarimana's death.[651] While this does support the Trial Chamber's reasoning that the attacks were organised, the Appeals Chamber is not convinced that this is sufficient to establish that the order for the attacks came from Nsengiyumva.

283. The Appeals Chamber considers that, in the absence of any evidence that Nsengiyumva gave any instructions,[652] the mere involvement of three soldiers in civilian attire under his

[647] Trial Judgement, para. 2142.
[648] *See infra*, Sections III.G.1 *and* I.1.
[649] Moreover, the Appeals Chamber notes the contrast between the involvement of only three soldiers in civilian attire in the killings committed in Gisenyi town and the massive participation of uniformed soldiers in the massacres perpetrated in Kigali in the very first days following the death of President Habyarimana. *See* Trial Judgement, paras. 15-27, 926, 1346, 1354-1356, 1427, 1428, 1922.
[650] Trial Judgement, para. 2142.
[651] Trial Judgement, para. 1065.
[652] With respect to the Prosecution's reliance on Witness ZF's testimony that Nsengiyumva ordered Lieutenant Bizumuremyi to begin operations to kill Tutsis, the Appeals Chamber notes that the Trial Chamber merely accepted that Witness ZF was present at the Gisenyi military camp for various periods from 6 to 7 April 1994 and declined to rely on Witness ZF's further testimony in the absence of corroboration. While the Trial Chamber did not explicitly articulate that it refused to rely on the witness's account on Nsengiyumva's alleged order to Bizumuremyi, its discussion of the witness's credibility and its general "questions about the credibility of Witness ZF's uncorroborated account" clearly suggest that the Trial Chamber also refused to rely on Witness ZF's testimony on Nsengiyumva's alleged order to Bizumuremyi along with his testimony concerning Nsengiyumva's alleged meeting with *Interahamwe* or conversations with Bagosora on that matter. This is reflected in the Trial Chamber's factual and legal findings on Nsengiyumva's responsibility, which do not refer to Nsengiyumva's alleged order to Bizumuremyi. *See* Trial Judgement, paras. 1051-1054, 1065, 2142.

command[653] and the existence of a pattern of crimes being committed in and around his area of control immediately after the death of the President could not lead a reasonable trier of fact to find that the only reasonable inference was that Nsengiyumva ordered the killings perpetrated in Gisenyi town on 7 April 1994.

284. The Appeals Chamber finds that the Trial Chamber erred when it held Nsengiyumva responsible for ordering the crimes committed in Gisenyi town on 7 April 1994 under Article 6(1) of the Statute.

(b) Superior Responsibility

285. The Trial Chamber found that soldiers assigned to the Gisenyi Operational Sector and soldiers of other units of the Rwandan army that were engaged in military operations in the area were under Nsengiyumva's command and authority.[654] Based on the evidence of close coordination between soldiers and civilian assailants during the attacks, and "bearing in mind [Nsengiyumva's] involvement in the arming and training of civilians both before and after 6 April 1994", it concluded that all attackers involved in the Gisenyi killings were Nsengiyumva's subordinates acting under his effective control.[655] It further found that the attacks in Gisenyi were organised military operations requiring authorisation, planning, and orders from the highest levels and that "[i]t is inconceivable that Nsengiyumva would not be aware that his subordinates would be deployed for these purposes".[656] The Trial Chamber concluded that Nsengiyumva "failed in his duty to prevent the crimes because he in fact participated in them".[657] Accordingly, it was satisfied that Nsengiyumva could be held responsible as a superior under Article 6(3) of the Statute for these crimes, which it took into account in sentencing.[658]

286. Nsengiyumva submits that the Trial Chamber erred in finding that he could be held responsible as a superior for the crimes committed in Gisenyi town on 7 April 1994.[659] He contends that the Trial Chamber erred in finding that the soldiers and civilian assailants involved in the killings were subordinates acting under his effective control, and submits that there is no evidence

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[653] Witness DO specifically implicated three soldiers in civilian attire in the killings of 7 April 1994. *See* Witness DO, T. 30 June 2003 pp. 26, 32, 62, T. 1 July 2003 p. 48, *and* T. 2 July 2003 pp. 36, 37, 39, 54. *See also* Trial Judgement, para. 1016. As regards Nsengiyumva's authority over these soldiers, the Appeals Chamber refers to its discussion *infra*, paras. 292-294, 297.
[654] Trial Judgement, paras. 2072, 2075, 2076. *See also ibid*., paras. 1065, 1166, 1252.
[655] Trial Judgement, paras. 2077, 2078.
[656] Trial Judgement, para. 2082.
[657] Trial Judgement, para. 2083.
[658] Trial Judgement, paras. 2161, 2189, 2197, 2216, 2248, 2272.
[659] Nsengiyumva Notice of Appeal, para. 23; Nsengiyumva Appeal Brief, para. 37. *See also* Nsengiyumva Notice of Appeal, paras. 9, 11, 12, 17-22.

that he had knowledge of the crimes committed by his subordinates, or that he failed to prevent or punish identifiable subordinates.[660]

287. With respect to his command over the assailants in particular, Nsengiyumva contends that the few men found to have accompanied the civilian attackers could have originated from camps over which he had no authority, or could have been students from the Saint Fidèle Institute, "deserters masquerading as soldiers", or "errant elements on a frolic of their own".[661] In this respect, he asserts that the Trial Chamber's assumption of a geographical authority as opposed to a functional one is unsupported by the evidence.[662] He adds that there is no evidence on the record indicating on what basis and in what circumstances soldiers from camps not under his command would fall under his authority during "military operations".[663] He also argues that there was no conclusive evidence that the soldiers accompanying the attackers were in fact soldiers and not gendarmes, *Interahamwe*, or "simply civilians".[664]

288. Similarly, Nsengiyumva contends that there is no proof beyond reasonable doubt that he had authority or effective control over the civilian assailants.[665] In this respect, he argues that the Trial Chamber failed to adequately specify or identify the non-uniformed assailants as a distinct group of persons with a demonstrable link to him as a superior or otherwise, and used different descriptions for the civilian assailants interchangeably, which was inconsistent with its own finding on the differences between groups of assailants.[666] He asserts that no reasonable trier of fact could conclude that it follows from his alleged involvement in the training of civil defence forces in 1993 and 1994 that he exercised authority over civilian attackers in Gisenyi in April 1994.[667]

[660] Nsengiyumva Notice of Appeal, paras. 9, 11, 17-22; Nsengiyumva Appeal Brief, paras. 26-30, 35-37, 43, 44, 55, 63, 64, 80, fn. 83; Nsengiyumva Reply Brief, para. 35. The Appeals Chamber recalls that it has already discussed and rejected Nsengiyumva's contention that the Trial Chamber erred in implying that the Defence had the burden of showing that Nsengiyumva prevented or punished crimes by his subordinates. *See supra*, paras. 233, 234.
[661] Nsengiyumva Appeal Brief, paras. 26, 27, 30. *See also ibid*., paras. 43-46; AT. 30 March 2011 p. 70; AT. 31 March 2011 p. 30.
[662] Nsengiyumva Appeal Brief, paras. 43-46, 114; Nsengiyumva Reply Brief, para. 7. *See also* AT. 30 March 2011 pp. 55, 56, 67, 68; AT. 31 March 2011 pp. 28-30. Nsengiyumva asserts that soldiers from the Bigogwe and Butotori training camps as well as military students from the Saint Fidèle Institute and Mudende University did not report to him. *See* Nsengiyumva Appeal Brief, paras. 26, 27, 160. Nsengiyumva argues that none of his soldiers were positively identified as being involved except for Bizumuremyi and the evidence in that regard was dismissed. *See* AT. 30 March 2011 p. 56.
[663] Nsengiyumva Appeal Brief, para. 46; Nsengiyumva Reply Brief, para. 8. *See also* AT. 30 March 2011 pp. 67, 69.
[664] Nsengiyumva Appeal Brief, paras. 28, 29. Nsengiyumva further argues that the soldiers could have been simply passing through Gisenyi as they were leaving the country and therefore not under his command. *See* AT. 30 March 2011 p. 17.
[665] Nsengiyumva Appeal Brief, paras. 34, 80.
[666] Nsengiyumva Notice of Appeal, paras. 18, 19; Nsengiyumva Appeal Brief, para. 173.
[667] Nsengiyumva Notice of Appeal, para. 21; Nsengiyumva Appeal Brief, paras. 59, 61, 63, 64, 80, 121, 136.

289. In addition, Nsengiyumva argues that there is no evidence that the attacks were a coordinated military operation.[668] He submits that the Trial Chamber failed to consider the alternative inferences that political leaders, prefectoral authorities, commanders of the gendarmerie, or *Interahamwe* leaders were superiors and could have coordinated or organised the attacks.[669]

290. The Prosecution responds that the Trial Chamber correctly concluded from the totality of the evidence that the soldiers and militiamen involved in the incident were Nsengiyumva's subordinates acting under his effective control, and that Nsengiyumva had the requisite knowledge and failed to discharge his duty to prevent or punish the crimes.[670] It contends that Nsengiyumva applies a piecemeal approach to the evidence before the Trial Chamber and fails to demonstrate that the alleged alternative conclusions he proposes regarding his authority over soldiers in Gisenyi are reasonable.[671]

291. In reply, Nsengiyumva submits that his authority over specific troops in Gisenyi does not *ipso facto* render him liable for the activities of all troops in the prefecture and is not synonymous with "effective control *over those committing the crimes*".[672] According to him, the Prosecution's approach imposes a "strict liability responsibility in which he must answer for every conceivable crime committed within the geographical boundaries of Gisenyi prefecture regardless of the lack of evidence of his authority over the perpetrators".[673]

(i) Superior-Subordinate Relationship

292. The Appeals Chamber rejects Nsengiyumva's contention that there was no conclusive evidence that the soldiers accompanying the attackers were in fact soldiers and not gendarmes, *Interahamwe*, or "simply civilians".[674] The Trial Chamber relied on Witness DO's direct and consistent evidence that soldiers in civilian attire accompanied the civilian attackers for its finding that soldiers were involved in the killings.[675] The witness's description of the events clearly demonstrates that he was able to distinguish soldiers from *Interahamwe* and gendarmes.[676]

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[668] Nsengiyumva Notice of Appeal, para. 17; Nsengiyumva Appeal Brief, paras. 46, 53.
[669] Nsengiyumva Notice of Appeal, para. 22; Nsengiyumva Appeal Brief, paras. 32, 33, 53.
[670] Prosecution Response Brief (Nsengiyumva), paras. 51-54, 64-80, 93, 94. *See also* AT. 31 March 2011 pp. 14, 15, 18.
[671] Prosecution Response Brief (Nsengiyumva), paras. 41, 43-46. *See also* AT. 31 March 2011 p. 17.
[672] Nsengiyumva Reply Brief, paras. 7, 35 (emphasis in original).
[673] Nsengiyumva Reply Brief, para. 36. *See also* Nsengiyumva Notice of Appeal, para. 11.
[674] *Cf.* Nsengiyumva Appeal Brief, paras. 28, 29.
[675] *See* Trial Judgement, paras. 1061-1064.
[676] *See* Witness DO, T. 30 June 2003 pp. 13, 14, 17, 24, 26, 29, 32-34, 43, 45, 49, 50, 60, 65, T. 1 July 2003 pp. 6, 15, 35-37, 48, 52, T. 2 July 2003 pp. 36, 39, *and* T. 17 October 2005 p. 15.

293. The Trial Chamber found that the soldiers involved in the killings came from the Gisenyi military camp "given its proximity to the crimes".[677] It also indicated that Witness DO had consistently implicated Lieutenant Bizumuremyi as playing a role in the events that day.[678] The Appeals Chamber considers that, although insufficient on its own to establish the origin and identity of the soldiers, the geographical proximity between the Gisenyi military camp and the crime scene was indeed a relevant factor for the Trial Chamber to take into account. The Appeals Chamber further notes that Witness DO also stated that the soldiers involved in the killing of the Tutsi teacher and his daughter on 7 April 1994 had come from the Gisenyi camp.[679]

294. The Appeals Chamber further considers that the Trial Chamber's statement that Witness DO consistently implicated Lieutenant Bizumuremyi as playing a role in the events that day[680] indicates that it accepted Witness DO's evidence with respect to Bizumuremyi's involvement. Although the Trial Chamber did not expand on this statement, the Appeals Chamber notes Witness DO's evidence that after one of the attacks perpetrated in Gisenyi town in the afternoon of 7 April 1994, Bizumuremyi instructed the assailants to return to the Gisenyi military camp and, moreover, that Bizumuremyi was supervising the massacres in Gisenyi town that day.[681] The Appeals Chamber considers that this evidence clearly establishes a link between the attacks of 7 April 1994, Bizumuremyi, and the Gisenyi military camp. The Appeals Chamber considers that a reasonable trier of fact could have concluded, on the basis of this evidence, taken together with the proximity of the camp and Witness DO's testimony that the soldiers were from the camp, that the soldiers originated from the Gisenyi military camp. In this regard, the Appeals Chamber recalls that Nsengiyumva did not dispute that he was the Commander of the Gisenyi Operational Sector and that he had command over the soldiers in the Gisenyi military camp.[682]

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[677] Trial Judgement, para. 1064.
[678] Trial Judgement, para. 1064.
[679] Witness DO, T. 30 June 2003 p. 26. The Appeals Chamber notes that, although the Trial Chamber rejected Witness DO's testimony that he departed with soldiers from the Gisenyi camp after a meeting held by Nsengiyumva prior to the killings, it relied on the evidence of Witness DO that soldiers participated in the killing of this Tutsi teacher and his daughter in finding that the soldiers provided assistance to the attacks in Gisenyi town on 7 April 1994. *See* Trial Judgement, paras. 1055-1058, 1064. *See also ibid*., para. 1016.
[680] Trial Judgement, para. 1064.
[681] Witness DO, T. 30 June 2003 p. 38, T. 1 July 2003 p. 53, *and* T. 2 July 2003 p. 40. *See also* Exhibit DNS27 (Witness DO Statement dated 30 July 1997), confidential, pp. 13446, 13445 (Registry pagination); Exhibit DNS29 (Witness DO Statement dated 28 February 2003), confidential, p. 13407 (Registry pagination). *See also* Trial Judgement, para. 1017. The Appeals Chamber notes that Witness DO's account of the subsequent meeting held by Nsengiyumva with the assailants at the Gisenyi military camp was not discussed by the Trial Chamber. The Appeals Chamber understands from the Trial Chamber's decision not to accept Witness DO's "account of Nsengiyumva's participation in meetings in the absence of corroboration", that this uncorroborated aspect of Witness DO's evidence was not accepted by the Trial Chamber and will therefore not consider it here. *See* Trial Judgement, paras. 1018, 1058, 1062.
[682] *See* Nsengiyumva, T. 5 October 2006 p. 70; Nsengiyumva Closing Brief, paras. 149, 150. *See also* Trial Judgement, paras. 70, 2072.

295. Turning to Nsengiyumva's authority over the civilian attackers, the Appeals Chamber recalls that the Trial Chamber did not find credible the evidence regarding the meeting on the morning of 7 April 1994 when Nsengiyumva allegedly addressed militiamen and distributed weapons to them.[683] The Appeals Chamber also reiterates that, contrary to the Trial Chamber's finding,[684] a pattern of assaults by soldiers and civilians in Gisenyi prefecture immediately after President Habyarimana's death was not established.[685] In the same vein, the Appeals Chamber considers that the Trial Chamber could not reasonably rely on the killings being perpetrated in Kigali on orders of the military to conclude that the killings in Gisenyi town on 7 April 1994 must have been part of a military operation. The only demonstrable link the Trial Chamber found between Nsengiyumva and the civilian attackers was the "coordination between soldiers and civilians" reflected in Witness DO's evidence.[686] However, the Appeals Chamber is not convinced that coordination between soldiers and civilians is sufficient to establish that a superior-subordinate relationship existed between Nsengiyumva and the civilian attackers.[687] Accordingly, the Appeals Chamber finds that the Trial Chamber erred in finding that the civilian attackers were Nsengiyumva's subordinates within the meaning of Article 6(3) of the Statute.

296. The Appeals Chamber recalls, however, the Trial Chamber's finding that, "even if the civilian assailants could not be considered as subordinates of Nsengiyumva, the cooperation, presence and active involvement of military personnel alongside their civilian counterparts rendered substantial assistance to the crimes perpetrated by the militiamen".[688] Nsengiyumva merely submits that there is insufficient evidence of "substantial assistance" by his alleged subordinates,[689] without demonstrating that the Trial Chamber erred. His argument is therefore summarily dismissed. Accordingly, the Appeals Chamber finds no error in the Trial Chamber's reasoning that Nsengiyumva is liable for the role of his subordinates in aiding and abetting the militiamen in addition to their own direct contribution to the criminal acts.[690]

297. In light of the foregoing, the Appeals Chamber finds that, although the Trial Chamber erred in finding that the civilian assailants were Nsengiyumva's subordinates within the meaning of Article 6(3) of the Statute, Nsengiyumva has failed to demonstrate that the Trial Chamber erred in

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[683] Trial Judgement, paras. 1055-1060.
[684] Trial Judgement, paras. 1065, 2077.
[685] *See supra*, paras. 256, 280. *See also infra*, para. 313.
[686] Trial Judgement, para. 1065. *See also ibid*., para. 2078.
[687] In this regard, the Appeals Chamber recalls that a material ability to prevent and punish may also exist outside a superior-subordinate relationship. *See Halilovi}* Appeal Judgement, para. 59 ("For example, a police officer may be able to 'prevent and punish' crimes under his jurisdiction, but this would not as such make him a superior (in the sense of Article 7(3) of the Statute) *vis-à-vis* any perpetrator within that jurisdiction.").
[688] Trial Judgement, para. 2081.
[689] Nsengiyumva Notice of Appeal, para. 33 (p. 24); Nsengiyumva Appeal Brief, para. 274.

concluding that Nsengiyumva's subordinates from the Rwandan army under his effective control participated in the killings in Gisenyi town on 7 April 1994.

(ii) Knowledge

298. The Appeals Chamber notes that, while Nsengiyumva generally argues that there is no evidence that he had the requisite knowledge, he fails to challenge the circumstantial evidence the Trial Chamber expressly relied on to reach its conclusion.[691] The Trial Chamber was satisfied that Nsengiyumva had actual knowledge that his subordinates were about to commit crimes on the basis that "these attacks were organised military operations requiring authorisation, planning and orders from the highest levels".[692] It considered that it was inconceivable that he would not be aware that his subordinates were deployed for these purposes, given that they occurred in the immediate aftermath of the death of the President and the resumption of hostilities with the RPF when the vigilance of military authorities would have been at its height.[693] It further noted that the crimes were committed around Gisenyi town, where Nsengiyumva was based.[694] The Appeals Chamber finds, Judges Meron and Robinson dissenting, that Nsengiyumva has failed to demonstrate an error in this respect.

(iii) Failure to Prevent or Punish

299. The Trial Chamber's findings on Nsengiyumva's alleged failure to prevent or punish reads as follows:

> As noted above, these operations were clearly organised and authorised or ordered at the highest level of the Gisenyi operational sector. Therefore, Nsengiyumva failed in his duty to prevent the crimes because he in fact participated in them. There is absolutely no evidence that the perpetrators were punished afterwards.[695]

300. As with his arguments relating to knowledge, Nsengiyumva fails to substantiate his general contention that there is no evidence that he failed to prevent the crimes of his subordinates.[696] Nonetheless, the Appeals Chamber recalls that the Trial Chamber erred in finding that

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[690] *See supra*, para. 232.
[691] *See* Nsengiyumva Appeal Brief, paras. 36, 37, 80.
[692] Trial Judgement, para. 2082. With respect to Nsengiyumva's argument that "there is no finding that the Appellant knew or ought have known of crimes committed by identified subordinates in Gisenyi town", the Appeals Chamber considers the Trial Chamber's finding at paragraph 2082 of the Trial Judgement to be a clear finding that Nsengiyumva had the requisite knowledge to be held responsible as a superior for his subordinates' criminal conduct in Gisenyi town. *See* Nsengiyumva Appeal Brief, fn. 83.
[693] Trial Judgement, para. 2082.
[694] Trial Judgement, para. 2082.
[695] Trial Judgement, para. 2083.
[696] *See* Nsengiyumva Appeal Brief, paras. 36, 37.

Nsengiyumva ordered the killings in Gisenyi town.[697] Accordingly, the Trial Chamber could not have relied on his ordering the Gisenyi town killings to find that Nsengiyumva failed in his duties to prevent them because he in fact participated in them. That said, the Appeals Chamber recalls the evidence that Lieutenant Bizumuremyi played a prominent role in the 7 April 1994 killings in Gisenyi town, moving around town to supervise the killings being carried out.[698] There is also evidence that Bizumuremyi instructed Witness DO and his group of assailants to return to the Gisenyi military camp because Nsengiyumva wanted to see them.[699] Although this was not referred to explicitly by the Trial Chamber, the Appeals Chamber considers that it supports the Trial Chamber's reasoning that the attack must at least have been authorised by Nsengiyumva. Accordingly, the Appeals Chamber, Judges Meron and Robinson dissenting, finds no error in the Trial Chamber's finding that Nsengiyumva failed to prevent the killings in Gisenyi town on 7 April 1994.

301. With respect to the failure to punish, the Appeals Chamber recalls that it considers that the Trial Chamber did not find that Nsengiyumva could be held responsible pursuant to Article 6(3) of the Statute for failing to punish his culpable subordinates.[700] Nsengiyumva's contention in this respect is therefore moot.

(iv) Conclusion

302. In light of the foregoing, the Appeals Chamber finds, Judges Meron and Robinson dissenting, that Nsengiyumva has failed to demonstrate that the Trial Chamber erred in finding that he could be held responsible as a superior pursuant to Article 6(3) of the Statute for failing to prevent the criminal conduct of his subordinates in Gisenyi town on 7 April 1994.

[697] *See supra,* Section III.F.2(a), paras. 277-284.
[698] Witness DO, T. 1 July 2003 p. 53 *and* T. 2 July 2003 p. 40. *See also* Exhibit DNS27 (Witness DO Statement dated 30 July 1997), confidential pp. 13446, 13445 (Registry pagination); Exhibit DNS29 (Witness DO Statement dated 28 February 2003), confidential, p. 13407 (Registry pagination).
[699] Witness DO, T. 30 June 2003 p. 38. The Appeals Chamber reiterates that it understands from the Trial Chamber's decision not to accept Witness DO's "account of Nsengiyumva's participation in meetings in the absence of corroboration", that Witness DO's account of the subsequent meeting held by Nsengiyumva with the assailants at the Gisenyi military camp was not accepted by the Trial Chamber. *See supra*, fn. 621.
[700] *See supra*, para. 234.

3. Conclusion

303. Based on the foregoing, the Appeals Chamber concludes that Nsengiyumva has failed to demonstrate that the Trial Chamber erred in relying on Witness DO's evidence about the killings perpetrated in Gisenyi town on 7 April 1994 and the involvement of soldiers. However, the Appeals Chamber finds that the Trial Chamber erred in finding that Nsengiyumva ordered the killings in Gisenyi town on 7 April 1994. Nevertheless, the Appeals Chamber finds, Judges Meron and Robinson dissenting, that Nsengiyumva has failed to demonstrate that the Trial Chamber erred in finding that he could be held responsible as a superior under Article 6(3) of the Statute for his subordinates' role in these crimes. Accordingly, the Appeals Chamber grants Nsengiyumva's Sixth Ground of Appeal in part and sets aside the finding that he is responsible pursuant to Article 6(1) of the Statute for ordering the killings committed in Gisenyi town on 7 April 1994 to which Witness DO testified, but finds him, Judges Meron and Robinson dissenting, criminally responsible as a superior for these crimes pursuant to Article 6(3) of the Statute. The Appeals Chamber will discuss the impact, if any, of this finding on Nsengiyumva's sentence in the appropriate section of this Judgement.

G. Alleged Errors Relating to the Killing of Alphonse Kabiligi (Ground 7 in part)

304. The Trial Chamber found that on 7 April 1994, civilian assailants accompanied by a Rwandan army soldier mutilated and killed Alphonse Kabiligi in front of his family, and that, on the following day, a group of five or six Rwandan army soldiers "returned" to verify the killing and remove the body.[701] It also found that Alphonse Kabiligi was on the Nsabimana List, a list of suspected RPF accomplices generated by or for members of the Rwandan army and found in February 1993 in the vehicle of the Rwandan army Chief of Staff Déogratias Nsabimana.[702] It held that Nsengiyumva had authority over the soldier and the civilian assailants who killed Alphonse Kabiligi and concluded that the only reasonable conclusion was that Nsengiyumva ordered this killing.[703] Accordingly, the Trial Chamber found Nsengiyumva guilty pursuant to Article 6(1) of the Statute for ordering this killing.[704] The Trial Chamber was also satisfied that Nsengiyumva could be held responsible as a superior under Article 6(3) of the Statute for this crime, which it took into account as an aggravating factor in sentencing.[705]

305. Nsengiyumva submits that the Trial Chamber erred in law and in fact in convicting him for the killing of Alphonse Kabiligi. Specifically, he argues that the Trial Chamber erred in: (i) finding him guilty of a crime of which he was not put on notice; (ii) its assessment of the evidence relating to his role in the preparation of lists and to the involvement of soldiers in this incident; and (iii) finding that he incurred criminal responsibility for this incident.[706]

306. The Appeals Chamber recalls that it has already addressed and dismissed Nsengiyumva's submissions relating to lack of notice in previous sections.[707] Accordingly, the Appeals Chamber will now examine Nsengiyumva's submissions pertaining to the assessment of the evidence relating to the killing of Alphonse Kabiligi, before turning to his submissions regarding his criminal responsibility.

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[701] Trial Judgement, paras. 1159, 1162, 1163, 1165, 1166. The Appeals Chamber notes that the Trial Chamber mistakenly refers in paragraphs 2145 and 2183 in the legal findings section to the involvement of "soldiers" in this killing whereas it only found that one soldier was involved in its factual findings. *See ibid*., paras. 1162, 1165, 1166. Likewise, the Appeals Chamber observes that the Trial Chamber stated that soldiers "returned" the following day whereas it did not find that these soldiers were involved in the killing perpetrated the previous evening. *See ibid*., paras. 1162, 1165, 1166.

[702] Trial Judgement, paras. 421-425, 1160, fn. 470. *See also ibid*., paras. 404, 405, fn. 1300.

[703] Trial Judgement, paras. 1166, 2184.

[704] Trial Judgement, paras. 2184, 2189, 2197, 2216, 2227, 2248, 2258. The Trial Chamber found that it had not been proven that the death of Alphonse Kabiligi, a Hutu of mixed parentage, constituted genocide. *See ibid*., para. 2145.

[705] Trial Judgement, paras. 2077-2083, 2189, 2197, 2223, 2248, 2272.

[706] Nsengiyumva Notice of Appeal, para. 24; Nsengiyumva Appeal Brief, paras. 102-122.

[707] *See supra*, Sections III.C.4 *and* 8.

1. Alleged Errors in the Assessment of Evidence

307. Nsengiyumva submits that no reasonable trier of fact would have concluded that the only reasonable inference to be drawn from the evidence was that the "soldier" involved in Alphonse Kabiligi's killing on 7 April 1994 and the "soldiers" who came the following day to Kabiligi's home were soldiers of the Rwandan army.[708] He contends that there was no conclusive evidence that the "soldiers" were in fact soldiers and not gendarmes, *Interahamwe,* or "simply civilians".[709] He adds that there is no proof that the alleged soldiers who came the next day were among the assailants who killed Kabiligi, and that the Trial Chamber's conclusion that these soldiers came to "verify the killing" is speculative.[710] Nsengiyumva further argues that the Trial Chamber erroneously relied on similar unproven killings in Gisenyi town, Mutura, and Mudende, to conclude that the soldiers involved in the killing of Kabiligi belonged to the Rwandan army.[711] Finally, he asserts that it was unreasonable to find that he must have prepared the Nsabimana List, and that the Trial Chamber ignored evidence that this list may have originated from a source other than the military.[712]

308. The Prosecution responds that the Trial Chamber properly assessed the totality of the evidence and drew the only reasonable inference that soldiers of the Rwandan army were involved in Alphonse Kabiligi's murder.[713] It asserts that the Trial Chamber duly considered the Nsabimana List and its origin in light of the evidence, including Nsengiyumva's own contentions on the issue.[714]

309. The Appeals Chamber notes that Prosecution Witness AS described the assailants who attacked Alphonse Kabiligi's home on the night of 7 April 1994 as a group of *Interahamwe* accompanied by one soldier in khaki uniform without a beret and carrying an army rifle.[715] She testified that the next day, about five or six soldiers wearing khaki uniforms and military boots

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[708] Nsengiyumva Appeal Brief, paras. 108, 110, 111. *See also ibid*., para. 28; AT. 31 March 2011 p. 29.

[709] Nsengiyumva Appeal Brief, paras. 28, 29. *See also* AT. 31 March 2011 p. 30. In support of his contention, Nsengiyumva argues that: (i) Witness AS was unable to tell whether the uniformed persons she testified about were from the military or gendarmes; (ii) *Interahamwe* were found to wear military fatigues on occasion; and (iii) while gendarmes largely did not participate in the crimes, this does not absolve each and every gendarme and there is evidence that gendarmes also participated in attacks. *See* Nsengiyumva Appeal Brief, paras. 28, 29, 108; AT. 30 March 2011 pp. 57, 69, 70; AT. 31 March 2011 pp. 30, 36.

[710] Nsengiyumva Appeal Brief, para. 111.

[711] Nsengiyumva Appeal Brief, para. 112. Nsengiyumva asserts that in "attempting to corroborate unproven with other equally unproven findings", the Trial Chamber applied a prejudicial circular reasoning. *See idem*. *See also ibid*., para. 228.

[712] Nsengiyumva Notice of Appeal, para. 24; Nsengiyumva Appeal Brief, paras. 115-119. Nsengiyumva purports that the Trial Chamber misrepresented his evidence since he never conceded that he was responsible for establishing any specific lists, let alone the Nsabimana List. *See* Nsengiyumva Appeal Brief, para. 118.

[713] Prosecution Response Brief (Nsengiyumva), paras. 42, 43, 124, 125. *See also* AT. 31 March 2011 p. 17.

[714] Prosecution Response Brief (Nsengiyumva), paras. 128, 129. *See also ibid.,* paras. 225, 226, 228, 239.

came to Kabiligi's house.[716] In response to a question put by Nsengiyumva's Counsel, the witness clarified that she was not in a position to say whether the soldier who accompanied the *Interahamwe* on 7 April 1994 or the soldiers who came the next day were soldiers of the Rwandan army or gendarmes as they did not wear berets and she did not know them.[717]

310. The Trial Chamber considered that "the number of men in khaki military-style uniforms, present both during the attack and the next morning, shows clearly that the assailants were not simply civilians or 'bandits', but either soldiers or gendarmes".[718] Nonetheless, it acknowledged that Witness AS's evidence did not "show" that they were soldiers under Nsengiyumva's control.[719] In assessing the circumstances of the killing, the Trial Chamber was, however, convinced that the uniformed assailant and those who came the next day identified by Witness AS were members of the Rwandan army.[720] The Trial Chamber reasoned that:

> While the evidence of Witnesses ZF and AS is insufficient to establish the identity of the uniformed assailant who accompanied Kabiligi's killers, the nature of the attack as described by Witness AS demonstrates military involvement when viewed in light of other systematic murders in Gisenyi. In the days following President Habyarimana's death, a pattern emerged in Gisenyi of soldiers playing a largely supporting role to civilian attackers who killed Tutsis and suspected accomplices. This is reflected in the evidence of Witnesses DO and XBG, who discuss attacks in Gisenyi town and elsewhere on 7 April […]. It also follows from the testimony of Witness HV, who described attacks on Central African Adventist University in Mudende on 8 April […]. The Chamber is further convinced that a soldier participated in the operation against Kabiligi, and not a gendarme, even though he did not wear a beret. There is evidence that at least immediately after the President's death, gendarmes appeared to protect civilians who had been singled out for attack […]. While Kabiligi may have been viewed as an accomplice by local political and government officials, the list in deceased General Déogratias Nsabimana's vehicle also demonstrates that the military had singled him out as having ties to the RPF. Under the circumstances, the Chamber is convinced that the uniformed "soldier" identified by Witness AS as accompanying the civilian assailants as well as the five or six that returned the next day were members of the Rwandan army.[721]

311. Nsengiyumva correctly points out that the Trial Chamber noted evidence that *Interahamwe* wore military fatigues on occasion.[722] It also transpires from the Trial Judgement that *Interahamwe*,

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[715] Witness AS, T. 2 September 2003 pp. 44, 45 (closed session) *and* T. 3 September 2003 pp. 17, 18.
[716] Witness AS, T. 2 September 2003 p. 48 (closed session) *and* T. 3 September 2003 p. 16.
[717] Witness AS, T. 3 September 2003 pp. 18, 19.
[718] Trial Judgement, para. 1163.
[719] Trial Judgement, paras. 1163, 1165. The Appeals Chamber notes that the Trial Chamber also found that Witness ZF's evidence was insufficient to establish the identity of the uniformed assailant who accompanied Kabiligi's killers. *See ibid.*, para. 1165.
[720] Trial Judgement, para. 1165.
[721] Trial Judgement, para. 1165 (internal references omitted).
[722] Trial Judgement, para. 167. *See also ibid*., fns. 504 ("In light of the [*Interahamwe*'s] uniforms' similarity to military-style camouflage and evidence that some members wore portions of military fatigues, the Chamber has considered throughout the judgement whether assailants could have been in fact *Interahamwe* before identifying them as members of the Rwandan military."), 2084 ("In making this finding, the Chamber has been mindful of the evidence that some members of the *Interahamwe* at roadblocks wore parts of military uniforms."). *See further ibid*., paras. 1477 ("[Prosecution Witness XXC testified that] [t]he *Interahamwe* wore uniforms of *kitenge* material, civilian attire, military uniforms, or a mix between military and civilian attire."), 1593 ("[Prosecution Witness DBJ] acknowledged

and civilians in general, received military training and weapons from the Rwandan army.[723] The Appeals Chamber observes that, while Witness AS was clear and determined in her differentiation between the *Interahamwe* and the "soldier" present on the night of 7 April 1994 and the "soldiers" who came the following day, she based her identification of the soldiers on their uniforms and guns.[724]

312. Against this background, the Appeals Chamber considers that the Trial Chamber erred in finding that the number of uniformed men "clearly" showed that they were not civilians, but rather either soldiers or gendarmes. Witness AS testified that only one uniformed man was present during the killing of Alphonse Kabiligi in the evening of 7 April 1994, along with a group of *Interahamwe*. In light of the fact that *Interahamwe* occasionally wore uniforms, a reasonable trier of fact could not, on the basis on Witness AS's evidence, exclude the possibility that the single man in uniform could have been an *Interahamwe*. The fact that five to six individuals wearing khaki uniforms and military boots came the following day may suggest that these individuals belonged to the military or the gendarmerie, and were not militiamen coincidentally wearing military fatigues and military boots. However, apart from testifying that the "soldiers" who arrived the next day also wore khaki uniforms and carried guns, Witness AS did not link the man who accompanied the *Interahamwe* on 7 April 1994 to those who came the following morning.[725] In this regard, the Appeals Chamber considers that the Trial Chamber's conclusion that these soldiers "returned" the next day "to verify the killing" is not supported by Witness AS's testimony and amounts to speculation on the part of the Trial Chamber.[726] The Appeals Chamber therefore considers that it was unreasonable for the Trial Chamber to find that Witness AS's testimony established that the uniformed assailant who accompanied Alphonse Kabiligi's killers was a soldier or a gendarme and not a civilian.

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that it was difficult to tell the difference between *Interahamwe* and soldiers at this time, as some *Interahamwe* wore military uniforms.").

[723] *See* Trial Judgement, paras. 458, 464, 465, 488, 489.

[724] *See* Witness AS, T. 2 September 2003 p. 45 (closed session) *and* T. 3 September 2003 pp. 16, 18. *See also* Trial Judgement, para. 1162.

[725] Witness AS, T. 2 September 2003 p. 45 (closed session) *and* T. 3 September 2003 pp. 16, 18. The Appeals Chamber notes in this respect that the Trial Chamber never stated that the uniformed men present on 8 April 1994 were among the assailants who killed Alphonse Kabiligi.

[726] *See* Trial Judgement, para. 1162; Witness AS, T. 2 September 2003 pp. 50-52 ("R. *Le lendemain, un groupe de militaires, il est arrivé avec Mathias qui travaillait au* [Economic Community of the Great Lakes Countries] [and was Alphonse Kabiligi's former colleague]. […] [Mathias] *a demandé aux militaires un peu de tourner le corps de* [Kabiligi] *pour voir son visage. Et il dit que c'est un bon travail. Q. Parlez-vous le kinyarwanda? R. Non. Je comprends un tout petit peu. Q. Est-ce que Mathias s'exprimait en Kinyarwanda lorsqu'il s'adressait aux militaires et qu'il regardait le cadavre de* [Kabiligi]*? R. Oui.* […] *Q. Qu'on fait les militaires? R. Ils discutaient encore un quart d'heure.* […] Q. *Après que les militaires aient entendu ce que vous leur avez dit* […]*, qu'ont-ils fait après ? R. Ils avaient une camionnette blanche, ils ont mis le corps de* [Kabiligi] *et le corps d'Innocent dans* [*la*] *camionnette* […].") (closed session) (French).

313. The Appeals Chamber further considers that the Trial Chamber could not conclusively rely on a "pattern" of soldiers supporting civilian assailants in attacks against Tutsis in Gisenyi prefecture in the days following President Habyarimana's death as evidence supporting its finding that the military was involved in Alphonse Kabiligi's killing.[727] While the Appeals Chamber has found in another section of this Judgement that the Trial Chamber did not err in concluding that soldiers assisted civilian assailants in other killings perpetrated in Gisenyi town on 7 April 1994,[728] it has also concluded that the Trial Chamber erred in finding that the presence of soldiers during the attack at Mudende University on 8 April 1994 had been established beyond reasonable doubt.[729] The Appeals Chamber has also found that no reasonable trier of fact would have relied on Witness XBG's background evidence of soldiers accompanying civilian attackers in Mutura.[730] The Appeals Chamber finds that the evidence of three soldiers in civilian attire assisting militiamen in killings in Gisenyi town on 7 April 1994[731] is insufficient to establish an actual "pattern" of soldiers playing a supporting role to civilian assailants.

314. The Trial Chamber also relied on the fact that Alphonse Kabiligi was singled out by the military as having ties to the RPF.[732] However, the Appeals Chamber considers that no reasonable trier of fact could have found this to be decisive in light of the Trial Chamber's finding that Alphonse Kabiligi was also popularly perceived as an RPF sympathiser and viewed as an accomplice by local and government officials.[733] Therefore, even assuming that the Nsabimana List indeed originated from the military, such proof could only serve to support one of several reasonable conclusions as to the identity of the uniformed man involved in the killing.

315. Based on the foregoing, the Appeals Chamber considers that the Trial Chamber was correct in finding that it could not conclusively rely on Witness AS's testimony to find that the uniformed man involved in the killing of Alphonse Kabiligi was undoubtedly a soldier from the Rwandan army. However, the Appeals Chamber considers that the Trial Chamber erred in finding that, when taken together with the circumstantial evidence, the only reasonable inference was that the uniformed man was a Rwandan army soldier. The Appeals Chamber considers that no reasonable trier of fact could have excluded the possibility that the uniformed man involved in the killing may have been a militiaman wearing a military fatigue and carrying an army rifle.

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[727] *See* Trial Judgement, paras. 1165, 1166.
[728] *See supra*, Section III.F.1.
[729] *See infra*, Section III.I.1, para. 362.
[730] *See supra*, para. 257.
[731] *See supra*, fn. 653.
[732] *See* Trial Judgement, paras. 424, 1160, 1165.
[733] Trial Judgement, paras. 1160, 1165.

316. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in concluding that a Rwandan army soldier was involved in the mutilation and murder of Alphonse Kabiligi on the evening of 7 April 1994. As a result of this finding, the Appeals Chamber deems it unnecessary to discuss Nsengiyumva's allegations of error concerning his role in the preparation of the Nsabimana List. It will examine the impact of its finding on Nsengiyumva's criminal responsibility in the following sub-section.

2. Alleged Errors Regarding Nsengiyumva's Criminal Responsibility

317. Nsengiyumva submits that there was no proof beyond reasonable doubt that he ordered the killing of Alphonse Kabiligi or that he could be held responsible as a superior for this crime.[734]

(a) Ordering

318. The Trial Chamber found that Nsengiyumva had *de jure* and *de facto* authority over the soldier and the civilian assailants who participated in the killing of Alphonse Kabiligi "given that the killing[] took place in Gisenyi town" and in light of the "clear coordination between the soldier and the civilian attackers".[735] It concluded that the speed with which the attack occurred, the involvement of soldiers under Nsengiyumva's command and the fact that it followed "a pattern consistent with other attacks taking place in the prefecture" led to the only reasonable conclusion that the killing of Alphonse Kabiligi was ordered by the highest military authority in the area, Nsengiyumva.[736] In support of its conclusion, the Trial Chamber explicitly referred to the participation of soldiers and militiamen in the killings in Gisenyi town on 7 April 1994 and at Mudende University, and considered Nsengiyumva's meeting with military officers during the night of 6 to 7 April 1994, as well as the fact that the killing occurred in the context of other parallel crimes committed in Kigali.[737]

319. Nsengiyumva submits that the Trial Chamber's conclusion that he ordered the murder of Alphonse Kabiligi was "neither open to the Trial Chamber nor [...] the only one[] open [to it] given the state of the evidence".[738] He argues that there is no proof beyond reasonable doubt that the alleged soldiers and the civilians involved in the killing were under his authority, that he was

[734] Nsengiyumva Notice of Appeal, para. 24; Nsengiyumva Appeal Brief, paras. 102, 106, 107, 120-122. *See also* Nsengiyumva Notice of Appeal, paras. 8, 9, 11, 17; Nsengiyumva Appeal Brief, paras. 23-37, 42-55, 58-64.
[735] Trial Judgement, para. 1166. *See also ibid*., para. 2184.
[736] Trial Judgement, para. 1166. *See also ibid*., para. 2184. The Appeals Chamber notes that at paragraph 1166, the Trial Chamber imputes responsibility to Nsengiyumva by virtue of his capacity as "the highest operational authority in the prefecture". Read in context of the Trial Judgement, the Appeals Chamber understands this statement to refer to the highest operational *military* authority.
[737] Trial Judgement, para. 2184.
[738] Nsengiyumva Appeal Brief, para. 107. *See also ibid*., paras. 25, 32.

involved in the attack, that he had the requisite *mens rea*, or that the killing was part of a coordinated military operation ordered by him.[739] In his view, the Trial Chamber applied a strict liability standard by holding him responsible for the mere fact that crimes were committed in Gisenyi town in the absence of any evidence that he had authority over the physical perpetrators.[740]

320. The Prosecution responds that the Trial Chamber did not err in concluding that the only reasonable inference to be drawn from the totality of the evidence was that Nsengiyumva must have ordered the killing of Alphonse Kabiligi.[741]

321. The Trial Chamber based its finding that Nsengiyumva ordered the killing of Alphonse Kabiligi on circumstantial evidence alone. It relied primarily on its conclusion that a soldier under Nsengiyumva's command participated in the crime. However, as discussed above, the Appeals Chamber finds that a reasonable trier of fact could not have found that the participation of a Rwandan army soldier in this crime was the only reasonable inference from the evidence.[742] The Appeals Chamber has also found that the Trial Chamber could not rely on a pattern of similar attacks taking place in the prefecture.[743]

322. Further, the Appeals Chamber reiterates that Nsengiyumva's meeting with military officers during the night of 6 to 7 April 1994 to discuss the situation in the aftermath of the death of President Habyarimana and the fact that parallel crimes were being committed in Kigali at the same time do not constitute circumstantial evidence that Nsengiyumva instructed his subordinates to commit crimes against Tutsis in Gisenyi.[744]

323. The Appeals Chamber finds that in the absence of evidence of military involvement and coordination between the military and the civilian attackers, the mere fact that the killing took place in Gisenyi town the day following President Habyarimana's death is insufficient for a reasonable trier of fact to find that the only reasonable inference was that the unidentified civilian assailants acted upon Nsengiyumva's orders. Even assuming that Nsengiyumva wielded some authority over civilians, his mere position of authority cannot suffice to infer that he must have ordered them to commit the crime.

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[739] Nsengiyumva Notice of Appeal, paras. 23, 26, 27, 30, 34, 43-46, 53, 54, 59-61, 64, 80, 81, 110-114; Nsengiyumva Reply Brief, paras. 11-20.
[740] Nsengiyumva Appeal Brief, para. 114.
[741] Prosecution Response Brief (Nsengiyumva), paras. 38, 98, 99, 120, 121.
[742] *See supra*, paras. 309-316.
[743] *See supra*, para. 313.
[744] *See supra*, para. 281.

324. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber erred in finding Nsengiyumva guilty pursuant to Article 6(1) of the Statute for ordering the killing of Alphonse Kabiligi.

(b) Superior Responsibility

325. The Trial Chamber found that soldiers assigned to the Gisenyi Operational Sector and soldiers of other units of the Rwandan army when engaged in military operations in the area were under Nsengiyumva's command and authority.[745] Based on the evidence of close coordination between soldiers and civilian assailants during the attacks, and "bearing in mind [Nsengiyumva's] involvement in the arming and training of civilians both before and after 6 April 1994", it concluded that all attackers involved in the Gisenyi killings were Nsengiyumva's subordinates acting under his effective control.[746] It further found that the attacks in Gisenyi were organised military operations requiring authorisation, planning, and orders from the highest levels and that "[i]t is inconceivable that Nsengiyumva would not be aware that his subordinates would be deployed for these purposes".[747] The Trial Chamber concluded that Nsengiyumva "failed in his duty to prevent the crimes because he in fact participated in them".[748] Accordingly, it was satisfied that Nsengiyumva could be held responsible as a superior under Article 6(3) of the Statute for these crimes, which it took into account in sentencing.[749]

326. Nsengiyumva submits that the Trial Chamber erred in finding that he could also be held responsible as a superior for the killing of Alphonse Kabiligi in Gisenyi town on 7 April 1994.[750] He contends that the Trial Chamber erred in finding that the assailants involved in the killing were his subordinates acting under his effective control, and submits that there is no evidence that he had the requisite knowledge or that he failed to prevent or punish identifiable subordinates.[751]

327. The Prosecution responds that Nsengiyumva's arguments must fail as the Trial Chamber rightly concluded from the totality of the evidence that the soldiers and militiamen involved in the

[745] Trial Judgement, paras. 2072, 2075, 2076. *See also ibid*., paras. 1065, 1166, 1252.
[746] Trial Judgement, paras. 2077, 2078.
[747] Trial Judgement, para. 2082.
[748] Trial Judgement, para. 2083.
[749] Trial Judgement, paras. 2077-2083, 2161, 2189, 2197, 2216, 2248, 2272.
[750] Nsengiyumva Notice of Appeal, para. 24; Nsengiyumva Appeal Brief, paras. 35-37, 102, 120-122.
[751] Nsengiyumva Notice of Appeal, paras. 12, 24; Nsengiyumva Appeal Brief, paras. 35-37, 120-122, 225, fn. 83. *See also* Nsengiyumva Notice of Appeal, paras. 9, 11, 17-22; Nsengiyumva Appeal Brief, paras. 26-30, 43-54, 61, 63, 64, 80; AT. 30 March 2011 pp. 58, 67-70; AT. 31 March 2011 pp. 28-31.

incident were his subordinates under his effective control, that he had the requisite knowledge, and that he failed to discharge his duty to prevent or punish.[752]

328. In light of the Appeals Chamber's finding that the Trial Chamber erred in concluding that a soldier participated in the killing of Alphonse Kabiligi, the question remains as to whether Nsengiyumva could incur criminal responsibility for the conduct of the civilian assailants under Article 6(3) of the Statute. The Trial Chamber found that the civilian assailants[753] were Nsengiyumva's subordinates acting under his effective control at the time of the crime.[754] It based this finding on the fact that the civilian assailants were working in close coordination with the soldier involved in the killing, and "bearing in mind [Nsengiyumva's] involvement in the arming and training of civilians both before and after 6 April 1994".[755]

329. As a result of its finding that no reasonable trier of fact could have concluded that the uniformed man involved in the killing was a Rwandan army soldier, the Appeals Chamber considers that there was no proper basis for the Trial Chamber to conclude that Nsengiyumva was the superior of the civilian assailants and had effective control over them. While the Trial Chamber explicitly referred to Nsengiyumva's involvement in the arming and training of civilians both before and after 6 April 1994, it failed to explain how Nsengiyumva's activities in this regard gave him authority, let alone effective control, over the civilian assailants present at Alphonse Kabiligi's house on 7 April 1994.

330. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in concluding that the uniformed man and civilian assailants involved in the killing of Alphonse Kabiligi were Nsengiyumva's subordinates acting under his effective control and, consequently, in finding that Nsengiyumva could be held responsible as a superior under Article 6(3) of the Statute for their crimes.

[752] Prosecution Response Brief (Nsengiyumva), paras. 48-54, 64-70, 75-79, 91-95, 112, 126.
[753] The Appeals Chamber notes that the Trial Chamber used interchangeably the terms "civilian assailants" and "militiamen" to describe the civilian attackers involved in the killing of Alphonse Kabiligi. The Appeals Chamber refers to its discussion under Nsengiyumva's Ninth Ground of Appeal on the matter. *See infra*, paras. 365, 366.
[754] Trial Judgement, para. 2078. *See also ibid*., para. 1166.
[755] Trial Judgement, para. 2078. *See also ibid*., para. 1166.

3. Conclusion

331. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber erred in finding that Nsengiyumva ordered the killing of Alphonse Kabiligi and that he could be held responsible as a superior pursuant to Article 6(3) of the Statute for this crime. The Appeals Chamber grants Nsengiyumva's Seventh Ground of Appeal in part and reverses his convictions under Counts 5, 6, 8, 9, and 10 of the Nsengiyumva Indictment for the killing of Alphonse Kabiligi. The Appeals Chamber will discuss the impact, if any, of this finding on the sentence in the appropriate section of this Judgement.

H. Alleged Errors Relating to Nyundo Parish (Ground 8 in part)

332. Based on the testimonies of Prosecution Witness Isaïe Sagahutu and Defence Witnesses RAS-4 and XX, the Trial Chamber found that, in the afternoon of 7 April 1994, *Interahamwe* engaged in a targeted attack and killed two Tutsi priests at the Nyundo seminary where Tutsis had sought refuge.[756] A second attack in the evening resulted in the death of a number of Tutsi refugees in the chapel of the seminary.[757] The survivors were evacuated to the cathedral and the bishop's residence nearby.[758] The Trial Chamber further found that, after several unsuccessful attacks against Nyundo Parish on 8 April 1994, *Interahamwe* returned on the morning of 9 April 1994 with reinforcements and increased firepower, including guns, and killed a number of Tutsi refugees before gendarmes put an end to the attack.[759] The Trial Chamber concluded that the only reasonable conclusion was that the series of attacks at Nyundo Parish was an organised military operation ordered by the area's military commander, Nsengiyumva.[760] Accordingly, the Trial Chamber convicted Nsengiyumva for ordering the killings at Nyundo Parish under Article 6(1) of the Statute.[761] It also found that Nsengiyumva could be held responsible as a superior under Article 6(3) of the Statute for these crimes, which it took into account as an aggravating factor in sentencing.[762]

333. Nsengiyumva submits that the Trial Chamber erred in law and in fact in convicting him for the killings at Nyundo Parish. He submits that the Trial Chamber erred in: (i) convicting him of charges of which he was not properly put on notice; (ii) its assessment of the credibility of Witness Sagahutu; (iii) relying on Witness Sagahutu's evidence without corroboration while disregarding corroborated Defence evidence; and (iv) finding that he was criminally liable pursuant to Article 6(1) of the Statute for ordering these attacks and that he could also be held liable as a superior.[763]

334. The Appeals Chamber recalls that it has already addressed and dismissed Nsengiyumva's submissions relating to lack of notice in previous sections of this Judgement.[764] Moreover, the Appeals Chamber finds that, even assuming that the Trial Chamber did not err in its assessment of Witness Sagahutu's credibility and in relying on his evidence over corroborated Defence evidence,

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[756] Trial Judgement, paras. 1196, 2150.
[757] Trial Judgement, paras. 1196, 2150.
[758] Trial Judgement, paras. 1196, 2150.
[759] Trial Judgement, paras. 1198, 1201, 1202, 2150.
[760] Trial Judgement, paras. 1203, 2152.
[761] Trial Judgement, paras. 2161, 2189, 2197, 2216, 2248, 2258.
[762] Trial Judgement, paras. 2161, 2189, 2197, 2216, 2248, 2272.
[763] Nsengiyumva Notice of Appeal, para. 25; Nsengiyumva Appeal Brief, paras. 123-144.

the Trial Chamber erred in holding Nsengiyumva responsible for the killings at Nyundo Parish for the reasons explained below.

1. Alleged Errors Regarding Ordering

335. The Trial Chamber found that the only reasonable conclusion to be drawn from the evidence was that the series of attacks at Nyundo Parish was a military operation ordered by Nsengiyumva.[765] It reasoned as follows:

> […] the Chamber has considered this attack in the context of the other killings in Gisenyi at this time […] as well as parallel attacks in Kigali […]. It has also noted the manner in which the series of attacks at the parish evolved from the initial targeted killings at the seminary on 7 April, an unsuccessful assault on 8 April and finally the massacre on 9 April involving reinforcements and the increased firepower of guns. The military clearly played a role in training and distributing weapons to militia groups […]. The manner in which the attack unfolded reflects coordination. Moreover, the repeated nature of the attack as well as its target, a major religious institution, indicates that it was not merely sporadic violence. In the Chamber's view, the only reasonable conclusion is that it was an organised operation which must have been sanctioned and ordered by the area's military commander, Nsengiyumva.[766]

In its legal findings, the Trial Chamber further relied on Nsengiyumva's "close connection with militiamen in Gisenyi given his involvement in their arming and training", the temporal proximity of the killings to the death of the President, and the resumption of hostilities with the RPF.[767]

336. Nsengiyumva submits that no reasonable trier of fact could have reached the conclusion that he must have ordered the attacks at Nyundo Parish.[768] According to him, neither the *actus reus* nor the *mens rea* for ordering the Nyundo attacks was proven beyond reasonable doubt.[769] In particular, he argues that there is no evidence that: (i) he exercised any authority over the civilian attackers at Nyundo Parish or had any demonstrable link with them;[770] (ii) he gave any order to the assailants to kill;[771] (iii) he was involved in any of the killings in Gisenyi;[772] (iv) the Nyundo killings were linked

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[764] *See supra*, Sections III.C.5 *and* 8.
[765] Trial Judgement, paras. 1203, 2152.
[766] Trial Judgement, para. 1203.
[767] Trial Judgement, para. 2152:

> Nsengiyumva clearly had a close connection with militiamen in Gisenyi given his involvement in their arming and training both before and after April 1994 […]. The Chamber has also concluded that he acted as their superior […]. Given the repeated nature of these assaults, increasing in intensity from targeted killings on 7 April to a massacre on 9 April, their proximity to the death of the President, the resumption of hostilities with the RPF, as well as their similarity with parallel killings in Gisenyi and Kigali involving military authorities, the only reasonable conclusion is that this was a military operation also ordered by Nsengiyumva. This order from the highest military authority in the area substantially assisted in the completion of the crime.

[768] Nsengiyumva Appeal Brief, paras. 23-25, 129.
[769] Nsengiyumva Appeal Brief, paras. 23, 134.
[770] Nsengiyumva Appeal Brief, paras. 34, 128. *See also* AT. 30 March 2011 p. 68. Nsengiyumva submits in particular that there is no link between the militiamen allegedly trained in 1993 and 1994 as part of the civil defence forces and the civilian assailants involved in the killings. *See* Nsengiyumva Appeal Brief, paras. 59, 61, 64.
[771] Nsengiyumva Appeal Brief, para. 134. *See also* AT. 31 March 2011 p. 26.
[772] Nsengiyumva Appeal Brief, para. 129.

to the attacks in Kigali;[773] and (v) the increased fire power originated from weapons he had distributed.[774] He also contends that it cannot be excluded that the operation may have been organised by the civilian attackers themselves or by other authorities over whom he had no authority or control.[775] Nsengiyumva adds that the conclusion that the attack on a major religious institution could only have been sanctioned by the military is speculative and erroneous.[776]

337. The Prosecution responds that the Trial Chamber committed no error regarding Nsengiyumva's responsibility for ordering the crimes at Nyundo.[777] It submits that the totality of the evidence pointed to the only reasonable conclusion that the killings for which he was convicted were not sporadic but systematic, well-organised and coordinated military operations following a striking pattern, and must have been ordered by the highest regional authority, Nsengiyumva.[778] It argues that Nsengiyumva fails to demonstrate that his other alternatives are reasonable.[779]

338. The Appeals Chamber recalls that a conviction for ordering requires proof that the accused instructed a person under his authority to commit an offence.[780] The Trial Chamber found that there was no direct evidence that Nsengiyumva gave an order to attack Nyundo Parish but concluded that he did so on the basis of circumstantial evidence.[781]

339. In support of its finding, the Trial Chamber relied on Nsengiyumva's role in the arming and training of militia groups in Gisenyi prefecture both before and after April 1994.[782] However, the Trial Chamber did not point to any evidence suggesting that the militiamen involved in the attacks at Nyundo Parish had been armed or trained by Nsengiyumva or by soldiers under his authority. The Trial Chamber also failed to explain how Nsengiyumva's role in the distribution of weapons and training of militiamen in 1993 and 1994[783] endowed him with authority and effective control over civilian attackers.

340. Moreover, the Appeals Chamber is not persuaded that the Trial Chamber could conclusively rely on the existence of parallel killings in Gisenyi prefecture and Kigali involving the military.[784] As discussed elsewhere in this Judgement, the Appeals Chamber finds that the Trial Chamber erred

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[773] Nsengiyumva Appeal Brief, paras. 47, 49, 130.
[774] Nsengiyumva Appeal Brief, para. 132.
[775] Nsengiyumva Appeal Brief, paras. 33, 131.
[776] Nsengiyumva Appeal Brief, para. 133.
[777] Prosecution Response Brief (Nsengiyumva), paras. 35, 36, 137.
[778] Prosecution Response Brief (Nsengiyumva), paras. 38, 39, 43, 45, 47, 69, 74, 98, 99.
[779] Prosecution Response Brief (Nsengiyumva), paras. 41, 46, 138.
[780] *See supra*, para. 277.
[781] Trial Judgement, paras. 1203, 2152.
[782] Trial Judgement, paras. 1203, 2152.
[783] *See* Trial Judgement, paras. 465, 506, 1805, 1817.
[784] *See* Trial Judgement, paras. 1203, 2079, 2152.

in finding that the attacks in Gisenyi town on 7 April 1994 and at Mudende University on 8 April 1994, as well as the killing of Alphonse Kabiligi, were military operations ordered by Nsengiyumva.[785] It further considers that the fact that killings were being perpetrated in Kigali on orders of military authorities contemporaneously says in itself nothing about Nsengiyumva's personal involvement in the killings committed in Gisenyi prefecture.[786]

341. The Appeals Chamber considers that it was reasonable for the Trial Chamber to conclude that the manner in which the series of attacks evolved and the fact that they targeted a major religious institution reflected coordination and indicated that it was not merely sporadic violence.[787] However, the Appeals Chamber finds that this does not necessarily indicate that the military must have played a role in the attack. As stated above, there is no conclusive evidence that the assailants had been armed by the military. There is also no reliable evidence that the military, and in particular Nsengiyumva, as Gisenyi Operational Sector Commander, had anything to do with the fact that the militiamen returned with reinforcements on 9 April 1994 or with increased firepower. While the vigilance of the Gisenyi military authorities must indeed have been at its height in the aftermath of the death of President Habyarimana and the resumption of hostilities with the RPF,[788] it does not automatically imply that the military authorities were involved in all attacks exhibiting coordination and involving firearms or a significant number of assailants in Gisenyi prefecture in April 1994.

342. In light of the foregoing, the Appeals Chamber concludes that the evidence presented to the Trial Chamber could not lead a reasonable trier of fact to find that the only reasonable conclusion was that the series of attacks at Nyundo Parish was a military operation ordered by Nsengiyumva. Not only does the evidence not demonstrate that the military was involved in the attacks, but there is also no indication that Nsengiyumva gave any order that Tutsis be attacked at Nyundo Parish.

343. As a result, the Appeals Chamber finds that the Trial Chamber erred in finding Nsengiyumva guilty pursuant to Article 6(1) of the Statute for ordering the crimes committed by militiamen at Nyundo Parish between 7 and 9 April 1994.

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785 *See supra*, Sections III.F.2(a) *and* G.2(a); *infra*, Section III.I.3.
786 *See supra*, para. 281.
787 *See* Trial Judgement, paras. 1203, 2079, 2152.
788 *See* Trial Judgement, para. 2082.

2. Alleged Errors Regarding Superior Responsibility

344. The Trial Chamber found that Nsengiyumva could be held responsible as a superior under Article 6(3) of the Statute for the crimes committed by militiamen at Nyundo Parish.[789] Based on its finding that the series of attacks at Nyundo Parish mirrored other massacres of civilians in Gisenyi and Kigali which involved soldiers, as well as the degree of coordination and control reflected in the operation and the role played by the military in training and distributing weapons to militia groups, the Trial Chamber concluded that the operation "must have been sanctioned by the area's military commander, Nsengiyumva" and that the "assailants were therefore acting under military control and were equally subordinates of Nsengiyumva".[790] The Trial Chamber was also satisfied that Nsengiyumva had the requisite knowledge and that he had failed in his duty to prevent the crimes because he in fact participated in them.[791]

345. Nsengiyumva submits that the Trial Chamber erred in finding that he could be held liable under Article 6(3) of the Statute for the crimes committed at Nyundo Parish.[792] He contends that there is no demonstration of how the alleged training and arming of unidentified individuals has any link with the attackers at Nyundo Parish.[793]

346. The Prosecution responds that the Trial Chamber rightfully concluded that the militiamen involved in the incident were Nsengiyumva's subordinates acting under his effective control and with his knowledge, and that Nsengiyumva failed to discharge his duty to prevent or punish.[794]

347. The Appeals Chamber has concluded above that the Trial Chamber erred in finding that the series of attacks at Nyundo Parish was a military operation ordered by Nsengiyumva.[795] There was no conclusive evidence that the military was involved in the attacks at Nyundo Parish.[796] As a result, there was no basis for the Trial Chamber to conclude that the militiamen were acting under military control and were subordinates of Nsengiyumva. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in finding that Nsengiyumva could be held responsible as a superior under Article 6(3) of the Statute for the crimes committed by the civilian assailants at Nyundo Parish.

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[789] Trial Judgement, paras. 2161, 2189, 2197, 2216, 2248, 2272.
[790] Trial Judgement, para. 2079.
[791] Trial Judgement, paras. 2082, 2083.
[792] Nsengiyumva Notice of Appeal, para. 25; Nsengiyumva Appeal Brief, paras. 136, 137. *See also* Nsengiyumva Notice of Appeal, paras. 9, 11, 17-22; Nsengiyumva Appeal Brief, paras. 36, 37, 47-54, 58-61, 63, 64.
[793] Nsengiyumva Appeal Brief, paras. 136, 137. *See also ibid*., paras. 35, 36, 59, 64, 126; AT. 30 March 2011 pp. 68, 69.
[794] Prosecution Response Brief (Nsengiyumva), paras. 51-54, 64, 71-79, 130, 137.
[795] *See supra*, para. 342.

3. Conclusion

348. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in finding Nsengiyumva guilty pursuant to Article 6(1) of the Statute for ordering the crimes committed by militiamen at Nyundo Parish between 7 and 9 April 1994 and in finding that he could be held responsible under Article 6(3) of the Statute for these crimes. Accordingly, the Appeals Chamber grants Nsengiyumva's Eighth Ground of Appeal in part and reverses his convictions under Counts 2, 5, 6, 8, and 10 of the Nsengiyumva Indictment for the crimes committed at Nyundo Parish. The Appeals Chamber will discuss the impact, if any, of this finding on Nsengiyumva's sentence in the appropriate section below.

[796] *See supra*, paras. 341, 342.

I. Alleged Errors Relating to Mudende University (Ground 9 in part)

349. The Trial Chamber found that, on 7 April 1994, several hundred Tutsi refugees arrived at Mudende University in Gisenyi prefecture.[797] It held that, on the morning of 8 April 1994, militiamen supported by at least two soldiers attacked and killed Tutsi refugees at the university.[798] During the attack, assailants separated Hutu and Tutsi students, and some of the Tutsis were killed.[799] The Trial Chamber further found that, in the evening, gendarmes who were protecting some of the survivors turned back masked assailants who were carrying lists and searching the survivors' identity documents.[800] It concluded that the only reasonable conclusion was that the attack was a planned military operation ordered by Nsengiyumva.[801] Accordingly, the Trial Chamber found Nsengiyumva guilty pursuant to Article 6(1) of the Statute for ordering these killings.[802] The Trial Chamber was also satisfied that Nsengiyumva could be held responsible as a superior under Article 6(3) of the Statute for the crimes committed at Mudende University, which it took into account as an aggravating factor in sentencing.[803]

350. Nsengiyumva submits that the Trial Chamber erred in law and in fact in convicting him for the killings at Mudende University. He submits that the Trial Chamber erred in: (i) finding him guilty of charges of which he had no notice; (ii) its assessment of the evidence concerning the identification of soldiers; (iii) finding that the killings were part of a planned military operation despite the absence of evidence to that effect; and (iv) finding that he was criminally liable for the Mudende attack.[804]

351. The Appeals Chamber recalls that it has already addressed and dismissed Nsengiyumva's submissions relating to lack of notice in previous sections of this Judgement.[805] Accordingly, the Appeals Chamber will turn to examine Nsengiyumva's submissions pertaining to the Trial Chamber's assessment of the evidence relating to the involvement of soldiers in the attack at Mudende University on 8 April 1994, as well as his contentions regarding the military nature of the attack and his criminal liability.

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797 Trial Judgement, para. 1246.
798 Trial Judgement, paras. 1248, 1251, 2146.
799 Trial Judgement, paras. 1249, 2146.
800 Trial Judgement, para. 1249.
801 Trial Judgement, paras. 1252, 2148.
802 Trial Judgement, paras. 2148, 2161, 2189, 2197, 2216, 2248, 2258.
803 Trial Judgement, paras. 2161, 2189, 2197, 2216, 2248, 2272.
804 Nsengiyumva Notice of Appeal, para. 26; Nsengiyumva Appeal Brief, paras. 145-175.
805 *See supra*, Sections III.C.6 *and* 8.

1. Alleged Errors Regarding the Involvement of Soldiers

352. On the basis of Witness HV's testimony, the Trial Chamber found that "at least" two Rwandan army soldiers played a supporting role in the attack at Mudende University on the morning of 8 April 1994.[806] It acknowledged that Witness HV was alone in placing soldiers at the scene.[807] Nonetheless, it accepted her identification of the soldiers based on their uniforms and found her testimony on the issue credible and reliable as "she was in a position to follow the attack for a brief period from her dormitory, heard gunfire, and was later personally questioned by a soldier during the separation of Hutu and Tutsi students".[808] The Trial Chamber was, however, not convinced by Witness HV's testimony that the masked assailants, who carried lists and searched the survivors' identity documents and who were turned back by gendarmes on the evening of 8 April 1994, were soldiers, as opposed to militiamen, given the assailants' use of masks.[809] It also declined to rely on her evidence relating to the presence of soldiers at Mudende University on the evening of 7 April 1994.[810]

353. Nsengiyumva submits that the Trial Chamber erred in relying on Witness HV's uncorroborated evidence that soldiers were involved in the Mudende University killings as it made inconsistent and contradictory findings regarding Witness HV's identification of the soldiers involved.[811] First, he contends that in accepting Witness HV's identification of soldiers based on her ability to distinguish between the uniforms of soldiers and gendarmes, the Trial Chamber contradicted its own findings that military units and the gendarmerie had similar uniforms.[812] Second, Nsengiyumva submits that the Trial Chamber erred in its selective acceptance of parts of Witness HV's testimony regarding the identification of soldiers.[813] He further claims that the Trial Chamber erred by failing to place sufficient weight on the impact that trauma could have had on her observations, and failing to take into account the inconsistencies and contradictions in her evidence.[814]

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[806] Trial Judgement, paras. 1248, 1249, 1251.
[807] Trial Judgement, para. 1248.
[808] Trial Judgement, para. 1248. *See also ibid*., para. 1246, fn. 1390.
[809] Trial Judgement, para. 1249. *See also ibid*., para. 1211.
[810] Trial Judgement, para. 1246.
[811] Nsengiyumva Notice of Appeal, para. 26; Nsengiyumva Appeal Brief, paras. 158-167.
[812] Nsengiyumva Appeal Brief, paras. 158, 159. *See also* Nsengiyumva Reply Brief, para. 62.
[813] Nsengiyumva Notice of Appeal, para. 26; Nsengiyumva Appeal Brief, para. 163. Nsengiyumva points out that the Trial Chamber did not accept Witness HV's account of soldiers arriving at the campus on the evening of 7 April 1994 without corroboration and that it was not convinced that the masked assailants in camouflage uniforms on the evening of 8 April 1994 were soldiers as opposed to militiamen. *See* Nsengiyumva Appeal Brief, paras. 163, 164.
[814] Nsengiyumva Notice of Appeal, para. 26; Nsengiyumva Appeal Brief, paras. 165-167. Nsengiyumva notes that Witness HV clearly referred to gendarmes in prior statements and gave contradictory testimony about seeing the soldiers with firearms and shooting at the door. *See* Nsengiyumva Appeal Brief, paras. 165, 167. Nsengiyumva also

354. In addition, Nsengiyumva submits that the Trial Chamber failed to give reasons for disregarding first-hand Defence evidence that no soldiers participated in the attack on the morning of 8 April 1994, and that there were no weapons used or gunshots heard.[815] He avers that, faced with the uncorroborated testimony of Witness HV on the participation of soldiers and the use of firearms, the Trial Chamber was under an obligation to weigh that testimony against the corroborated testimonies of the Defence witnesses and to provide sufficient reasons for its preference.[816]

355. In response, the Prosecution submits that there was no inconsistency in the Trial Chamber's findings.[817] It contends that Witness HV's testimony was reliable, credible, and corroborated to varying degrees by Defence witnesses.[818] The Prosecution adds that the Trial Chamber considered evidence from both parties holistically and even relied upon portions of the testimonies of Defence witnesses, as demonstrated in relevant portions of the Trial Judgement.[819] It contends that the Trial Chamber did in fact provide reasons for preferring the testimony of Witness HV to that of Defence witnesses.[820]

356. The Appeals Chamber observes that Witness HV identified the individuals she saw during the attack on the morning of 8 April 1994 as soldiers based on their camouflage uniforms.[821] When asked how she could distinguish soldiers from gendarmes, the witness explained that "[s]oldiers had their own uniform, the camouflage, while the gendarmes had khaki colour uniform[s]. Their berets were also of different colours. The gendarmes wore red berets".[822] The Trial Chamber concluded from this and her prior statements that the witness "had no problems" distinguishing between soldiers and gendarmes.[823]

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points out that Witness HV lost consciousness during the events and testified that she was still traumatised by them. *See ibid.*, para. 167.

[815] Nsengiyumva Notice of Appeal, para. 26; Nsengiyumva Appeal Brief, paras. 168-171. *See also* Nsengiyumva Reply Brief, para. 64.

[816] Nsengiyumva Appeal Brief, para. 172.

[817] Prosecution Response Brief (Nsengiyumva), paras. 165, 173-175.

[818] Prosecution Response Brief (Nsengiyumva), paras. 171, 172.

[819] Prosecution Response Brief (Nsengiyumva), para. 177.

[820] Prosecution Response Brief (Nsengiyumva), para. 178. *See also* AT. 31 March 2011 pp. 20, 21.

[821] Witness HV, T. 24 September 2004 p. 11 ("I saw their uniforms and realised that they were soldiers, but I did not know them."). Witness HV's testimony reflects that she generally identified soldiers on the basis of their uniforms. *See* Witness HV, T. 24 September 2004 pp. 3, 12 ("Q. How were you able to identify these particular soldiers? A. I was able to identify them thanks to their uniform. Q. Which – what type of uniform was it? A. They were wearing camouflage uniforms.").

[822] Witness HV, T. 23 September 2004 p. 35, *cited in* Trial Judgement, fn. 1390. The witness reiterated under cross-examination that she attached camouflage uniforms to soldiers and khaki-coloured uniforms to gendarmes. *See* Witness HV, T. 24 September 2004 pp. 3, 6, 7, 24.

[823] Trial Judgement, para. 1246.

357. Elsewhere in the Trial Judgement, the Trial Chamber established the colour of the beret as the main distinguishing feature between the uniforms of the different military units as well as the gendarmes.[824] It noted, for instance, that gendarmes wore red berets,[825] which is consistent with Witness HV's observation in this regard.[826] Witness HV was, however, unable to remember whether the two uniformed men she identified as soldiers involved in the attack in the morning of 8 April 1994 wore berets.[827] Witness HV's identification of these men as soldiers therefore rested on the camouflage uniforms she saw them wearing. The Appeals Chamber considers that Witness HV's ability to identify them as soldiers on this basis is questionable given the Trial Chamber's own indication that "[a]lthough not part of the army, the gendarmerie had similar uniforms", which consisted of black boots and khaki or camouflage trousers and shirt.[828] The Trial Chamber also recalled hearing evidence that, at times, *Interahamwe* wore military fatigues.[829] The different versions of Witness HV's written statement of 28 November 1995 which were admitted into the record raise further questions as to her ability to clearly identify soldiers based on their uniform.[830]

358. The Trial Chamber also relied on the fact that Witness HV heard gunfire and was later personally questioned by a soldier during the separation of Hutu and Tutsi students.[831] The Appeals Chamber does not, however, consider that the use of firearms in and of itself necessarily implies the

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[824] Trial Judgement, para. 166. The Trial Chamber specified that the Presidential Guard, as well as most of the other army units, wore black berets, that the aviation squadrons wore blue ones, and that four other different units wore camouflage-coloured berets. *See idem.*
[825] Trial Judgement, para. 166.
[826] Witness HV, T. 24 September 2004 p. 7.
[827] Witness HV, T. 24 September 2004 p. 11. Witness HV also stated that she was not able to tell whether the two soldiers who went to the dormitory were the same soldiers whom she had seen earlier that day accompanying the villagers and opening the doors of the classrooms. She was not specifically asked whether these two "soldiers" in particular wore berets but said that she was able to identify them as soldiers on the basis of their camouflage uniforms. *See* Witness HV, T. 23 September 2004 p. 27 *and* T. 24 September 2004 pp. 12, 13.
[828] Trial Judgement, para. 166.
[829] Trial Judgement, para. 167. *See also supra*, fn. 722.
[830] The Appeals Chamber notes some confusion in Witness HV's identification of the uniformed men who came to the campus of the university on the evening of 7 April 1994. Witness HV distinctly referred to gendarmes and "*militaires*", but also mentioned the arrival of soldiers wearing red caps and multicoloured, but predominantly green clothes. *See* Exhibit DNS60A (Witness HV's written statement, dated 28 November 1995, which seems to be the original statement, handwritten in French and signed on 28 November 1995), p. 2. The English and typed version of the statement disclosed to the Defence contained the same information. *See* Exhibit DNS60C (Witness HV's written statement, dated 28 November 1995, English), p. 1. However, in an addendum to Witness HV's statement, dated 10 September 2003, the witness specified that "[i]nstead of red caps I recall only that the gendarmes were wearing caps". *See* Exhibit DNS60D (Addendum to Witness HV's statement) (emphasis added). Further, the Appeals Chamber notes that on 1 September 2004, the Prosecution disclosed a "statement reconfirmation" of Witness HV, typed and in English, where slight amendments to Witness HV's initial statement were made and portions struck through, including the word "red" in the sentence relating to the soldiers wearing caps. *See* Exhibit DNS60B (Witness HV's statement reconfirmation disclosed on 1 September 2004) (emphasis added).
[831] Trial Judgement, para. 1248.

presence of soldiers.[832] Furthermore, the fact that Witness HV later personally witnessed two uniformed individuals conduct checks of identity documents and separate Hutu and Tutsi students[833] does not provide any corroboration of her identification of these individuals as soldiers since her observation was premised on her belief that individuals wearing camouflage attire were soldiers. In this regard, the Appeals Chamber notes that the Trial Chamber's finding that the witness "was later personally questioned by a soldier during the separation of Hutu and Tutsi students" is incorrect as the witness did not report any direct verbal interaction between herself and any of the uniformed individuals.[834]

359. Furthermore, the Appeals Chamber observes that Witness HV identified the uniformed persons present during the attack in the morning and the masked assailants who came in the evening of 8 April 1994 as soldiers pursuant to the same criterion, their camouflage uniforms.[835] However, the Trial Chamber, while relying on Witness HV's identification of the uniformed individuals as soldiers during the attack in the morning, doubted the reliability of her identification of the uniformed assailants as soldiers in the evening.[836] It also considered that Witness LT-1's testimony that the assailants who returned in the evening and began checking the students' identification papers were civilians raised some additional doubt.[837] The Appeals Chamber considers that the fact that the Trial Chamber found that Witness HV may have been mistaken regarding the identity of the assailants who came in the evening of 8 April 1994 should have led it to also question the reliability of her identification of the soldiers involved in the attack occurring in the morning.[838]

360. The Appeals Chamber also considers that the Trial Chamber should have questioned the reliability of Witness HV's identification of the uniformed persons all the more in light of the testimonies of Defence witnesses who the Trial Chamber found credible and who unanimously

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[832] *See* Trial Judgement, paras. 489 ("Rwandan military and civilian authorities were arming and training civilians before April 1994"), 1203 ("[t]he military clearly played a role in training and distributing weapons to the militia groups").
[833] *See* Witness HV, T. 23 September 2004 pp. 27, 28.
[834] *See* Witness HV, T. 23 September 2004 pp. 27, 28; T. 24 September 2004 pp. 12, 13.
[835] *See* Witness HV, T. 24 September 2004 p. 14.
[836] Trial Judgement, para. 1249 ("The Chamber is not entirely convinced that these assailants were soldiers, as opposed to militiamen, given the assailants' use of masks.").
[837] Trial Judgement, para. 1249.
[838] However, the fact that the Trial Chamber declined to rely on Witness HV's account of soldiers coming to the campus on the evening of 7 April 1994 was not inconsistent with its decision to rely on her testimony that soldiers participated in the attack on the morning of 8 April 1994. The Appeals Chamber indeed notes that the Trial Chamber's decision not to accept Witness HV's account of the visit of the alleged soldiers on 7 April 1994 was unrelated to the reliability of the witness's identification of the "soldiers", but based on the fact that the witness had previously failed to mention this aspect of the events to Tribunal investigators and on her explanation for this omission. *See* Trial Judgement, para. 1246, fn. 1389.

denied that soldiers or individuals wearing military uniforms participated in the attack.[839] The Trial Chamber acknowledged that Defence Witnesses LK-2, LT-1, WY, MAR-1, and Willy Biot "corroborate[d] to varying degrees an attack that morning primarily by militiamen".[840] Witness LK-2 testified that he received a report from the gendarmes which only referred to civilians as the attackers.[841] Meanwhile Witnesses LT-1, WY, and MAR-1, who testified to having directly witnessed the events, clearly denied that soldiers or individuals wearing military uniforms participated in the attack.[842] The Trial Chamber explained that it was nonetheless convinced by Witness HV's testimony that soldiers were involved "since she was in a position to follow the attack for a brief period from her dormitory […] and was later personally questioned by a soldier".[843] However, as discussed above, the Trial Chamber was mistaken about Witness HV's personal interaction with a soldier.[844] In addition, as regards Witness HV's observation post, the Appeals Chamber notes that Witness LT-1 also testified to watching the attack from the girls' dormitory.[845]

361. Based on the foregoing, the Appeals Chamber finds that no reasonable trier of fact could have conclusively relied on Witness HV's identification evidence to find that the uniformed men involved in the killings described by the witness were undoubtedly soldiers from the Rwandan army. The Appeals Chamber is not persuaded by Nsengiyumva's argument that the uniformed men could have been gendarmes as all eye-witnesses unanimously testified that gendarmes came on 8 April 1994 to Mudende University to stop the fighting and protect the survivors.[846] However, the Appeals Chamber considers that a reasonable trier of fact could not have excluded the possibility that the uniformed men identified by Witness HV were militiamen wearing camouflage uniforms.

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[839] *See* Witness MAR-1, T. 29 May 2006 pp. 61, 62, 64, 70, 71, 73; Witness LT-1, T. 26 April 2005 pp. 58, 59; Witness WY, T. 31 May 2006 p. 5; Trial Judgement, para. 1246. *See also* Witness LK-2, T. 19 April 2005 p. 24.

[840] Trial Judgement, para. 1248. The Appeals Chamber notes the Trial Chamber's statement that "[t]he Defence evidence is second-hand and far from definitive". *See* Trial Judgement, para. 1245. Considering this statement in its proper context, the Appeals Chamber understands that it did not apply to the testimonies of Defence Witnesses LT-1, WY, and MAR-1 regarding the attack on the morning of 8 April 1994.

[841] Witness LK-2, T. 19 April 2005 p. 24.

[842] *See* Witness MAR-1, T. 29 May 2006 pp. 61, 62, 64, 70, 71, 73; Witness LT-1, T. 26 April 2005 pp. 58, 59; Witness WY, T. 31 May 2006 p. 5.

[843] Trial Judgement, para. 1248.

[844] *See supra,* para. 358.

[845] Witness LT-1, T. 26 April 2005 pp. 54, 55. Witnesses WY and MAR-1 stated that they watched the attack from the courtyard in front of the cafeteria, which was located in front of the chapel. *See* Witness MAR-1, T. 29 May 2006 p. 61; Witness WY, T. 31 May 2006 p. 4. *See also* Exhibit DNS 177 (sketch of Mudende University).

[846] *See* Witness MAR-1, T. 29 May 2006 pp. 61, 62, 69; Witness LT-1, T. 26 April 2005 p. 59; Witness WY, T. 31 May 2006 p. 5. *See also* Witness LK-2, T. 19 April 2005 p. 23; Witness HV, T. 23 September 2004 p. 32 *and* T. 24 September 2004 p. 15.

362. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber erred in concluding that Rwandan army soldiers supported militiamen in an attack at Mudende University on the morning of 8 April 1994.

2. Alleged Error Regarding the Nature of the Attack

363. The Trial Chamber considered that Witness HV's evidence showed clear coordination between soldiers and the civilian attackers, as demonstrated in particular by soldiers firing at the doors of classrooms so that militiamen could gain access and kill refugees inside.[847] Given the speed with which this attack occurred, the targeting of a major educational institution in the Gisenyi Operational Sector, its "tactical tempo", and the fact that it followed a pattern consistent with other attacks taking place in the prefecture, the Trial Chamber concluded that the only reasonable conclusion was that the attack was a planned military operation ordered by Nsengiyumva.[848]

364. Nsengiyumva submits that there is no evidentiary basis for the Trial Chamber's finding that the killings at Mudende University were part of a planned military operation.[849] In this respect, he asserts that the Trial Chamber's finding that the attack was perpetrated by "militiamen" is not supported by the evidence since Witness HV identified the attackers as "civilians" and the "pre-trial brief" referred to "villagers".[850] Nsengiyumva also argues that it was erroneous to place emphasis on the alleged "tactical tempo", speed, and pattern of attacks elsewhere, as well as the fact that an educational institution was targeted, to arrive at the conclusion that it was a planned military operation.[851]

365. The Appeals Chamber notes that the Trial Chamber described the civilian attackers at Mudende University on the morning of 8 April 1994 not only as "militiamen",[852] but also as "civilian attackers" or "civilian assailants".[853] While the Appeals Chamber agrees that the term "militiamen" generally describes members of a group with military discipline and organisation,[854] it observes that at the time in Rwanda, the term served to refer to members of youth wings of certain

[847] Trial Judgement, paras. 1249, 1252.
[848] Trial Judgement, para. 1252. *See also ibid*., para. 2077.
[849] Nsengiyumva Notice of Appeal, para. 26; Nsengiyumva Appeal Brief, para. 175. *See also* AT. 31 March 2011 pp. 28, 29.
[850] Nsengiyumva Appeal Brief, para. 173. *See also ibid*., paras. 49, 174. Nsengiyumva submits that the term "militiamen" implies persons trained militarily and that the Trial Chamber "does not explain the conversion of ordinary villagers or civilians into 'militiamen'". *See ibid*., para. 173.
[851] Nsengiyumva Appeal Brief, paras. 174, 175. *See also ibid*., para. 49.
[852] *See* Trial Judgement, paras. 1248, 1249, 1251.
[853] *See* Trial Judgement, para. 1252.
[854] The Oxford English Dictionary defines the term "militia" *inter alia* as "a military force raised from the civilian population of a country or region, esp. to supplement a regular army in an emergency".

political parties such as the *Impuzamugambi* of the CDR or the *Interahamwe* of the MRND.[855] More importantly, the Trial Chamber established that "[e]ventually, civilians involved in the killings in Rwanda from 7 April were commonly referred to as *Interahamwe* even if they were not specifically members of the MRND youth wing".[856] The Trial Judgement reflects that the Trial Chamber sometimes referred to *Interahamwe*, militiamen, civilian attackers, civilian militiamen, or civilian assailants interchangeably.[857]

366. Regarding the present incident, the Appeals Chamber considers that the Trial Chamber used different terms to describe the civilian attackers at Mudende to denote an informal, yet definable, group of persons from amongst the civilian population who followed a broad common objective of slaying the Tutsi refugees and students at Mudende. It observes that while a number of witnesses described the attackers as "civilians",[858] "villagers"[859] or "members of the population",[860] these witnesses also confirmed that the civilian attackers came to Mudende armed with machetes, sharpened bamboos, clubs, and stones.[861] Furthermore, the Appeals Chamber observes that the civilian assailants participated in separating Hutus from Tutsis, thus partaking in the ethnic segregation that was being carried out at Mudende. The Appeals Chamber therefore finds no error in the Trial Chamber's use of the term "militiamen" in these circumstances.

367. The Appeals Chamber has found above, however, that the Trial Chamber erred in concluding that the presence of soldiers during the attack at Mudende University on the morning of 8 April 1994 was established beyond reasonable doubt. As a result, the Trial Chamber's factual finding that there was clear coordination between soldiers and civilian attackers during this attack must be vacated. It also follows that the attack at Mudende could not be said to have been part of a pattern of attacks involving soldiers taking place in the prefecture. In this context, the Appeals Chamber is not persuaded that the circumstances of the attack necessarily imply that it was planned by the military.

368. The Appeals Chamber sees no error in the Trial Chamber's reliance on the fact that the attack at Mudende mirrored other attacks perpetrated by civilian assailants against Tutsis after

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[855] *See* Trial Judgement, Section III.2.6.1.
[856] Trial Judgement, para. 459.
[857] *See supra*, para. 198, fn. 454.
[858] Witness LK-2, T. 19 April 2005 p. 24; Witness LT-1, T. 26 April 2005 p. 54.
[859] Witness MAR-1, T. 29 May 2006 pp. 60, 61. Witness MAR-1 also used the expression "farmers" as well as "peasant farmers". *See ibid*., pp. 69, 70. Nsengiyumva does not substantiate his contention that attackers were referred to as "villagers" in the "pre-trial brief".
[860] *See* Witness HV, T. 23 September 2004 pp. 26, 28, 29; Witness WY, T. 31 May 2006 p. 4.
[861] *See* Witness HV, T. 23 September 2004 pp. 25, 26 *and* T. 24 September 2004 p. 10; Witness WY, T. 31 May 2006 pp. 4, 5; Witness MAR-1, T. 29 May 2006 pp. 61, 70; Witness LT-1, T. 26 April 2005 p. 54.

7 April 1994 in the prefecture, the speed with which it occurred after the death of President Habyarimana, and the fact that it targeted a major educational institution.[862] This evidence indeed suggests that the attack was probably part of a broader scheme. Nevertheless, in the absence of conclusive evidence of any military involvement in the assault, the Appeals Chamber finds that no reasonable trier of fact could have concluded that the only reasonable conclusion to be drawn was that the attack was a planned military operation.

369. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in finding that the attack at Mudende University on 8 April 1994 was a planned military operation.

3. Alleged Errors Regarding Nsengiyumva's Criminal Responsibility

370. Nsengiyumva submits that the Trial Chamber erred in finding that he ordered the killings at Mudende University and that he could be held responsible as a superior for these crimes.[863] He argues, *inter alia*, that it was unreasonable to find that the soldiers allegedly involved in the killings were under his command,[864] and that the Trial Chamber failed to explain how he had authority over the civilian assailants.[865]

371. The Prosecution responds that the Trial Chamber did not err in concluding that the only reasonable inference to be drawn from the totality of the evidence was that Nsengiyumva must have ordered the attack at Mudende University and that he was the superior of the soldiers and civilians involved in the killings.[866]

372. The Trial Chamber based its conclusion that the attack at Mudende University must have been ordered by the highest military authority in the area, Nsengiyumva, in significant part on its finding of involvement of soldiers in the attack.[867] However, the Appeals Chamber has found above that the Trial Chamber erred in concluding that Rwandan army soldiers were involved in the attack.[868] The Trial Chamber also relied on the fact that the attack was a planned military operation,[869] a factual finding which has likewise been overturned by the Appeals Chamber.[870]

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[862] *See* Trial Judgement, paras. 1252, 2148.
[863] Nsengiyumva Notice of Appeal, para. 26. *See also* Nsengiyumva Notice of Appeal, paras. 8, 9, 11, 17, 19, 22; Nsengiyumva Appeal Brief, paras. 23-37, 42-61.
[864] Nsengiyumva Appeal Brief, paras. 160, 162. *See also* Nsengiyumva Reply Brief, para. 62; AT. 30 March 2011 pp. 57, 66, 67; AT. 31 March 2011 pp. 29, 30.
[865] Nsengiyumva Appeal Brief, para. 173.
[866] Prosecution Response Brief (Nsengiyumva), paras. 35, 38, 48-52, 167-169.
[867] Trial Judgement, paras. 1252, 2148.
[868] *See supra*, paras. 361, 362.
[869] Trial Judgement, para. 1252.
[870] *See supra*, para. 369.

Against this background, the Trial Chamber's additional reliance on a pattern of similar attacks involving soldiers and militiamen in the prefecture is unsound.[871]

373. In support of its finding that Nsengiyumva ordered the attack, the Trial Chamber further referred to Nsengiyumva's meeting with military officers during the night of 6 to 7 April 1994, as well as to other parallel crimes being committed by elite units and other soldiers in Kigali on orders of military authorities.[872] As discussed in prior sections of this Judgement, the Appeals Chamber considers that neither this meeting nor the Kigali killings constitute circumstantial evidence that Nsengiyumva instructed individuals under his authority to attack Tutsis in Gisenyi.[873]

374. The Appeals Chamber considers that it was not unreasonable for the Trial Chamber to take into account the speed with which the attack occurred – that is, two days after President Habyarimana's death – in reaching its conclusions on Nsengiyumva's responsibility.[874] However, this does not demonstrate that the attack at Mudende University must have been ordered by Nsengiyumva.

375. The Appeals Chamber further finds that there is no evidence that the civilians responsible for the killings were under Nsengiyumva's authority or that they were his subordinates, as found by the Trial Chamber.[875] The Trial Chamber's finding was based on evidence of coordination between the civilian attackers and the soldiers during the attack.[876] The Appeals Chamber recalls in this regard that it has found that there was insufficient evidence for the Trial Chamber to conclude that soldiers were involved in the attack and that the attack was a military operation.[877] The Appeals Chamber notes that the Trial Chamber also referred to Nsengiyumva's involvement in the arming and training of civilians both before and after 6 April 1994 in reaching its conclusion on the relationship between Nsengiyumva and the civilians implicated in the crimes.[878] However, the Trial Chamber failed to explain how Nsengiyumva's role in the distribution of weapons and training of militiamen in 1993 and 1994 endowed him with authority, let alone effective control, over the civilians involved in the attack at Mudende University on 8 April 1994.

376. Accordingly, the Appeals Chamber finds that the evidence presented to the Trial Chamber could not lead a reasonable trier of fact to find that the only reasonable conclusion to be drawn from

[871] Trial Judgement, paras. 1252, 2148.
[872] Trial Judgement, para. 2148.
[873] *See supra*, para. 281.
[874] Trial Judgement, para. 1252.
[875] Trial Judgement, paras. 1252, 2078.
[876] Trial Judgement, paras. 1252, 2078.
[877] *See supra*, paras. 362, 369.
[878] *See* Trial Judgement, para. 2078.

the evidence was that the civilian assailants at Mudende University on 8 April 1994 were under Nsengiyumva's authority or his subordinates, and that Nsengiyumva ordered the attack. Not only does the evidence fail to demonstrate that the military was involved in the attack or linked to the civilian assailants, but there is also no indication that Nsengiyumva gave any instruction that Tutsis be attacked at Mudende University. As a result, the Appeals Chamber finds that the Trial Chamber erred in finding that Nsengiyumva was responsible under Article 6(1) of the Statute for ordering the killings of Tutsis at Mudende University, and that he could be held responsible for these crimes as a superior.

4. Conclusion

377. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber erred in finding that Rwandan army soldiers were involved in the attack at Mudende University on 8 April 1994, that the attack was a military operation ordered by Nsengiyumva, and that Nsengiyumva could also be held responsible for this attack as a superior. Accordingly, the Appeals Chamber grants Nsengiyumva's Ninth Ground of Appeal in part and reverses his convictions under Counts 2, 5, 6, 8, and 10 of the Nsengiyumva Indictment for the crimes committed at Mudende University. The Appeals Chamber will discuss the impact, if any, of this finding on Nsengiyumva's sentence in the appropriate section of this Judgement.

J. Alleged Errors Relating to the Elements of the Crimes (Ground 13)

378. The Trial Chamber convicted Nsengiyumva of genocide, as well as murder, extermination, and persecution as crimes against humanity, and violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for ordering killings in Gisenyi town, at Nyundo Parish, and at Mudende University, and for aiding and abetting killings in Bisesero.[879] It also found Nsengiyumva guilty of murder, extermination, persecution, and other inhumane acts as crimes against humanity, as well as violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for ordering the killing of Alphonse Kabiligi which was done in a brutal manner in front of his family.[880]

379. Nsengiyumva submits that the Trial Chamber erred in its determination of the elements of the crimes and regarding their proof beyond reasonable doubt.[881]

380. The Appeals Chamber has found in prior sections of this Judgement that the Trial Chamber erred in convicting Nsengiyumva for the killing of Alphonse Kabiligi, as well as the killings perpetrated at Mudende University, at Nyundo Parish, and in Bisesero.[882] Nsengiyumva's submissions therefore need not be considered in respect of these incidents. The Appeals Chamber has also found that the Trial Chamber erred in convicting Nsengiyumva for ordering the killings in Gisenyi town pursuant to Article 6(1) of the Statute.[883] The Appeals Chamber has nevertheless found him criminally responsible for these killings pursuant to Article 6(3) of the Statute.[884] As such, the Appeals Chamber will only consider Nsengiyumva's submissions with respect to these killings insofar as they relate to his superior responsibility.[885]

381. Before turning to Nsengiyumva's submissions, the Appeals Chamber notes the Prosecution's claim that Nsengiyumva failed to raise in his Notice of Appeal issues relating to the crime of genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II that he discussed in his Appeal Brief. The Prosecution requests that Nsengiyumva's arguments in these respects should therefore be summarily

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[879] Trial Judgement, paras. 2161, 2189, 2197, 2216, 2248, 2258.
[880] Trial Judgement, paras. 2189, 2197, 2216, 2227, 2248, 2258. The killing of Alphonse Kabiligi was not found to constitute genocide. *See ibid.*, para. 2145. Regarding the conviction for persecution, *see supra*, fn. 282.
[881] Nsengiyumva Notice of Appeal, paras. 32-45 (pp. 23-27); Nsengiyumva Appeal Brief, paras. 261-283.
[882] *See supra*, Sections III.C.7 *and* G-I, paras. 187, 331, 348, 377.
[883] *See supra*, para. 284.
[884] *See supra*, paras. 302, 303.
[885] Nsengiyumva alleges a number of errors regarding the Trial Chamber's assessment of the *actus reus* and *mens rea* requirements for the specific intent crimes which he was found to have ordered. *See* Nsengiyumva Appeal Brief, paras. 261-267, 269, 270, 272, 273, 280-283. These allegations do not apply to superior responsibility.

dismissed.[886] The Appeals Chamber accepts the Prosecution's objection that Nsengiyumva's contentions regarding the lack of finding of his genocidal intent, the *chapeau* requirements of crimes against humanity, and the Trial Chamber's failure to provide a reasoned opinion regarding the nexus between the crimes and the armed conflict go beyond the scope of his Notice of Appeal. Nevertheless, the Appeals Chamber considers that it is in the interests of justice to consider Nsengiyumva's arguments.[887] As the Prosecution responded to these allegations despite its objection to their consideration, the Appeals Chamber considers that there is no unfairness to the Prosecution in this respect.

1. Alleged Errors Regarding Genocide

382. Nsengiyumva submits that the Trial Chamber erred in failing to make the finding that he had the requisite intent to destroy, in whole or in part, the Tutsi population, and in disregarding evidence that negated his intent to commit genocide.[888] He also argues that the Trial Chamber erred in finding him liable as a superior for genocide despite the lack of proof beyond reasonable doubt that he knew of the assailants' genocidal intent.[889]

383. The Prosecution responds that Nsengiyumva's knowledge of the commission of crimes by his subordinates and his awareness of their specific intent were proven beyond reasonable doubt.[890]

384. The Appeals Chamber recalls that, for a conviction as a superior pursuant to Article 6(3) of the Statute, it is not necessary for an accused to have had the same intent as the perpetrator of the criminal act; it suffices to prove that the accused knew or had reason to know that the subordinate was about to commit such act or had done so.[891] The Trial Chamber was therefore not required to establish that Nsengiyumva shared his subordinates' intent to find that he could be held responsible as a superior. It follows that the Trial Chamber did not err in finding that Nsengiyumva was liable as a superior without considering evidence suggesting that he might not have had such intent.

385. Further, the Appeals Chamber, Judges Meron and Robinson dissenting, reiterates its finding that Nsengiyumva has failed to demonstrate that the Trial Chamber erred in finding that he had

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[886] Prosecution Response Brief (Nsengiyumva), paras. 262, 276, 305. *See also* Nsengiyumva Reply Brief, paras. 74, 75.
[887] *Cf. Kalimanzira* Appeal Judgement, para. 154; *Nchamihigo* Appeal Judgement, para. 241; *Deronji}* Judgement on Sentencing Appeal, paras. 102, 103, 130.
[888] Nsengiyumva Notice of Appeal, para. 32 (p. 23); Nsengiyumva Appeal Brief, paras. 261-264, 269, 270; Nsengiyumva Reply Brief, para. 76.
[889] Nsengiyumva Appeal Brief, para. 268.
[890] Prosecution Response Brief (Nsengiyumva), para. 272.
[891] *Nahimana et al*. Appeal Judgement, para. 865.

actual knowledge of the crimes committed in Gisenyi town on 7 April 1994,[892] which the Trial Chamber also found to have been perpetrated with genocidal intent.[893] The Trial Chamber also expressly found that Nsengiyumva was aware of the participants' genocidal intent.[894] Nsengiyumva does not substantiate his allegation of error concerning his lack of knowledge of the assailants' genocidal intent, which is accordingly dismissed.

386. For these reasons, the Appeals Chamber concludes that Nsengiyumva has failed to demonstrate that the Trial Chamber erred in finding that he could be held liable for genocide as a superior for the killings in Gisenyi town on 7 April 1994.

2. Alleged Errors Regarding Crimes Against Humanity

387. Nsengiyumva submits that the Trial Chamber erred with respect to the *chapeau* elements of crimes against humanity, as well as with respect to the specific crimes of murder, extermination, and persecution.[895] The Appeals Chamber will examine Nsengiyumva's submissions on each of these crimes in turn, after discussing his submissions on the *chapeau* elements.

(a) *Chapeau* Elements

388. Nsengiyumva submits that the Trial Chamber erred in failing to make a reasoned finding on the "common elements" of crimes against humanity.[896] Specifically, he argues that the Trial Chamber failed to "illustrate the attacks [as being] systematic or widespread, instead taking the country of Rwanda as one crime scene".[897] The Prosecution responds that this argument is unfounded on the merits.[898]

389. An enumerated crime under Article 3 of the Statute constitutes a crime against humanity if it is proven to have been committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic, racial or religious grounds.[899] The term "widespread" refers to the large scale nature of the attack and the number of victims, whereas the term "systematic"

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[892] *See supra*, para. 298.
[893] Trial Judgement, para. 2141.
[894] Trial Judgement, para. 2144.
[895] Nsengiyumva Notice of Appeal, paras. 37, 38, 41, 42 (pp. 25, 26); Nsengiyumva Appeal Brief, paras. 271-278. The Appeals Chamber notes that Nsengiyumva's arguments regarding other inhumane acts as a crime against humanity have become moot as a result of the reversal of his convictions based on the killing of Alphonse Kabiligi. *See* Nsengiyumva Notice of Appeal, para. 43 (p. 26); Nsengiyumva Appeal Brief, paras. 279-281.
[896] Nsengiyumva Appeal Brief, para. 271.
[897] Nsengiyumva Appeal Brief, para. 271.
[898] Prosecution Response Brief (Nsengiyumva), paras. 277-279.
[899] Article 3 of the Statute. *See also Semanza* Appeal Judgement, paras. 268, 269; *Ntakirutimana* Appeal Judgement, para. 516.

refers to "the organised nature of the acts of violence and the improbability of their random occurrence".[900] With respect to the *mens rea*, the perpetrator must have acted with knowledge of the broader context of the attack, and with knowledge that his acts (or omissions) formed part of the widespread or systematic attack against the civilian population.[901]

390. The Trial Chamber correctly articulated these required elements of crimes against humanity[902] and, contrary to Nsengiyumva's contention, provided a reasoned opinion for its conclusion that the totality of the evidence established that these required elements were met.[903] Nsengiyumva's argument that the Trial Chamber erred in "taking the country of Rwanda as one crime scene" implies that, in order to qualify as crimes against humanity, the attacks in Gisenyi should have been shown to have been widespread or systematic *independently* of attacks taking place elsewhere in Rwanda. Such a suggestion is, however, erroneous, as the requirement is that the attacks be committed within a broader context, that is, *as part of* a widespread or systematic attack.[904] Nsengiyumva fails to show that the Trial Chamber erred in holding that this requirement was satisfied.

(b) Murder

391. Nsengiyumva submits that the elements of murder as a crime against humanity, including the *mens rea*, are unsupported by the evidence.[905] However, all the arguments he presents in support of his contention relate to the *mens rea* for ordering,[906] or the substantial assistance provided by his alleged subordinates.[907] These arguments have become moot as a result of the Appeals Chamber's decision to set aside the findings that Nsengiyumva ordered the crimes committed in Gisenyi prefecture,[908] or have already been discussed and rejected in a prior section.[909]

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[900] *Nahimana et al*. Appeal Judgement, para. 920, *quoting Kordi} and Čerkez* Appeal Judgement, para. 94; *Ntakirutimana* Appeal Judgement, para. 516; *Gacumbitsi* Appeal Judgement, para. 101.
[901] *See Gacumbitsi* Appeal Judgement, para. 86. *See also Kordi} and Čerkez* Appeal Judgement, para. 99; *Bla{ki}* Appeal Judgement, paras. 124-127; *Kunarac et al*. Appeal Judgement, para. 102.
[902] Trial Judgement, paras. 2165, 2166.
[903] Trial Judgement, para. 2167 ("The Chamber has considered the totality of the evidence, in particular concerning the ethnic composition of the individuals who sought refuge at various sites as well as the actual or perceived political leanings of many of those killed or singled out at roadblocks in the days after President Habyarimana's death. It finds that there were widespread and systematic attacks against the civilian population on ethnic and political groups between April and July 1994.").
[904] *Cf. Gacumbitsi* Appeal Judgement, para. 103 ("the question is simply whether the totality of the evidence proves a nexus between the act and the widespread or systematic attack.").
[905] Nsengiyumva Notice of Appeal, paras. 37, 38 (p. 25). The Appeals Chamber has discussed Nsengiyumva's arguments pertaining to lack of notice developed in his Notice of Appeal under this ground of appeal in Section III.C of this Judgement. *See* Nsengiyumva Notice of Appeal, para. 36 (p. 25).
[906] Nsengiyumva Appeal Brief, paras. 272, 273.
[907] Nsengiyumva Notice of Appeal, para. 38 (p. 25); Nsengiyumva Appeal Brief, para. 274.
[908] *See supra*, paras. 303, 331, 348, 377.

(c) Extermination

392. Nsengiyumva submits that the Trial Chamber failed to find that he intended that mass killings be committed and that there is no evidence that he possessed the requisite intent.[910] He also contends that the Trial Chamber erred in considering the different factual findings concerning all co-Accused as cumulative evidence of mass killings where the alleged killings were in no way connected to each other.[911] He argues that the threshold element of extermination that killings must have happened on a large scale is not met by isolated or small-scale killings taken cumulatively.[912] He asserts that it is erroneous to take the context of widespread or systematic attacks on the civilian population as cumulative proof of the *actus reus* of extermination.[913]

393. The Prosecution responds that Nsengiyumva's submissions are unfounded.[914] It submits that the Trial Chamber was correct in considering the events Bagosora, Ntabakuze, and Nsengiyumva were convicted of together since they were part of the same widespread or systematic attacks against the civilian population and committed in a relatively brief period.[915]

394. Extermination as a crime against humanity under Article 3(b) of the Statute is the act of killing on a large scale,[916] committed within the context of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds.[917]

395. When assessing the co-Accused's responsibility for extermination, the Trial Chamber explained that it had "considered the events for which the Accused have been held responsible together since they are essentially part of the same widespread and systematic attacks against the civilian population on political and ethnic grounds".[918] It emphasised in this respect "the relatively brief time period in which these crimes were committed and that each of them were based on the same set of orders or authorisation from the Accused".[919] Against this backdrop, the Trial Chamber concluded that it was clear that all killings for which Bagosora, Ntabakuze, and Nsengiyumva were

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[909] *See supra*, Section III.F.2(b).
[910] Nsengiyumva Notice of Appeal, para. 40 (pp. 25, 26); Nsengiyumva Appeal Brief, para. 276.
[911] Nsengiyumva Appeal Brief, para. 276.
[912] Nsengiyumva Notice of Appeal, para. 41 (p. 26).
[913] Nsengiyumva Appeal Brief, para. 276.
[914] Prosecution Response Brief (Nsengiyumva), para. 286.
[915] Prosecution Response Brief (Nsengiyumva), para. 288. The Prosecution argues that all crimes constituting extermination Nsengiyumva was convicted for "occurred over a few days". *See idem.*
[916] *Rukundo* Appeal Judgement, para. 185; *Seromba* Appeal Judgement, para. 189; *Ntakirutimana* Appeal Judgement, para. 516.
[917] *Rukundo* Appeal Judgement, para. 185; *Ntakirutimana* Appeal Judgement, para. 516.
[918] Trial Judgement, para. 2192.
[919] Trial Judgement, para. 2192.

held responsible "satisfy either in themselves or collectively the requirement of killings on a large-scale".[920]

396. The Appeals Chamber has found that the Trial Chamber erred in finding that Nsengiyumva ordered the crimes committed in Gisenyi prefecture.[921] In view of this, the Trial Chamber could not rely on such orders as a basis for a conviction for these attacks. More importantly, the Appeals Chamber considers that the Trial Chamber was unreasonable to conclude that the "large scale" requirement for extermination was satisfied based on a collective consideration of events committed in different prefectures, in different circumstances, by different perpetrators, and over a period of two months. Each of the incidents which formed the basis of Nsengiyumva's convictions presented distinct features and could not be said to constitute one and the same incident.[922] As such, they could not be considered to constitute one and the same crime sharing the same *actus reus*.

397. The Appeals Chamber notes that the Trial Chamber nonetheless suggested that some of the killings of which the co-Accused were convicted "in themselves" satisfied the requirement of killing on a large scale.[923] However, the Trial Chamber failed to make any factual findings as to whether the killings perpetrated in Gisenyi town on 7 April 1994 met the requisite threshold of having been committed "on a large scale" in themselves.[924] With respect to the killings in Gisenyi town, the Trial Chamber's findings are limited to stating that "targeted attacks against Tutsis and suspected accomplices" were perpetrated.[925] The Appeals Chamber is concerned that the Trial Chamber did not make any specific findings on this fundamental element of the crime of extermination.

398. Nevertheless, the Appeals Chamber considers that the facts as found by the Trial Chamber and the evidence it relied upon support a finding beyond reasonable doubt that the killings in Gisenyi town were perpetrated on a large scale. The Appeals Chamber notes with respect to the Gisenyi town killings that the Trial Chamber accepted and relied upon Prosecution Witness DO's evidence that the victims included: a Tutsi teacher and his daughter; Hutus suspected of being accomplices, such as Daniel Rwabijongo, as well as Assoumani Kajanja and his Tutsi wife; Gilbert and another Tutsi man hiding in a compound with him; and a Tutsi woman named Mukabutare and

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[920] Trial Judgement, para. 2193.
[921] *See supra*, Sections III.F-I.
[922] The Appeals Chamber refers to the description of the incidents as discussed under the sections addressing Grounds 6, 7, 8, 9, 10.
[923] Trial Judgement, para. 2193.
[924] In this respect, the Appeals Chamber recalls that the expression "on a large scale" does not suggest a numerical minimum. *See Rukundo* Appeal Judgement, para. 185; *Ntakirutimana* Appeal Judgement, para. 516.
[925] Trial Judgement, para. 1064. *See also ibid*., paras. 2077, 2140, 2141.

her daughter.[926] Witness DO testified that there were several other groups of assailants apart from the one he was assigned to that were perpetrating parallel killings throughout Gisenyi town at the same time.[927] In the Appeals Chamber's view, these killings are qualifiable as having occurred on a large scale.

399. As to Nsengiyumva's contention that the Trial Chamber erred in failing to find that he intended that mass killings be committed and that there is no evidence that he possessed the requisite intent, the Appeals Chamber reiterates that a superior need not share the intent of the principal perpetrators.[928]

400. As a result, the Appeals Chamber finds that Nsengiyumva has failed to demonstrate that the Trial Chamber erred in finding him responsible for extermination as a crime against humanity for the Gisenyi town killings.

(d) Persecution

401. Nsengiyumva submits that the *actus reus* and *mens rea* of persecution were not proven beyond reasonable doubt.[929] The Prosecution responds that all elements of the crime of persecution were duly established.[930]

402. The Appeals Chamber notes that Nsengiyumva does not substantiate his allegation of error. This contention is therefore dismissed.

[926] Trial Judgement, paras. 1016, 2140. *See also* Witness DO, T. 30 June 2003 pp. 24-36, 42-45, T. 1 July 2003 pp. 47-51, 63-65, T. 2 July 2003 pp. 12-17, 54-56, *and* T. 17 October 2005 pp. 14-19; Decision on Anatole Nsengiyumva's Motions for the Admission of Additional Evidence, 21 March 2011, para. 22.
[927] Witness DO, T. 30 June 2003 pp. 28, 29, 33-35; T. 1 July 2003 pp. 35-38, 48, 49. *See also* Trial Judgement, paras. 1016, 1066.
[928] *See supra*, para. 384.
[929] Nsengiyumva Notice of Appeal, para. 42 (p. 26); Nsengiyumva Appeal Brief, para. 278.
[930] Prosecution Response Brief (Nsengiyumva), paras. 289-292.

3. Alleged Errors Regarding Serious Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II

403. Nsengiyumva submits that the Trial Chamber erred in law and in fact in concluding that there was a "nexus" between the crimes and the armed conflict between the Rwandan army and the RPF.[931] He argues that "[e]ven if the crimes were committed using the pretext of the conflict, it may not be concluded that they were sufficiently close in relationship" to the conflict.[932] He also asserts that the Trial Chamber's reliance on the *Semanza* case was misplaced.[933] According to him, there was no reasoned opinion to arrive at the conclusion that the crimes were "in furtherance of or under the guise of the armed conflict".[934] Regarding violence to life in particular, Nsengiyumva contends that there is a lack of evidence that he committed this crime and had the *mens rea* to do so.[935]

404. In response, the Prosecution argues that Nsengiyumva fails to show that the Trial Chamber abused its discretion.[936] It submits that the nexus between the perpetrators' acts and the armed conflict was amply demonstrated.[937] As regards violence to life, the Prosecution avers that the killings in Gisenyi town constitute murder under Article 4(a) of the Statute since they were intentional targeted killings committed with the awareness that the victims were not taking part in the hostilities and in furtherance or under the guise of the armed conflict.[938]

405. The Trial Chamber found that the military and civilian assailants were acting in furtherance of the armed conflict between Rwandan government forces and the RPF or under its guise and, accordingly, concluded that the requisite nexus between the offences and the armed conflict had been established.[939] Contrary to Nsengiyumva's contention, the Trial Chamber did explain in detail the reasons for its conclusion.[940] It did not rely on the *Semanza* Trial Judgement to so find, but on the specific facts of the case before it.[941] First, it outlined that "the ongoing armed conflict between the Rwandan government forces and the RPF, which was identified with the Tutsi ethnic minority

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[931] Nsengiyumva Notice of Appeal, para. 44 (p. 26); Nsengiyumva Appeal Brief, para. 282.
[932] Nsengiyumva Notice of Appeal, para. 44 (p. 26).
[933] Nsengiyumva Appeal Brief, para. 282. Specifically, Nsengiyumva argues that the reliance on the *Semanza* Trial Judgement was misplaced as there were no adjudicated facts which had been taken judicial notice of from this case or factual findings that the conflict had reached Gisenyi. *See idem*.
[934] Nsengiyumva Appeal Brief, para. 282, *citing Kunarac et al*. Appeal Judgement, para. 58.
[935] Nsengiyumva Notice of Appeal, para. 45 (p. 27); Nsengiyumva Appeal Brief, para. 283.
[936] Prosecution Response Brief (Nsengiyumva), para. 305.
[937] Prosecution Response Brief (Nsengiyumva), para. 308. The Prosecution refers to the fact that the ongoing armed conflict created the situation and provided a pretext for the killings, and the fact that military personnel acted in conjunction with militiamen in a significant number of killings and substantially influenced the manner in which they were executed. *See idem*.
[938] Prosecution Response Brief (Nsengiyumva), para. 310.
[939] Trial Judgement, para. 2236.
[940] *See* Trial Judgement, paras. 2231-2235.
[941] *See* Trial Judgement, paras. 2232-2236.

in Rwanda and many members of the political opposition, both created the situation and provided a pretext for the extensive killings and other abuses of members of the civilian population in Rwanda".[942] It further reasoned that the participation of military personnel in the attacks substantially influenced the manner in which the killings and other crimes were executed.[943]

406. These factors considered by the Trial Chamber demonstrate that the killings in Gisenyi town were perpetrated in furtherance of or under the guise of the armed conflict between Rwandan government forces and the RPF, which, according to settled jurisprudence,[944] was sufficient to conclude that the perpetrators' acts were closely related to the armed conflict. The Appeals Chamber therefore finds that the Trial Chamber did not err in concluding that there was a nexus between the killings in Gisenyi town and the armed conflict occurring at the time.

407. Finally, the Appeals Chamber notes that Nsengiyumva claims that the elements of the crime of violence to life were not proven beyond reasonable doubt without advancing any argument in support of his contention. The Appeals Chamber therefore declines to address Nsengiyumva's unsubstantiated allegation of error, and summarily rejects it.

408. Accordingly, the Appeals Chamber dismisses Nsengiyumva's submissions pertaining to his conviction under Article 4(a) of the Statute.

4. Conclusion

409. For the foregoing reasons, the Appeals Chamber dismisses Nsengiyumva's Thirteenth Ground of Appeal in its entirety.

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[942] Trial Judgement, para. 2232.
[943] Trial Judgement, para. 2234.
[944] *See Setako* Appeal Judgement, para. 249; *Staki}* Appeal Judgement, para. 342; *Rutaganda* Appeal Judgement, paras. 569, 570; *Kunarac et al*. Appeal Judgement, paras. 58, 59.

K. Alleged Errors Relating to Cumulative Convictions (Ground 14)

410. Nsengiyumva submits that the Trial Chamber erred in law by entering impermissibly cumulative convictions.[945] Specifically, he asserts that the Trial Chamber erred in convicting him of murder and extermination as crimes against humanity based on the same set of facts "as the latter requires all of the elements of the former, and the additional element of killing on a large scale".[946] He also submits that his conviction for murder as a crime against humanity is impermissibly cumulative with his convictions for persecution as a crime against humanity, other inhumane acts as a crime against humanity, and violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. This is so, in his view, because they are based on the same criminal conduct without any additional finding as to a distinct element regarding each crime or an additional finding of fact.[947] He argues that the count of murder should be "subsumed" into the counts of extermination, persecution, and other inhumane acts.[948]

411. The Prosecution responds that, even assuming that cumulative convictions for murder and extermination are not permissible, the vacation of the conviction for murder would not impact on Nsengiyumva's sentence given the grave nature of the crimes of which he was found guilty.[949] It further submits that Nsengiyumva's cumulative convictions for murder in conjunction with persecution and violence to life are permissible as each crime contains a materially different element not required by the other.[950]

412. At the outset, the Appeals Chamber notes that the question of whether the Trial Chamber erred in convicting Nsengiyumva for both murder and other inhumane acts as a crime against humanity for the brutal killing of Alphonse Kabiligi in front of his family has become moot as a result of the Appeals Chamber's reversal of these convictions,[951] and, as such, need not be addressed.

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[945] Nsengiyumva Notice of Appeal, para. 46 (p. 27).
[946] Nsengiyumva Notice of Appeal, paras. 39 (p. 25), 47 (p. 27); Nsengiyumva Appeal Brief, para. 285.
[947] Nsengiyumva Notice of Appeal, paras. 42 (p. 26), 47 (p. 27); Nsengiyumva Appeal Brief, paras. 286-288. Nsengiyumva submits that: (i) for the crime of persecution, there was no finding of a "violation of a fundamental right" as a required additional element; (ii) for the crime of other inhumane acts, there was no finding that Nsengiyumva ordered Alphonse Kabiligi to be killed in front of his family; and (iii) for the crime of violence to life, there was no nexus to the armed conflict shown. *See ibid*., paras. 286-288.
[948] Nsengiyumva Appeal Brief, paras. 285-287.
[949] Prosecution Response Brief (Nsengiyumva), para. 311. *See also ibid*., para. 4.
[950] Prosecution Response Brief (Nsengiyumva), paras. 312, 314. The Appeals Chamber notes that the Prosecution does not respond to Nsengiyumva's allegation of error relating to his convictions for both murder and other inhumane acts as crimes against humanity based on the same set of facts. *See ibid*., paras. 311-314.
[951] *See supra*, para. 331.

413. 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. An element is materially distinct if it requires proof of a fact that is not required by the other.[952]

414. The Appeals Chamber notes that the permissibility of cumulative convictions for the crimes of murder as a crime against humanity and persecution as a crime against humanity has been specifically considered by the Appeals Chamber.[953] The Appeals Chamber has found that the crime of persecution requires a materially distinct element to be proven that is not present as an element in the crime of murder, namely proof that an act or omission discriminates in fact and that the act or omission was committed with specific intent to discriminate.[954] The crime of murder was also held to require proof of a materially distinct element that is not required to be proven in establishing the crime of persecution, namely proof of the death of one or more persons.[955] Therefore, cumulative convictions for murder and persecution as crimes against humanity were found to be permissible.[956] The Appeals Chamber accordingly finds that the Trial Chamber did not err in convicting Nsengiyumva for both murder and persecution as crimes against humanity for the killings in Gisenyi town.[957]

415. Similarly, the Appeals Chamber finds that the Trial Chamber did not err in entering convictions for both murder as a crime against humanity (Article 3 of the Statute) and violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Article 4 of the Statute) on the basis of Nsengiyumva's role in the killings in Gisenyi town. It recalls that a conviction under Article 4 of the Statute has a materially distinct element not required for a conviction under Article 3 of the Statute, namely the existence of a nexus between the alleged crimes and the armed conflict satisfying the requirements of common Article 3 of the Geneva Conventions and Article 1 of Additional Protocol II.[958] Likewise, a conviction under

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[952] *See*, *e.g.*, *Krajišnik* Appeal Judgement, para. 386, *citing Čelebići* Appeal Judgement, para. 412; *Nahimana et al.* Appeal Judgement, para. 1019, fn. 2329; *Ntagerura et al.* Appeal Judgement, para. 425.
[953] *Kraji{nik* Appeal Judgement, para. 388; *Staki}* Appeal Judgement, para. 359; *Kordi} and Čerkez* Appeal Judgement, para. 1041. *Cf. Nahimana et al*. Appeal Judgement, paras. 1026, 1027.
[954] *Staki}* Appeal Judgement, para. 359; *Kordi} and Čerkez* Appeal Judgement, para. 1041.
[955] *Staki}* Appeal Judgement, para. 359; *Kordi} and Čerkez* Appeal Judgement, para. 1041.
[956] *Staki}* Appeal Judgement, para. 359; *Kordi} and Čerkez* Appeal Judgement, para. 1041.
[957] The Appeals Chamber recalls that it has found in prior sections of this Judgement that the Trial Chamber erred in convicting Nsengiyumva for the killings perpetrated at Nyundo Parish and Mudende University, the killing of Alphonse Kabiligi, and the killings in Bisesero. *See supra*, Sections III.C.7 *and* G-I, paras. 187, 331, 348, 377.
[958] *Ntagerura et al*. Appeal Judgement, para. 427; *Semanza* Appeal Judgement, para. 368; *Rutaganda* Appeal Judgement, para. 583.

Article 3 of the Statute requires proof of a materially distinct element not required under Article 4 of the Statute, namely proof of a widespread or systematic attack against a civilian population.[959]

416. The Appeals Chamber recalls, however, that cumulative convictions for extermination and murder as crimes against humanity based on the same set of facts are not permissible because, whereas extermination requires the materially distinct element that the killings occur on a mass scale, murder does not contain an element materially distinct from extermination.[960] The Trial Chamber therefore erred in law in entering cumulative convictions for murder and extermination as crimes against humanity for the killings in Gisenyi town. Since the offence of extermination contains an additional materially distinct element,[961] which is present in the instant case,[962] the Appeals Chamber concludes that Nsengiyumva's convictions for extermination entered under Count 6 of the Nsengiyumva Indictment should be upheld while his convictions for murder as a crime against humanity under Count 5 should be vacated.

417. In light of the foregoing, the Appeals Chamber grants Nsengiyumva's Fourteenth Ground of Appeal in part and reverses his convictions for murder as a crime against humanity for the killings in Gisenyi town entered under Count 5 of the Nsengiyumva Indictment. The impact of this finding, if any, on sentencing will be considered in the appropriate section of this Judgement.

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[959] *Ntagerura et al*. Appeal Judgement, para. 427; *Semanza* Appeal Judgement, para. 368; *Rutaganda* Appeal Judgement, para. 583.
[960] *Ntakirutimana* Appeal Judgement, para. 542.
[961] *See Krajišnik* Appeal Judgement, para. 386, *citing Čelebići* Appeal Judgement, para. 413: "Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision". *See also Strugar* Appeal Judgement, para. 321.
[962] *See supra*, para. 398.

L. Alleged Errors Relating to Sentencing (Ground 15)

418. The Trial Chamber sentenced Nsengiyumva to life imprisonment.[963] Nsengiyumva submits that the Trial Chamber erred in: (i) failing to individualise the penalty; (ii) imposing a sentence which is disproportionate to the gravity of the offences and manifestly excessive; (iii) using an "ingredient" of the crime as an aggravating factor; and (iv) failing to give sufficient weight to mitigating circumstances.[964]

419. The Appeals Chamber considers it unnecessary to examine Nsengiyumva's contentions that the Trial Chamber erred in failing to individualise his penalty and in imposing a sentence disproportionate to the gravity of the offences in light of the reversal of the vast majority of the offences of which he was convicted. The Appeals Chamber will only discuss Nsengiyumva's arguments relating to alleged double counting and mitigating circumstances, before turning to consider the impact of its findings on Nsengiyumva's responsibility on his sentence. In addressing these arguments, the Appeals Chamber bears in mind that Trial Chambers are vested with a broad discretion in determining the appropriate sentence due to their obligation to individualise penalties to fit the circumstances of the convicted person and the gravity of the crime.[965] As a rule, the Appeals Chamber will not substitute its own sentence for that imposed by the Trial Chamber unless the appealing party demonstrates that the Trial Chamber committed a discernible error in exercising its discretion, or failed to follow the applicable law.[966]

1. Alleged Double Counting

420. Nsengiyumva submits that "Ŧtğhe inference of Ŧhisğ role in the crimes, regarding 'organized military operations' which is an ingredient of the crime is erroneously used as an aggravating factor contrary to jurisprudence".[967] The Prosecution responds that Nsengiyumva's submissions are without merit.[968]

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[963] Trial Judgement, para. 2279.

[964] Nsengiyumva Notice of Appeal, paras. 42-44 (p. 27); Nsengiyumva Appeal Brief, paras. 290-302. The Appeals Chamber notes that in his Notice of Appeal, Nsengiyumva also submits that: (i) the sentence imposed was also "manifestly harsh and unjust" by virtue of "the prejudice Ŧheğ suffered resulting from the violation of his fundamental rights"; and (ii) "Ŧtğhe sentence violates the Statute and the Rules of Procedure and Evidence". *See* Nsengiyumva Notice of Appeal, paras. 44, 45 (p. 27). As Nsengiyumva does not pursue these submissions in his Appeal Brief, the Appeals Chamber considers that he has abandoned them.

[965] *See*, *e.g.*, *Setako* Appeal Judgement, para. 277; *Munyakazi* Appeal Judgement, para. 166; *Renzaho* Appeal Judgement, para. 606; *Nchamihigo* Appeal Judgement, para. 384.

[966] *See*, *e.g.*, *Setako* Appeal Judgement, para. 277; *Munyakazi* Appeal Judgement, para. 166; *Renzaho* Appeal Judgement, para. 606; *Nchamihigo* Appeal Judgement, para. 384.

[967] Nsengiyumva Appeal Brief, para. 296 (internal references omitted). *See also ibid*., para. 292(d).

[968] Prosecution Response Brief (Nsengiyumva), para. 322.

421. The Appeals Chamber rejects as unfounded Nsengiyumva's assertion that "organised military operations" is an element of any of the offences for which he was convicted. It also notes that in assessing the aggravating circumstances with respect to Nsengiyumva, the Trial Chamber did not rely on the form and nature of the operations conducted, but only took into account "Nsengiyumva's role as a superior with respect to the targeted killings in Gisenyi town, including Alphonse Kabiligi, and the massacres at Mudende University and Nyundo Parish" and "[t]he large number of Tutsi victims during the course of the attacks and massacres".[969] The Appeals Chamber finds that the Trial Judgement does not reflect any impermissible double-counting. However, in light of its findings that Nsengiyumva should be held responsible as a superior under Article 6(3) of the Statute for the killings perpetrated by his subordinates in Gisenyi town on 7 April 1994, and that his other convictions should be reversed, the Appeals Chamber considers that his role as a superior can no longer be taken into consideration as an aggravating factor in sentencing. Likewise, the Appeals Chamber considers that the large number of Tutsi victims during the course of the attacks at Mudende University, Nyundo Parish, and Bisesero cannot be held against Nsengiyumva in the determination of his sentence.

2. Alleged Failure to Give Sufficient Weight to Mitigating Circumstances

422. Nsengiyumva submits that the Trial Chamber failed to consider the mitigating circumstances in his case appropriately.[970] In particular, he contends that the Trial Chamber erred in failing to accord sufficient weight to the assistance that he rendered to Tutsis.[971] Nsengiyumva argues that he risked great danger by saving Tutsis, including by hiding them in his house, helping them cross the border and evacuating them in very difficult circumstances.[972] He emphasises that he helped in the evacuation of bus-loads of Tutsi women from Kigali and children of victims of the attacks in Gisenyi town.[973] He alleges that several witnesses testified that he assisted Tutsis and asserts that he was not selective in his assistance and did not turn people away.[974]

423. The Prosecution responds that the Trial Chamber specifically considered the selective assistance that Nsengiyumva rendered to certain Tutsis, and that Nsengiyumva does not show how his selective assistance weighed heavily in mitigation.[975] It argues that the gravity of the crimes and

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969 Trial Judgement, para. 2272.
970 Nsengiyumva Notice of Appeal, para. 43 (p. 27); Nsengiyumva Appeal Brief, paras. 292(e), 297.
971 Nsengiyumva Appeal Brief, paras. 298-302.
972 Nsengiyumva Appeal Brief, paras. 298-300.
973 Nsengiyumva Appeal Brief, para. 300, *citing* Witness Star-2, T. 28 February 2006 pp. 24-26, 30-33.
974 Nsengiyumva Appeal Brief, paras. 298, 300, *citing* T. 9 October 2006 pp. 63, 64.
975 Prosecution Response Brief (Nsengiyumva), para. 323.

aggravating factors in Nsengiyumva's case outweighed the selective assistance and other alleged mitigating factors.[976]

424. The Appeals Chamber recalls that while a Trial Chamber has the obligation to consider any mitigating circumstances when determining the appropriate sentence, it enjoys a considerable degree of discretion in determining what constitutes a mitigating circumstance and the weight, if any, to be accorded to that factor.[977]

425. The Appeals Chamber notes that Nsengiyumva failed to make sentencing submissions at trial.[978] The Trial Chamber, in considering the mitigating circumstances, nonetheless recalled its assessment of the assistance Nsengiyumva provided to some Tutsis in Gisenyi prefecture, including that of Defence Witness XX referred to in Section III.3.6.6 of the Trial Judgement.[979] In that section, the Trial Chamber recounted the testimony of Witness XX that Nsengiyumva provided assistance to this witness, a Bishop, and other Tutsis who sought refuge at his residence.[980] The Appeals Chamber further notes that, elsewhere in the Trial Judgement, the Trial Chamber noted Defence evidence relating to Nsengiyumva's assistance in hiding or evacuating Tutsi women and children from Gisenyi.[981] The Trial Chamber considered that such assistance was selective and carried only limited weight as a mitigating factor.[982]

426. The Appeals Chamber observes that the Trial Chamber did not expressly note or discuss Defence Witness STAR-2's evidence that, in early June 1994, buses passing through Gisenyi with Tutsi women had been stopped by *Interahamwe*, and that only after Nsengiyumva's intervention could the buses continue on their way to Goma, Zaire.[983] The Appeals Chamber sees no error in this; not only did Nsengiyumva fail to identify this alleged mitigating evidence at trial,[984] but the witness's testimony also reveals that the *Interahamwe* were not threatening the Tutsi women in the

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[976] Prosecution Response Brief (Nsengiyumva), para. 323.
[977] *See*, *e.g.*, *Munyakazi* Appeal Judgement, para. 174; *Bikindi* Appeal Judgement, para. 158; *Nchamihigo* Appeal Judgement, para. 387; *Milo{evi}* Appeal Judgement, para. 316.
[978] *See* Trial Judgement, para. 2262.
[979] Trial Judgement, para. 2273, *referring to ibid.*, Section III.3.6.6.
[980] Trial Judgement, paras. 1187, 1190, 1191.
[981] *See* Trial Judgement, Section III.3.6.6, fn. 1326, *referring to* Witness STAR-2, T. 28 February 2006 pp. 4, 19-21; Section III.3.6.3, fn. 1222, *referring to* Witness RN-1, T. 13 February 2006 pp. 57, 75-77, 83, *and* Witness STAR-2, T. 28 February 2006 pp. 31-34.
[982] Trial Judgement, para. 2273, *citing Kajelijeli* Appeal Judgement, para. 311.
[983] Witness STAR-2, T. 28 February 2006 pp. 24-26.
[984] The Appeals Chamber recalls that Rule 86(C) of the Rules clearly indicates that sentencing submissions shall be addressed during closing arguments. *See also*, *e.g.*, *Bikindi* Appeal Judgement, para. 165, *quoting Kvo~ka et al*. Appeal Judgement, para. 674; *Mrk{i} and [ljivančanin* Appeal Judgement, para. 388; *Muhimana* Appeal Judgement, para. 231.

buses, but were trying to stop a suspected RPF accomplice from crossing the border, and that Nsengiyumva merely intervened to "take" the suspected accomplice.[985]

427. The Appeals Chamber has previously determined that "selective assistance" may be given only limited weight as a mitigating factor.[986] Nsengiyumva fails to point to any error on the part of the Trial Chamber in its conclusion. Accordingly, the Appeals Chamber finds that it was within the Trial Chamber's discretion to conclude that Nsengiyumva's assistance to Tutsis was selective, and to accord limited weight to such evidence in mitigation for the purposes of sentencing.

3. Impact of the Appeals Chamber's Findings on the Sentence

428. The Appeals Chamber recalls that it has reversed Nsengiyumva's convictions for the killing of Alphonse Kabiligi, as well as the killings at Nyundo Parish, Mudende University, and Bisesero. It has also set aside the finding that Nsengiyumva was responsible for ordering the Gisenyi town killings pursuant to Article 6(1) of the Statute, finding him, Judges Meron and Robinson dissenting, criminally responsible as a superior instead. Consequently, Nsengiyumva's role as a superior, as well as the large number of Tutsi victims during the course of the attacks at Nyundo Parish, Mudende University, and Bisesero can no longer be held against him as aggravating factors. In addition, the Appeals Chamber has reversed Nsengiyumva's conviction for murder as a crime against humanity.

429. The Appeals Chamber considers that the reversal of nearly all of Nsengiyumva's convictions represents a significant reduction in his culpability and calls for a revision of his sentence. The Appeals Chamber notes, however, that Nsengiyumva remains guilty of genocide, extermination, and persecution as crimes against humanity, as well as violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for the killings perpetrated in Gisenyi town on 7 April 1994. These are extremely serious crimes.

430. Therefore, the Appeals Chamber sets aside Nsengiyumva's sentence of imprisonment for the remainder of his life and, Judges Meron and Robinson dissenting, sentences him to a term of 15 years of imprisonment.

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[985] *See* Witness STAR-2, T. 28 February 2006 pp. 24-27. It appears from Witness STAR-2's testimony that Nsengiyumva did not even know who was inside the buses. *See idem*.

[986] *Nchamihigo* Appeal Judgement, para. 389, *citing*, *e.g.*, *Kajelijeli* Appeal Judgement, para. 311. *See also Bikindi* Appeal Judgement, para. 163.

IV. APPEAL OF THÉONESTE BAGOSORA

A. Alleged Errors Relating to Bagosora's Superior Position and Effective Control (Ground 1 in part)

431. The Trial Chamber held Bagosora responsible as a superior under Article 6(3) of the Statute for genocide, crimes against humanity (murder, extermination, persecution, other inhumane acts, and rapes), as well as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (violence to life and outrages upon personal dignity) for killings, acts of rape, sexual violence, and maltreatment committed by Rwandan army soldiers and militiamen between 7 and 9 April 1994 in Kigali and in Gisenyi prefecture.[987]

432. Bagosora's convictions as a superior were based on the Trial Chamber's findings that in the period of 6 to 9 April 1994, as *directeur de cabinet* in the Rwandan Ministry of Defence, Bagosora assumed the power of the highest authority in the Ministry of Defence, acting in fact as the Minister of Defence. It found that during that period, Bagosora's conduct reflects "that he exercised control over the Rwandan Armed Forces, the most powerful entity at the time in the Rwandan government".[988] Based on, among other findings, "Bagosora's role at the head of the Rwandan military", the Trial Chamber found that the civilian militiamen who participated in the crimes of which Bagosora was convicted were also his subordinates acting under his effective control during

[987] Specifically, Bagosora was found guilty of crimes against humanity (murder, extermination, and persecution) and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (violence to life) for the killings of Prime Minister Uwilingiyimana, Joseph Kavaruganda, Frédéric Nzamurambaho, Landoald Ndasingwa, and Faustin Rucogoza; crimes against humanity (murder) and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (violence to life) for the killing of the ten Belgian peacekeepers; crimes against humanity (murder, extermination, persecution, and other inhumane acts) and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (violence to life) for the killing of Alphonse Kabiligi; crimes against humanity (murder, extermination, and persecution) and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (violence to life) for the killings of civilians committed at *Centre Christus*; genocide, crimes against humanity (murder, extermination, and persecution) and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (violence to life) for the killings of civilians committed at Kibagabaga Mosque, Kabeza, the Saint Josephite Centre, Karama Hill, Kibagabaga Catholic Church, Gikondo Parish, Gisenyi town, Mudende University, and Nyundo Parish; crime against humanity (other inhumane acts) for the torture of Alphonse Kabiligi and sexual assault against the Prime Minister; crimes against humanity (rapes) for the rapes committed at the Kigali area roadblocks; crimes against humanity (other inhumane acts and rapes) and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (outrages upon personal dignity) for the rapes and stripping of female refugees at the Saint Josephite Centre, the rapes at Gikondo Parish, and the "sheparding" of refugees to Gikondo Parish where they were killed. *See* Trial Judgement, paras. 2158, 2186, 2194, 2203, 2213, 2224, 2245, 2254. The Trial Chamber found that Bagosora was also liable as a superior for genocide, crimes against humanity (murder, extermination, and persecution) and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (violence to life) for the killings and acts of sexual violence and maltreatment committed between 7 and 9 April 1994 at Kigali area roadblocks, but only took this into account in sentencing, having already held him responsible under Article 6(1) of the Statute for these crimes. *See* Trial Judgement, paras. 2158, 2186, 2194, 2213, 2245, 2272.

[988] Trial Judgement, para. 2031. *See also ibid*., paras. 723, 2265.

that time.[989] After finding that Bagosora had the requisite knowledge of his subordinates' crimes,[990] the Trial Chamber concluded that "Bagosora failed in his duty to prevent the crimes because he in fact participated in them", and that there was "absolutely no evidence that the perpetrators were punished afterwards".[991]

433. Bagosora submits that the Trial Chamber erred in law and in fact in finding that he held a superior position and had effective control over the Rwandan Armed Forces.[992] He accordingly requests that all of his convictions based on superior responsibility be overturned.[993]

434. The Prosecution responds that Bagosora essentially reargues his case *de novo* without demonstrating any errors warranting appellate intervention, and that this justifies summary dismissal by the Appeals Chamber.[994]

1. Preliminary Issue

435. A review of Bagosora's submissions indicates that some of his points of contention were already made at trial,[995] and that he repeats on appeal some of the arguments he made in his Closing Brief.[996] The Appeals Chamber recalls that the purpose of appellate proceedings is not for the Appeals Chamber to reconsider the evidence and arguments submitted before the Trial Chamber.[997] In the present case, however, the Appeals Chamber is not persuaded that, taken as a whole, Bagosora's First Ground of Appeal constitutes an attempt to re-argue his case *de novo*. Many of his allegations of error arise for the first time on appeal and are closely linked to specific findings in the Trial Judgement. As such, the Appeals Chamber does not consider summary dismissal to be justified.

[989] Trial Judgement, para. 2034. *See also ibid*., para. 2036.
[990] Trial Judgement, paras. 2038, 2039.
[991] Trial Judgement, para. 2040.
[992] Bagosora Notice of Appeal, pp. 5-8; Bagosora Appeal Brief, paras. 12, 17-171.
[993] Bagosora Appeal Brief, para. 171. *See also ibid*., p. 49.
[994] Prosecution Response Brief (Bagosora), paras. 7, 12. *See also ibid.*, paras. 13-122.
[995] *See* Trial Judgement, para. 2016, fn. 2206.
[996] *See*, *e.g.*, *The Prosecutor v. Théoneste Bagosora et al*., Case No. ICTR-98-41-T, *Corrigendum Mémoire final de la Défense de Théoneste Bagosora*, 25 May 2007 ("Bagosora Closing Brief"), paras. 510 (no operational powers before 6 April 1994), 512 (post was political), 517 *and* 520 (no power to give orders to the army), 1178 (not named army Chief of Staff), 1786-1788 (chairing and holding meetings was normal for *directeur de cabinet*, Bagosora did not initiate meetings), 1792 (Prime Minister had no authority over the army), p. 376 (no command over the army or *Interahamwe*).
[997] *Čelebi}i* Appeal Judgement, para. 837.

2. Trial Chamber's Findings

436. The Trial Chamber found that the President of the Republic of Rwanda was the supreme commander in chief of the Rwandan Armed Forces, which was composed of the army and the gendarmerie.[998] He was assisted in the performance of his duties by the Minister of Defence who handled daily defence matters, including the Rwandan Armed Forces, and was ranked above the army and gendarmerie Chiefs of Staff in the hierarchy.[999] As part of its key staff, the Minister's immediate office included a *directeur de cabinet*,[1000] a position that Bagosora assumed from June 1992 to July 1994.[1001] The *de jure* authority of the *directeur de cabinet* was defined by the Official Journal of the Rwandan government, issued in November 1992.[1002] That Journal identified the *directeur de cabinet* as holding the most senior position in the Ministry after that of the Minister of Defence; the *directeur de cabinet* was in charge of coordinating and supervising the daily work of the Ministry, and would replace the Minister in his absence.[1003] The *directeur de cabinet* was nonetheless part of a separate chain of command within the Ministry and not directly above the gendarmerie and army Chiefs of Staff.[1004]

437. In determining the scope of Bagosora's powers as *directeur de cabinet*, the Trial Chamber further considered a letter of 27 January 1993 from the then Minister of Defence, James Gasana, which sought to restrict the authority of the *directeur de cabinet* when the Minister was absent or unavailable ("Gasana Letter").[1005] It found, however, that it was not clear whether the restrictions remained in legal force after Gasana fled Rwanda for security reasons in July 1993 and was replaced by Augustin Bizimana.[1006] The Trial Chamber considered that, even if the restrictions set out in the Gasana Letter did remain in force, "the *directeur de cabinet* still played an important role

[998] Trial Judgement, para. 146.
[999] Trial Judgement, para. 146.
[1000] Trial Judgement, para. 146.
[1001] Trial Judgement, para. 147.
[1002] Trial Judgement, para. 2018, *referring to* Exhibit DB4 (*Journal officiel de la République rwandaise*, dated 15 November 1992), pp. 1766-1769.
[1003] Trial Judgement, para. 2018, *referring to* Exhibit DB4 (*Journal officiel de la République rwandaise*, dated 15 November 1992), pp. 1766-1769.
[1004] Trial Judgement, para. 2018. The army Chief of Staff was the operational head of the army and the overall commander of troops. *See ibid.*, para. 151.
[1005] Trial Judgement, para. 2019 (internal references omitted), *referring to* Exhibit P246 (Letter of 27 January 1993 from the Minister of Defence to the *directeur de cabinet*):

> […] In particular, it obliged the *directeur de cabinet* to ensure the proper functioning of the daily business (*les affaires courantes*) of the Ministry. It authorised him, among other things, to convoke and preside over meetings of the chiefs of staff of the army and gendarmerie as well as the other directors of the Ministry. After such a meeting, the *directeur de cabinet* could issue operational orders to the chiefs of staff of the army and gendarmerie if they were in writing and had also been previously approved by those in attendance, in particular the concerned chief of staff. In all other respects, the competence of the chiefs of staffs of the army and gendarmerie remained unaffected. Several notable powers were not conferred by Gasana's directive, such as the transfer or promotion of officers and the taking of disciplinary measures.

[1006] Trial Judgement, para. 2020.

in presiding over joint meetings of the chiefs of staff of the army and gendarmerie as well as other Ministry officials, which could ultimately result in the issuance of operational orders to commands of these two military forces".[1007]

438. The Trial Chamber found that, after the death of President Habyarimana, Bagosora assumed the power of the highest authority in the Ministry of Defence, acting in fact as Minister of Defence.[1008] It found that Bagosora's conduct reflected that he exercised effective control over the Rwandan Armed Forces, at least until the afternoon of 9 April 1994 when the Minister of Defence returned and the interim government ("Interim Government") was installed.[1009]

439. In support of its finding, the Trial Chamber relied on Bagosora's *de jure* authority as *directeur de cabinet*, as well as on his activities during the period from 6 to 9 April 1994.[1010] In relation to Bagosora's *de jure* authority, the Trial Chamber noted that when the plane carrying President Habyarimana of Rwanda, President Ntaryimara of Burundi, and the Chief of Staff of the Rwandan army, General Déogratias Nsabimana, crashed on 6 April 1994,[1011] the Minister of Defence was on official mission in Cameroon.[1012] Accordingly, between 6 and 9 April 1994, Bagosora replaced the Minister of Defence in his absence.[1013]

440. The Trial Chamber found that, "on a number of occasions", Bagosora exceeded the limits of his authority as *directeur de cabinet* as defined by the Gasana Letter.[1014] It referred, in particular, to the role that Bagosora played in the meeting of senior military officers held at the initiative of the gendarmerie Chief of Staff, General Augustin Ndindiliyimana, at the army headquarters in Camp Kigali on the evening of 6 April 1994 ("6 April Meeting").[1015] The Trial Chamber found that

[1007] Trial Judgement, para. 2021.
[1008] Trial Judgement, para. 2031.
[1009] Trial Judgement, para. 2031.
[1010] Trial Judgement, paras. 2017-2030. Bagosora also submits that the Trial Chamber only found him to have *de facto* and not *de jure* authority over the Rwandan Armed Forces. *See* Bagosora Notice of Appeal, para. 20; Bagosora Appeal Brief, paras. 11(e), 18; Bagosora Reply Brief, paras. 2-9; AT. 31 March 2011 p. 40; AT. 1 April 2011 pp. 16, 17. The Appeals Chamber considers it unclear from the Trial Judgement whether Bagosora was found to have *de jure* authority over the Rwandan Armed Forces. Considering that the core issue in this case is whether or not Bagosora had effective control over the Rwandan Armed Forces between 7 and 9 April 1994, the Appeals Chamber finds it unnecessary to determine whether he was found to exercise both *de facto* and *de jure* authority over the Rwandan Armed Forces.
[1011] Trial Judgement, para. 650.
[1012] Trial Judgement, paras. 2018, 2028.
[1013] Trial Judgement, para. 2018.
[1014] Trial Judgement, paras. 2022, 2025.
[1015] The Trial Chamber did not specify precisely who attended the 6 April Meeting. The Appeals Chamber notes that the UNAMIR Commander, General Roméo Dallaire, testified that "[t]he table was not full, but I'd say ten-ish or so" were present. *See* Roméo Dallaire, T. 19 January 2004 p. 23. The minutes taken at the meeting list the participants as including the *directeur de cabinet* of the Ministry of Defence, the gendarmerie Chief of Staff, Ministry of Defence officers, the army and gendarmerie senior staff, the UNAMIR Commander, and the ESM Commander (Colonel Rusatira). *See* Exhibit DB66 (Minutes of the meeting of the *directeur de cabinet*, gendarmerie Chief of Staff, Ministry

Bagosora chaired the meeting and played the dominant role in it.[1016] It underscored that Bagosora was the one who proposed naming an acting army Chief of Staff and personally signed the telegram appointing Colonel Marcel Gatsinzi to this position.[1017] This was despite the fact that the Gasana Letter specifically excluded Bagosora's authority to promote and transfer personnel without the express authorisation of the Minister of Defence. This led the Trial Chamber to conclude that in fact Bagosora was exercising greater authority than that conferred by the Gasana Letter.[1018]

441. The Trial Chamber further relied on its findings that Bagosora chaired and "played the dominant role" at a meeting of senior military officers at ESM on 7 April 1994 ("7 April ESM Meeting").[1019] The purpose of this meeting was to gather operational commanders of the army and gendarmerie, update them on the prevailing situation, and issue instructions for the maintenance of order.[1020] It was at this meeting that officers present agreed to the forming of a Crisis Committee, composed of the participants of the 6 April Meeting, which was set up to coordinate the General Staffs of the army and provide material support to politicians so they could form a new government.[1021] The Trial Chamber found that Bagosora conducted the meeting and acted as the main authority, even in relation to the members of the Crisis Committee.[1022] It stated that Bagosora was the one who decided that General Ndindiliyimana should chair its subsequent meetings.[1023] In the Trial Chamber's view, Bagosora's role at this meeting was "much more expansive […] than simply chairing a joint meeting of chiefs of staff and Ministry officials, as described in [the Gasana Letter]".[1024]

442. The Trial Chamber also considered that Bagosora's prominence and authority was

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of Defence officers, army and gendarmerie senior staff on the night of 6-7 April 1994). *See also* Exhibit P170 (List of reports and cables authored by General Dallaire), UNAMIR cable addressed to Maurice Baril dated 7 April 1994 (reference MIR-722), para. 8 ("[Dallaire] arrived at 2255 hours and was met by the Chef de cabinet of the [Ministry of Defence] […], the Chief of Staff of the Gendarmerie and the key staff appointments of the army and gendarmerie."); Exhibit DB8 (Testimony of Augustin Ndindiliyimana before the *Commission spéciale Rwanda* of Belgium, 21 April 1997), p. 3/14.

[1016] Trial Judgement, para. 2022.

[1017] Trial Judgement, para. 2022.

[1018] *See* Trial Judgement, para. 2022.

[1019] Trial Judgement, para. 2022. *See also ibid.*, paras. 2025, 2026.

[1020] Trial Judgement, para. 2025.

[1021] Trial Judgement, paras. 675, 684. The Trial Chamber found that "[i]n the hours that followed the plane crash on 6 April, Bagosora chaired a military crisis committee of senior military officials from both the army and gendarmerie at army headquarters in Camp Kigali which continued into the early hours of the next day". *See* Trial Judgement, para. 659. *See also ibid.*, para. 662. It referred to this meeting as the "first Crisis Committee meeting". *See ibid.*, para. 2022. The Appeals Chamber notes, however, that the Trial Chamber observed that, although the senior military officers who attended the 6 April Meeting ultimately became the members of the Crisis Committee, the Crisis Committee was not *per se* established until a meeting of senior military officers at ESM on 7 April 1994. *See ibid.*, para. 675. The Appeals Chamber finds that the Trial Chamber's error in this regard has no bearing on its legal findings.

[1022] Trial Judgement, para. 684.

[1023] Trial Judgement, para. 2025.

[1024] Trial Judgement, para. 2025.

evidenced by the fact that he was the person that the Commander of Camp Kigali, Colonel Nubaha, approached during the 7 April ESM Meeting concerning the ongoing attack against the ten Belgian peacekeepers at Camp Kigali.[1025] It found that Bagosora instructed Nubaha to take care of the problem and then went to the camp to follow up on it after the meeting.[1026] The Trial Chamber considered that Bagosora's actions were "more similar to that of a commander issuing orders and ensuring their implementation than those of a civilian functionary".[1027] It noted that after the death of the peacekeepers, Nubaha was transferred at Bagosora's request to a more significant post.[1028]

443. Additionally, the Trial Chamber referred to the fact that, at meetings held on 7 April 1994 with the Special Representative for the Secretary-General of the United Nations ("SRSG") and with the United States' Ambassador, Bagosora "was in fact representing the Rwandan military – the main authority still operating in the country – to the international community and was viewed by senior military officials as the most appropriate person to do so".[1029] The Trial Chamber also relied on the fact that, on 7 April 1994, "Bagosora also became the face of the Rwandan authorities to his own population" by signing a communiqué from the Minister of Defence and a communiqué on behalf of the Rwandan Armed Forces, both of which were read over the radio.[1030]

444. Furthermore, the Trial Chamber relied on Bagosora's key role in the installation of the Interim Government by meeting with political leaders on 7 and 8 April 1994.[1031] It found that, although a member of the Crisis Committee was resistant to Bagosora, as a retired officer, participating in the Crisis Committee meeting on 8 April 1994, "Bagosora ultimately performed the task of ensuring the formation of the new government and presented it to the committee for its approval".[1032] It noted that the person resistant to Bagosora's participation in the Crisis Committee, Colonel Léonidas Rusatira (then ESM Commander), was "ultimately marginalised".[1033] The Interim Government was sworn in on 9 April 1994.[1034] The Trial Chamber observed that the Crisis Committee "effectively ceased to exist after its meeting on 8 April".[1035]

445. The Trial Chamber found that Bagosora's specific role and authority over the military and militiamen after 9 April 1994 was less clear, but considered that he maintained influence and

[1025] Trial Judgement, para. 2026.
[1026] Trial Judgement, para. 2026. *See also ibid*., para. 679, fn. 2218.
[1027] Trial Judgement, para. 2026.
[1028] Trial Judgement, para. 2026.
[1029] Trial Judgement, para. 2023.
[1030] Trial Judgement, para. 2024.
[1031] Trial Judgement, paras. 2027, 2028. *See also ibid.*, paras. 1288, 1309, 1310.
[1032] Trial Judgement, para. 2027.
[1033] Trial Judgement, para. 2027.
[1034] Trial Judgement, para. 1309.

significance within the Rwandan government and military for the duration of the relevant events.[1036] The Trial Chamber considered Bagosora to be "an experienced and well trained officer, fully capable of command" and noted his seeming desire for more power than the post of *directeur de cabinet* allowed.[1037] The Trial Chamber stated that "[f]rom the morning of 7 April, he was armed, in uniform and accompanied by a military escort, certainly not the public persona of a simple civilian functionary", and that "[f]rom that date, in spite of any possible formal limitations stemming from his retirement from the army and his position as *directeur de cabinet*, he projected military power and authority, consistent with his conduct".[1038]

3. Discussion

446. Bagosora submits that the Trial Chamber erred in: (a) confusing his functions as a delegate of the Rwandan Armed Forces with those of a leader;[1039] (b) equating the notion of influence with that of effective control;[1040] (c) failing to consider the emergency situation;[1041] (d) failing to take into consideration evidence demonstrating that he lacked operational powers or authority over the Rwandan Armed Forces;[1042] (e) ignoring the powers of the Crisis Committee and other military officers;[1043] (f) considering as an indication of his effective control irrelevant evidence;[1044] (g) attaching undue importance to his refusal to recognise Prime Minister Uwilingiyimana's authority;[1045] (h) presuming that he had the ability to punish military officers;[1046] (i) failing to consider that the evidence could also lead to the inference that he lacked effective control over the Rwandan Armed Forces;[1047] and (j) thereby depriving him of the benefit of reasonable doubt.[1048] Bagosora contends that although there may have been some evidence to suggest that he had

[1035] Trial Judgement, para. 2027.
[1036] Trial Judgement, paras. 2028, 2029, 2031.
[1037] Trial Judgement, para. 2030.
[1038] Trial Judgement, para. 2030.
[1039] Bagosora Notice of Appeal, Ground 1(B); Bagosora Appeal Brief, paras. 32-46.
[1040] Bagosora Notice of Appeal, Grounds 1(C), 1(N); Bagosora Appeal Brief, paras. 47-54, 148, 149.
[1041] Bagosora Notice of Appeal, Grounds 1(A), 1(G); Bagosora Appeal Brief, paras. 25-31, 80-85.
[1042] Bagosora Notice of Appeal, Grounds 1(E), 1(F), 1(H), 1(K); Bagosora Appeal Brief, paras. 55-79, 86-100, 121-130.
[1043] Bagosora Notice of Appeal, Grounds 1(A), 1(J); Bagosora Appeal Brief, paras. 115-120.
[1044] Bagosora Notice of Appeal, Grounds 1(M), 1(O); Bagosora Appeal Brief, paras. 145-147, 150-161.
[1045] Bagosora Notice of Appeal, Ground 1(L); Bagosora Appeal Brief, paras. 131-144.
[1046] Bagosora Notice of Appeal, Ground 1(P); Bagosora Appeal Brief, paras. 162-165.
[1047] Bagosora Notice of Appeal, Ground 1(D); Bagosora Appeal Brief, paras. 55-68.
[1048] Bagosora Notice of Appeal, Ground 1(Q); Bagosora Appeal Brief, paras. 166-170. Bagosora also submits that the Trial Chamber erred in failing to compel Marcel Gatsinzi, who was appointed acting army Chief of Staff, to comply with a subpoena to testify in his defence. *See* Bagosora Notice of Appeal, Ground 1(I); Bagosora Appeal Brief, paras. 101-114. Bagosora's submissions in this respect are not directly related to his general challenge to the Trial Chamber's assessment of his effective control or superior responsibility, but rather allege violations of his fair trial rights. His submissions on the matter have therefore been addressed separately. *See infra*, Section IV.B.

effective control over the Rwandan Armed Forces, such evidence was insufficient to fulfil the required standard of proof.[1049] The Appeals Chamber will consider these submissions in turn.

(a) Confusion of Functions of a Delegate with Powers of a Leader

447. As indicated above, the Trial Chamber's conclusion that Bagosora had effective control over the Rwandan Armed Forces was based in part on its finding that he was a representative thereof:

> On 7 April, Bagosora, on behalf of the Rwandan military, met with Jacques Roger Booh-Booh, the Special Representative of the Secretary-General, around 1.00 a.m. […] and with the United States Ambassador at 9.00 a.m. […]. He claimed that he did not initiate these meetings and, in the case of the meeting with the United States, noted that he was accompanied by Ndindiliyimana. In the Chamber's view, the question of whether he initiated the meetings is besides the point: he was in fact representing the Rwandan military – the main authority still operating in the country – to the international community and was viewed by senior military officials as the most appropriate person to do so.[1050]
>
> In this same vein, Bagosora also became the face of the Rwandan authorities to his own population since he signed the communiqués read over the radio at 6.30 a.m. on 7 April and another one later that afternoon at 5.20 p.m. The first communiqué was an announcement from the Minister of Defence informing the country of the death of the President. It also asked the armed forces to "remain vigilant, to ensure the security of the people" and the population "to stay at home and await new orders". The second communiqué was issued on behalf of the armed forces. It informed the country of the army and gendarmerie's joint meeting at ESM earlier that day, the creation of the Crisis Committee, as well as […] their intention to ensure security, especially in Kigali, and support the country's political authorities.[1051]

448. Bagosora submits that the Trial Chamber erred by confusing the powers and duties that he had as a delegate with those of the head of an organ such as the Rwandan Armed Forces.[1052] He argues that the Trial Chamber attributed too much importance to his role of a spokesperson, which did not include decision-making powers or control over the country.[1053] To illustrate his argument, he asserts that the meeting with the SRSG was initiated at the suggestion of the Commander of the United Nations Assistance Mission for Rwanda ("UNAMIR"), General Roméo Dallaire, that he did not negotiate on behalf of the army during that meeting but that it was the SRSG who made requests to the military, and that he never attended meetings without another member of the Rwandan Armed Forces.[1054] In addition, he contends that he only signed the radio communiqués in his capacity as representative of the Ministry of Defence and as a result of having been delegated to do so by the Crisis Committee.[1055] As such, he argues, he merely set down in

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[1049] AT. 31 March 2011 p. 49.
[1050] Trial Judgement, para. 2023.
[1051] Trial Judgement, para. 2024 (internal references omitted).
[1052] Bagosora Notice of Appeal, Ground 1(B); Bagosora Appeal Brief, para. 32.
[1053] Bagosora Appeal Brief, paras. 38, 41; Bagosora Reply Brief, para. 25. *See also* AT. 31 March 2011 p. 43.
[1054] Bagosora Appeal Brief, paras. 34, 35, 37. *See also* Bagosora Reply Brief, paras. 25, 26.
[1055] Bagosora Appeal Brief, para. 39; Bagosora Reply Brief, para. 28. At the appeal hearing, Bagosora also submitted that to avoid "giving the impression of a military coup", "you could not have a communiqué signed by a group of military officers". *See* AT. 31 March 2011 p. 41.

writing the decisions taken by the two General Staffs and the directors of the Ministry at the 6 April Meeting, and those of the officers who attended the 7 April ESM Meeting.[1056] He further submits that his representation of the Rwandan Armed Forces and the appearance that he had power does not mean that he effectively had it.[1057]

449. The Prosecution responds that Bagosora fails to demonstrate any error by the Trial Chamber, and distorts the Trial Chamber's approach.[1058] It argues that Bagosora's representation of the army and gendarmerie at critical meetings cannot be reduced to a mere appearance of authority but was a material factor that the Trial Chamber properly took into account in establishing his effective control.[1059] The Prosecution asserts that Bagosora "cannot run away from his actual exercise of authority by generally claiming that he was representing someone else".[1060]

450. The Appeals Chamber recalls that indicators of effective control are a matter of evidence showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate.[1061] An accused's superior position and effective control are matters which, along with the other constituent elements of superior responsibility, must be established beyond reasonable doubt on the basis of the totality of the evidence adduced.[1062]

451. The Appeals Chamber is not persuaded by Bagosora's submission that, because the meeting with the SRSG was initiated by General Dallaire and because he never attended meetings without another member of the Rwandan Armed Forces, the Trial Chamber erred in considering his representation of the Rwandan Armed Forces in meetings with the international community as evidence of his effective control. As the Trial Chamber correctly observed, regardless of who initiated the meeting, Bagosora was regarded as the appropriate authority to engage in discussions with the international community on behalf of the Rwandan Armed Forces.[1063] The fact that other members of the Rwandan Armed Forces accompanied him does not undermine this.

[1056] Bagosora Appeal Brief, para. 39; Bagosora Reply Brief, para. 28.
[1057] Bagosora Appeal Brief, paras. 40, 42-46. *See also* Bagosora Reply Brief, para. 29.
[1058] Prosecution Response Brief (Bagosora), paras. 35-37.
[1059] Prosecution Response Brief (Bagosora), paras. 38-41.
[1060] Prosecution Response Brief (Bagosora), para. 42.
[1061] *Strugar* Appeal Judgement, para. 254; *Bla{ki}* Appeal Judgement, para. 69. *See also Ori}* Appeal Judgement, para. 20; *Halilovi}* Appeal Judgement, para. 66.
[1062] *Nahimana et al.* Appeal Judgement, para. 789; *Ntagerura et al.* Appeal Judgement, paras. 172-175, 399.
[1063] Trial Judgement, para. 2023. *See also* Roméo Dallaire, T. 19 January 2004 p. 33 ("Colonel Bagosora was to attend [the meeting at the U.S. Ambassador's residence on the morning of 7 April 1994]. He was the interlocutor. He was the person of authority and demonstrating that authority and exercising it. So the SRSG clearly said that, yes, Colonel Bagosora had to represent the government, the military situation on the RGF and government side.").

452. Bagosora's representation of the Rwandan Armed Forces in meetings with the international community is consistent with the fact that, in accordance with the Official Journal, Bagosora was to replace the Minister of Defence in his absence.[1064] While this representation of the Rwandan Armed Forces does not on its own demonstrate that Bagosora exercised effective control over the Rwandan Armed Forces, it is indicative of the fact that he played a sufficiently prominent role in the Rwandan Armed Forces to be trusted with discussions with high level contacts. Moreover, the Appeals Chamber notes that the Trial Chamber found that, during the meeting with the SRSG, Bagosora "acted as the representative of the armed forces and refused to consult with the Prime Minister",[1065] and was also "clearly acting as an authority of the military during the meeting" with the United States' Ambassador where the security situation in Kigali was discussed.[1066] Bagosora does not demonstrate that the Trial Chamber erred in so finding. Accordingly, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to have considered this evidence in its assessment of whether Bagosora had effective control over the Rwandan Armed Forces, nor was the weight given by the Trial Chamber to Bagosora's role in this respect unreasonable.

453. The Appeals Chamber considers that the fact that Bagosora signed two communiqués read over the radio on 7 April 1994 addressing the Rwandan population and Rwandan Armed Forces does not, alone, demonstrate that Bagosora exercised effective control over the Rwandan Armed Forces. However, the Appeals Chamber notes that Bagosora testified that his role in the issuance of the communiqués was not limited to signing them. With respect to the drafting of the second communiqué, issued on behalf of the Rwandan Armed Forces, Bagosora testified that: "Well, in principle, the boss will ask the juniors and subordinates to work. I was the chair of that meeting. I could not be attending to the drafting of the communiqué. I had to review the draft with them afterwards to make sure it was okay".[1067] This explanation indicates that he not only signed the communiqué, but he also approved it once it had been drafted by subordinates. While this does not demonstrate that Bagosora was solely responsible for the issuance of the communiqués, it was

[1064] Trial Judgement, para. 2018.
[1065] Trial Judgement, para. 668.
[1066] Trial Judgement, para. 672.
[1067] Bagosora, T. 8 November 2005 p. 8. *See also ibid.*, p. 32 ("In the meantime, there was the communiqué. […] The head of the information division brought the draft to me. Actually, what he brought to me was the draft so that I could review or approve the style of the drafting. At the time we were designating the drafting committee, we had agreed that they would prepare the draft and I was going to discuss it with them once the draft had been completed. The head of the information division brought the draft to me. […] Then, there was the communiqué, which I had not yet discussed with the drafting committee, and that communiqué had to be published. I also had to go and rescue my family. I decided to have the communiqué published as it was, so I signed it and handed it to the head of the information division for onward transmission to Radio Rwanda. […] What I mean is that it was the first version, because we had agreed that after the drafting of the communiqué we were going to discuss it, so as to approve it together, and then have it published. Now, since they had prepared it and when I read it I did not see anything to add to it, and on account of the emergency situation, I decided to have the communiqué published as it was.").

reasonable for the Trial Chamber to have considered this evidence in its assessment of whether he exercised effective control.

454. As regards Bagosora's argument that he merely set down in writing the decisions of the officers who attended the 6 April Meeting and the 7 April ESM Meeting, the Appeals Chamber refers to its discussion below of the prominent role Bagosora actually played at these two meetings.[1068]

455. For the foregoing reasons, the Appeals Chamber considers that Bagosora has failed to demonstrate that the Trial Chamber erred in relying on this evidence. While his role as representative of the Rwandan Armed Forces could not, on its own, have supported a finding that he exercised effective control over the Rwandan Armed Forces, the Appeals Chamber stresses that it was only one among many indicators that the Trial Chamber took into account.[1069] The Appeals Chamber will consider Bagosora's arguments in relation to these factors in subsequent sections.

456. Bagosora's submission that the Trial Chamber erred in confusing the powers and duties he had as a delegate with those of a leader is therefore dismissed.

(b) Equation of Influence with Effective Control

457. Bagosora submits that the Trial Chamber erred in equating the notion of influence in an emergency context, or of political influence, with that of effective control over the Rwandan Armed Forces.[1070] He argues that the ability to influence others should not be confused with the power to command military officers to perform specific acts.[1071]

458. The Prosecution responds that the Trial Chamber considered the totality of the evidence in establishing his superior responsibility, and that Bagosora's pre-eminent position and his conduct at important meetings cannot be reduced to mere influence without effective control.[1072]

459. The Appeals Chamber finds Bagosora's argument that the Trial Chamber equated influence with effective control unconvincing. The Trial Chamber correctly stated that the requirement of proving effective control "is not satisfied by a showing of general influence on the part of the

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[1068] *See infra*, paras. 474-479, 492.
[1069] *See* Trial Judgement, paras. 2022-2031. *See also infra*, para. 459.
[1070] Bagosora Notice of Appeal, Grounds 1(C), 1(N); Bagosora Appeal Brief, paras. 47, 148. *See also* AT. 31 March 2011 p. 43.
[1071] Bagosora Appeal Brief, paras. 48, 50, 148, 149.
[1072] Prosecution Response Brief (Bagosora), paras. 44-52, 111, 112.

accused".[1073] Moreover, the factors relied on by the Trial Chamber in finding that his effective control had been established were not merely indicators of general influence. As noted above, the Trial Chamber also relied on, *inter alia*: his *de jure* powers as *directeur de cabinet*; his representation of the Rwandan Armed Forces in meetings with the international community; his issuing and approving a communiqué on behalf of the Rwandan Armed Forces; his behaviour at important meetings of the Rwandan Armed Forces, including at the meeting at which the idea of the Crisis Committee was ratified; his issuing instructions; and his role in installing the Interim Government and transferring authority to it from the Crisis Committee.[1074] These indicators of authority were not merely examples of influence but concrete instances of Bagosora's involvement in crucial decisions and actions taken by the military in the wake of the death of the President.

460. The Appeals Chamber notes that the Trial Chamber did find that, after the return of the Minister of Defence on the afternoon of 9 April 1994 and the installation of the Interim Government that day, Bagosora continued to play a prominent role and was tasked with important functions.[1075] However, this conclusion did not lead to any adverse finding against him as the Trial Chamber only found that he exercised effective control between 6 and 9 April 1994.[1076]

461. Accordingly, the Appeals Chamber finds that Bagosora has demonstrated no error in the Trial Chamber's approach.

(c) Failure to Consider the Emergency Situation

462. Bagosora submits that the Trial Chamber failed to consider the exceptional character of the emergency situation.[1077] He argues that the urgent situation created by the President's death, the absence of other leaders from Rwanda at the time, and the resumption of RPF hostilities, had an impact on the effective control over the Rwandan Armed Forces and on his role as *directeur de cabinet* as of 6 April 1994.[1078] He asserts that in the circumstances he had to take certain emergency actions which did not amount to effective control over the armed forces, and that the Trial Chamber should have considered the emergency situation in interpreting the facts and his actions.[1079] In his

[1073] Trial Judgement, para. 2012.
[1074] Trial Judgement, paras. 2022-2031.
[1075] Trial Judgement, paras. 2028, 2029, 2031.
[1076] Trial Judgement, paras. 2017-2031.
[1077] Bagosora Notice of Appeal, Grounds 1(A), 1(G); Bagosora Appeal Brief, paras. 25-31, 80-85.
[1078] Bagosora Appeal Brief, paras. 25, 29-31. *See also ibid*., paras. 20, 74, 85; Bagosora Reply Brief, para. 17.
[1079] Bagosora Appeal Brief, paras. 80, 84. *See also ibid*., paras. 55, 220-222.

view, the Trial Chamber failed to consider that the circumstances made it impossible to comply strictly with the terms set out in the Gasana Letter.[1080]

463. The Prosecution responds that Bagosora does not elaborate on his arguments, which are unfounded and misguided, and demonstrate no error by the Trial Chamber.[1081] It submits that the Trial Chamber was clearly alive to the situation existing at the time, and that it reached its conclusions after considering the totality of the evidence.[1082] It adds that Bagosora does not explain how his non-adherence to the terms of the Gasana Letter undermined his superior position and effective control, and that by exceeding the limits imposed therein, he demonstrated the exercise of effective authority.[1083]

464. A reading of the Trial Judgement reveals that the Trial Chamber was seised of the extraordinary circumstances prevailing at the time in assessing the evidence in relation to Bagosora's authority.[1084] Indeed, the Trial Chamber's discussion shows that it specifically viewed the actions taken by Bagosora, which indicated the scope of his authority, in the light of the crisis situation. In considering his role in representing the Rwandan Armed Forces in the meetings with the international community, the Trial Chamber noted that the Rwandan military was "the main authority still operating in the country" at the time.[1085] Similarly, it considered his dominant role within the group of senior military officials which gathered at the 6 April Meeting.[1086] It also considered his role within the group of operational commanders of the gendarmerie and army which gathered at the 7 April ESM Meeting, the purpose of which was to "update them on the prevailing situation, and issue instructions for the maintenance of order".[1087] It further took into account his role in facilitating the installation of the Interim Government on 9 April 1994.[1088]

465. The evidence considered by the Trial Chamber demonstrates that Bagosora was involved in almost all aspects of the high level response to the emergency circumstances, which was initially undertaken by the military, since it was the primary authority still functioning in the country in the immediate aftermath of the President's death. In fact, Bagosora's authority was greater than it

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[1080] Bagosora Appeal Brief, para. 85. *See also ibid*., paras. 20, 59, 74.
[1081] Prosecution Response Brief (Bagosora), paras. 23-33, 74-78. *See also ibid*., para. 51.
[1082] Prosecution Response Brief (Bagosora), paras. 26-29. *See also ibid*., paras. 149-156.
[1083] Prosecution Response Brief (Bagosora), paras. 25, 69, 78.
[1084] *See*, *e.g*., Trial Judgement, para. 2038 ("It is inconceivable that Bagosora would not be aware that his subordinates would be deployed for these purposes, in particular in the immediate aftermath of the death of President Habyarimana and the resumption of hostilities with the RPF, when the vigilance of military authorities would have been at its height.").
[1085] Trial Judgement, para. 2023.
[1086] Trial Judgement, para. 2022.
[1087] Trial Judgement, para. 2025.
[1088] Trial Judgement, para. 2027.

would have been in normal circumstances because of the existence of the emergency circumstances, including the Minister of Defence's absence.

466. Bagosora's contention that the Trial Chamber failed to consider the exceptional character of the emergency situation is therefore dismissed.

(d) Lack of Operational Powers and Authority

467. Bagosora submits that the Trial Chamber failed to consider evidence that he had no operational powers and lacked authority.[1089] He contends that the Trial Chamber failed to consider that he had no operational powers over the army or gendarmerie before 6 April 1994, and that his role in the 6 April Meeting was in strict conformity with his powers as *directeur de cabinet*.[1090] He asserts that there is no evidence that he deployed any troops or issued any orders, and that the record shows that the crimes during the relevant period were committed independently of any orders.[1091] He argues that, as of 7 April 1994, all operational decisions were taken by a group of officers, then by the Crisis Committee,[1092] and that one such collectively taken decision was Gatsinzi's appointment as interim army Chief of Staff, which was not a promotion or a transfer, but simply a necessary delegation to someone with military operational experience in a time of urgent need.[1093]

468. Moreover, Bagosora submits that the Trial Chamber failed to consider that the reason he presided over some Crisis Committee meetings was that his retirement from the army enabled the other member officers to reach decisions democratically, and that his post was of a political, not military, nature.[1094] He adds that the Trial Chamber ignored the fact that his membership in the Crisis Committee was contested by officers such as Colonel Rusatira,[1095] and that there was no

[1089] Bagosora Notice of Appeal, Grounds 1(E), 1(F), 1(H), 1(K); Bagosora Appeal Brief, paras. 51-53, 69-75, 86-100.
[1090] Bagosora Appeal Brief, para. 69.
[1091] Bagosora Appeal Brief, paras. 49, 53; Bagosora Reply Brief, paras. 17, 32-35, 74-76.
[1092] Bagosora Appeal Brief, paras. 25, 51(c), 60-62, 66, 71-73, 86, 88, 95-97, 100. *See also* AT. 31 March 2011 p. 54.
[1093] Bagosora Appeal Brief, paras. 86-99; Bagosora Reply Brief, para. 37. *See also* Bagosora Appeal Brief, para. 66(d). In this respect, Bagosora specifically contests the Trial Chamber's view at footnote 2216 of the Trial Judgement that since "Colonel Mur[a]samp[o]ngo, head of the administration bureau (G-1), was already serving as acting chief of staff on 6 April in the absence of Déogratias Nsabimana since he was the next most senior member of the army staff […] there was therefore no gap necessitating an emergency appointment in the absence of the Minister of Defence." *See* Bagosora Appeal Brief, paras. 89, 90; AT. 31 March 2011 p. 40. In the Appeals Chamber's view, whether or not the appointment was necessary has no bearing on whether Bagosora exercised effective control. As Bagosora's contention that the Trial Chamber's view at footnote 2216 was factually inaccurate is of no consequence to the present appeal, the Appeals Chamber will not consider it.
[1094] Bagosora Notice of Appeal, Ground 1(K); Bagosora Appeal Brief, paras. 19, 66(e), 121. *See also* Bagosora Reply Brief, para. 21.
[1095] Bagosora Appeal Brief, paras. 121, 123. *See also ibid.*, paras. 51(c), 77(b).

evidentiary basis for concluding that Rusatira was marginalised.[1096] According to him, the fact that he presided over the 6 April Meeting, which was customary for the *directeur de cabinet*, and co-presided over the 7 April ESM Meeting, does not signify that he had authority over any of those present.[1097]

469. Bagosora also contends that the Trial Chamber failed to consider that he only learned of the emergency 6 April Meeting accidentally, that he did not attend several important meetings from 6 to 9 April 1994, that the decisions taken at these meetings were imposed on him, and that he never convened a meeting during this period.[1098] In particular, he points to his absence from a meeting which took place in the evening of 7 April 1994 because he was out of Kigali at the time, and asserts that if he was as central an authority as found by the Trial Chamber, he would have been able to order a helicopter to take him back to Kigali.[1099] He further points to his absence from a meeting in the morning of 8 April 1994, where his membership in the Crisis Committee was contested, and another meeting in the morning of 9 April 1994.[1100] He asserts that the Trial Chamber should have taken into consideration the effect of the holding of important meetings in his absence, and his last-minute invitations to those which he did attend.[1101] This, in Bagosora's view, demonstrates that he was not treated as a military authority but as a political figure.[1102]

470. Bagosora further submits that the Trial Chamber failed to consider as evidence of his lack of effective control over the armed forces the fact that the "mutineers at Camp Kigali […] were not at all impressed by [him]", that "[h]e was even labeled an accomplice", and that "[he] did not know what to do after his fruitless visit to Camp Kigali".[1103]

471. The Prosecution responds that Bagosora appears to equate effective control with operational control, but does not develop this argument, and that he fails to provide any support to his contention that decisions were imposed on him or that his authority was revoked.[1104] It asserts that, as a matter of law, proof is not required that the accused deployed troops or gave orders for superior

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[1096] Bagosora Appeal Brief, paras. 124, 125, *referring to* Trial Judgement, para. 2027, fn. 2221.
[1097] Bagosora Appeal Brief, paras. 126, 127; Bagosora Reply Brief, paras. 21, 23. Bagosora also submits that at no time did Gatsinzi, Ndindiliyimana, or any other military officer complain during the meetings of the Crisis Committee that he was interfering with the command of the Rwandan Armed Forces, and that after the 7 April ESM Meeting he no longer chaired any meeting of soldiers or military structures. *See* Bagosora Appeal Brief, paras. 52, 128, 130.
[1098] Bagosora Notice of Appeal, Ground 1(F); Bagosora Appeal Brief, paras. 28, 51(a), 66(a), 76. *See also* Bagosora Reply Brief, paras. 12, 98.
[1099] Bagosora Appeal Brief, paras. 66(c), 77(a).
[1100] Bagosora Appeal Brief, paras. 77(b), (c); Bagosora Reply Brief, para. 98.
[1101] Bagosora Appeal Brief, para. 78.
[1102] Bagosora Appeal Brief, para. 79.
[1103] Bagosora Appeal Brief, paras. 51(e), 51(f) (emphasis omitted). *See also* Bagosora Reply Brief, para. 100.
[1104] Prosecution Response Brief (Bagosora), paras. 63-65, 70, 71.

responsibility to exist.[1105] It further submits that the evidence established Bagosora's ability to issue orders to the Rwandan Armed Forces between 7 and 9 April 1994.[1106] The Prosecution adds that Bagosora's purported reasons for presiding over some meetings are "beside the point",[1107] and that his alleged absence from certain meetings and lack of involvement in convening any of them are irrelevant as far as superior responsibility is concerned.[1108]

472. With respect to Bagosora's argument that crimes were committed independently of orders and that there is no proof that he ever issued any orders or deployed any troops, the Appeals Chamber emphasises that absence of proof of orders is not demonstrative of a lack of effective control, and the fact that subordinates might perpetrate crimes independently of orders does not show that a superior lacks the ability to prevent or punish those crimes.[1109] In any event, as discussed below, there is evidence that Bagosora did issue orders in the course of the relevant period.

473. Turning to Bagosora's ability to issue orders, the Trial Chamber found that according to the Official Journal of the Rwandan government, the *directeur de cabinet* held the most senior position in the Ministry of Defence after the Minister – who was the direct superior of the Chiefs of Staff of the army and gendarmerie in the chain of command – and was to replace the Minister in his absence.[1110] The Official Journal did not set out any limitations on the scope of the *directeur de cabinet*'s powers when replacing the Minister.[1111] The Trial Chamber also found that pursuant to the Gasana Letter, which limited the *directeur de cabinet*'s responsibilities, the *directeur de cabinet*

[1105] Prosecution Response Brief (Bagosora), paras. 47, 52. *See also ibid*., para. 24.
[1106] In particular, the Prosecution points to: Bagosora's authoritative manner of speaking to unit commanders during a meeting on 7 April 1994; Bagosora's qualification of the group of officers designated to draft the communiqué, including Rusatira, as his "juniors and subordinates"; Bagosora's concession that, on 7 April 1994, he ordered Gatsinzi to be in Kigali at 6.00 a.m.; Bagosora's refusal to place the Rwandan Armed Forces under the authority of the Prime Minister; Bagosora's forceful and immediately effective instructions to members of the Presidential Guard who were manning a roadblock in Kimihurura to let him and Dallaire pass through quickly; Nubaha's immediate compliance with Bagosora's dismissal of and instruction to Nubaha to return to Camp Kigali to deal with the situation there; Bagosora's request that Nubaha be transferred; and Bagosora's statement that members of the Presidential Guard who did not know him would have nevertheless listened to him as an authority of the Ministry of Defence in accordance with the rules enforced, according to which they have to respect the authorities. *See* AT. 31 March 2011 pp. 70-73.
[1107] Prosecution Response Brief (Bagosora), para. 95. *See also ibid*., para. 98.
[1108] Prosecution Response Brief (Bagosora), paras. 33, 49, 72.
[1109] *Cf. Nahimana et al*. Appeal Judgement, para. 484; *Ori}* Appeal Judgement, para. 18; *Halilovi}* Appeal Judgement, paras. 59, 210.
[1110] Trial Judgement, para. 2018.
[1111] The Appeals Chamber notes that the Official Journal specifies that the *directeur de cabinet*'s replacement of the Minister of Defence is with respect to routine matters. *See* Exhibit DB4 (*Journal officiel de la République rwandaise*, dated 15 November 1992), p. 1766 ("*Remplacement du Ministre en cas d'absence ou d'empêchement de ce dernier pour ce qui concerne les affaires courantes*"). However, the Appeals Chamber does not consider this to have limited the scope of the *directeur de cabinet*'s *de jure* authority over the Rwandan Armed Forces while replacing the Minister of Defence in his absence. As such, the Appeals Chamber is not convinced by the suggestion made by Bagosora's Lead Counsel in the course of his cross-examination of Witness Marcel Gatsinzi on appeal, that supervising a crisis

was authorised "to convoke and preside over meetings of the chiefs of staff of the army and gendarmerie as well as the other directors of the Ministry", and to subsequently "issue operational orders to the chiefs of staff of the army and gendarmerie if they were in writing and had also been previously approved by those in attendance, in particular the concerned chief of staff".[1112] Regardless of whether the limitations imposed by the Gasana Letter remained in force after Gasana fled Rwanda in July 1993,[1113] in the Minister's absence between 6 and 9 April 1994, Bagosora ultimately had the power to issue operational orders to the army and gendarmerie in his capacity as acting Minister of Defence.[1114]

474. The Trial Judgement reflects that in the power vacuum following the President's death, Bagosora sought and gained control of the initial response to the emergency situation. In this respect, the Appeals Chamber recalls Bagosora's testimony that he was the one who proposed the creation of the Crisis Committee:

> After the death of the president, the minister of defence, who had the responsibility to coordinate alone the army and the gendarmerie, he could serve as joint chief of staff because there was no other. Given that the chief of staff of the army had died and was replaced and the interim still being in Butare, given that there was this void, I proposed the crisis committee to serve the purposes that a joint general staff would have served if it had existed.[1115]

General Dallaire testified that he quickly realised that Bagosora was the person of authority with whom he needed to coordinate.[1116] He remarked in respect of his meeting with Bagosora and Ndindiliyimana on the afternoon of 7 April 1994 that "I had, by that time, I must repeat, seen no one other than Colonel Bagosora as the leading body, and he, at no time, demonstrated that he was

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committee or activities relating to such a committee was not part of the "*affaires courantes*". *See* AT. 30 March 2011 p. 20 (French).

[1112] Trial Judgement, para. 2019.

[1113] *See* Trial Judgement, para. 2020.

[1114] Trial Judgement, para. 2021. This finding is supported by the Appeals Chamber's finding below that the fact that Bagosora requested Nubaha's transfer is relevant in showing that Bagosora made decisions in respect of military personnel which were carried out. *See infra*, para. 501. The Appeals Chamber also notes Bagosora's statement that soldiers of the Presidential Guard would have "listened to [him] as an authority of the ministry in accordance with the rules enforced, according to which they have to respect the authorities." *See* Bagosora, T. 7 November 2005 p. 18.

[1115] Bagosora, T. 7 November 2005 p. 5. *See also ibid*., p. 4 ("I proposed that a crisis committee should be set up to manage the situation").

[1116] Roméo Dallaire, T. 19 January 2004 p. 43 ("So when [Bagosora] arrived from lunch I was not particularly enamoured to see him in one sense, yet I was glad that he was there because he was the link between UNAMIR and myself and any organisation or seemingly organised entity within the government or governmental forces."). Dallaire's impression of Bagosora's authority was reinforced by an earlier encounter with soldiers of the Presidential Guard who immediately obeyed Bagosora's instructions to let him and Dallaire through a roadblock on their way to the SRSG's house. *See ibid*., pp. 29-31 ("It came during the trip towards Mr. Booh-Booh, where there were elements of the Presidential Guard already deployed […] near their camp at […] Meridian roundabout. […] [W]e did get stopped […] immediately at the roundabout by a roadblock [by maybe six or seven members of the Presidential Guard]. […] I turned to Colonel Bagosora and asked him to intercede so we can get through this barrier rapidly, because time was, of course, at the route of essence [*sic*]. […] He stayed in the car, and rolled down the window and spoke. […] I'm afraid [I do] not [know what he said]. It was in Kinyarwanda, but the effect was immediate. I don't remember the exact rank, it was an

giving that up or, you know, that he had lost his position of authority, that was created the night before".[1117]

475. The Appeals Chamber observes that, contrary to Bagosora's contentions, the Trial Chamber did consider evidence that he may not have initiated meetings.[1118] Indeed, the manner in which he claims to have learned of the 6 April Meeting is consistent with the Trial Chamber's finding that Ndindiliyimana convoked it.[1119] The Appeals Chamber finds no error in the Trial Chamber's assessment of Bagosora's authority given that this meeting was organised on short notice to address the crisis situation that followed the death of the President a mere few hours earlier, and given that despite its *de jure* attributions, Bagosora's position as *directeur de cabinet* did not necessarily dictate that he assume military leadership.[1120] More importantly, Bagosora's purported last-minute invitation does not undermine the Trial Chamber's finding that he ultimately chaired the meeting and played the dominant role in it.[1121] In this respect, the Trial Chamber noted that Bagosora confirmed that he was the natural person to chair the 6 April Meeting given the Minister's absence.[1122]

476. The Trial Chamber's findings are supported by the observations of Major Brent Beardsley, General Dallaire's executive assistant who later joined the meeting with Dallaire, that all the senior military officers at the meeting deferred to Bagosora.[1123] Beardsley further testified in response to a

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NCO who came close to the car and he belted out some instructions in a very forceful manner, and the chap immediately reacted and the barrier was opened and we made right through.").

[1117] Roméo Dallaire, T. 19 January 2004 p. 47. *See also ibid*., p. 46 ("[…] I had concluded [Bagosora] was the kingpin, that I had seen no other option anywhere on the government side to look for somebody else in authority was reinforced during the afternoon, and the information [Bagosora] was giving me, at no time did Ndindiliyimana demonstrate any contrary reaction.").

[1118] *See* Trial Judgement, paras. 2022, 2023.

[1119] Trial Judgement, para. 2022.

[1120] In this respect, the Appeals Chamber notes Dallaire's evidence that he was surprised that Bagosora was chairing the meeting. *See* Roméo Dallaire, T. 19 January 2004 p. 35 ("I must say I did find it unusual when I did arrive that Ndindiliyimana was not chairing the meeting, as he was the senior military officer, and finding instead Colonel Bagosora, who was the *chef de cabinet*.").

[1121] Trial Judgement, para. 2022.

[1122] *See* Trial Judgement, fn. 2215, *citing* Bagosora, T. 2 November 2005 p. 77 ("And in the course of the meeting, I found myself chairing the meeting at the invitation of General Ndindiliyimana; but I should even point out that even if he had not requested me to do so, I would have chaired the meeting. I was empowered to chair the meeting. […] I was not the highest ranking officer, but with regard to the duties which had been outlined by the minister in his directives, which we have already visited from January 1993, there was a provision authorising the director of cabinet to convene and chair the meeting of the joint chiefs, as well as service heads at [the Ministry of Defence]. […] But I was actually the most appropriate person, because General Ndindiliyimana, being a gendarme, had no authority over the army, whereas in my capacity as director of cabinet, sitting in for the minister, I could speak to the two armed forces or two forces by delegation. […] The minister was absent. There was a serious crisis. If the minister would have been there, he would have done the same thing. Since he was not present, I replaced him."). *See also* Trial Judgement, para. 659.

[1123] Brent Beardsley, T. 3 February 2004 pp. 24, 25 ("All of them, all of them deferred to Bagosora. The only other one to speak was Major-General Ndindiliyimana, when he was called upon by Colonel Bagosora to identify vital points in the city that required guards, and one other officer who took a phone call. Other than that, all of the conversation was

question about whether his impression of the 6 April Meeting was that the military was in control of Rwanda:

> They certainly said that they were and they intended to, except they were having problems – this is all from Bagosora – except they were having problems with the Presidential Guard which was distraught at the loss of the president, but that he would make every effort to bring them under control. But there was no doubt in my mind when we left that first meeting that Colonel Bagosora was in charge of this committee, and that this committee stated they had control since they were at the army headquarters, that they had control of the armed forces and the gendarmerie in Rwanda.[1124]

477. The Trial Chamber's findings are further supported by the cable code Major Beardsley prepared and sent on behalf of General Dallaire to Maurice Baril, head of the military division of the United Nations Department of Peacekeeping Operations in New York. The cable code reported that operational plans for joint UNAMIR and Rwandan Armed Forces patrols were discussed at the meeting and that Bagosora "asked to place troops on alert for possible deployment but [stated] they would remain in their barracks".[1125] Similarly, the minutes from the meeting reflect that it was Bagosora who assured Dallaire of any cooperation he required.[1126] In addition, as the Trial Chamber noted, it was Bagosora who rejected Dallaire's suggestion that the Rwandan Armed Forces be placed under the authority of the Prime Minister.[1127]

478. Additionally, the Appeals Chamber is of the view that the Trial Chamber reasonably considered the evidence that the senior military officers present decided in the course of the 6 April Meeting to appoint Colonel Gatsinzi as interim army Chief of Staff.[1128] The Trial Chamber

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led by Bagosora and all of the others deferred and looked to him. Even when General Ndindiliyimana spoke, he looked to Bagosora for approval of what he was saying.").

[1124] Brent Beardsley, T. 3 February 2004 pp. 32, 33.

[1125] Exhibit P170 (List of reports and cables authored by General Dallaire), UNAMIR cable addressed to Maurice Baril dated 7 April 1994 (reference MIR-722), para. 15.

[1126] Exhibit DB66 (Minutes of the meeting of the *directeur de cabinet*, gendarmerie Chief of Staff, Ministry of Defence officers, army and gendarmerie senior staff on the night of 6-7 April 1994), para. 3.

[1127] Trial Judgement, para. 660. *See* Bagosora, T. 7 November 2005 pp. 5 ("It was then that [Dallaire] asked that Prime Minister Agathe Uwilingiyimana should be involved in our discussions or that our discussions should be carried out under her authority. At that time, I told him no, that was not possible, that our armed forces cannot be placed under the authority of our prime minister, Agathe Uwilingiyimana. There was no discussion about this issue on the spot. I simply said that Agathe Uwilingiyimana was not the right person for that situation. There was no discussion on that."), 8 ("I said that I was refusing that proposal because Madam Uwilingiyimana was not the right person for the situation and no one else disputed that fact."), 15, 24. *See also* Roméo Dallaire, T. 19 January 2004 pp. 24, 25; Brent Beardsley, T. 3 February 2004 p. 25. The Appeals Chamber considers that the reference to the "officer**s**" present at the 6 April Meeting scoffing and stating that the Prime Minister "and her group were not a government" in the UNAMIR 7 April 1994 cable signed by Beardsley on behalf of Dallaire to Maurice Baril does not undermine corroborative testimonial evidence that Bagosora was the one who rejected Dallaire's suggestion that the Rwandan Armed Forces be placed under the authority of the Prime Minister. *See* Bagosora Appeal Brief, paras. 72, 73, *referring to* Exhibit P170.

[1128] *See* Trial Judgement, paras. 659 ("The Crisis Committee decided that Colonel Marcel Gatsinzi would serve as the interim chief of staff."), 2022 ("It was of course consistent with his authority as *directeur de cabinet* to preside over joint meetings of the army and gendarmerie chiefs of staff. However, several of the actions taken during the meeting and afterwards were not. In particular, the committee named Marcel Gatsinzi, the commanding officer of ESO in Butare prefecture, as the acting army chief of staff. It was Bagosora who proposed naming an acting chief of staff and personally signed the telegram making the appointment.").

noted Bagosora's own testimony that he proposed naming an acting Chief of Staff during this meeting, supported the choice of Gatsinzi to fill the position, and personally signed the telegram making the appointment after Gatsinzi was chosen over Rusatira by those present.[1129] Bagosora also testified that he later telephoned Gatsinzi and ordered him to return to Kigali at 6.00 a.m. to take up his duties.[1130] Accordingly, while the decision to appoint Gatsinzi was not Bagosora's alone, the Appeals Chamber finds no error in the Trial Chamber's conclusion that he was instrumental in it.[1131]

479. The Appeals Chamber finds no error in the Trial Chamber's conclusion that Bagosora acted as a main authority at the 7 April ESM Meeting either.[1132] In this respect, the Trial Chamber noted that the 7 April ESM Meeting did not start before Bagosora arrived,[1133] and that Bagosora instructed Rwandan Armed Forces officers to maintain control and curtail excesses.[1134] General Dallaire also observed that "it was clear that Colonel Bagosora was giving instructions, direction, and General Ndindiliyimana acquiescing to that".[1135] In addition, the Appeals Chamber notes that Bagosora clearly considered that he played a role in issuing orders to the Reconnaissance Battalion

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[1129] Trial Judgement, para. 2022, *referring to* Bagosora, T. 2 November 2005 pp. 79-81 *and* T. 7 November 2005 p. 57.
[1130] Bagosora, T. 7 November 2005 p. 32.
[1131] With respect to Bagosora's contention that Gatsinzi's appointment was neither a promotion nor a transfer, the Appeals Chamber notes that Gatsinzi himself also testified to that effect. *See* Marcel Gatsinzi, AT. 30 March 2011 p. 47 (closed session) ("It was not at all a promotion because I consider that a promotion involves [a higher] rank […]. [T]hat was an assignment […] to other duties. So for me that was not a promotion. It was just a […] way of embarrassing me."). Nevertheless, the Appeals Chamber finds these arguments to be unconvincing. As one of the three most senior positions within the Ministry of Defence second to the Minister himself (*see* Trial Judgement, para. 2018, *referring to* Exhibit DB4 (*Journal officiel de la République rwandaise*, 15 November 1992), pp. 1766-1769), Gatsinzi's appointment from commanding officer of the *École des sous-officiers* in Butare prefecture to the Chief of Staff of the Rwandan army, even if only temporary, was undeniably a promotion in the ordinary sense of the word. In addition, the Appeals Chamber notes the Trial Chamber's finding that Gatsinzi's appointment as acting Chief of Staff on 7 April 1994 also involved a promotion in his rank, from Colonel to General. *See* Trial Judgement, para. 151.
[1132] Trial Judgement, paras. 684, 2025.
[1133] Trial Judgement, para. 675 ("The meeting was scheduled to start at 10.00 a.m., but began late because Bagosora arrived closer to 10.15 a.m."), *referring to*, *inter alia*, Bagosora, T. 7 November 2005 pp. 73, 74.
[1134] Trial Judgement, para. 677, *referring to* Roméo Dallaire, T. 19 January 2004 pp. 37, 38 ("[Bagosora] goes right straight to the lectern after showing me a chair and he continues for a short while, a bit in Kinyarwanda and then in French, in [which] he is telling the commanders that the situation has got to be kept under control, that the unit commanders are to keep firm discipline in their units, and that the *débordement* that is commenced will be resolved and curtailed, and essentially gave them this information in a[] sense of, 'You now have your orders, so get on with it.'"). *See also* Bagosora, T. 8 November 2005 p. 8 ("Q. […] Why are you not among the group of people charged with drafting the communiqué you had talked to us about? A. Well, in principle, the boss will ask the juniors and subordinates to work. I was the chair of that meeting. I could not be attending to the drafting of the communiqué. I had to review the draft with them afterwards to make sure it was okay. That is quite logical, and also I had promised the commander of the Camp Kigali to go and find out about the tension he was talking about. I needed to go and see for myself exactly what was going on, more so because we had heard gunfire from that area while we were at the meeting."). This is further supported by the Appeals Chamber's finding below that Nubaha's choice to address Bagosora during the 7 April ESM Meeting shows that Nubaha perceived Bagosora to be the relevant person to notify of the situation at Camp Kigali and the one in a position of authority with the means to take action to address the situation. *See infra*, para. 500.
[1135] Roméo Dallaire, T. 19 January 2004 p. 41.

to undertake patrols to neutralise soldiers of the Presidential Guard who were shooting in the air.[1136] In response to a question about whether this was part of his duties, Bagosora responded: "Once we were in a meeting with the gendarmerie chief of staff and myself, it was a meeting which fell in line with the framework which I had been authorised".[1137] Bagosora testified that he later telephoned the Commander of the Presidential Guard to follow up on the order.[1138] Thus, contrary to Bagosora's contention, the evidence before the Trial Chamber clearly supported its finding that Bagosora acted as a main authority, even in relation to the Crisis Committee, at the 7 April ESM Meeting.

480. As regards Bagosora's argument that the Trial Chamber failed to consider that the conditions under which the 7 April ESM Meeting was convened supported the inference that he lacked authority, the Appeals Chamber notes that Bagosora himself testified that, although the meeting was initiated by the military officers present at the 6 April Meeting while he was meeting with the SRSG and the United States' Ambassador, the meeting only took place because he agreed with the initiative.[1139] It was therefore reasonable for the Trial Chamber not to discuss the fact that Bagosora did not initiate this meeting.

481. The Appeals Chamber observes that the Trial Chamber explicitly took note of the fact that Colonel Rusatira, the ESM Commander, contested Bagosora's membership of the Crisis Committee because of his retired status during a Crisis Committee meeting on the morning of 8 April 1994.[1140] The Appeals Chamber considers, however, that the Trial Chamber erroneously referred to the testimonies of Prosecution Expert Witnesses Alison Des Forges and Filip Reyntjens, as well as to Bagosora's testimony, in support of its finding that "Rusatira was ultimately marginalised".[1141] The cited portion of the transcript of Witness Des Forges's testimony mentions Rusatira, but only to the effect that "[t]here were threats made against Rusatira so that he goes [*sic*] into hiding".[1142] The cited portions of Witness Reyntjens's and Bagosora's testimony transcripts, however, make no

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[1136] Bagosora, T. 7 November 2005 p. 60 ("So, in the meeting at staff headquarters, the officers present agreed that it was necessary to send a very strong patrol […]. We gave the instructions to the staff headquarters, so that the reconnaissance battalion be used.").
[1137] Bagosora, T. 7 November 2005 p. 60.
[1138] Bagosora, T. 8 November 2005 p. 30 ("Now, remembering that in the morning we had taken measures to have the soldiers of the Presidential Guard return to their barracks, I was somehow surprised that it was not yet done. So I told [the RPF representative], I said, 'Sir, thank you for that information. We are going to do everything for this matter to be sorted out.' Immediately I hung up, I phoned the commander of the Presidential Guard, who was in his camp.").
[1139] Bagosora, T. 7 November 2005 p. 75 (French) ("Q. *Vous nous avez expliqué, entre autres, qu'en lisant la déclaration du colonel Rusat*[]*ira, que vous n'êtes pas à l'origine de cette réunion. Pourquoi ce ne sont pas ceux qui l'ont convoquée qui ont dirigé cette réunion?* R. *Ils l'ont convoquée. J'ai adhéré à leurs propositions et décisions. Et les décisions, je les ai « fait » miennes. Ils n'avaient pas le pouvoir, en tout cas, de réunir une telle réunion qui regroupait les deux forces*.").
[1140] Trial Judgement, para. 2027 ("Rusatira was resistant to Bagosora, as a retired officer, participating in the Crisis Committee meeting on 8 April.").
[1141] Trial Judgement, para. 2027, fn. 2221.
[1142] Alison Des Forges, T. 25 September 2002 p. 119.

such reference, and a review of the transcripts does not reveal any evidence to support the Trial Chamber's finding. Nevertheless, the Appeals Chamber does not consider that this error has any impact on the Trial Chamber's assessment of Bagosora's effective control over the armed forces. There is no indication as to when the Trial Chamber considered Rusatira's marginalisation to have occurred, or whether it considered Bagosora to be responsible for it. Whether Rusatira was marginalised has no bearing on the Trial Chamber's findings regarding Bagosora's representation of the armed forces, his conduct during meetings, and his role in facilitating the installation of the Interim Government. Similarly, although Rusatira challenged Bagosora's membership in the Crisis Committee, this did not prevent Bagosora from attending the meeting and proceeding with arrangements to get the Interim Government in place to replace the Crisis Committee on 9 April 1994. It also has no impact on the Trial Chamber's findings regarding Bagosora's conduct on 6 and 7 April 1994.

482. Furthermore, the Appeals Chamber finds Bagosora's unsubstantiated claim that his role in the Crisis Committee was based on his retired status because it promoted democratic decision-making to be unconvincing. Bagosora provides no evidence to support this argument and his assertion is contradicted by his own testimony that he had the power to convene and chair meetings by virtue of the powers vested in him as *directeur de cabinet*.[1143] The Appeals Chamber also recalls that the doctrine of superior responsibility applies not only to military commanders, but also to *de jure* or *de facto* political or civilian superiors.[1144] Bagosora's contention that his post was political in nature is therefore inconsequential.

483. The Appeals Chamber is equally not persuaded by Bagosora's assertion that the Trial Chamber could not safely conclude that he exercised effective control without finding that he was present at *all* Crisis Committee meetings. The Trial Chamber's conclusions regarding Bagosora's authority and effective control were not based on the fact that he was present at all meetings, but on his conduct during the meetings which he attended.[1145] The Appeals Chamber does not consider that his absence from other meetings detracts from the Trial Chamber's findings given his conduct at those which he attended.

484. Moreover, Bagosora does not demonstrate that the Trial Chamber ignored evidence that several meetings of the Crisis Committee were held in his absence. With respect to the Crisis

[1143] Bagosora, T. 7 November 2005 pp. 44 ("I told you that I chaired these two meetings of the two general staffs and the cabinet of the minister by virtue of the powers given to me through the directive that you are aware of. I acted as the representative of the minister of defence.").
[1144] *See Kajelijeli* Appeal Judgement, para. 85; *Bagilishema* Appeal Judgement, para. 51; *Čelebići* Appeal Judgement, paras. 195, 196; *Aleksovski* Appeal Judgement, para. 76.

Committee meeting held at 8.00 a.m. on 8 April 1994, the Appeals Chamber notes that Bagosora's own testimony indicates that although he did not learn of the meeting until that morning, he did indeed attend it.[1146] He testified that he did not stay for the whole duration of that meeting because he had another pre-arranged meeting to attend at 9.00 a.m.[1147] Relying on Exhibits DB9 and DB8, and on the testimonies of Witnesses Matthieu Ngirumpatse and Jean Kambanda, Bagosora also alleges that he was not present at two Crisis Committee meetings held, respectively, in the evening of 7 April 1994 and at 7.00 a.m. on 9 April 1994.[1148] The Appeals Chamber observes that neither Exhibit DB9, nor the cited testimonial evidence, support Bagosora's assertion.[1149] The extracts of General Ndindiliyimana's testimony before a Belgium Commission admitted as Exhibit DB8 indeed suggest that Bagosora did not attend a Crisis Committee meeting organised on 7 April 1994 around 6.00 p.m., as well as a meeting of the officers of the Crisis Committee held on 9 April 1994 at 7.00 a.m.[1150] This piece of evidence was admitted for the purpose of cross-examining Witness Des Forges,[1151] and was not tested by the Trial Chamber as Ndindiliyimana, an accused before this Tribunal, was not called to testify. As such, the contents of Exhibit DB8 could only be given very little probative value.[1152] Regarding the Crisis Committee meeting that allegedly took place on 9 April 1994, it is also worth noting that the Trial Chamber found that the "Crisis Committee effectively ceased to exist after its meeting on 8 April",[1153] a finding Bagosora does not challenge. It was therefore reasonable for the Trial Chamber not to rely on Exhibit DB8 as evidence that Bagosora did not attend certain Crisis Committee meetings, and not to refer to it in its discussion on Bagosora's authority over the Rwandan Armed Forces.

[1145] *See* Trial Judgement, paras. 2022, 2025, 2026.
[1146] Bagosora, T. 8 November 2005 pp. 57 ("In the morning of the 8th of April […] I learned that there was a meeting of the crisis committee at the ESM. I went there and I arrived there at around 8 a.m."), 58, 70.
[1147] Bagosora, T. 8 November 2005 p. 58.
[1148] Bagosora Appeal Brief, paras. 77(b), (c), *referring to* Exhibit DB8, pp. 9/14-13/14; Exhibit DB9, pp. 81, 83, 85; Matthieu Ngirumpatse, T. 5 July 2005 p. 77 (French); Jean Kambanda, T. 11 July 2006 p. 32 (French). *See also* Bagosora Reply Brief, para. 98.
[1149] In the cited parts of their testimony, Witnesses Ngirumpatse and Kambanda refer to the meeting held at ESM on the evening of 8 April 1994 during which Bagosora introduced the Interim Government to the Crisis Committee. Exhibit DB9 consists in the cover page, back page, and pages 34, 35, 42, 43, 52-55, 62, 63 of the book "*Rwanda: Trois jours qui on fait basculer l'histoire*" by F. Reyntjens. The pages of this book cited by Bagosora were not admitted into the record. *See* T. 25 September 2002 p. 112 (French). Nothing in the pages admitted as Exhibit DB9 supports Bagosora's statement.
[1150] Exhibit DB8 (Testimony of Augustin Ndindiliyimana before the *Commission spéciale Rwanda* of Belgium, 21 April 1997), pp. 10/14, 13/14.
[1151] *See* Alison Des Forges, T. 25 September 2002 pp. 55, 56.
[1152] *See Simba* Appeal Judgement, para. 20 ("The Appeals Chamber […] agrees with the Trial Chamber's reasoning that, as a matter of law, statements of non-testifying individuals used during cross-examination may be admitted into evidence, even if they do not conform to the requirements of Rules 90(A) and 92*bis* of the Rules, provided the statements are necessary to the Trial Chamber's assessment of the witness's credibility and are not used to prove the truth of their contents."). *Cf. also Akayesu* Appeal Judgement, para. 134.
[1153] Trial Judgement, para. 2027.

485. To further demonstrate that he was not treated as an authority, Bagosora submits that the Trial Chamber failed to consider that none of the Ministers in active service before April 1994 contacted him on 6, 7, or 8 April 1994, gave him any orders, or placed themselves at his disposal.[1154] The Appeals Chamber finds no merit in this argument. First, the Appeals Chamber recalls the Trial Chamber's finding that four of those Ministers, including the Prime Minister, were killed on 7 April 1994 by elements of the Rwandan military and that there was an institutional vacuum in the immediate aftermath of the death of the President.[1155] Second, the Trial Chamber established that, as early as 7.00 a.m. on 7 April 1994, Bagosora met with members of the executive committee of the MRND, the Presidential political party, to discuss the appointment of a new President. Then, on 8 April 1994, he facilitated meetings of and met with representatives of various political parties which culminated in the appointment of the Interim Government, which was sworn in the next day.[1156] Bagosora was the one who presented the Interim Government to the Crisis Committee on the evening of 8 April 1994.[1157]

486. Finally, Bagosora submits that the Trial Chamber failed to consider evidence that the "mutineers at Camp Kigali […] were not at all impressed by [him]", that "[h]e was even labeled an accomplice", and that "[he] did not know what to do after his fruitless visit to Camp Kigali".[1158] The Appeals Chamber notes that, contrary to Bagosora's contention, the Trial Chamber did consider evidence of the mutineers' reactions to Bagosora and his subsequent uncertainty as to how to proceed.[1159] However, it did not find the evidence persuasive due to the witnesses' interest in distancing themselves from the crimes.[1160] The fact that the Trial Chamber did not find this evidence to be persuasive in no way demonstrates that it failed to consider it, and Bagosora has not challenged the reasonableness of the Trial Chamber's finding that it was not persuasive.[1161]

487. In light of the foregoing, the Appeals Chamber considers that the Trial Judgement reflects that the Trial Chamber duly considered that Bagosora was not the one who convened the 6 April Meeting and that, as a retired officer, his role was contested by Rusatira. The Appeals Chamber considers that this evidence does not detract from the prominent role Bagosora effectively

[1154] Bagosora Appeal Brief, para. 51(b).
[1155] *See* Trial Judgement, paras. 693, 751.
[1156] Trial Judgement, paras. 1308, 1309.
[1157] Trial Judgement, para. 1309.
[1158] Bagosora Appeal Brief, paras. 51(e), 51(f). *See also* Bagosora Reply Brief, para. 100.
[1159] Trial Judgement, paras. 765, 768, 769, 778, 780, 793.
[1160] Trial Judgement, para. 793.
[1161] In any event, the Appeals Chamber considers that this finding was reasonable given that both the witnesses who testified to the reaction of the soldiers to Bagosora's presence at Camp Kigali were soldiers who were present during the events and therefore, as the Trial Chamber found, could have had an interest in distancing themselves from the events. *See* Trial Judgement, paras. 776, 779.

played in relation to the military between 6 and 9 April 1994. Similarly, the Appeals Chamber considers that the fact that he might have been invited to the 6 April Meeting at the last minute does not diminish the role he played at this meeting. The Appeals Chamber further notes that Bagosora offers no evidence to support his claim that decisions were imposed on him. Rather, the evidence indicates that he took an active role in the initial response to the institutional vacuum that existed following the death of the President, and that the members of the Crisis Committee deferred to his leadership. In this regard, the Appeals Chamber finds no error in the Trial Chamber's reliance on, among other factors, the fact that he presided and co-presided over certain meetings. While such presidency is not, *per se*, sufficient to demonstrate that Bagosora had authority over those present at those meetings, the manner in which he exercised his presidency demonstrates that he did in fact have authority over them.

488. Bagosora's submissions that the Trial Chamber failed to consider evidence that he had no operational powers and lacked authority are accordingly dismissed.

(e) Failure to Consider the Powers of the Crisis Committee and Other Military Authorities

489. Bagosora submits that the Trial Chamber erred in failing to consider the powers and duties of the Crisis Committee, which was exceptionally created in order to respond to the emergency situation, and in erroneously attributing the decisions of the Crisis Committee to him.[1162] He contends that it also failed to consider that an interim army Chief of Staff was chosen, and that the army General Staff and Chief of Staff, as well as other military authorities, also wielded powers.[1163] He argues in substance that, as of 7 April 1994, control over the Rwandan Armed Forces was shared between the Crisis Committee and the army and gendarmerie Chiefs of Staff.[1164]

490. The Prosecution responds that Bagosora's dominant role *vis-à-vis* the Crisis Committee suggests that the Crisis Committee did not always act collectively and that, in any event, the existence and powers of the Crisis Committee and the allegedly collective nature of decisions did not exclude that he exercised effective control over the Rwandan Armed Forces or relieve him of

[1162] Bagosora Notice of Appeal, Ground 1(A); Bagosora Appeal Brief, paras. 25, 39.
[1163] Bagosora Appeal Brief, paras. 51(d), 100, 115-120. In this respect, Bagosora contends that "because *de facto* authority is not exercised in a vacuum", the Trial Chamber should have considered the exercise or existence of his *de facto* authority in the context of various other authorities who had *de jure* control, such as the army Chief of Staff. *See* Bagosora Appeal Brief, paras. 117, 119.
[1164] Bagosora Appeal Brief, paras. 68, 100, 115-120.

his duty to prevent and punish.[1165] It also submits that the Trial Chamber correctly considered the powers of the army General Staff and Chief of Staff *vis-à-vis* those of Bagosora.[1166]

491. The Appeals Chamber notes that the Trial Chamber found that the Crisis Committee was created to respond to the emergency situation caused by the President's death, by coordinating the actions of the army and gendarmerie to ensure security and by maintaining authority until a political structure could be put into place.[1167] Bagosora does not qualify what other powers or duties the Crisis Committee might have held that the Trial Chamber allegedly failed to consider. Furthermore, nothing in the Trial Judgement suggests that the Trial Chamber attributed decisions taken by the Crisis Committee to him alone.[1168] The Crisis Committee was made up of a limited number of individuals, including Bagosora.[1169] It was thus not an entity which could reasonably be interpreted to act independently of its members; any collective powers or duties it may have held do not detract from the responsibilities of its individual members. The Appeals Chamber considers that Bagosora's authority and control were not exclusive of that which may have been exercised by others or by the Crisis Committee. The Trial Chamber did not find that Bagosora was the *only* military authority at the time, but that he was the *highest* military authority in the Ministry of Defence.[1170] The Appeals Chamber recalls in this regard that, in his capacity as *directeur de cabinet*, Bagosora was replacing the Minister of Defence in his absence and was, as such and even assuming that the limitations imposed by the Gasana Letter remained in force, at the top of the *de jure* chain of command given the President's death.

492. In this respect, the facts as established by the Trial Chamber show that Bagosora played a dominant role *vis-à-vis* the Crisis Committee. Not only did Bagosora propose the creation of the Crisis Committee, but he also chaired the first meeting of its members.[1171] He also initiated significant decisions such as the designation of an army Chief of Staff, and gave instructions to its

[1165] Prosecution Response Brief (Bagosora), paras. 29-31, 43, 49, 50, 67, 68, 73, 96, 97.
[1166] Prosecution Response Brief (Bagosora), paras. 86-92.
[1167] Trial Judgement, paras. 659 ("In the hours that followed the plane crash on 6 April, Bagosora chaired a military crisis committee of senior military officials from both the army and gendarmerie at army headquarters in Camp Kigali which continued into the early hours of the next day."), 660 ("During the meeting, Bagosora explained that the military's main concern was to keep Kigali calm and secure and to maintain authority until a political structure could be put in place."), 675 ("It was also agreed that the Crisis Committee would have two tasks: first, to coordinate the actions of the army and gendarmerie in order to ensure security; and second, to provide material support to politicians so they could form the new government."), 684 ("Bagosora conducted the meeting of senior officers at ESM on 7 April 1994 and acted as a main authority even in relation to the Crisis Committee, which was set up to coordinate the General Staffs of the army and the gendarmerie.").
[1168] *See*, *e.g.*, Trial Judgement, para. 2027 ("Bagosora ultimately performed the task of ensuring the formation of the new government *and presented it to the committee for its approval.*" (emphasis added)).
[1169] *See supra*, fns. 1015 *and* 1021.
[1170] *See* Trial Judgement, paras. 723, 2031.
[1171] As mentioned above, while the 6 April Meeting was not formally a Crisis Committee meeting, the senior military officers who attended the 6 April Meeting ultimately became the members of the Crisis Committee. *See supra*, fn. 1015.

members and to other army officials.[1172] During the 6 April Meeting, he was the one who decided that the Rwandan Armed Forces would not be placed under the Prime Minister's authority, as suggested by General Dallaire.[1173] Major Beardsley from UNAMIR testified that "all of the conversation [during the 6 April Meeting] was led by Bagosora and all of the others deferred and looked to him. Even when General Ndindiliyimana spoke, he looked to Bagosora for approval of what he was saying".[1174] The evidence relied upon by the Trial Chamber clearly reflects that Bagosora, in General Dallaire's words, "was the person of authority and demonstrating that authority and exercising it".[1175]

493. With respect to powers wielded by other military authorities, Bagosora argues that while the Trial Judgement refers to the structure of the Rwandan Armed Forces, this does not mean that the Trial Chamber actually considered it.[1176] He further asserts that the Trial Chamber "assumed that the commanders at the various levels would never have violated the law or the hierarchical authority of the Army".[1177] Bagosora offers no evidence to support these claims, which are speculative. Moreover, the Appeals Chamber considers that the Trial Chamber's express discussion of the army's structure and distribution of powers, as well as Bagosora's position in relation to the armed forces, is the strongest indicator that the Trial Chamber in fact considered the powers wielded by other military authorities.[1178]

494. The Appeals Chamber is also not persuaded by Bagosora's contention that he had no operational powers since it was Gatsinzi, as interim army Chief of Staff from 7 April 1994 onwards, who headed the Rwandan army.[1179] The Trial Chamber specifically considered the level of command held by Gatsinzi in this capacity, namely that he "was the operational head of the Rwandan Army and the overall commander of troops", but also that his "formal duties included [...] reporting to the Minister of Defence".[1180] As Bagosora was found to have acted as Minister of

[1172] *See supra*, Section IV.A.3(d).
[1173] Trial Judgement, paras. 662, 713. *See also* Bagosora, T. 7 November 2005 pp. 5, 15, 24.
[1174] Brent Beardsley, T. 3 February 2004 pp. 24, 25.
[1175] Roméo Dallaire, T. 19 January 2004 p. 33. *See also supra*, para. 451, fn. 1063.
[1176] Bagosora Appeal Brief, para. 116, *referring to* Trial Judgement, paras. 146-173.
[1177] Bagosora Appeal Brief, para. 120.
[1178] *See* Trial Judgement, paras. 146-176. *See also ibid*., paras. 2017-2019.
[1179] Bagosora Appeal Brief, para. 51(d).
[1180] Trial Judgement, para. 151 ("The chief of staff was the operational head of the Rwandan Army and the overall commander of troops. His formal duties included coordinating subordinate activities; managing and deploying all military forces; and reporting to the Minister of Defence. At the beginning of April 1994, this position was occupied by General Déogratias Nsabimana, who was killed in the Presidential plane crash on 6 April. The next day, Colonel Marcel Gatsinzi was promoted to general and appointed acting chief of staff. As part of his command authority, the chief of staff was supported in his functions by a general staff composed of four bureaus common to most armies worldwide: G-1 (Personnel and Administration), G-2 (Intelligence), G-3 (Military Operations) and G-4 (Logistics)." (internal references omitted)).

Defence from 6 to 9 April 1994,[1181] he was, within the hierarchical structure of the Rwandan Armed Forces, Gatsinzi's immediate superior from 7 to 9 April 1994.[1182] Bagosora's argument that Gatsinzi's operational powers obviated his own is therefore without merit.

495. The conclusion that the powers of those with authority over the Rwandan Armed Forces were not mutually exclusive is supported by Bagosora's own submission that control over the armed forces was shared between the Crisis Committee and the Chiefs of Staff of the army and the gendarmerie, and that all operational decisions were taken by the group of constituent officers.[1183] The Appeals Chamber recalls its findings that nothing in the Trial Judgement suggests that the Trial Chamber attributed decisions taken by the Crisis Committee to Bagosora alone, and that the Crisis Committee's possession of certain collective powers and duties does not detract from the responsibilities of its individual members, in particular from those playing a dominant role in the Crisis Committee.[1184] In the same vein, the alleged sharing of control over the Rwandan Armed Forces between the Crisis Committee and the Chiefs of Staff would not demonstrate an absence of hierarchy or lack of operational powers among individual officers.[1185]

496. Bagosora's submissions that the Trial Chamber failed to consider the powers of the Crisis Committee and of other military authorities are accordingly dismissed.

(f) Consideration of Irrelevant Evidence

497. Bagosora submits that the Trial Chamber erred in considering as evidence of effective control over the Rwandan Armed Forces irrelevant factors such as his signature of the communiqué announcing the death of the President and his role in facilitating the installation of the Interim Government.[1186] He further submits that the Trial Chamber erred in relying on the fact that Colonel Nubaha spoke to him during the 7 April ESM Meeting, and in speculating what Nubaha

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[1181] Trial Judgement, para. 2031.

[1182] *See* Bagosora, T. 7 November 2005 p. 55 ("I had the power to convene chiefs of staff to a meeting. I was inviting [Gatsinzi] to a meeting which had been decided on a day before by the crisis committee. Therefore, I had the power to summon him to that meeting.").

[1183] Bagosora Appeal Brief, paras. 60, 61, 69, 71, 74, 96, 100.

[1184] *See supra*, Section IV.A.3(e), para. 491.

[1185] *See Halilovi}* Trial Judgement, para. 62 ("[T]he test of effective control implies that more than one superior may be held responsible for his failure to prevent or punish the same crime committed by a subordinate."); *Strugar* Trial Judgement, para. 365; *Bla{ki}* Trial Judgement, para. 303; *Aleksovski* Trial Judgement, para. 106.

[1186] Bagosora Notice of Appeal, Ground 1(M); Bagosora Appeal Brief, paras. 145-147. *See also* AT. 31 March 2011 p. 43.

told him.[1187] He also contends that the Trial Chamber erred in considering as other relevant factors his apparent calm, his explanation thereof, and Nubaha's subsequent transfer.[1188]

498. The Prosecution responds that Bagosora's claims should be summarily dismissed because they are general and offer no elaboration as to how the Trial Chamber erred in its approach to effective control by considering such factors.[1189]

499. The Appeals Chamber recalls that it has already found that the Trial Chamber was reasonable in its consideration of the import of Bagosora's role in the issuance of the communiqués following the President's death.[1190] Similarly, it was also reasonable for the Trial Chamber to consider Bagosora's role in the formation and installation of the Interim Government. In this regard, the Appeals Chamber recalls that the military was the primary authority still functioning in the country in the immediate aftermath of the death of the President.[1191] Bagosora testified that he was designated as the person in charge of contacting the politicians following the SRSG's request that a new President be nominated.[1192] Furthermore, he stated that he facilitated the formation of a new government at the request of representatives of the international community and the Crisis Committee.[1193] The Appeals Chamber considers that this reflects Bagosora's prominence and position within the Crisis Committee. Accordingly, Bagosora fails to demonstrate that the Trial Chamber erred in relying on this evidence.

500. The Trial Chamber found that Bagosora's prominence and authority were also apparent in the fact that he was the person Colonel Nubaha approached during the 7 April ESM Meeting concerning the ongoing attack at Camp Kigali.[1194] The Appeals Chamber considers that Nubaha's decision to address Bagosora in a meeting co-chaired by Bagosora and the gendarmerie Chief of Staff and attended by the members of the Crisis Committee and many senior officers shows that Nubaha perceived Bagosora to be the relevant person to notify of the situation at Camp Kigali and to be the one in a position of authority with the means to take action to address the situation.[1195]

[1187] Bagosora Notice of Appeal, Ground 1(O); Bagosora Appeal Brief, paras. 150-153. *See also* Bagosora Reply Brief, paras. 55-57; AT. 31 March 2011 p. 42.
[1188] Bagosora Notice of Appeal, Ground 1(O); Bagosora Appeal Brief, paras. 155, 156, 158-161. *See also* Bagosora Reply Brief, paras. 58, 59.
[1189] Prosecution Response Brief (Bagosora), paras. 105-117.
[1190] *See supra*, Section IV.A.3(a), paras. 453, 454.
[1191] Trial Judgement, para. 2023.
[1192] Bagosora, T. 7 November 2005 pp. 61, 62 *and* T. 8 November 2005 p. 58.
[1193] Bagosora Closing Brief, paras. 993, 994, 1132, 1133, 1136. *See* Trial Judgement, paras. 1288, 1310.
[1194] Trial Judgement, para. 2026.
[1195] This is supported by Bagosora's own testimony that he told Nubaha that he would follow up on the matter after the meeting. *See* Bagosora, T. 8 November 2005 pp. 7 ("Colonel Nubaha arrived at the meeting room at the ESM. […] He came to me at the time I was talking to those attending the meeting. He came towards me and spoke to my ears, saying that there was great tension at Kigali camp, that the situation at Kigali camp was dire. […] So I said, 'Fine. Go

Bagosora's argument that it was natural that Nubaha addressed him because he was chairing the meeting is consistent with this interpretation.

501. As to the relevance of Nubaha's subsequent transfer, the Appeals Chamber considers that the fact that Bagosora requested Nubaha's transfer,[1196] regardless of who implemented his request,[1197] is relevant in showing that he made decisions in respect of military personnel which were carried out. The Appeals Chamber considers that it was reasonable for the Trial Chamber to rely on this as an indicator of his effective control.[1198]

502. Finally, the Appeals Chamber notes that the Trial Chamber referred to Bagosora's apparent calm upon learning of the death of the peacekeepers, finding his own explanation that "if you are an officer in command, you have to be calm"[1199] to be "revealing".[1200] The Appeals Chamber observes that, as asserted by Bagosora, the French version of the transcript attributes to him a somewhat different set of words, namely that he said: "*on apprend à un officier qui a une charge de commandement d'être calme*".[1201] The Appeals Chamber considers that the discrepancy is attributable to nuances in translation or interpretation, and not, as Bagosora contends, to a twisting of his words by the Trial Chamber.[1202] However, the element which the Trial Chamber considered

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back to your camp so as to calm the situation. I will come and check the state of affairs after the meeting.' He left."), 11 ("[Nubaha] cut me [off] while I was speaking. […] I told him, 'Go and calm down the situation, and I'll pass by and see what I could do.'"). Under his Third Ground of Appeal, Bagosora also develops the argument that the Trial Chamber erred in speculating about the extent of what Nubaha told him during the meeting. The Appeals Chamber will consider whether other reasonable inferences were open to the Trial Chamber in this respect in its discussion of this Third Ground of Appeal. *See infra*, Section IV.C.3(b).

[1196] Trial Judgement, para. 2026, fn. 2219, *referring to* Bagosora, T. 8 November 2005 p. 17 ("Because since the minister was absent, when I learned that [Nubaha] had just lost his wife and children, and that at Camp Kigali there was this situation he had described, I requested staff headquarters to see how to replace him so as to appoint someone fresh. He was already weary and tired, and I asked staff headquarters to see how to replace him and move him to another position where he could also attend to his personal problems. […] I talked about it immediately to Colonel Murasampongo, who was a G1, since Gatsinzi had not yet arrived in the afternoon of the 7th. Before I left the ministry, I phoned the G1 and asked him to study the issue of replacing Nubaha. […] [U]nder normal circumstances it was a promotion."). The Appeals Chamber notes that Gatsinzi also testified to transferring Nubaha. *See* Marcel Gatsinzi, AT. 30 March 2011 pp. 28, 29 ("Q. Can you tell us who transferred [Nubaha]? A. It was the army headquarters, that is, I, myself. […] I transferred him for two reasons: The first is that he didn't seem to master […] what had happened at […] Camp Kigali. Secondly, he had expressed […] the desire not to continue being in charge of that camp because he had lost […] his wife and children during the fighting that had taken place at the place where he lived. […] So he had to be moved to the base where he exercised duties that were less demanding than the duties of the Camp Kigali."). Pursuant to this testimony, Bagosora pleaded that because Gatsinzi admitted to transferring Nubaha, such transfer could not be used to establish Bagosora's control over the army. *See* AT. 31 March 2011 p. 42. However, in the Appeals Chamber's view, Gatsinzi's admission to transferring Nubaha does not negate or contradict Bagosora's own admission that he requested Nubaha's transfer. Rather, the Appeals Chamber considers Gatsinzi's testimony to be compatible with Bagosora's, such that after Bagosora purported to have requested Murasampongo to "study the issue of replacing Nubaha", Gatsinzi, as the new interim army Chief of Staff, would have followed up on the matter.

[1197] *See* Bagosora Appeal Brief, paras. 158-160.

[1198] *See* Trial Judgement, para. 2026.

[1199] Bagosora, T. 8 November 2005 p. 26.

[1200] Trial Judgement, fn. 2218.

[1201] Bagosora, T. 8 November 2005 p. 28 (French).

[1202] *See* Bagosora Appeal Brief, para. 156.

to be "revealing" from the English version of the transcripts does not appear in the French original version, which is the most accurate reflection of Bagosora's testimony. The Trial Chamber could therefore not have relied, even in a footnote, on Bagosora's statement in this regard. Be that as it may, the Appeals Chamber notes that the Trial Chamber relied on several other factors in support of its finding that Bagosora exercised effective control over the Rwandan Armed Forces. The Appeals Chamber therefore finds the Trial Chamber's error to be inconsequential with regard to its findings on Bagosora's effective control.

503. Bagosora's submissions in these respects are accordingly dismissed.

(g) Exaggeration of Denial of Prime Minister's Authority

504. The Trial Chamber found that Bagosora refused to recognise the authority of Prime Minister Agathe Uwilingiyimana.[1203]

505. Bagosora submits that the Trial Chamber erred in according to the position of the Prime Minister an importance which did not exist, and that it thereby placed too much importance on his reticence that Agathe Uwilingiyimana be vested with more control than that to which she was entitled, particularly over the military.[1204] The Prosecution responds that Bagosora makes no effort to demonstrate the nature of the alleged error committed by the Trial Chamber and its impact on the verdict.[1205]

506. The Appeals Chamber observes that Bagosora does not link his submissions in this respect to the Trial Chamber's finding of his *de facto* authority and effective control over the military. It also notes that, although the Trial Chamber mentioned that Bagosora rejected General Dallaire's suggestion that the Rwandan Armed Forces be placed under Prime Minister Uwilingiyimana's authority,[1206] the Trial Chamber did not rely on Bagosora's attitude about the Prime Minister's authority as an indication of his effective control.[1207] Rather, the Trial Chamber relied on Bagosora's rejection of Dallaire's proposal as indicative of Bagosora's dominant role in the 6 April Meeting, which is one of several factors supporting the Trial Chamber's finding of his effective

[1203] Trial Judgement, para. 662.
[1204] Bagosora Notice of Appeal, Ground 1(L); Bagosora Appeal Brief, paras. 131-138. *See also* Bagosora Reply Brief, paras. 44-53. The Appeals Chamber will consider under Bagosora's Third Ground of Appeal his challenges to the Trial Chamber's assessment of the evidence pertaining to the killing of the Prime Minister and his responsibility for her death. *See infra*, Section IV.C.2.
[1205] Prosecution Response Brief (Bagosora), paras. 99, 100.
[1206] Trial Judgement, para. 660.
[1207] *See* Trial Judgement, paras. 2022-2031.

control.[1208] Thus, even if it were determined that the Trial Chamber accorded undue importance to the Prime Minister's position, this would not invalidate the Trial Chamber's decision to rely on Bagosora's rejection of Dallaire's suggestion as indicative of his dominant role, an element relevant to his effective control. His argument is accordingly dismissed.

(h) Presumption of Ability to Punish

507. Bagosora submits that the Trial Chamber erred in presuming that he had the power to punish any military officer.[1209] He asserts that only those who are identified as guilty after an investigation may be punished, and that Gatsinzi, the interim army Chief of Staff, ordered such investigations.[1210] Bagosora indicates that he "will elaborate on this point in relation to each attack".[1211]

508. The Prosecution responds that, based on its previous submissions detailing Bagosora's superior position and effective control, his material ability to prevent or punish crimes is indisputable.[1212] It further contends that even if the army Chief of Staff ordered investigations, this would not be a defence to his failure to discharge his responsibilities as a superior.[1213]

509. The Appeals Chamber notes that Bagosora does not provide any references to other portions of his Appeal Brief to support his assertion that he would elaborate on the issue of investigations and punishment in relation to each attack. A review of his Appeal Brief shows that he has not done so.

510. The Appeals Chamber is concerned that the Trial Chamber failed to explicitly consider whether Bagosora had the material ability to punish culpable subordinates in the Trial Judgement. The Appeals Chamber considers that this amounts to a failure to provide a reasoned opinion. Nonetheless, the Appeals Chamber recalls that even where a superior personally lacks disciplinary or sanctioning powers, the duty can be fulfilled by reporting the crimes to the competent authorities to trigger investigation or disciplinary action.[1214] In light of Bagosora's senior position in the Ministry of Defence, and his access to senior military officers, as demonstrated by his attendance at meetings with them, even if he did not have direct sanctioning powers, he nonetheless had the ability to report the incidents to the relevant military officers to trigger investigations.

[1208] *See supra*, paras. 455, 459, 487.
[1209] Bagosora Notice of Appeal, Ground 1(P); Bagosora Appeal Brief, paras. 162, 163. *See also* Bagosora Appeal Brief, para. 75; Bagosora Reply Brief, para. 60.
[1210] Bagosora Appeal Brief, paras. 163, 164, *referring to* Exhibit DB256.
[1211] Bagosora Appeal Brief, para. 165. *See also ibid*., para. 63.
[1212] Prosecution Response Brief (Bagosora), paras. 118, 119.
[1213] Prosecution Response Brief (Bagosora), para. 120.
[1214] *See Bo{koski and Tar~ulovski* Appeal Judgement, paras. 231, 232.

511. To the extent that Bagosora seeks to show that it was not he, but rather Gatsinzi as interim army Chief of Staff, who had the authority and material ability to prevent crimes or punish perpetrators,[1215] the Appeals Chamber considers that proof of Gatsinzi's authority does not cast doubt on that of Bagosora, as such power was not exclusive.

512. The Appeals Chamber will consider Bagosora's assertions that Gatsinzi ordered investigations in support of his arguments that steps were in fact taken to prevent or punish further crimes,[1216] and that he did not know the identity of the soldiers implicated in the crimes[1217] in connection with his Second and Fourth Grounds of Appeal, where he challenges the Trial Chamber's assessment of his failure to prevent or punish.[1218]

(i) Failure to Consider Inference of Lack of Effective Control

513. Bagosora submits that the Trial Chamber based its conclusion that he had effective control on inferences, not on direct evidence.[1219] He contends that the Trial Chamber erred in its assessment of the circumstantial evidence by failing to consider that his actions could also lead to another logical inference, namely the fulfilment of a duty or obligation in an exceptional and urgent situation while lacking operational or effective control.[1220] Moreover, he asserts that the evidence shows that the period of 6 to 9 April 1994 was marked by the absence of leadership and the adoption of important decisions by a group of officers and a committee, and that, accordingly, the Trial Chamber's presumption that "someone must have been in control" at the time was not the only reasonable inference open to it.[1221] Bagosora also argues that the Trial Chamber failed to consider evidence that, even prior to 6 April 1994, the Rwandan army was disorganised and its members undisciplined.[1222] In his view, the circumstantial evidence before the Trial Chamber was also compatible with the conclusion that there was an absence of effective control or that the Rwandan Armed Forces were managed by a committee between 6 and 9 April 1994.[1223] He further asserts that, contrary to the finding that he decided that General Ndindiliyimana should chair the Crisis Committee's subsequent meetings, it was by virtue of tradition that Ndindiliyimana was

[1215] *See* Bagosora Reply Brief, paras. 61, 62.
[1216] Bagosora Appeal Brief, paras. 200, 209, 224, 227, 322.
[1217] Bagosora Appeal Brief, paras. 188, 190, 202-208, 215, 216, 316, 319.
[1218] *See infra*, Sections IV.D.2 *and* E.2.
[1219] Bagosora Appeal Brief, para. 56.
[1220] Bagosora Notice of Appeal, Ground 1(D); Bagosora Appeal Brief, para. 55. *See also* AT. 31 March 2011 p. 54.
[1221] Bagosora Appeal Brief, paras. 59-68.
[1222] Bagosora Notice of Appeal, Ground 1(M); Bagosora Appeal Brief, para. 145.
[1223] Bagosora Appeal Brief, para. 68.

chosen because, as the only General in active service present in the Crisis Committee, Ndindiliyimana was the highest-ranking officer.[1224]

514. The Prosecution responds that the Trial Chamber properly assessed the evidence before it.[1225] In particular, it submits that not only was the Trial Chamber entitled to rely on circumstantial evidence, but the totality of the evidence also included direct evidence and established beyond reasonable doubt Bagosora's *de jure* and *de facto* control over the Rwandan Armed Forces.[1226] In addition, it contends that Bagosora's propositions are irrelevant and unclear, and in no way support his claim that they establish another logical conclusion.[1227]

515. The Appeals Chamber recalls that a Trial Chamber may infer the existence of a particular fact upon which the guilt of the accused depends from circumstantial evidence only if it is the only reasonable conclusion that could be drawn from the evidence presented.[1228] If there is another conclusion which is also reasonably open from the evidence, and which is consistent with the non-existence of that fact, the conclusion of guilt beyond reasonable doubt cannot be drawn.[1229]

516. As such, the question is whether no reasonable trier of fact could have found that the only reasonable inference from the evidence was that Bagosora exercised effective control over the Rwandan Armed Forces.

517. With respect to his argument that the emergency nature of the situation could also imply a lack of effective control, the Appeals Chamber recalls its finding above that such an argument is flawed. To the contrary, it was specifically because of the emergency situation, which resulted from a temporary breakdown of the usual power structure in Rwanda and the absence of the Minister of Defence, that Bagosora had more power than he would normally have had in his role as *directeur de cabinet*.[1230] Furthermore, the fact that there were a series of meetings and that steps were quickly taken to address the emergency situation clearly refutes Bagosora's suggestion that there was no one in control. In the absence of any substantiation, the Appeals Chamber also dismisses

[1224] Bagosora Appeal Brief, para. 58, *referring to* Trial Judgement, para. 2025. *See also* Bagosora Appeal Brief, para. 122; Bagosora Reply Brief, para. 13.
[1225] Prosecution Response Brief (Bagosora), paras. 53-62.
[1226] Prosecution Response Brief (Bagosora), paras. 53-55. *See also ibid.*, paras. 60, 67, 73, 92.
[1227] Prosecution Response Brief (Bagosora), paras. 56-62.
[1228] *Nchamihigo* Appeal Judgement, para. 80, *citing Stakić* Appeal Judgement, para. 219. *See also Karera* Appeal Judgement, para. 34; *Ntagerura et al.* Appeal Judgement, para. 306.
[1229] *Karera* Appeal Judgement, para. 34; *Ntagerura et al.* Appeal Judgement, para. 306.
[1230] *See supra*, Section IV.A.3(c), para. 465.

Bagosora's claim that the Trial Chamber failed to consider evidence that the Rwandan army was disorganised and its members undisciplined.[1231]

518. The Appeals Chamber reiterates that Bagosora's argument that during the period between 6 and 9 April 1994, authority and control were held by a group rather than by any one individual does not detract from his individual responsibility. The group in question, the Crisis Committee, was made up of a limited number of individuals, including Bagosora who was found to play a dominant role within it.[1232] The Crisis Committee was not an entity which could reasonably be interpreted to act independently of its members. Any collective powers or duties it may have held do not detract from the responsibilities of its individual members, or from the conclusion that Bagosora was the highest authority in the Ministry of Defence at the time, in other words at the top of the military chain of command. Furthermore, Bagosora's authority and control are not exclusive of that which may have been exercised by others. In this regard, the Appeals Chamber reiterates that the Trial Chamber did not find that Bagosora was the *only* military authority at the time.[1233]

519. The Appeals Chamber notes that the Trial Chamber erred in finding that it was Bagosora who decided that Ndindiliyimana should chair all Crisis Committee meetings after the 7 April ESM Meeting,[1234] when in fact the evidence indicated that Ndindiliyimana chaired subsequent meetings because of his rank as General.[1235] Nevertheless, in light of the other evidence that Bagosora played a dominant role *vis-à-vis* the Crisis Committee,[1236] and given that shared decisions do not detract from the responsibilities of individuals, the Trial Chamber's error does not undermine its conclusion that Bagosora had effective control.

520. Bagosora's submission that the Trial Chamber failed to consider the inference that he lacked effective control is accordingly dismissed.

[1231] In fact, a review of the Trial Judgement reflects that the Trial Chamber did consider the possibility "that formal military structures and procedures were not always followed during the genocide". *See* Trial Judgement, para. 1460.
[1232] *See* Trial Judgement, paras. 2022, 2025.
[1233] *See supra*, para. 491.
[1234] Trial Judgement, para. 2025.
[1235] Bagosora, T. 8 November 2005 p. 33. *See also* Witness STAR-1, T. 23 February 2006 p. 44. *See also* Trial Judgement, para. 675 ("During the course of the [7 April ESM Meeting], the officers agreed with the idea of having a Crisis Committee, composed of the participants of the previous evening, and chaired by Ndindiliyimana."). The Appeals Chamber also notes evidence on the record that it was only at the Crisis Committee meeting held on the morning 8 April 1994 that it was decided that Ndindiliyimana would chair the Crisis Committee meetings, as a result of Rusatira's challenge to Bagosora's presence at military meetings. *See* Exhibit DB8 (Testimony of Augustin Ndindiliyimana before the *Commission spéciale Rwanda* of Belgium, 21 April 1997), p. 11/14; Exhibit DB255 (Rusatira *Pro Justitia* Statement dated 6 October 1995), p. K0076520; Exhibit DB256A (Gatsinzi *Pro Justitia* Statement dated 16 June 1995), pp. 15112, 15111 (Registry pagination).
[1236] S*ee supra*, Section IV.A.3(e), para. 492.

(j) Failure to Give the Benefit of Reasonable Doubt

521. Bagosora submits that, in light of his demonstration that the Trial Chamber erred in its conclusions about his authority and effective control, the Trial Chamber failed to give him the benefit of reasonable doubt.[1237]

522. The Prosecution responds that the Trial Chamber committed no error and did not fail to properly apply the principle of proof beyond reasonable doubt.[1238]

523. The Appeals Chamber has rejected the vast majority of Bagosora's allegations of error regarding the Trial Chamber's assessment of his authority and effective control and, where the Appeals Chamber has found that the Trial Chamber erred, it has concluded that the errors had no impact on the Trial Chamber's finding that he had effective control. The Appeals Chamber therefore dismisses his contention here. The Appeals Chamber finds that the Trial Chamber reasonably concluded that the only reasonable inference was that Bagosora was at the head of and exercised effective control over the Rwandan Armed Forces between 6 and 9 April 1994 not only on the basis of his *de jure* powers as acting Minister of Defence, but also due to the dominant role he played in the 6 April Meeting and the 7 April ESM Meeting where the senior military officers sought to respond to the crisis situation, his role in the creation of the Crisis Committee and apparent authority over its members, his issuance of instructions to senior military officers, his representation of the Rwandan Armed Forces in meetings with the SRSG and the United States' Ambassador, his approval and signature of communiqués issued on behalf of the Minister of Defence and Rwandan Armed Forces, and his role in establishing the Interim Government.[1239]

4. Conclusion

524. Based on the foregoing analysis, the Appeals Chamber finds that Bagosora has failed to demonstrate that the Trial Chamber erred in finding that he held a superior position and had effective control over the Rwandan Armed Forces between 6 and 9 April 1994. Accordingly, this part of Bagosora's First Ground of Appeal is dismissed.

[1237] Bagosora Notice of Appeal, Ground 1(Q); Bagosora Appeal Brief, para. 166. *See also* Bagosora Appeal Brief, paras. 54, 167-170.
[1238] Prosecution Response Brief (Bagosora), paras. 121, 122.
[1239] *See* Trial Judgement, paras. 2022-2031.

B. Alleged Violation of Fair Trial Rights by Failing to Enforce Subpoena (Ground 1 in part)

525. On 6 June 2006, Bagosora requested the issuance of a subpoena for the appearance and testimony before the Tribunal of General Marcel Gatsinzi, the then Rwandan Minister of Defence.[1240] On 11 September 2006, the Trial Chamber granted Bagosora's request and ordered the Registrar to prepare and communicate a subpoena to Gatsinzi "requiring his appearance before this Chamber to give testimony in the present case".[1241] On 5 October 2006, the Registrar informed the Trial Chamber that Gatsinzi indicated his willingness to testify, provided that he was called as a Chamber witness and permitted to testify via video-link from the Tribunal's premises in Kigali, Rwanda, given the demands of his official engagements.[1242] On 10 October 2006, Bagosora indicated his disagreement with Gatsinzi's conditions and requested that the Trial Chamber: (i) find that Gatsinzi failed to comply with the Subpoena Decision; (ii) order the Rwandan authorities to ensure Gatsinzi's transfer to and appearance before the Chamber; (iii) begin contempt proceedings against Gatsinzi and issue a warrant for his arrest; and (iv) stay the close of Bagosora's case until Gatsinzi testified.[1243]

526. On 8 December 2006, Bagosora asked the Trial Chamber whether it had "taken a decision on Gatsinzi".[1244] The Trial Chamber answered: "The Chamber has issued a subpoena. Mr. Gatsinzi has said that he's only willing to come and testify by video link. There is no request for video link. […] [T]he Chamber has no intention to call Mr. Gatsinzi as a Chamber witness".[1245] It further indicated that it would issue its reasons for this decision in writing, "[i]n order to ensure that the communication is perfect […] and […] to avoid any misunderstanding".[1246] During a status conference four days later, Bagosora raised the issue again,[1247] and the Trial Chamber responded: "We made a subpoena in relation to this general. It is true that he came back with comments, but why was it, according to you, a need to reinforce the subpoena when the subpoena still stood?"[1248] After a series of submissions by the parties,[1249] and Bagosora's requests that the Trial Chamber

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1240 *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, *Requête de la Défense de Bagosora visant l'émission d'un subpoena*, 6 June 2006 ("Subpoena Motion"), paras. 2, 26, pp. 7, 8.
1241 *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request for a Subpoena, 11 September 2006 ("Subpoena Decision"), p. 5.
1242 *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, The Registrar's Submissions Regarding the Trial Chamber's Decision on Request for a Subpoena of 11 September 2006, confidential, 5 October 2006, paras. 6, 7.
1243 *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, *Mémoire de la Défense de Bagosora en réponse à* The Registrar's Submissions Regarding the Trial Chamber's Decision on Request for a Subpoena of 11 September 2006 *déposées le 5 octobre 2006*, 10 October 2006 ("10 October 2006 Motion"), p. 9.
1244 T. 8 December 2006 p. 4 (closed session).
1245 T. 8 December 2006 pp. 4, 5 (closed session).
1246 T. 8 December 2006 p. 5 (closed session).
1247 Status Conference, T. 12 December 2006 pp. 12, 13 (closed session).
1248 Status Conference, T. 12 December 2006 p. 13 (closed session).
1249 Status Conference, T. 12 December 2006 pp. 13-15 (closed session).

assert its position on Gatsinzi's conditions and the status of the subpoena to the Registrar,[1250] the Trial Chamber agreed that there was a need to clarify its position and indicated that it would do so in the form of a decision or memorandum to the Registry.[1251]

527. During another status conference five weeks later, Bagosora raised the issue again,[1252] and the Trial Chamber indicated that it would render its decision in writing "soon".[1253] On 28 February 2007, Bagosora requested that the Trial Chamber suspend proceedings until it rendered its decisions on pending matters, including the modalities of Gatsinzi's appearance.[1254] On 2 May 2007, the Trial Chamber declared Bagosora's request to suspend proceedings moot, but found it "useful" to address the Gatsinzi matter:[1255]

> The Chamber has already made its position clear. On 8 December 2006, the Chamber stated that it had no intention of calling General Gatsinzi as a Chamber witness. At that time, the Chamber further noted that the Defence had made no request for the witness to appear by video-link. The Defence had the opportunity to make such an application but chose not to do so. This means that the Chamber's initial decision of 11 September 2006 to issue the subpoena remained in force but that the conditions stipulated by the witness led to his non-appearance. Meanwhile, all parties completed the presentation of evidence on 12 December 2006, with the exception of three Kabiligi witnesses who testified in the week from 15 January 2007. Other than noting that General Gatsinzi was unwilling to testify as a Bagosora witness in Arusha, the Chamber can do nothing more at this time.[1256]

528. On 9 May 2007, Bagosora stated that the question of Gatsinzi's appearance had not been addressed and accordingly moved the Trial Chamber to clarify its position and rule on the 10 October 2006 Motion, or in the alternative, grant certification to appeal the 2 May 2007 Decision.[1257] On 23 May 2007, the Trial Chamber declined to clarify its 2 May 2007 Decision, finding that it "did, in fact, dispose of all outstanding issues relating to the appearance of General Gatsinzi",[1258] repeating verbatim its previous reasoning therein,[1259] and adding only that:

> The Chamber issued the requested subpoena and received the Registrar's submissions concerning the appearance of the witness. On 8 December 2006, the Chamber stated its intention not to call the witness and made clear that the initial subpoena remained in force. Following subsequent

[1250] Status Conference, T. 12 December 2006 pp. 13, 15 (closed session).
[1251] Status Conference, T. 12 December 2006 p. 15 (closed session).
[1252] Status Conference, T. 19 January 2007 p. 17.
[1253] Status Conference, T. 19 January 2007 p. 18.
[1254] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Bagosora Defence Request to Suspend Proceedings Pending Decisions on Interlocutory Motions, 28 February 2007, paras. 2-14, p. 5.
[1255] *The Prosecutor v. Théoneste Bagosora et al*., Case No. ICTR-98-41-T, Decision on Bagosora Motion for Additional Time for Closing Brief and on Related Matters, 2 May 2007 ("2 May 2007 Decision"), para. 4. *See also ibid*., paras. 5, 7.
[1256] 2 May 2007 Decision, para. 7 (internal references omitted).
[1257] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Bagosora Defence Application for Ruling on 10 October 2006 Motion and Alternative Request for Certification, 9 May 2007, pp. 28, 29.
[1258] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Bagosora Request for Ruling or Certification Concerning Subpoena Issued to General Marcel Gatsinzi, 23 May 2007 ("23 May 2007 Decision"), para. 7.
[1259] 23 May 2007 Decision, para. 7, *quoting* 2 May 2007 Decision, para. 7.

> reflection, the Chamber decided that the only clarification needed was that given in its 2 May 2007 decision.[1260]

The Trial Chamber also denied Bagosora's request for certification to appeal, stating that:

> Here, the parties and the Tribunal have made diligent efforts to secure the appearance of this witness. The witness declined to appear and set forth conditions under which he was willing to testify, which the Bagosora Defence rejected. At this late stage, given the conclusion of evidentiary proceedings on 18 January 2007, the Chamber finds it in the interests of justice to conclude this trial and to proceed with closing arguments scheduled for 28 May to 1 June 2007.[1261]

529. On appeal, Bagosora submits that the Trial Chamber erred in law in failing to order compliance with the subpoena issued against Gatsinzi, despite Bagosora's insistent requests on the matter.[1262] He contends that the Trial Chamber recognised the importance of Gatsinzi's testimony, and that, by failing to take the necessary measures to ensure compliance with its subpoena order, the Trial Chamber deprived him of a fundamental means of defence.[1263] He asserts that Gatsinzi's testimony was important because Gatsinzi participated in Crisis Committee meetings from 7 to 9 April 1994 and because his analysis of the killings of politicians concluded that they constituted a loss of control not attributable to the army command structure.[1264] He submits that he never desired that Gatsinzi testify by video-link and that the Trial Chamber therefore erred in reproaching him for not having previously requested it, thereby causing him grave prejudice.[1265]

530. The Prosecution responds that Bagosora's allegations are unfounded because he was offered the opportunity to have Gatsinzi testify by video-link but chose not to use it, and because he was able to introduce key aspects of Gatsinzi's testimony into evidence.[1266] It further submits that Bagosora does not demonstrate that his fair trial rights were violated or that he suffered prejudice.[1267]

531. In the course of the appeal proceedings, Bagosora moved the Appeals Chamber to call Gatsinzi as a witness on appeal pursuant to Rule 115 of the Rules.[1268] The Appeals Chamber denied Bagosora's request, but decided to summon Gatsinzi pursuant to Rules 98 and 107 of the Rules in

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[1260] 23 May 2007 Decision, para. 8.
[1261] 23 May 2007 Decision, para. 11.
[1262] Bagosora Notice of Appeal, Ground 1(I); Bagosora Appeal Brief, paras. 101-114; Bagosora Reply Brief, paras. 38-43.
[1263] Bagosora Appeal Brief, paras. 102, 105, 109, 113, 114; Bagosora Reply Brief, paras. 42, 43.
[1264] Bagosora Appeal Brief, paras. 101, 110-112, *referring to* Exhibits DB274, DB284, DNT184, DK75; T. 8 November 2005 pp. 76, 77; T. 21 November 2005 pp. 89, 90.
[1265] Bagosora Appeal Brief, paras. 104, 106, 113. *See also* Bagosora Reply Brief, paras. 38-41.
[1266] Prosecution Response Brief (Bagosora), paras. 82-84.
[1267] Prosecution Response Brief (Bagosora), para. 85. The Prosecution argues that Gatsinzi's testimony was not key and that it confirms the occurrence of killings by Rwandan Armed Forces. *See idem.*
[1268] Appellant Théoneste Bagosora's Motion Seeking Leave to Present Additional Evidence, filed in French on 25 August 2010, English translation filed on 14 September 2010.

order to determine whether or to what extent his failure to testify at trial violated Bagosora's right to a fair trial and caused him prejudice.[1269] The Appeals Chamber heard Gatsinzi on 30 March 2011, and afforded Bagosora and the Prosecution the opportunity to cross-examine the witness.[1270] Gatsinzi testified that, upon being informed by the Kigali Public Prosecutor's Office that the Trial Chamber required his appearance to testify for Bagosora's defence, he indicated that he was only willing to testify by video-link and as a witness of the Trial Chamber.[1271] Gatsinzi confirmed that, after that, he was never contacted on the matter again.[1272]

532. A "subpoena" within the meaning of Rule 54 of the Rules is a binding order issued under the threat of penalty for non-compliance.[1273] An individual who does not comply with the requirements of a subpoena may be found in contempt of the Tribunal.[1274] Subpoenas should therefore not be issued lightly for they involve the use of coercive powers and may lead to the imposition of a criminal sanction.[1275] The Appeals Chamber notes that Gatsinzi was the Minister of Defence of Rwanda when the Trial Chamber issued the subpoena for his appearance.[1276] However, the Appeals Chamber recalls that State officials do not enjoy functional immunity from subpoenas *ad testificandum* compelling them to provide testimony before the Tribunal.[1277] They are therefore to be held to the same standards as private individuals when assessing whether the requirements for the issuance of a subpoena are met, and what remedies to pursue in cases of non-compliance.

533. A review of the procedural history and the Trial Chamber's conduct following the issuance of the Subpoena Decision indicates that the Trial Chamber did not require Gatsinzi to comply with

[1269] Decision on Théoneste Bagosora's Motion for Admission of Additional Evidence, 7 February 2011, paras. 10, 11.
[1270] *See* Order to Summon a Witness, 10 February 2011, p. 1; Order Setting the Timetable for the Appeal Hearing, 11 February 2011, p. 1; Marcel Gatsinzi, AT. 30 March 2011 pp. 4-48.
[1271] Marcel Gatsinzi, AT. 30 March 2011 p. 4.
[1272] Marcel Gatsinzi, AT. 30 March 2011 p. 4.
[1273] *Prosecutor v. Tihomir Bla{ki}*, 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 ("*Bla{ki}* Subpoena Decision"), para. 21.
[1274] *See Bla{ki}* Subpoena Decision, para. 59.
[1275] *Prosecutor v. Sefer Halilovi}*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, para. 6; *Prosecutor v. Radoslav Brđanin and Momir Tali}*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002, para. 31. *See also* Subpoena Decision, para. 5.
[1276] *See* Subpoena Decision, para. 1. *See also ibid*., para. 7 ("The Chamber does not lightly issue a subpoena to a serving Minister of a State").
[1277] *Prosecutor v. Radislav Krsti}*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, para. 27. The Appeals Chamber specified that "[s]hould a State official give evidence before the Tribunal, whether under compulsion or voluntarily, he cannot be compelled to answer any question relating to any information provided under Rule 70, or as to its origin, if he declines to answer on grounds of confidentiality". *See ibid*., para. 28. It also reiterated that State officials do enjoy functional immunity from subpoenas *duces tecum* compelling them to produce documents in their custody in their official capacity, but that a subpoena *duces tecum* may however be issued to a State official where the information to be provided was gained before he took office as such and where the evidence is unrelated to his "current" function as a State official, or where he gained that information at the time he was a State official but he was not actually exercising his official functions when he gained it. *See ibid*., paras. 20, 23-28, *referring to Bla{ki}* Subpoena Decision, paras. 38, 40, 41, 43, 44, 49, 50.

its subpoena. There is nothing in Rule 54 of the Rules that makes it mandatory for the Trial Chamber to issue a subpoena. However, the Appeals Chamber considers that because it is a binding order, the decision to issue a subpoena triggers a responsibility on the Trial Chamber to ensure compliance therewith. As such, once the Trial Chamber decided that Gatsinzi's testimony was necessary and of sufficient importance for the conduct of the trial to use coercive measures to assist Bagosora in obtaining it, it became incumbent upon the Trial Chamber to take every measure within its capacity to enforce its order in the event of non-compliance.[1278]

534. In the Appeals Chamber's view, Gatsinzi's request for a video-link constituted a rejection of the explicit instruction of the Subpoena Decision that he personally appear before the Trial Chamber.[1279] Contrary to the Trial Chamber's position that "the conditions stipulated by the witness led to his non-appearance",[1280] the Appeals Chamber considers that it was the Trial Chamber's failure to react to Gatsinzi's conditions that led to his non-appearance. If the Trial Chamber reconsidered its Subpoena Decision, it should have done so explicitly, and with reasons.[1281] It did not. Rather, the Trial Chamber repeatedly claimed that the subpoena remained in force, but took no steps to enforce it despite Bagosora's repeated requests, which created confusion for Bagosora as to how to proceed.

535. In addition, the Trial Chamber's indication in its 2 May 2007 Decision that Bagosora had the opportunity to make an application for a video-link but chose not to do so,[1282] erroneously presumes that this was the only option open to Bagosora to secure Gatsinzi's testimony. Bagosora chose to seek enforcement of the subpoena as it stood, initiation of contempt proceedings in case of continued non-compliance, and a stay of proceedings until the matter was resolved.[1283] Instead, the Trial Chamber continuously failed to definitively answer Bagosora's requests in any form, and then found against him at a late stage in the proceedings because he did not pursue a different course of action.

[1278] *Cf. Tadi}* Appeal Judgement, para. 52.
[1279] *See* Subpoena Decision, para. 8.
[1280] 2 May 2007 Decision, para. 7; 23 May 2007 Decision, para. 7.
[1281] The Appeals Chamber notes that Kabiligi, Nsengiyumva, and Ntabakuze were opposed to having Gatsinzi come testify, and accordingly moved the Trial Chamber to reconsider its Subpoena Decision. *See The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Joint Request for Reconsideration of the Trial Chamber's "Decision on Request for a Subpoena", 15 September 2006. A review of the trial record does not reveal a decision disposing of this particular request.
[1282] 2 May 2007 Decision, para. 7. The Appeals Chamber notes that, on 8 December 2006, the Trial Chamber alluded to the fact that no request for video-link had been made but did not clarify that it was expecting the Defence to do so. *See* T. 8 December 2006 p. 4 (closed session).
[1283] *See supra*, paras. 525-528.

536. The Appeals Chamber finds nothing to justify the Trial Chamber's failure to instruct the Registrar to inform Gatsinzi that his conditions were not acceptable. If the Trial Chamber was not ready to enforce the subpoena, it should have clarified its refusal to Bagosora earlier, called Gatsinzi as a Chamber witness, or *proprio motu* ordered the testimony to be heard by video-link despite Bagosora's disagreement with such modalities. Bagosora's rejection of the conditions imposed by Gatsinzi could not reasonably have been interpreted by the Trial Chamber as a waiver of his desire to have Gatsinzi testify altogether. Bagosora has never faltered in asserting the material importance of Gatsinzi's testimony to his defence, and the Trial Chamber explicitly acknowledged this to be so.[1284]

537. The Appeals Chamber is mindful of the Trial Chamber's discretion under Rule 85 of the Rules to limit the presentation of evidence "in the interests of justice". In this case, however, because the lapses in time between the 2 May 2007 and 23 May 2007 Decisions in relation to the 10 October 2006 Motion were attributable to the Trial Chamber, the Appeals Chamber considers that the Trial Chamber abused its discretion when it considered the "late stage" and "the conclusion of evidentiary proceedings" as its sole basis for finding it "in the interests of justice to conclude this trial and to proceed with closing arguments" without hearing Gatsinzi's testimony.[1285]

538. The Appeals Chamber now turns to consider whether the Trial Chamber's error prejudiced Bagosora and invalidated its decision. The Trial Chamber accepted Bagosora's submissions that Gatsinzi was expected to testify to several issues relevant to a number of paragraphs in the Bagosora Indictment.[1286] He was also expected to testify to several issues addressed by Prosecution Witnesses Alison Des Forges, Filip Reyntjens, DBY, AR, Roméo Dallaire, Brent Beardsley, GS, XXJ, XAP, and LN.[1287] Gatsinzi was further expected to testify about: the measures taken in

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[1284] 23 May 2007 Decision, para. 11.
[1285] 23 May 2007 Decision, para. 11.
[1286] Subpoena Decision, paras. 6, 7; Subpoena Motion, para. 35. In particular, Gatsinzi was expected to testify in relation to paragraphs 6.35 (Alleged telegram sent by the General Staff of the Rwandan Armed Forces on 7 April 1994 ordering the troops to seek the assistance of the *Interahamwe* and of civilians in identifying and exterminating Tutsis), 6.40 (Existence of a separate radio network through which Bagosora was alleged to have been in communication with the commanders of various army units), 6.41 (Bagosora's alleged regular meetings with Kabiligi, Ntabakuze, and the Commander of the Presidential Guard between April and July 1994), 6.50 (The participation of the Rwandan Armed Forces in massacres throughout Kigali starting 7 April 1994), 6.52 (Killings of Tutsi hospital patients at the *Centre Hospitalier de Kigali* by soldiers, and alleged daily reporting of these killings to the Ministry of Defence), 6.56 and 6.57 (Military involvement in the killings in Butare prefecture starting 20 April 1994), and 6.69 (The content of the alleged daily meetings between April and July 1994 attended by, *inter alia*, Bagosora, at which the officers of the army General Staff were informed of the massacres of the Tutsi civilian population).
[1287] Subpoena Decision, paras. 6, 7; Subpoena Motion, para. 36; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, *Annexe confidentielle à la Requête de la Défense de Bagosora visant l'émission d'un subpoena en date du 5 juin 2006*, confidential, 6 June 2006. Gatsinzi was expected to testify on the following specific issues: Witness Des Forges's description of the events of 7 April 1994 and the following days in Kigali, in particular in relation to Gatsinzi's appointment as interim army Chief of Staff; Witness Reyntjens's description of the events immediately following the President's plane crash and the events which unfolded in the second and third weeks of

relation to the deaths of ten Belgian peacekeepers and the political assassinations in Kimihurura; the sanctions that may have been imposed on those identified as responsible; the process of installing the Interim Government from 7 to 9 April 1994; and the content of discussions at meetings held by Gatsinzi from 7 to 17 April 1994.[1288] The Trial Chamber considered Bagosora to have sufficiently shown that this evidence could not reasonably be obtained elsewhere.[1289]

539. The Appeals Chamber notes that Bagosora was ultimately acquitted of several of the allegations in relation to which Gatsinzi was expected to testify. For instance, Bagosora was acquitted of events which took place outside the period between 6 to 9 April 1994, and Gatsinzi's failure to testify in relation to such events could therefore not be prejudicial to Bagosora.[1290] In addition, some allegations falling within the 6 to 9 April 1994 time period were either dismissed, or not pursued at trial.[1291] Nevertheless, the central importance of Gatsinzi's testimony arose primarily from his unique position as interim army Chief of Staff during a crucial period. Therefore, with respect to those events from 7 to 9 April 1994 for which Bagosora was convicted, the Appeals Chamber considers that Gatsinzi's testimony could have been highly relevant.

540. The Appeals Chamber notes, however, that Bagosora introduced aspects of Gatsinzi's testimony into evidence by other means. For instance, he tendered into evidence an excerpt of SRSG Jacques Roger Booh-Booh's book indicating that, during a meeting on 15 April 1994, Gatsinzi condemned the massacres taking place in Rwanda, regretted that it was impossible to stop them while the war was ongoing, and swore that they were not planned but rather the unfortunate

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April 1994; the functioning of the Rwandan Armed Forces, and the dismissal of Tutsis from the Rwandan Armed Forces; the 11 April 1994 massacre at Nyanza; the events which unfolded in Kigali from 7 to 17 April 1994; the distribution of weapons to *Interahamwe* at Camp Kanombe starting 7 April 1994; the participation of soldiers from the *École des sous-officiers* ("ESO") in the Butare massacres; and the repeated rapes of civilians in Butare.

[1288] Subpoena Decision, paras. 6, 7; Subpoena Motion, para. 37.

[1289] Subpoena Decision, para. 7.

[1290] These include the military's involvement in the crimes in Butare alleged at paragraphs 6.56 and 6.57 of the Bagosora Indictment, as well as his alleged involvement in the 11 April 1994 massacre at Nyanza. *See* Bagosora Indictment, para. 6.51. The Trial Chamber acquitted Bagosora of his alleged participation in the crimes committed in Butare prefecture and at Nyanza, Kigali. *See* Trial Judgement, paras. 1359, 1360, 1749, 1750.

[1291] No evidence was led about the telegram alleged at paragraph 6.35 of the Bagosora Indictment. In addition, the Trial Chamber found the use of a "separate" radio network alleged at paragraph 6.40 of the Bagosora Indictment had not been proven beyond reasonable doubt. *See* Trial Judgement, para. 1005. Moreover, the Trial Chamber found that there was insufficient evidence to reliably implicate Bagosora in the killings of Tutsi hospital patients alleged at paragraph 6.52 of the Bagosora Indictment. *See* Trial Judgement, para. 1403. Furthermore, the Trial Chamber considered Witness DBY's evidence that Tutsi soldiers were demobilized from the army to be problematic and therefore unreliable. *See* Trial Judgement, paras. 408, 409. Finally, no findings were made against Bagosora for any involvement in the distribution of weapons.

reactions of some members of the army to the death of the President and of the army Chief of Staff.[1292]

541. During his testimony, Bagosora also played a recording of an interview that Gatsinzi gave to Radio Rwanda on 10 April 1994.[1293] In this recording, Gatsinzi mentioned that the massacres were being investigated, opined that only a few soldiers were involved, and stated that the army tried to help install a new government in order to implement the peace agreement.[1294] Bagosora briefly commented on these points.[1295]

542. Furthermore, Bagosora introduced into evidence a *Pro Justitia* statement Gatsinzi gave on 16 June 1995 to Rwandan judicial authorities detailing his recollection of events from 7 April 1994 onwards.[1296] In this statement, Gatsinzi described, among other things, the phone call he received from Bagosora on 7 April 1994 at 2.00 a.m. ordering him to present himself in Kigali at 6.00 a.m.[1297] He explained that he could not travel at night for security reasons, despite Bagosora's insistence that he do so.[1298] He said that he did not see Bagosora until the evening of 7 April 1994 at a meeting during which he sensed tension between Bagosora and the other officers, who rejected Bagosora's attempts to secure the presidency of the Crisis Committee.[1299] He stated that Bagosora left the meeting angry, but convened a meeting the following morning, at which he arrived with the members of the newly constituted Interim Government.[1300] Bagosora commented on some of the

[1292] Jacques Roger Booh-Booh, T. 21 November 2005 pp. 89, 90, *referring to* Exhibit DB284 (Book written by Jacques Roger Booh-Booh titled "*Le Patron de Dallaire parle*"), pp. 87, 88 (or, pp. 168-170 of the book).
[1293] Bagosora, T. 8 November 2005 pp. 75-78.
[1294] Bagosora, T. 8 November 2005 p. 76. *See also* Exhibits DB274 (Audio-recording of Jean Kambanda's Speech and portion of Marcel Gatsinzi's Interview with a journalist of Radio Rwanda of 10 April 1994) *and* DNS113 (Excerpts of transcripts of interview between Gatsinzi and a journalist from Radio Rwanda of 10 April 1994).
[1295] Bagosora commented that he recalled having heard the interview on 10 April 1994, that he "was not aware of the outcome of that investigation which [Gatsinzi] ordered", that he shared Gatsinzi's views on the limited involvement of soldiers and role of the army, and that he thought Gatsinzi "wanted to clear the discredit that had tarnished [Gatsinzi's] army". Bagosora also testified that "apart from these elements, whom [Gatsinzi] described as, '[c]ivilians who disguised themselves as soldiers,' […] [Gatsinzi] had no problem carrying out his command duties" as interim army Chief of Staff. *See* Bagosora, T. 8 November 2005 p. 75.
[1296] Exhibit DB256A (Gatsinzi *Pro Justitia* Statement dated 16 June 1995).
[1297] Exhibit DB256A (Gatsinzi *Pro Justitia* Statement dated 16 June 1995), pp. 15114, 15113 (Registry pagination).
[1298] Exhibit DB256A (Gatsinzi *Pro Justitia* Statement dated 16 June 1995), pp. 15113-15111 (Registry pagination). Gatsinzi also mentioned that he suspected that Bagosora hoped he might be killed on the way. *See ibid.*, p. 15112 (Registry pagination).
[1299] Exhibit DB256A (Gatsinzi *Pro Justitia* Statement dated 16 June 1995), pp. 15111, 15110 (Registry pagination). Gatsinzi indicated that the outcome of the meeting was an agreement to look into how to reinstate discipline within the Presidential Guard, and how to facilitate contact between the RPF and high government officials through UNAMIR so as to constitute a transitional government.
[1300] Exhibit DB256A (Gatsinzi *Pro Justitia* Statement dated 16 June 1995), p. 15111 (Registry pagination). Gatsinzi stated that Bagosora had apparently chosen the members of the new Interim Government himself, and in non-conformity with the decisions taken at the meeting the night before.

points raised in Gatsinzi's *Pro Justitia* statement,[1301] indicating, for instance, that he supported Gatsinzi's candidature and that he ordered him to appear in Kigali at 6.00 a.m. on 7 April 1994.[1302]

543. The Appeals Chamber considers that crucial elements to which Gatsinzi was expected to testify were introduced into evidence by other means, and that Bagosora was given the opportunity to address them at trial. It recalls, nevertheless, that documentary or hearsay evidence is not a substitute for live testimony, which is generally preferred.[1303] It considers that, had Gatsinzi been called to testify in person, more detailed testimony could have been elicited in respect of the attacks for which Bagosora was convicted, in particular the killings of the Belgian peacekeepers, the killings of officials in Kimihurura, and the meetings which took place between 7 and 9 April 1994. A review of Gatsinzi's 30 March 2011 testimony before the Appeals Chamber confirms that Gatsinzi was able to provide more detailed and relevant information about these topics. Bagosora was thus deprived of the opportunity to present a potentially important witness. Having been in a position to assist, the Trial Chamber failed in its obligation to ensure the fairness of the proceedings and violated Bagosora's right to present his defence. The Appeals Chamber therefore finds that Bagosora suffered prejudice from the Trial Chamber's error in failing to enforce the Subpoena Decision.

544. However, the Appeals Chamber considers such prejudice to have been remedied by the fact that Gatsinzi was ultimately heard. The Appeals Chamber is mindful of the fact that such testimony was not heard at trial, but rather on appeal. In this respect, Bagosora submits that the very limited time he had to examine Gatsinzi on appeal prevented him from exploring certain issues in depth, whereas at trial Gatsinzi "would have been on for a few days".[1304] He also submits that:

> Th[e Appeals] Chamber will retain or reject whatever [it] decides to retain or reject concerning [Gatsinzi]. But there are repercussions on the credibility of others when accepting the testimony of this person. The [Trial] Chamber might have rejected a certain testimony or parts of a certain testimony, and this witness now confirms that part. So there could be – I'm not saying […] there

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[1301] Bagosora, T. 7 November 2005 pp. 31-33.

[1302] Bagosora testified that he considered that in the circumstances prevailing at the time, "Gatsinzi was the officer in the best position to take over the command of the army", and that "[e]ven though we were not friends, I supported his candidature, and the other members of the meeting supported him". He admitted to ordering Gatsinzi to appear in Kigali at 6.00 a.m. on 7 April 1994, explaining that "we had to restore the head of the army as quickly as possible", and also addressed Gatsinzi's delayed arrival. *See* Bagosora, T. 7 November 2005 pp. 32, 33. Bagosora opined that Gatsinzi could have requested the use of a helicopter to reach Kigali earlier, and that Gatsinzi's absence from Kigali at such a critical time had an impact on the events. *See* Bagosora, T. 7 November 2005 p. 33 ("It was during [Gatsinzi's] absence that the units of Camp Kigali attacked the UNAMIR soldiers. It was next to his staff headquarters. If he had been there, he would have been able to intervene. Furthermore, the Presidential Guard battalion also made outings, and if there was an acknowledged chief, he would have taken care of the situation. For his part, he says that he was not sure about things in Kigali in the morning, but he came later on when the RPF was attacking. I do not know why he did not come on time.").

[1303] *Cf. Simba* Appeal Judgement, paras. 20, 103; *Rutaganda* Appeal Judgement, paras. 33, 149.

[1304] AT. 31 March 2011 p. 50.

will be, but there could be a certain difficulty in applying the witness's testimony to the first instance judgement.[1305]

545. The Appeals Chamber considers that a presentation of Gatsinzi's evidence at trial would have done little in fact to assist in Bagosora's defence. In particular, the Appeals Chamber notes that Gatsinzi did not testify in Bagosora's favour,[1306] a point on which Bagosora agrees.[1307] Moreover, the Appeals Chamber finds that Gatsinzi's testimony contained a number of inconsistencies,[1308] speculations,[1309] and hearsay evidence,[1310] thereby lacking credibility and reliability, a point on which Bagosora also agrees.[1311] In addition, Gatsinzi's proximity to the crimes and his superior military position at the time of the events make him a potential accomplice, thereby giving him motive to shift blame, diminish his own authority, or distance himself from Bagosora. This is apparent, for instance, in Gatsinzi's attempts to justify his own failures to intervene during his tenure as army Chief of Staff by accusing Bagosora of sabotaging him.[1312] The Appeals Chamber therefore considers that Gatsinzi's testimony would not have had an impact on the Trial Chamber's verdict against Bagosora.

546. As such, the Appeals Chamber finds that, although the Trial Chamber violated Bagosora's right to a fair trial by failing to enforce the Subpoena Decision, any prejudice Bagosora suffered was remedied by hearing Gatsinzi on appeal. The Appeals Chamber therefore concludes that the violation of Bagosora's right to a fair trial did not amount to an error of law invalidating the Trial Judgement.[1313]

[1305] AT. 31 March 2011 p. 39.
[1306] Gatsinzi testified, among other things, that Bagosora: had authority over the army and the gendarmerie staff; had ultimate authority over the Crisis Committee, which was answerable to him; tried to have Gatsinzi assassinated on the day of his arrival to Kigali; circumvented Gatsinzi by giving orders directly to unit commanders; and undermined Gatsinzi authority by having funds transferred to Gitarama with armed escorts without his consent. *See* Marcel Gatsinzi, AT. 30 March 2011 pp. 6, 7, 11-13, 25, 31, 32, 45, 46.
[1307] *See* AT. 31 March 2011 p. 38.
[1308] For instance, Gatsinzi testified that he did not order investigations into the murders of the Prime Minister and other prominent personalities in Kimihurura because it did not fall under his jurisdiction. He then testified that investigations should have been ordered, but that he did not have time to order them because he was relieved of his post. Gatsinzi was later confronted with the transcripts of radio interviews he gave on 11 April 1994, wherein he stated that investigations into the murders of the prominent personalities were being carried out and assured the population that the soldiers involved were rogue and not acting on orders. *See* Marcel Gatsinzi, AT. 30 March 2011 pp. 29, 31, 33.
[1309] Such speculations were apparent, for instance, in Gatsinzi's belief that Bagosora: was opposed to his appointment as army Chief of Staff; tried to have him killed; sabotaged him; and was ultimately responsible for his dismissal from the post of army Chief of Staff. *See* Marcel Gatsinzi, AT. 30 March 2011 pp. 29-33, 35-41.
[1310] For instance, Gatsinzi testified that an adviser to the Minister of Defence told him that Bagosora had a personal radio network, parallel to the military's normal network, through which he had direct contact with the Presidential Guard, Para-Commando Battalion, and Reconnaissance Battalion. *See* Marcel Gatsinzi, AT. 30 March 2011 p. 13.
[1311] *See* AT. 31 March 2011 p. 38.
[1312] Marcel Gatsinzi, AT. 30 March 2011 p. 36.
[1313] The Appeals Chamber recalls that when a party alleges on appeal that the right to a fair trial has been infringed, it must prove that the violation caused prejudice that amounts to an error of law invalidating the judgement. *See Renzaho* Appeal Judgement, para. 196; *Haradinaj et al.* Appeal Judgement, para. 17; *Gali}* Appeal Judgement, para. 21.

C. Alleged Errors in the Assessment of Circumstantial Evidence (Ground 3)

547. The Trial Chamber found Bagosora guilty pursuant to Article 6(1) of the Statute for ordering crimes at Kigali area roadblocks, as well as the killing of Augustin Maharangari.[1314] The Trial Chamber also found that the only reasonable inference was that Bagosora ordered, or "ordered or authorised", the killings of Alphonse Kabiligi, Prime Minister Agathe Uwilingiyimana, the officials in the Kimihurura neighbourhood, and the killings in Nyundo Parish,[1315] and relied in part on these factual findings to find him guilty of these crimes as a superior under Article 6(3) of the Statute.[1316] In addition, the Trial Chamber found that Bagosora had knowledge of the threat faced by the Belgian peacekeepers, and had the authority and means to prevent the attack against them, but failed to do so,[1317] and accordingly convicted him of their killings as a superior under Article 6(3) of the Statute.[1318]

548. In the alternative to his First Ground of Appeal, Bagosora contends that the Trial Chamber failed to consider that other reasonable inferences could have been drawn from the circumstantial evidence relied upon to convict him of these crimes.[1319] In particular, he argues that the Trial Chamber failed to consider that the attacks which led to these killings could have been ordered or authorised by someone other than him and alleges further specific errors relating to the killings of the Prime Minister and the Belgian peacekeepers.[1320]

549. Specific to his convictions for the killing of Alphonse Kabiligi and the attacks committed in Nyundo Parish in Gisenyi prefecture, Bagosora refers to Nsengiyumva's appeal submissions and submits that the Trial Chamber erred in inferring that he must have ordered or authorised the attacks that Nsengiyumva himself ordered or authorised.[1321] The Appeals Chamber recalls that, in another part of this Judgement, it has found that the Trial Chamber erred in finding that Nsengiyumva ordered the killing of Alphonse Kabiligi, as well as the killings committed at Nyundo Parish, and that he could be held liable as a superior for these crimes.[1322] As Bagosora was convicted for these crimes pursuant to Article 6(3) of the Statute on the basis that Nsengiyumva, as Gisenyi Operational

[1314] Trial Judgement, paras. 2158, 2186, 2194, 2213, 2245.
[1315] Trial Judgement, paras. 723, 752, 1167, 1204, 2178, 2182.
[1316] Trial Judgement, paras. 2040, 2158, 2186, 2194, 2213, 2224, 2245. The Trial Chamber noted that, while the murder of Augustin Maharangari was charged against Bagosora under Article 6(1) of the Statute, the killing of the other prominent personalities was charged only under Article 6(3). *See ibid.*, para. 2004, fn. 2355.
[1317] Trial Judgement, para. 796.
[1318] Trial Judgement, paras. 2186, 2245.
[1319] Bagosora Notice of Appeal, pp. 10-13; Bagosora Appeal Brief, paras. 241-314.
[1320] Bagosora Notice of Appeal, pp. 10-13; Bagosora Appeal Brief, paras. 248-312.
[1321] Bagosora Appeal Brief, paras. 233-239.
[1322] *See supra*, Sections III.G *and* H, paras. 331, 348.

Sector Commander, was under his command,[1323] the Appeals Chamber also reverses Bagosora's convictions for the killing of Alphonse Kabiligi and the killings perpetrated at Nyundo Parish. Bagosora's arguments in respect of these incidents therefore need not be considered.

550. The Appeals Chamber further notes that Bagosora does not make any specific references or factual arguments in relation to his convictions for the crimes committed at Kigali area roadblocks under this ground of appeal. The Appeals Chamber will therefore address the import of Bagosora's general arguments under the present ground on his convictions for the crimes committed at Kigali area roadblocks together with the specific arguments he raises under his Fourth Ground of Appeal.[1324]

1. Alleged Failure to Consider that the Attacks Could Have Been Ordered or Authorised by Someone Other Than Bagosora

551. Bagosora submits that the Trial Chamber erred in finding that the killings of Augustin Maharangari, Prime Minister Agathe Uwilingiyimana, and the officials in the Kimihurura neighbourhood, as well as the killings of the Belgian peacekeepers, could only have been perpetrated on his orders or with his authorisation.[1325] He argues that the Trial Chamber failed to consider that these attacks could have been ordered or authorised by someone else, such as clandestine groups or military authorities other than himself.[1326]

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

(a) Clandestine Networks

553. The Trial Chamber considered allegations regarding the existence of clandestine networks, including the Zero Network, AMASASU, and death squads, and each co-Accused's role in them.[1327] Although it found that there was evidence suggesting the existence of such networks, it

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[1323] Trial Judgement, paras. 1167, 1204. *See also ibid.*, paras. 2034, *referring to* Bagosora's role at the head of the Rwandan military, *and* 2036, *referring to* the fact that the operation against Nyundo Parish must have been sanctioned by Nsengiyumva.
[1324] *See infra*, Section IV.E.
[1325] Bagosora Notice of Appeal, Ground 3(B); Bagosora Appeal Brief, paras. 261, 265. *See also* AT. 31 March 2011 p. 8.
[1326] Bagosora Notice of Appeal, Grounds 3(A), 3(B), 3(G); Bagosora Appeal Brief, paras. 248, 249, 251-253, 262-264, 266, 293-296; AT. 31 March 2011 p. 45.
[1327] Trial Judgement, paras. 523-620.

concluded that the evidence was insufficient to conclude beyond reasonable doubt that the co-Accused were involved in them.[1328]

554. Bagosora submits that the Trial Chamber erred in fact and in law in failing to consider that a number of the events for which he was convicted could have been the work of these clandestine networks, or of another powerful clandestine group close to President Habyarimana, the *Akazu*.[1329] In particular, he contends that it is reasonable to infer that the soldiers of the Presidential Guard, who were under a different chain of command and were implicated in the killings of the Prime Minister and the political officials in Kimihurura, were accountable to the *Akazu* or to their own authority.[1330] He further submits that senior military authorities may have been part of these clandestine networks and could have ordered the attacks.[1331] He also argues that the political figures murdered on the morning of 7 April 1994 were "ideal targets" for the clandestine networks.[1332] He asserts that the fact that the crimes may have been committed by clandestine networks implies that the inference that the crimes were attributable to him was not the only reasonable one.[1333]

555. The Prosecution responds that Bagosora's argument lacks merit and that the alleged possibility that the attacks were committed by clandestine groups is untenable given the manner in which the crimes were perpetrated.[1334] It points to the systematic, coordinated, notorious, and widespread nature of the attacks perpetrated by elite units of the army and militias with a substantial number of soldiers and militiamen and the amount of firepower involved.[1335]

556. With respect to the Zero Network, the Trial Chamber found that "there is considerable evidence of a group or network, close to President Habyarimana, which exercised influence within Rwanda".[1336] It noted that "[t]here is limited information about the activities of the group but the indirect evidence indicates that it instigated violence".[1337] However, Bagosora does not point to any evidence suggesting that the Zero Network may have been responsible for the specific crimes for which he was convicted.

[1328] Trial Judgement, paras. 537, 542, 580, 581, 619, 2105, 2106.
[1329] Bagosora Notice of Appeal, Grounds 3(A), 3(G); Bagosora Appeal Brief, paras. 248, 249, 251-253, 293-296. *See also* Bagosora Appeal Brief, para. 176; AT. 31 March 2011 p. 45.
[1330] Bagosora Appeal Brief, paras. 254, 255. *See also* Bagosora Reply Brief, paras. 84-90.
[1331] Bagosora Reply Brief, paras. 78-81.
[1332] Bagosora Appeal Brief, para. 293. *See also ibid*., paras. 294-296.
[1333] Bagosora Appeal Brief, paras. 256-260.
[1334] Prosecution Response Brief (Bagosora), paras. 165, 168-170, 182-187.
[1335] Prosecution Response Brief (Bagosora), para. 169. *See also ibid*., paras. 168, 170-177, 185-187.
[1336] Trial Judgement, para. 537.
[1337] Trial Judgement, para. 538.

557. Bagosora relies on the Trial Chamber's finding that "there is considerable evidence of a group or network, close to President Habyarimana, which exercised influence within Rwanda" to argue that this demonstrates that the political killings perpetrated by the Presidential Guard were attributable to the *Akazu*.[1338] The Appeals Chamber considers that the fact that the Presidential Guard Battalion was directly answerable to the President and that there was evidence of a clandestine network close to the President does not reasonably suggest that crimes perpetrated by the Presidential Guard were attributable to the clandestine network rather than to the regular chain of command of the Presidential Guard. Given that there was no evidence linking the crimes perpetrated by the Presidential Guard for which Bagosora was convicted to the clandestine network, it was not a reasonable inference that could have been drawn from the evidence presented. Accordingly, the Trial Chamber was correct in not considering this to be a reasonable alternative inference.

558. Similarly, in relation to the AMASASU group, the Trial Chamber found that "[i]t is clear that a group made its existence known through the AMASASU documents. While some persons centrally placed in the Rwandan government perceived the group to be a reality, others were not convinced".[1339] It considered that "[i]nformation about the AMASASU's activities is sparse and imprecise […]. Apart from its alleged involvement in massacres in late 1992, there is no evidencing [*sic*] concerning illegal acts from 1993 onwards that is directly linked to the AMASASU".[1340] Bagosora fails to demonstrate that the Trial Chamber erred in its assessment. Furthermore, Bagosora fails to point to any evidence linking the commission of the crimes for which he was convicted to the AMASASU.

559. The Trial Chamber also found that "considerable evidence points to the existence of death squads in Rwanda years before the killings in April 1994".[1341] However, as with the Zero Network and the AMASASU, Bagosora does not point to any evidence suggesting that the death squads may have been responsible for the specific crimes for which he was convicted.

560. The Appeals Chamber further notes that, to the extent that there was evidence linking the crimes to one of the clandestine groups, the Trial Chamber did consider this evidence. The Trial Judgement reflects that the Trial Chamber considered Witness ZF's evidence regarding Zero Network using a secret radio communication system in its assessment of the evidence about

[1338] Bagosora Appeal Brief, paras. 251-255.
[1339] Trial Judgement, para. 580.
[1340] Trial Judgement, para. 580.
[1341] Trial Judgement, para. 619. *See also ibid*., para. 2106.

the killing of Augustin Maharangari.[1342] However, it concluded that his evidence about the secret radio network carried little weight and that "[i]t would also be surprising if a secret radio network could be so easily and inadvertently overheard by a civilian operating a Motorola hand-held radio".[1343] Accordingly, the Trial Chamber did consider whether attributing the killing of Augustin Maharangari to the Zero Network was a reasonable inference but reasonably concluded that it was not.

561. Finally, the Appeals Chamber dismisses Bagosora's argument that the political figures killed were ideal targets for clandestine networks. While the Trial Chamber did find that prominent political personalities and opposition figures were systematically targeted,[1344] Bagosora fails to explain why they would have been ideal targets for clandestine networks specifically rather than targets for military authorities.

562. While a conviction based on inference must be the only reasonable inference available, the Appeals Chamber recalls that it must be the only reasonable one that could be drawn *from the evidence presented*.[1345] In light of the fact that there was no evidence suggesting that the clandestine groups were linked to the crimes for which Bagosora was convicted, it was reasonable for the Trial Chamber not to have considered as a reasonable alternative inference that these crimes were committed by clandestine groups. Accordingly, the Appeals Chamber finds that Bagosora has failed to demonstrate an error in this regard.

(b) Military Authorities

563. Bagosora submits that the Trial Chamber failed to consider the possibility that even if the orders came from high-ranking military authorities, there were other people apart from him who might have given such orders, such as the authorities in charge of the Crisis Committee.[1346] He further questions the discipline and internal cohesion of the Rwandan army, suggesting that this undermines the assumption that these were organised attacks ordered or authorised by the highest military authorities.[1347]

564. The Prosecution responds that the Trial Chamber committed no error in finding that the only reasonable conclusion to draw from Bagosora's authority and the organised military operations

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[1342] Trial Judgement, paras. 948, 957.
[1343] Trial Judgement, para. 957.
[1344] Trial Judgement, para. 2178.
[1345] *See Nchamihigo* Appeal Judgement, para. 80, *citing Stakić* Appeal Judgement, para. 219. *See also Karera* Appeal Judgement, para. 34; *Ntagerura et al.* Appeal Judgement, para. 306; *Čelebići* Appeal Judgement, para. 458.
[1346] Bagosora Appeal Brief, paras. 262-264, 266; AT. 31 March 2011 p. 45.

involving different units of the army is that the crimes had to have been ordered or authorised by the highest military authorities, including Bagosora.[1348] The Prosecution concedes that there is no direct evidence that Bagosora ordered crimes, but submits that the issuance of orders can be proven through circumstantial evidence.[1349] It also argues that Bagosora fails to provide any basis for his argument that the Rwandan army was disorganised.[1350]

565. The Appeals Chamber will now examine whether the Trial Chamber erred in concluding that Bagosora ordered or authorised the killing of Augustin Maharangari, for which Bagosora was convicted under Article 6(1) of the Statute. As regards the killings of officials in Kimihurura for which Bagosora was convicted under Article 6(3) of the Statute, the Appeals Chamber recalls that, in the context of superior responsibility, the accused need not have ordered or authorised the crime provided that he knew or had reason to know of his subordinates' crime and had the authority and means to prevent it or punish his subordinates but failed to do so.[1351] As such, a finding that the Trial Chamber erred in concluding that Bagosora ordered or authorised the killings of officials in Kimihurura would not *per se* invalidate the Trial Chamber's decision to hold Bagosora responsible as a superior. However, since the Trial Chamber's conclusion that Bagosora failed in his duty to prevent these crimes was based upon its factual finding that he ordered or authorised them,[1352] the Appeals Chamber considers that an error in respect of such factual finding could have an impact on the Trial Chamber's determination of Bagosora's superior responsibility. The Appeals Chamber will therefore also examine Bagosora's contentions in this respect.

566. As Bagosora raised a number of other allegations of error regarding the attacks on the Prime Minister and the peacekeepers, the Appeals Chamber will consider Bagosora's arguments that someone else could have ordered or authorised these crimes in separate sub-sections below.[1353]

(i) Killing of Augustin Maharangari

567. The Trial Chamber found that Augustin Maharangari, the Director of the Rwandan Bank of Development, was killed at his residence by soldiers of the Rwandan army on 8 April 1994.[1354] It found that the killing of Maharangari, who was a suspected RPF accomplice, was targeted,

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[1347] Bagosora Appeal Brief, paras. 271, 272, 276. *See also* Bagosora Reply Brief, paras. 91-100.
[1348] Prosecution Response Brief (Bagosora), paras. 165, 171-174, 188-195, 200; AT. 1 April 2011 pp. 1-4.
[1349] AT. 31 March 2011 p. 73.
[1350] Prosecution Response Brief (Bagosora), paras. 196-199.
[1351] *See*, *e.g.*, *Nahimana et al*. Appeal Judgement, para. 484; *Ori}* Appeal Judgement, para. 18; *Halilovi}* Appeal Judgement, paras. 59, 210.
[1352] *See infra*, para. 667.
[1353] *See infra*, Sections IV.C.2 *and* 3.
[1354] Trial Judgement, paras. 961 ("on or around 8 April 1994"), 2182 ("on 8 April 1994").

premeditated, and mirrored the political assassinations that occurred in the wake of the death of the President.[1355] It observed that "[t]here is no credible evidence directly showing that Bagosora was aware of the murder of Maharangari".[1356] Nonetheless, it found that "given the widespread killing throughout Kigali perpetrated by or with the assistance of military personnel, including the targeted killings on the morning of 7 April [...], the Chamber is satisfied that Bagosora was aware that personnel under his authority were participating in killings".[1357] In its legal findings, the Trial Chamber further considered, "as the only reasonable inference, that Bagosora in the exercise of his authority between 6 and 9 April ordered the political assassinations conducted throughout Kigali and Gisenyi prefecture".[1358] Accordingly, the Trial Chamber convicted Bagosora under Article 6(1) of the Statute for ordering the killing of Augustin Maharangari.[1359]

568. In addition to his general arguments summarised above, Bagosora points to the evidence of Witness AL that the former soldier involved in the killing had problems with Maharangari which, he argues, indicates that Maharangari's killing was not committed upon a military order.[1360]

569. The Appeals Chamber finds no error in the Trial Chamber's finding that Maharangari's killing "mirrors other targeted assassinations in the wake of the death of President Habyarimana" and that it "was premeditated and conducted on political grounds".[1361] In this regard, the Appeals Chamber recalls Witness AL's credible evidence that Maharangari was specifically sought out by four armed soldiers who brought him back to his home from a neighbouring convent where he had been sheltering.[1362] The soldiers then shot Maharangari inside the house.[1363] The manner in which he was apprehended and killed, along with the fact that he was the Director of the Rwandan Bank of Development and a suspected RPF accomplice,[1364] indicates that his killing was targeted. The Appeals Chamber dismisses Bagosora's argument that, because the former soldier involved in Maharangari's killing had another motive for the killing, the order to kill Maharangari may not have come from the military. While Witness AL did testify that there may have been another motive for the killing, he acknowledged that this was merely speculation.[1365]

[1355] Trial Judgement, para. 2182.
[1356] Trial Judgement, para. 962.
[1357] Trial Judgement, para. 962.
[1358] Trial Judgement, para. 2182.
[1359] Trial Judgement, paras. 2182, 2186, 2194, 2213, 2245.
[1360] AT. 31 March 2011 p. 58.
[1361] Trial Judgement, para. 2182.
[1362] Trial Judgement, paras. 942, 953. The Appeals Chamber notes that it is not disputed that soldiers were among the attackers. *See* AT. 31 March 2011 p. 58.
[1363] Trial Judgement, paras. 942, 953.
[1364] *See* Trial Judgement, para. 2182.
[1365] Witness AL, T. 29 April 2004 p. 80.

570. Furthermore, this killing was similar to the political killings which took place on 7 April 1994, which systematically targeted senior government officials. For the reasons expressed below, the Appeals Chamber has concluded that the Trial Chamber reasonably found that the killings in the Kimihurura neighbourhood on 7 April 1994, including the murder of the Prime Minister, were part of an organised military operation.[1366]

571. Turning to the Trial Chamber's finding that Bagosora ordered the killing of Maharangari, the Appeals Chamber observes that the Trial Chamber's factual findings do not support its legal conclusion. In its factual findings, the Trial Chamber concluded that:

> Bagosora had authority over the Rwandan army at the time of the attack […]. There is no credible evidence directly showing that Bagosora was aware of the murder of Maharangari. However, given the widespread killing throughout Kigali perpetrated by or with the assistance of military personnel, including the targeted killings on the morning of 7 April […], the Chamber is satisfied that Bagosora was aware that personnel under his authority were participating in killings.[1367]

While the Trial Chamber discussed Bagosora's awareness of the killing of Maharangari and Bagosora's superior position, at no point did it discuss evidence that Bagosora ordered the crimes. The Trial Chamber's factual findings therefore appear to correspond only to those which would normally be entered in relation to superior responsibility.

572. In light of the foregoing, the Appeals Chamber considers that the Trial Chamber failed to provide a reasoned opinion for its finding that Bagosora was criminally responsible under Article 6(1) of the Statute for ordering the killing of Maharangari. The Appeals Chamber finds that, based on the Trial Chamber's factual findings, no reasonable trier of fact could have found that the only reasonable inference was that Bagosora ordered the crime. Indeed, it cannot be excluded that the specific order could have come from a military authority other than Bagosora. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in convicting Bagosora of the killing of Maharangari pursuant to Article 6(1) of the Statute.[1368]

573. Based on the foregoing, the Appeals Chamber grants this part of Bagosora's Third Ground of Appeal and reverses the convictions entered against him under Counts 4, 6, 8, and 10 of the Bagosora Indictment for the killing of Augustin Maharangari.

(ii) <u>Killings of Officials in Kimihurura</u>

[1366] *See infra*, paras. 576, 585, 586.
[1367] Trial Judgement, para. 962.
[1368] The Appeals Chamber notes that the Trial Chamber did not find, as it did for the other Article 6(1) convictions entered against the co-Accused in this case, that Bagosora was also liable for this incident as a superior under Article 6(3) of the Statute.

574. The Trial Chamber found that, on the morning of 7 April 1994, elements of the Presidential Guard and Para-Commando Battalion undertook an organised military operation and systematically killed: Joseph Kavaruganda, the President of the Constitutional Court; Frédéric Nzamurambaho, the Chairman of the PSD and Minister of Agriculture; Landoald Ndasingwa, the Vice-Chairman of the *Parti libéral* and Minister of Labour and Community Affairs; and Faustin Rucogoza, an official of the *Mouvement démocratique républicain* and Minister of Information.[1369] It found, "as the only reasonable inference, that Bagosora in the exercise of his authority between 6 and 9 April ordered the political assassinations conducted throughout Kigali".[1370] Noting that these killings were not charged against Bagosora under Article 6(1) of the Statute but only under Article 6(3),[1371] the Trial Chamber convicted Bagosora as a superior under Article 6(3) of the Statute for the killings of officials in the Kimihurura neighbourhood.[1372]

575. In addition to his general arguments summarised above, Bagosora suggests in relation to these political killings that it could have been the commander of the Presidential Guard who issued the order or "the hierarchs from among the President's sympathisers [who] assembled at the Presidential Guard camp" on the night of 6 to 7 April 1994.[1373]

576. The Appeals Chamber considers that Bagosora has failed to demonstrate an error on the part of the Trial Chamber in finding that these political killings were part of an organised military operation. In reaching this finding, the Trial Chamber reasonably considered the fact that it was an attack involving elite units of the Rwandan army and that it systematically targeted senior government officials.[1374] In this regard, the Appeals Chamber notes the speed and efficiency with which the operation was undertaken following the death of the President.[1375] The Trial Chamber relied on evidence that as early as 4.00 a.m. on 7 April 1994, within hours of the Presidential plane crash, the Kimihurura neighbourhood was surrounded and people were not allowed to leave.[1376] As found by the Trial Chamber, members of the MRND party were evacuated from the neighbourhood by elements of the Rwandan Armed Forces while the same elements systematically targeted prominent personalities or opposition politicians and killed them in the early morning

[1369] Trial Judgement, paras. 751, 752, 2178.
[1370] Trial Judgement, para. 2182.
[1371] Trial Judgement, para. 2004, fn. 2355.
[1372] Trial Judgement, paras. 752, 2178, 2182, 2186, 2194, 2213, 2245.
[1373] Bagosora Appeal Brief, para. 268. *See also* AT. 31 March 2011 p. 45.
[1374] Trial Judgement, para. 752.
[1375] *See also* Trial Judgement, para. 2038 ("It is inconceivable that Bagosora would not be aware that his subordinates would be deployed for these purposes, in particular in the immediate aftermath of the death of President Habyarimana and the resumption of hostilities with the RPF, when the vigilance of military authorities would have been at its height.").
[1376] Trial Judgement, paras. 728, 734, 742.

hours.[1377] The Trial Chamber also considered the evidence in light of the killing of the Prime Minister which took place during the same time-frame.[1378]

577. The Appeals Chamber turns to consider Bagosora's argument that the Trial Chamber failed to consider that other military authorities could have ordered or authorised the killings. The Trial Chamber concluded that the order for such an assault could only have come from Bagosora as the highest military authority after noting that the attack was an organised military operation involving elite units of the Rwandan Armed Forces and targeting senior government officials.[1379] In its legal findings, it found that the attack was "an organised military operation ordered *or* authorised at the highest level of the Rwandan military".[1380] The Trial Chamber, nonetheless, failed to explain why the only reasonable inference was that Bagosora, as the highest military authority, was the only person who could have ordered or authorised it.[1381] While the factors enumerated and relied upon by the Trial Chamber could reasonably lead to the inference that the killings of officials in Kimihurura were ordered and authorised by the military, the Appeals Chamber finds that they do not lead to the conclusion that the only reasonable inference was that it was Bagosora who ordered or authorised them. In particular, it considers that a reasonable trier of fact could not exclude that the specific orders or authorisation could have come from high-level military authorities other than Bagosora. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in finding that Bagosora must have ordered or authorised the attack in Kimihurura.

578. The Appeals Chamber will examine the impact of this error in the section of this Judgement dedicated to Bagosora's allegations of error regarding the Trial Chamber's application of the law of superior responsibility under his Second Ground of Appeal.[1382]

2. Alleged Errors Relating to the Killing of the Prime Minister

579. The Trial Chamber found that on the morning of 7 April 1994, the Prime Minister's residential compound and the neighbouring compound where she was hiding came under attack by soldiers from the Presidential Guard and Reconnaissance Battalion.[1383] The Prime Minister was shot dead that morning, and a bottle was then shoved into her vagina.[1384] The Trial Chamber found that "[t]he organised attack, involving elite units of the Rwandan army, targeted a senior government

[1377] Trial Judgement, paras. 727, 735-737, 742, 744, 751, 2178.
[1378] Trial Judgement, para. 752.
[1379] Trial Judgement, para. 752.
[1380] Trial Judgement, para. 2178 (emphasis added).
[1381] *Cf. Renzaho* Appeal Judgement, para. 319.
[1382] *See infra*, Section IV.D.
[1383] Trial Judgement, paras. 700-703, 717.
[1384] Trial Judgement, paras. 705, 718, 2219.

official [and that] the order for such an assault could only have come from the highest military authority, which at the time was Bagosora".[1385] In relation to this finding, it recalled Bagosora's refusal to consult with the Prime Minister, his suspicions that she was involved in an attempted *coup d'état*, and his awareness that UNAMIR wanted her to address the nation.[1386] In its legal findings, the Trial Chamber concluded that the operation could only have been ordered or authorised at the highest level of the Rwandan military.[1387] Noting that Bagosora was not charged with the killing of the Prime Minister under Article 6(1) of the Statute but only under Article 6(3),[1388] the Trial Chamber found Bagosora guilty for the Prime Minister's killing and the desecration of her body pursuant to Article 6(3) of the Statute.[1389]

580. Bagosora submits that the Trial Chamber erred in convicting him for the attack on the Prime Minister because it did not demonstrate that the inference that it could only have been perpetrated upon his orders or with his authorisation was the only reasonable inference.[1390] He contends that the Trial Chamber erred in: (i) failing to consider that it was not an organised military operation; (ii) exaggerating his denial of the Prime Minister's authority; (iii) inferring that General Dallaire told Bagosora that he was sending soldiers to take the Prime Minister to the radio station, which allegedly prompted him to order the attack; and (iv) concluding that the killing of the Prime Minister could only have been perpetrated on his orders or with his authorisation.[1391]

581. The Appeals Chamber reiterates that a superior need not have ordered or authorised a crime to be convicted pursuant to Article 6(3) of the Statute.[1392] Nevertheless, the Appeals Chamber notes that the Trial Chamber relied on its factual finding that Bagosora ordered or authorised the attack on the Prime Minister to conclude that he failed in his duty to prevent this crime.[1393] Any error in respect of such factual finding could therefore have an impact on the Trial Chamber's determination of Bagosora's superior responsibility. The Appeals Chamber now turns to examine Bagosora's contentions.

[1385] Trial Judgement, para. 723. *See also ibid*., paras. 720, 2178.
[1386] Trial Judgement, para. 723.
[1387] Trial Judgement, para. 2178. *See also ibid.*, para. 2182.
[1388] Trial Judgement, para. 2004, fn. 2355.
[1389] Trial Judgement, paras. 2186, 2194, 2213, 2224, 2245.
[1390] Bagosora Appeal Brief, paras. 262, 267.
[1391] Bagosora Notice of Appeal, Grounds 1(L), 3(B)-(E); Bagosora Appeal Brief, paras. 131-144, 261, 262, 265, 267, 274, 278-288.
[1392] *See supra*, para. 565.
[1393] Trial Judgement, para. 2040.

(a) Organised Military Operation

582. Bagosora submits that the Trial Chamber erred in failing to consider that the attack on the Prime Minister may not have been an organised military operation and that the soldiers involved were acting of their own volition, and not under orders.[1394] In this regard, he asserts that the evidence about the Prime Minister's killing demonstrates that the soldiers involved were disorganised and uncoordinated and that there was disagreement between them regarding the fate of the Prime Minister.[1395] In particular, he submits that the indignity to which her body was subjected suggests an act of vengeance rather than soldiers carrying out a mission.[1396] He also contends that the Trial Chamber should have considered that, given that the Rwandan Armed Forces were not informed of the dispatch of peacekeepers to the Prime Minister's residence in conformity with the normal procedure, their unexpected arrival at the Prime Minister's compound prompted a hostile and undisciplined reaction from the soldiers in an already volatile environment and led to the killing of the Prime Minister and the peacekeepers without any order having been issued.[1397]

583. The Prosecution responds that Bagosora's argument lacks merit.[1398] It submits that, given the manner in which the attack on the Prime Minister was perpetrated, it could not have been the sporadic act of soldiers and militiamen out of control.[1399] It also contends that, even if the deployment of peacekeepers to the Prime Minister's residence was unannounced, Bagosora fails to demonstrate how this derogated from the soldiers' responsibility not to attack the peacekeepers and the Prime Minister and does not alter the fact that Bagosora failed to intervene to stop the violence.[1400]

[1394] Bagosora Appeal Brief, paras. 285, 287. *See also* AT. 31 March 2011 p. 55.
[1395] Bagosora Appeal Brief, paras. 262, 267, 274, 275, 284, 285. *See also* AT. 31 March 2011 pp. 44, 45, 55, *referring to* Exhibit DB64 *and* the cross-examination of Luc Marchal. The Appeals Chamber notes that Exhibit DB64 is an excerpt from Faustin Twagiramungu's testimony in the *Ntakirutimana* case in which he testified that he knew of no general genocidal plan. This exhibit does not address whether the killing of the Prime Minister was a military operation.
[1396] Bagosora Appeal Brief, para. 287.
[1397] Bagosora Notice of Appeal, Ground 3(D); Bagosora Appeal Brief, paras. 280-283. Bagosora submits that, in light of the rumours circulating at the time to the effect that it was the Belgians who had shot down the President's plane and of the "historical background of the favouritism shown by the colonizers – the Belgians – towards the Tutsi elite", "it was not unexpected that the FAR soldiers would treat the Belgian peacekeepers as enemies if they happened to go to […] the residence of the Prime Minister who, a few days earlier, had been publicly accused of trying to plan a *coup d'état*". *See* Bagosora Appeal Brief, paras. 281, 282.
[1398] Prosecution Response Brief (Bagosora), paras. 205, 208.
[1399] Prosecution Response Brief (Bagosora), paras. 168, 169, 197, 199. *See also* AT. 1 April 2011 pp. 2, 3. The Prosecution asserts that the Trial Chamber correctly interpreted the discussion between the soldiers regarding the killing of the Prime Minister as a "mere hesitation on the part of some of the soldiers to kill the Prime Minister of their country" and that the manner in which her body was treated does not negate that there was an order to kill her. *See* Prosecution Response Brief (Bagosora), paras. 198, 209, 210.
[1400] Prosecution Response Brief (Bagosora), paras. 206, 207.

584. The Appeals Chamber observes that, at trial, Bagosora also emphasised the chaotic nature of the attack and suggested that it did not conform to an organised military operation.[1401] The Trial Chamber considered these arguments[1402] but concluded that "the attack on the Prime Minister's residence in Kiyovu was an organised military operation".[1403] In reaching this conclusion, the Trial Chamber took into account:

> the proximity in time of the attack to the killing of other moderate politicians in the Kimihurura area nearby […]. Furthermore, the use of armoured vehicles and the build-up of soldiers during the course of the night, including elite units of the Rwandan army, also strongly suggest an organised military operation. Moreover, the Chamber simply cannot accept in this context that elite units of the Rwandan army would spontaneously engage in sustained gun and grenade fire with Rwandan gendarmes and United Nations peacekeepers, arrest these individuals, and then brutally murder and sexually assault the Prime Minister of their country unless it formed part of a military operation. The fact that Witness AE observed some soldiers who did not wish to pursue this ultimate course of action in the overall context does not detract from the Chamber's finding.[1404]

Accordingly, contrary to Bagosora's assertion, the Trial Chamber did consider the possibility that the killing of the Prime Minister was not part of an organised military operation. However, having considered this possibility, it did not conclude that this was a reasonable inference that could be drawn from the evidence.

585. Bagosora fails to show that the Trial Chamber's assessment was unreasonable. In this regard, the Appeals Chamber does not accept that a reasonable alternative explanation was that the killing of the Prime Minister was an undisciplined reaction by soldiers prompted by not having been forewarned that peacekeepers were going to be dispatched to the Prime Minister's residence. It observes that the attack on the Prime Minister's residential compound was found to have begun before the additional Belgian peacekeepers arrived.[1405] From sometime around 11.00 p.m., there were already soldiers manning the roadblocks by the Prime Minister's residence and an armoured vehicle and a tripod-mounted machine gun were pointed at the Prime Minister's residence.[1406] The Prime Minister's compound came under gunfire and rifle-propelled grenades were launched into the compound prior to the arrival of the peacekeepers around 4.00 a.m.[1407] Furthermore, as the attack progressed following the arrival of the Belgian peacekeepers, it did not bear the hallmarks of an undisciplined reaction to their arrival. The attack does not appear to have immediately intensified in response to the arrival of the peacekeepers, as it was only between 7.30 and 8.00 a.m. that the

[1401] Bagosora Closing Brief, paras. 1683, 1691. *See also* Trial Judgement, paras. 719, 720.
[1402] *See* Trial Judgement, para. 719.
[1403] Trial Judgement, para. 720.
[1404] Trial Judgement, para. 720.
[1405] Trial Judgement, paras. 700, 717. Ghanaian peacekeepers were already stationed at the Prime Minister's residence as part of her security detail. *See* Trial Judgement, para. 696, fn. 855.
[1406] Witness XXO, T. 20 November 2003 pp. 18-20.
[1407] Trial Judgement, paras. 700, 717; Witness XXO, T. 20 November 2003 pp. 21, 22.

soldiers advanced upon the compound.[1408] Additionally, the fact that the soldiers enquired where the gendarmes who had been in the Prime Minister's compound had gone and continued to search for the Prime Minister[1409] indicates that the soldiers were systematically searching for the Prime Minister and not simply violently reacting to the presence of the peacekeepers. While the Trial Chamber did find that there was disagreement among the soldiers as to whether the Prime Minister should be killed or taken back to the military headquarters,[1410] the Trial Chamber reasonably considered that this did not detract from the overall context.

586. Accordingly, the Appeals Chamber finds that Bagosora has failed to demonstrate an error on the part of the Trial Chamber in finding that the attack on the Prime Minister was an organised military operation.

(b) Exaggeration of Denial of the Prime Minister's Authority

587. Bagosora submits that the Trial Chamber erred in according to the position of Prime Minister an importance which did not exist, and that it thereby placed too much importance on his reticence that Agathe Uwilingiyimana be vested with more control than that to which she was entitled, particularly over the military.[1411] He argues that he was reproached for not having wanted to contact Agathe Uwilingiyimana without an explanation as to why he should have taken such steps or why she did not attempt to reunite her government, her focus having been solely on addressing the nation.[1412] He contends that, despite evidence to the contrary, the Trial Chamber wrongly implied that her assassination was linked to his refusal to contact her and aimed at preventing her from addressing the country.[1413]

588. The Prosecution responds that Bagosora makes no effort to demonstrate the nature of the alleged error committed by the Trial Chamber or its impact on the verdict, and does not show any error.[1414]

589. The Appeals Chamber considers that, contrary to Bagosora's assertion, nothing in the Trial Chamber's reasoning suggests that it found Agathe Uwilingiyimana to have been vested with authority or control over the military. Rather, the Trial Chamber recounted "largely

[1408] Trial Judgement, paras. 702, 717. *See also* Witness XXO, T. 20 November 2003 p. 28.
[1409] *See* Witness XXO, T. 20 November 2003 pp. 29, 31.
[1410] Trial Judgement, paras. 704, 720. *See also* Luc Marchal, T. 4 December 2006 p. 68 ("[…] it is obvious that people were of divided opinions [about what to do with the Prime Minister] and this specific framework, as far as I am concerned, does not tally with a truly military operation.").
[1411] Bagosora Appeal Brief, paras. 131-138. *See also* Bagosora Reply Brief, paras. 44-53; AT. 31 March 2011 p. 53.
[1412] Bagosora Appeal Brief, para. 139. *See also* AT. 31 March 2011 p. 53.
[1413] Bagosora Appeal Brief, paras. 140-144. *See also* Bagosora Reply Brief, para. 54.

uncontested"[1415] evidence that "Dallaire […] asked Bagosora why he did not recognise Prime Minister Agathe Uwilingiyimana as the political authority in the aftermath of Habyarimana's death" and that "Bagosora explained that the Prime Minister was not the right person for the situation and that the armed forces could not be placed under her authority".[1416] The Trial Chamber's subsequent reiteration that Bagosora "refused to recognise the authority of Prime Minister Agathe Uwilingiyimana" did not constitute a pronouncement on whether or to what extent she had any authority over the military.[1417]

590. The Appeals Chamber is also not persuaded by Bagosora's contention that the Trial Chamber should have explained why the Prime Minister did not attempt to reunite her government. It is unclear why such an explanation would be necessary. Furthermore, the Appeals Chamber notes to the contrary that the Trial Chamber recalled evidence that the Prime Minister did attempt to reach members of her cabinet.[1418]

591. With respect to the Trial Chamber's reliance on Bagosora's refusal to consult with the Prime Minister, the Appeals Chamber observes that the Trial Chamber did not articulate why this supported its finding that the order for the Prime Minister's assault could only have come from the highest military authority, which at the time was Bagosora.[1419] However, as discussed below, the Appeals Chamber finds that the Trial Chamber erred in concluding that the only reasonable inference based on the evidence was that Bagosora must have ordered or authorised the killing of the Prime Minister, as it cannot be reasonably excluded that such orders or authorisation could have come from other military authorities.[1420] Bagosora's allegation that the Trial Chamber erred in relying on his refusal to consult with the Prime Minister to find that he ordered or authorised her killing is therefore moot and need not be considered any further.

592. Bagosora's submissions in this regard are therefore dismissed.

[1414] Prosecution Response Brief (Bagosora), paras. 99-103.
[1415] Trial Judgement, para. 662.
[1416] Trial Judgement, para. 660. *See also* Bagosora, T. 7 November 2005 pp. 5, 8.
[1417] *See* Trial Judgement, para. 662.
[1418] *See* Trial Judgement, para. 697 ("General Dallaire spoke by telephone with Prime Minister Uwilingiyimana several times before 10.30 p.m., and she informed him that she was having difficulty reaching members of her cabinet."), *referring to* Roméo Dallaire, T. 19 January 2004 p. 24.
[1419] Trial Judgement, para. 723.
[1420] *See infra*, para. 606.

(c) Knowledge of the Dispatch of UNAMIR Soldiers to Escort the Prime Minister

593. In finding Bagosora responsible for the attack on the Prime Minister, the Trial Chamber considered, *inter alia*, his awareness that UNAMIR wanted her to address the nation.[1421] This finding was based largely on the evidence of General Dallaire and Major Beardsley:

> Dallaire testified that he did not inform members of the Crisis Committee of his specific plan to dispatch Belgian peacekeepers to escort the Prime Minister to Radio Rwanda. Beardsley recalled, however, that Dallaire proposed that the Prime Minister address the country during the first part of the meeting with the Crisis Committee. This is reflected in the cable drafted shortly after the meeting. In the context of Rwanda, such an address would clearly be given over the radio. Therefore, in the Chamber's view, Bagosora would have been aware, at the very least, of Dallaire's desire to arrange for the Prime Minister to make a radio address.[1422]

594. Bagosora submits that the Trial Chamber erred in finding that he was aware that General Dallaire was sending peacekeepers to escort the Prime Minister to a radio station to address the nation on 7 April 1994.[1423] He asserts that Dallaire himself testified that he did not inform him.[1424] He contends that, had the Trial Chamber not committed this error, it could not have inferred that he ordered the attack on the Prime Minister's residence.[1425]

595. The Prosecution responds that Bagosora's argument is without merit.[1426] In particular, it argues that the Trial Chamber also relied on evidence and factors other than just his knowledge of the dispatch of peacekeepers before convicting him of the killing of the Prime Minister.[1427]

596. Bagosora replies that the cable sent by Major Beardsley after the 6 April Meeting makes no reference to Rwandan officers being told that peacekeepers were being sent to escort the Prime Minister, and that the minutes of the meeting do not list Beardsley as having been present.[1428] He also points to the statements of officers present, which he argues contradict Beardsley on the fact that Dallaire's desire to have the Prime Minister give a radio address was raised during the meeting.[1429]

597. The Appeals Chamber notes that although the Trial Chamber did rely, in part, on the fact that Bagosora knew of General Dallaire's wish to organise a radio address by the Prime Minister to establish that the order for the assault could only have come from him,[1430] the fact that the Prime

[1421] Trial Judgement, para. 723.
[1422] Trial Judgement, para. 714 (internal references omitted). *See also ibid.*, para. 715.
[1423] Bagosora Notice of Appeal, Ground 3(C); Bagosora Appeal Brief, para. 278.
[1424] Bagosora Appeal Brief, para. 278. *See also* AT. 31 March 2011 p. 44.
[1425] Bagosora Appeal Brief, paras. 278, 279.
[1426] Prosecution Response Brief (Bagosora), para. 201.
[1427] Prosecution Response Brief (Bagosora), paras. 201-204.
[1428] Bagosora Reply Brief, paras. 101-106.
[1429] Bagosora Reply Brief, paras. 107-109, *referring to* Exhibits DB262 *and* DB257.
[1430] Trial Judgement, para. 723.

Minister was to be accompanied by peacekeepers was not part of its finding. Bagosora's contention that the Trial Chamber found otherwise is therefore flawed.

598. Turning to Bagosora's argument that the Trial Chamber failed to consider evidence contradicting Major Beardsley's testimony that at the Crisis Committee meeting General Dallaire suggested that the Prime Minister give a radio address, the Appeals Chamber rejects the suggestion that Beardsley was not present at the 6 April Meeting. It observes in this regard that both Beardsley and Dallaire testified to him being at the meeting, and that it is clear that the minutes of the meeting did not exhaustively list those present.[1431]

599. Furthermore, while the statements of Colonels Murasampongo and Kayumba cited by Bagosora could suggest that Dallaire may not have requested that the Prime Minister make a radio address,[1432] the Appeals Chamber observes that neither Murasampongo nor Kayumba testified at trial and that their statements were merely put to Bagosora in the course of his testimony.[1433] In neither case did Bagosora confirm or provide any comment on the relevant portions of their statements.[1434] In view of the foregoing, the Appeals Chamber finds it reasonable for the Trial Chamber to have accepted Beardsley's testimony that Dallaire suggested that the Prime Minister give a radio address to the nation.[1435] This was particularly so given that, as the Trial Chamber correctly considered, Beardsley's testimony was corroborated by the cable he sent after the meeting.[1436]

600. Accordingly, the Appeals Chamber finds that Bagosora has failed to demonstrate an error on the part of the Trial Chamber in finding that he knew of Dallaire's wish to organise a radio address by the Prime Minister.

(d) Orders and Authorisation

601. The Trial Chamber found that "[t]he organised attack [on the Prime Minister], involving elite units of the Rwandan army, targeted a senior government official [and that] the order for such an assault could only have come from the highest military authority, which at the time was

[1431] Brent Beardsley, T. 3 February 2004 pp. 23, 24; Roméo Dallaire, T. 19 January 2004 p. 23; Exhibit DB66 (Minutes of the meeting of the *directeur de cabinet*, gendarmerie Chief of Staff, Ministry of Defence officers, army and gendarmerie senior staff on the night of 6-7 April 1994), para. 1.
[1432] *See* Exhibit DB262 (Joseph Murasampongo *Pro Justitia* Statement, dated 1 September 1994), p. 3; Exhibit DB257 (Cyprien Kayumba *Pro Justitia* Statement, dated 18 November 1997), p. 8.
[1433] Bagosora, T. 7 November 2005 pp. 37, 38 *and* T. 8 November 2005 pp. 12, 13.
[1434] Bagosora, T. 7 November 2005 pp. 37, 38 *and* T. 8 November 2005 pp. 12, 13.
[1435] *See* Trial Judgement, para. 714.

Bagosora".[1437] In its legal findings, the Trial Chamber concluded that the operation could only have been ordered or authorised at the highest level of the Rwandan military.[1438] As noted above, the Trial Chamber relied on this finding in its determination of Bagosora's superior responsibility.[1439]

602. Bagosora submits that the Trial Chamber erred in finding that the killing of the Prime Minister could only have been perpetrated on his orders or with his authorisation.[1440] He asserts that the Trial Chamber failed to consider the possibility that the order or authorisation came from other high-ranking military authorities.[1441]

603. The Prosecution responds that the manner in which the killing of the Prime Minister was executed indicates that it had to have been ordered or authorised by the highest military authorities, including Bagosora.[1442] It concedes that there is no direct evidence that Bagosora ordered crimes, but submits that the issuance of orders can be proven through circumstantial evidence.[1443]

604. In finding that the killing of the Prime Minister was an organised military operation which could only have been ordered or authorised at the highest military level, the Trial Chamber failed to explain why Bagosora was the only person who could reasonably be inferred to have ordered or authorised it.[1444] While the factors enumerated and relied upon by the Trial Chamber could reasonably lead to the inference that the killing of the Prime Minister was ordered or authorised by Bagosora, the Appeals Chamber finds that they do not lead to the only reasonable inference that it was Bagosora who ordered or authorised it. In particular, the Appeals Chamber considers that it cannot be reasonably excluded that the orders or authorisation could have come from high-level military authorities other than Bagosora.

605. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in finding that Bagosora must have ordered or authorised the attack on the Prime Minister.

(e) Conclusion

[1436] *See* Trial Judgement, para. 714; Exhibit P170 (List of reports and cables authored by General Dallaire), UNAMIR cable addressed to Maurice Baril dated 7 April 1994 (reference MIR-722), para. 11 ("The FC asked who would speak to the population and suggested the PM Agathe.").
[1437] Trial Judgement, para. 723. *See also ibid*., para. 720.
[1438] Trial Judgement, para. 2178. *See also ibid*., para. 2182.
[1439] *See supra*, para. 581.
[1440] Bagosora Notice of Appeal, Ground 3(B); Bagosora Appeal Brief, paras. 261, 265.
[1441] Bagosora Appeal Brief, paras. 262-264, 266; AT. 31 March 2011 p. 45. Bagosora also contends that he was not aware that the Prime Minister was in any danger, and that he only discovered who killed her much later. *See* Bagosora Reply Brief, para. 54.
[1442] Prosecution Response Brief (Bagosora), paras. 171-174, 188; AT. 1 April 2011 p. 2.
[1443] AT. 31 March 2011 p. 73.
[1444] *Cf. Renzaho* Appeal Judgement, para. 319.

606. For the reasons expressed above, the Appeals Chamber finds no error in the Trial Chamber's inference that the attack on the Prime Minister was an organised military operation, or in the Trial Chamber's finding that Bagosora knew of Dallaire's wish to organise a radio address by the Prime Minister. The Appeals Chamber finds error, however, in the Trial Chamber's factual finding that Bagosora must have ordered or authorised the killing of the Prime Minister. Since the Trial Chamber relied on this factual finding to conclude that Bagosora failed in his duty to prevent this crime,[1445] the Appeals Chamber will examine the impact, if any, of this error on Bagosora's convictions under Article 6(3) of the Statute in the section of this Judgement addressing Bagosora's Second Ground of Appeal.[1446]

[1445] *See supra*, para. 581. The Appeals Chamber reiterates that Bagosora was not held responsible for ordering the assault on the Prime Minister under Article 6(1) of the Statute.
[1446] *See infra*, Section IV.D.

3. Alleged Errors Relating to the Killing of the Belgian Peacekeepers

607. The Trial Chamber found that, on the morning of 7 April 1994, ten Belgian peacekeepers dispatched to escort the Prime Minister to Radio Rwanda, as well as five Ghanaian peacekeepers stationed at the Prime Minister's residence as part of her security detail, were arrested and disarmed during an attack by Rwandan soldiers on the Prime Minister's residence.[1447] The peacekeepers were taken to Camp Kigali at around 9.00 a.m. where four Belgian peacekeepers were beaten to death by a mob of soldiers.[1448] The beatings did not stop even though some officers at the camp, including Colonel Nubaha, tried to verbally intervene.[1449] At around 10.30 a.m., Colonel Nubaha sent his escort into Camp Kigali to bring the Ghanaian peacekeepers to safety.[1450] The six remaining Belgian peacekeepers were able to seek refuge in the UNAMIR office there and to fend off the assailants for several hours.[1451] They were later killed by grenades.[1452] The Trial Chamber found that "Bagosora had knowledge of the threat [the peacekeepers] faced as [the] attack against them unfolded. He had the authority and means to prevent it, but failed to do so".[1453] The Trial Chamber found Bagosora guilty pursuant to Article 6(3) of the Statute for the killings of the ten Belgian peacekeepers.[1454]

608. At the outset, the Appeals Chamber notes that the Trial Chamber's factual findings on the attack on the peacekeepers do not reflect that Bagosora either ordered or authorised it.[1455] As such, the Trial Chamber's general conclusion in its legal findings section that all attacks of which Bagosora was convicted "were clearly organised and authorised or ordered at the highest level of the Rwandan military" and that Bagosora therefore failed in his duty to prevent "because he in fact participated in them"[1456] is unsupported by the evidence with regard to the attack on the peacekeepers. The Appeals Chamber therefore grants Bagosora's appeal to the extent that he alleges that the Trial Chamber erred in finding that he ordered or authorised the attack on the peacekeepers. It remains that Bagosora's conviction as a superior for the killing of the peacekeepers was clearly based on specific factual findings which are not affected by this finding.

[1447] Trial Judgement, paras. 786, 2174, fn. 855.
[1448] Trial Judgement, paras. 786, 2174.
[1449] Trial Judgement, paras. 786, 2174.
[1450] Trial Judgement, para. 787.
[1451] Trial Judgement, paras. 787, 2174.
[1452] Trial Judgement, paras. 788, 789, 2174 (*referring to* "high power weapons").
[1453] Trial Judgement, para. 796.
[1454] Trial Judgement, paras. 2186, 2245.
[1455] *See* Trial Judgement, paras. 783-796. The Appeals Chamber does not consider that the Trial Chamber's finding that "[Bagosora's] inaction, in fact, had the effect of encouraging the assailants" can lead to the implication that Bagosora authorised the assault. *See ibid*., para. 793.
[1456] Trial Judgement, para. 2040.

609. In this regard, Bagosora submits that the Trial Chamber erred in convicting him for the killing of the ten Belgian peacekeepers because it did not demonstrate that the only reasonable inference was that he knew about the threat the peacekeepers faced and had the authority and means to prevent it but failed to do so.[1457] He contends that the Trial Chamber erred in: (i) failing to consider that the unannounced dispatch of the peacekeepers to the Prime Minister's residence could have contributed to the attack on the peacekeepers; (ii) inferring that he knew about the dire situation of the peacekeepers; and (iii) finding that he had the means to intervene to save the peacekeepers.[1458]

610. The Appeals Chamber will examine these contentions in turn.

(a) Unannounced Dispatch of the Peacekeepers

611. Bagosora reiterates that the Trial Chamber should have considered that the unexpected arrival of the peacekeepers at the Prime Minister's compound prompted a hostile and undisciplined reaction from the Rwandan army soldiers in an already volatile environment and led to the killing of the Prime Minister and the peacekeepers without any order having been issued.[1459]

612. The Prosecution responds that even if the deployment of peacekeepers to the Prime Minister's residence was unannounced, Bagosora fails to demonstrate how this derogated from the soldiers' responsibility not to attack the peacekeepers and the Prime Minister, and does not alter the fact that Bagosora failed to intervene to stop the violence.[1460]

613. The Appeals Chamber notes that the Trial Chamber acknowledged that "the initial assault on the peacekeepers after they were brought to the camp may have resulted from insubordination" and that there was evidence suggesting that "these killings were not part of a highly coordinated plan".[1461] Whether or not the arrival of the peacekeepers was expected does not change the Trial Chamber's findings that Bagosora knew of the attack as it unfolded, and had the authority and means to prevent it but failed to do so. Bagosora's argument is without foundation because the Trial Chamber did not find in its factual findings that Bagosora ordered the attack on the peacekeepers, but determined that Bagosora failed to prevent the attack which resulted from insubordination.[1462]

[1457] Bagosora Notice of Appeal, Grounds 3(D) (French), 3(H)-3(L); Bagosora Appeal Brief, paras. 280-283, 297-312.
[1458] Bagosora Appeal Brief, paras. 280-283, 297-312.
[1459] Bagosora Notice of Appeal, Ground 3(D) (French); Bagosora Appeal Brief, paras. 280-283; Bagosora Reply Brief, paras. 110-113. *See also* AT. 31 March 2011 p. 55.
[1460] Prosecution Response Brief (Bagosora), paras. 206, 207.
[1461] Trial Judgement, para. 791.
[1462] Trial Judgement, para. 796.

In light of this, the Appeals Chamber finds that Bagosora has failed to demonstrate an error on the part of the Trial Chamber.

(b) Knowledge of the Attack on the Belgian Peacekeepers

614. In concluding that Bagosora knew of the threat the peacekeepers faced as the attack against them unfolded,[1463] the Trial Chamber found that "he was aware of the threat posed to the Belgian peacekeepers around 10.45 a.m. when Colonel Nubaha informed him of the unrest at Camp Kigali".[1464] The Trial Chamber further found that "[i]n any event, he was fully apprised of the dire situation facing them when he personally visited the camp between 12.15 and 2.00 p.m. after the conclusion of the [7 April ESM Meeting] and saw the bodies of the dead peacekeepers".[1465] It noted that when Bagosora visited the camp, many of the peacekeepers were still alive in the UNAMIR office.[1466]

615. Bagosora submits that the Trial Chamber erred in finding that the only reasonable inference to be drawn from the evidence was that he knew that the Belgian peacekeepers were under attack at Camp Kigali.[1467] In support of this, he submits that the Trial Chamber erred in: (i) speculating that Nubaha informed Bagosora about the situation facing the peacekeepers when he whispered to Bagosora during the 7 April ESM Meeting;[1468] and (ii) failing to consider that, despite having witnessed the situation before the meeting, General Dallaire did not mention it at the 7 April ESM Meeting until the very end when Bagosora was no longer present.[1469]

616. The Prosecution responds that the Trial Chamber did not err in finding that the totality of the evidence established that the only reasonable inference was that Nubaha informed Bagosora of the ongoing attack against the Belgian peacekeepers.[1470] It argues that it is "absolutely implausible" that having rushed to seek intervention because UNAMIR soldiers were dying and having had the

[1463] Trial Judgement, para. 796. *See also* Trial Judgement, para. 684 ("The Chamber finds that during the course of the [7 April ESM Meeting], Bagosora was made aware of a serious threat to the safety of the 10 Belgian peacekeepers at Camp Kigali. This follows from Colonel Nubaha's interruption of the meeting and the evidence of Dallaire who was informed immediately after it ended about the situation at Camp Kigali.").
[1464] Trial Judgement, para. 792.
[1465] Trial Judgement, para. 792. *See also ibid*., para. 2039.
[1466] Trial Judgement, para. 792.
[1467] Bagosora Appeal Brief, para. 303.
[1468] Bagosora Notice of Appeal, Ground 3(H); Bagosora Appeal Brief, paras. 297-300. *See also* Bagosora Notice of Appeal, Ground 1(O), p. 8; Bagosora Appeal Brief, paras. 150-153. Bagosora submits that had he known about the situation, "he would not have gone to the scene with only two escorts". *See* Bagosora Appeal Brief, para. 300. *See also* Bagosora Reply Brief, paras. 55-57; AT. 31 March 2011 p. 42.
[1469] Bagosora Notice of Appeal, Ground 3(I); Bagosora Appeal Brief, paras. 301-303. *See also* Bagosora Appeal Brief, para. 157.
[1470] Prosecution Response Brief (Bagosora), para. 213; *See also ibid*., paras. 113-115; AT. 1 April 2011 p. 7.

opportunity to speak, Nubaha would have failed to inform Bagosora.[1471] It further asserts that the fact that Dallaire did not mention the mistreatment of the Belgian peacekeepers until the end of the 7 April ESM Meeting when Bagosora had already left does not mean that he did not know about the mistreatment.[1472] The Prosecution points out that, in any event, by the time Bagosora arrived at Camp Kigali and saw the dead bodies of the four peacekeepers, Bagosora must have known that the remaining six peacekeepers who were still alive were about to be killed.[1473]

617. The Appeals Chamber observes that the Trial Chamber found that Colonel Nubaha informed Bagosora of the dire situation at Camp Kigali during the 7 April ESM Meeting on the basis of the testimonies of Bagosora and Witness DK-32.[1474] The Trial Chamber also relied on the fact that Dallaire was informed about the situation at Camp Kigali "immediately" after the 7 April ESM Meeting.[1475] Witness DK-32, who was present at the meeting, testified that Nubaha entered the meeting and spoke with Bagosora and then left but that he was unable to hear what was said.[1476] The fact that Dallaire was informed immediately after the meeting does not shed light on what Nubaha told Bagosora. Accordingly, the only direct evidence of what Nubaha told Bagosora comes from Bagosora himself. Bagosora testified that Nubaha arrived at the 7 April ESM Meeting between about 10.45 and 11.00 a.m. and advised him that "there was great tension at Kigali Camp".[1477] Bagosora stated that he cut off Nubaha before he was finished speaking because he had interrupted the meeting, and that he told Nubaha to return to the camp and that he would check in on the situation after the meeting.[1478] He stated that Nubaha did not tell him about the situation facing the peacekeepers.[1479] Bagosora further testified that after the meeting, which ended at about 12.00 or 12.15 p.m., he telephoned Nubaha but, as he was unavailable, he spoke to Nubaha's secretary who informed him that some of the peacekeepers had been killed but that others were still alive.[1480] He stated that this was the first time he was informed about the situation facing the peacekeepers.[1481]

618. The Appeals Chamber notes that the Trial Chamber relied principally on Bagosora's evidence for its findings regarding Nubaha's interruption of the 7 April ESM Meeting.[1482] Despite

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[1471] AT. 1 April 2011 p. 7, *referring to* Exhibit DB261.
[1472] Prosecution Response Brief (Bagosora), paras. 214, 215.
[1473] AT. 1 April 2011 pp. 7, 8, 12.
[1474] *See* Trial Judgement, paras. 676, 768, fns. 798, 799.
[1475] Trial Judgement, para. 684.
[1476] Witness DK-32, T. 27 June 2005 p. 77 (closed session).
[1477] Bagosora, T. 8 November 2005 pp. 7, 10.
[1478] Bagosora, T. 8 November 2005 pp. 7, 11.
[1479] Bagosora, T. 8 November 2005 pp. 11, 18.
[1480] Bagosora, T. 8 November 2005 pp. 8, 20.
[1481] Bagosora, T. 8 November 2005 p. 20.
[1482] Trial Judgement, paras. 676, 768.

this, in finding that Nubaha told him about the peacekeepers during the meeting, it rejected Bagosora's denial of having been so informed during the meeting. While it was open to the Trial Chamber to accept some parts of Bagosora's testimony while rejecting others,[1483] the Appeals Chamber considers that the Trial Chamber should have explained its decision not to accept that portion of his evidence despite having accepted the general account of Nubaha's interruption. Indeed, although it inferred that Nubaha informed Bagosora of the situation facing the peacekeepers at Camp Kigali, nowhere did it clearly conclude that this was the only reasonable inference available from the evidence.

619. The Appeals Chamber considers that it was not unreasonable for the Trial Chamber to infer that Bagosora was told of the peacekeepers' situation by Nubaha during the meeting. However, the Appeals Chamber is not convinced that this was the only reasonable inference available. Bagosora's explanation that he cut off Nubaha before he fully briefed him on the situation was also reasonable in light of the fact that Nubaha interrupted the meeting. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in finding that Nubaha informed Bagosora of the situation facing the peacekeepers during the 7 April ESM Meeting.

620. Nonetheless, the Appeals Chamber considers that this error does not undermine the finding that Bagosora knew about the attack on the peacekeepers in time to intervene to save at least some of them. In this regard, it notes that Bagosora admitted that he learned about the situation facing the peacekeepers from Nubaha's secretary at 12.15 p.m. and that following this conversation, he proceeded to Camp Kigali to investigate the matter for himself when at least some of the peacekeepers were still alive in the UNAMIR office.[1484] He testified that, upon returning to his office, he told Dallaire that four of the Belgian peacekeepers had been killed, but that the others were still alive in the camp's UNAMIR office.[1485]

621. In light of this, the Appeals Chamber dismisses Bagosora's argument that the Trial Chamber erred in failing to consider that Bagosora did not know about the situation with the peacekeepers at Camp Kigali because Dallaire did not mention it at the 7 April ESM Meeting until the very end when Bagosora was no longer present. While it is true that Dallaire did not raise the issue until the end of the meeting,[1486] given the fact that Bagosora learned of the situation facing the peacekeepers

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[1483] *See*, *e.g.*, *Munyakazi* Appeal Judgement, para. 103; *Muvunyi* Appeal Judgement of 29 August 2008, para. 44; *Haradinaj et al.* Appeal Judgement, para. 201.

[1484] Trial Judgement, paras. 768, 789; Bagosora, T. 8 November 2005 pp. 8 ("[Nubaha's secretary] told me the peacekeepers were dead but that there were still some people alive. And I asked him, 'What about the gunfire?' So he told me they were shooting at the peacekeepers. […] The attack was directed against the Belgian peacekeepers."), 20.

[1485] Bagosora, T. 8 November 2005 pp. 25, 26; Trial Judgement, para. 769.

[1486] Trial Judgement, para. 764.

from other sources while six of the peacekeepers were still alive, the fact that Dallaire did not mention it earlier is immaterial. The material issue is that Bagosora knew of the situation of the peacekeepers in time to intervene, not from whom he learned of it.

622. Accordingly, the Appeals Chamber finds that while Bagosora may not have learned of the threat posed to the ten Belgian peacekeepers at 10.45 a.m. when Nubaha interrupted the 7 April ESM Meeting, he became aware of the situation in time to intervene and save the peacekeepers who were still alive.

(c) Ability to Prevent the Attack on the Belgian Peacekeepers

623. The Trial Chamber found that Bagosora had the means to quash the attack on the peacekeepers but failed to do so.[1487] It reasoned as follows:

> Bagosora's testimony, as corroborated by Witnesses RO-6 and RO-3, suggests that the rioting soldiers refused to heed his calls for calm, and he withdrew from the camp. The Chamber does not find this evidence persuasive, bearing in mind their interest in distancing themselves from the crimes. In addition, the Chamber has also viewed the attack and the Defence evidence considering that the camp remained well guarded during the attack and that the guard posts were in fact reinforced as the events escalated. At no point did Bagosora or other military officers order the use of force to quell a highly volatile situation, notwithstanding the presence of the Reconnaissance Battalion, an elite unit at the camp. It is also noteworthy that a significant number of high-ranking military officials were meeting a few hundred metres away at ESM. Furthermore, the Chamber is satisfied that Bagosora had the means to quash the attack on the peacekeepers. In these circumstances, the Chamber finds that there was a clear failure by Bagosora to prevent the killing of the Belgian peacekeepers and that his inaction, in fact, had the effect of encouraging the assailants. Indeed, the attack escalated shortly after Bagosora's departure as the assailants used powerful weapons to finish off the surviving peacekeepers.[1488]

624. Bagosora submits that the Trial Chamber erred in finding that he had the means to intervene and prevent the attack on the peacekeepers.[1489] He argues that the Trial Chamber erred in: (i) failing to take into account the size of Camp Kigali in finding that he had sufficient troops to stop the attack;[1490] (ii) blaming him for having withdrawn after being threatened although he felt that his life was in danger;[1491] and (iii) blaming him for not diverting more troops to Camp Kigali where the redeployment of troops would have left the city in the hands of the RPF.[1492]

[1487] Trial Judgement, para. 796.
[1488] Trial Judgement, para. 793.
[1489] Bagosora Notice of Appeal, Grounds 3(J)-3(L); Bagosora Appeal Brief, paras. 304-311; Bagosora Reply Brief, paras. 113-116.
[1490] Bagosora Notice of Appeal, Ground 3(J); Bagosora Appeal Brief, paras. 304-308. In this regard, Bagosora argues that it was not realistic for the Trial Chamber to have found that he could have ordered the Reconnaissance Battalion to intervene given its finding that the battalion had been involved in massacres earlier the same day. *See* Bagosora Appeal Brief, para. 308.
[1491] Bagosora Notice of Appeal, Ground 3(K); Bagosora Appeal Brief, paras. 309, 310.
[1492] Bagosora Notice of Appeal, Ground 3(L); Bagosora Appeal Brief, para. 311. *See also* Bagosora Appeal Brief, para. 305.

625. The Prosecution responds that Bagosora's arguments are unmeritorious.[1493] In particular, it submits that Bagosora fails to articulate how the Trial Chamber blamed him for withdrawing from Camp Kigali when he was threatened.[1494] It asserts that the Trial Chamber did not accept the evidence that the soldiers did not heed his call for calm.[1495] The Prosecution also argues that the Trial Chamber properly found that Bagosora failed to order the Reconnaissance Battalion to quell the attack despite their presence at the camp.[1496] It contends that the Trial Chamber did not in fact blame him for not having redeployed troops from the war front and that even if it had, it would not have been erroneous.[1497]

626. The Appeals Chamber dismisses Bagosora's argument that the Trial Chamber blamed him for having withdrawn from Camp Kigali after allegedly being threatened. The Trial Chamber did not find Bagosora responsible for having withdrawn from Camp Kigali, but rather for having failed to prevent the attack.[1498] Further, the Appeals Chamber considers that even if Bagosora's assertion that he had been threatened were true, it would not suffice to demonstrate that he did not have the means to prevent the attack. It bears noting that, even after he personally withdrew, he could have ordered troops to stop the attack.

627. The Appeals Chamber finds no merit in Bagosora's argument that he did not have the means to quell the attack given that his troops were deployed fighting the RPF at the front. In this regard, it recalls that the Reconnaissance Battalion, an elite unit, was located in the camp, and given the finding that it had been engaged in the organised military operation carrying out the attack on the Prime Minister's residence earlier in the day,[1499] it is clear that it was neither otherwise engaged on the front fighting the RPF, nor affected by the insubordination surrounding the peacekeepers. In this regard, the Appeals Chamber notes that when the battalion had been involved in the attack on the Prime Minister's residence earlier in the day, the peacekeepers were arrested, disarmed and taken to Camp Kigali with assurances that they were being taken to a safe place.[1500] The Appeals Chamber considers that this demonstrates that the Reconnaissance Battalion soldiers were acting in a disciplined manner toward the peacekeepers. Moreover, as the Trial Chamber noted, there were a

[1493] Prosecution Response Brief (Bagosora), paras. 180, 181, 216-224.
[1494] Prosecution Response Brief (Bagosora), para. 217.
[1495] Prosecution Response Brief (Bagosora), para. 220.
[1496] Prosecution Response Brief (Bagosora), para. 222.
[1497] Prosecution Response Brief (Bagosora), para. 224.
[1498] Trial Judgement, paras. 793, 796.
[1499] Trial Judgement, paras. 717, 720, 2178.
[1500] Trial Judgement, paras. 771, 786.

significant number of high-ranking military officials a few hundred metres away at the ESM from whom Bagosora could have sought assistance.[1501]

628. Furthermore, Bagosora fails to demonstrate that he had insufficient troops to quell the attack given the size of Camp Kigali. The Appeals Chamber observes that it was not the whole of Camp Kigali which was involved in attacking the peacekeepers. While the Trial Chamber did not establish how many were involved in the attack, various witnesses placed the number of soldiers involved between 40 and 100.[1502] The Appeals Chamber does not consider that this was such a large group that it could not have been brought under control by the elite Reconnaissance Battalion[1503] or with the assistance of the high-ranking military officials meeting nearby.

629. Accordingly, the Appeals Chamber finds that Bagosora's arguments do not demonstrate any error in the Trial Chamber's finding that Bagosora had the means to prevent the attack.

(d) Conclusion

630. For the reasons expressed above, the Appeals Chamber dismisses Bagosora's arguments regarding the dispatch of the peacekeepers and his ability to prevent the attack. However, as a result of the Trial Chamber's error in finding that Nubaha informed Bagosora of the situation facing the peacekeepers during the 7 April ESM Meeting, the Appeals Chamber finds that the Trial Chamber erred in finding Bagosora responsible pursuant to Article 6(3) of the Statute for failing to prevent the death of the four peacekeepers killed before his visit to Camp Kigali. Nonetheless, the Appeals Chamber finds that Bagosora became aware of the situation in time to intervene and save the peacekeepers who were still alive and that, despite having the means to prevent the attack, he failed to do so.

4. Conclusion

631. Based on the foregoing, the Appeals Chamber grants Bagosora's Third Ground of Appeal to the extent that the Trial Chamber erred in finding that Bagosora ordered, or "ordered or authorised", the killings of Prime Minister Agathe Uwilingiyimana, Joseph Kavaruganda,

[1501] Trial Judgement, para. 793.
[1502] *See* Trial Judgement, paras. 756, 759, 761, 778. The Trial Chamber found that Prosecution Witness XAF stated that five disabled Rwandan soldiers were beating two Belgian peacekeepers and a "crowd of around 100 Rwandan soldiers and others" were blaming the Belgians for the death of the President. It cited Prosecution Witness CE as having stated that "around 40 soldiers" were involved in the attack, and found that Prosecution Witness AH testified that "around 50 soldiers" participated and that Defence Witness RO-3 stated that "Bagosora told the 70 to 80 soldiers on the scene to stop the attack". *See ibid.*, paras. 756, 759, 761, 778.
[1503] The Appeals Chamber recalls that a battalion comprises approximately 700 men and the Reconnaissance Battalion was stationed at Camp Kigali. *See* Trial Judgement, paras. 164, 170.

Frédéric Nzamurambaho, Landoald Ndasingwa, and Faustin Rucogoza. The Appeals Chamber will consider the impact of this finding on Bagosora's convictions pursuant to Article 6(3) of the Statute in the following section of this Judgement.

632. The Appeals Chamber also finds that the Trial Chamber erred in convicting Bagosora for the killing of Alphonse Kabiligi and the killings perpetrated at Nyundo Parish. The Appeals Chamber therefore reverses Bagosora's convictions entered under Counts 2, 4, 6, 8, 9, and 10 of the Bagosora Indictment on the basis of these killings.

633. The Appeals Chamber further finds that the Trial Chamber erred in concluding that Bagosora ordered the killing of Augustin Maharangari and, as a result, in convicting him pursuant to Article 6(1) of the Statute for this crime. Accordingly, the Appeals Chamber reverses Bagosora's convictions entered under Counts 4, 6, 8, and 10 of the Bagosora Indictment on the basis of the killing of Augustin Maharangari.

634. As regards the killing of the Belgian peacekeepers, the Appeals Chamber finds that the Trial Chamber erred in finding Bagosora responsible pursuant to Article 6(3) of the Statute for failing to prevent the death of the peacekeepers killed before his visit to Camp Kigali. Nonetheless, it finds that Bagosora has failed to demonstrate that the Trial Chamber committed an error in convicting him pursuant to Article 6(3) of the Statute for failing to prevent the killing of the peacekeepers who were still alive when he visited the military camp.

635. The Appeals Chamber will examine the impact, if any, of these findings on sentencing in the appropriate section of this Judgement.

D. Alleged Errors in Applying the Law of Superior Responsibility (Ground 2)

636. The Trial Chamber held Bagosora criminally responsible as a superior for the killings of Prime Minister Agathe Uwilingiyimana, Joseph Kavaruganda, Frédéric Nzamurambaho, Landoald Ndasingwa, Faustin Rucogoza, ten Belgian peacekeepers, and Alphonse Kabiligi, as well as the killings committed at *Centre Christus*, Kibagabaga Mosque, Kabeza, the Saint Josephite Centre, Karama Hill, Kibagabaga Catholic Church, Gikondo Parish, Gisenyi town, Mudende University, and Nyundo Parish.[1504] The Trial Chamber also found him responsible as a superior for the rapes committed at Kigali area roadblocks, the desecration of the Prime Minister's body, the torture of Alphonse Kabiligi, the rapes and stripping of female refugees at the Saint Josephite Centre, the rapes at Gikondo Parish, and the "sheparding" of refugees to Gikondo Parish where they were killed.[1505]

637. Bagosora submits that the Trial Chamber erred in its application of the law on superior responsibility with respect to his alleged failure to prevent or punish the attacks for which he was convicted.[1506] Specifically, he asserts that the Trial Chamber erred in: (i) assessing his duty to prevent or punish, in particular with respect to his knowledge of the attacks;[1507] (ii) finding him responsible for having failed to prevent or punish the attacks;[1508] and (iii) thereby depriving him of the benefit of reasonable doubt.[1509]

638. The Appeals Chamber recalls that, as a result of its findings on Nsengiyumva's responsibility for the killing of Alphonse Kabiligi and the killings perpetrated at Nyundo Parish in Gisenyi prefecture, it has reversed Bagosora's convictions for these crimes.[1510] Given that Bagosora was convicted as a superior for the killings perpetrated at Mudende University in Gisenyi prefecture on the basis that Nsengiyumva was under his command,[1511] and that the Appeals Chamber found that Nsengiyumva could not be held responsible for these killings,[1512] the Appeals Chamber

[1504] Trial Judgement, paras. 2158, 2186, 2194, 2213, 2245. While the Trial Chamber did not specifically refer to the killing of Alphonse Kabiligi in paragraphs 2186, 2194, and 2213, the Appeals Chamber understands from the Trial Chamber's reference to this specific killing in its factual findings and deliberations sections that its general reference to the killings in Gisenyi town in these paragraphs encompassed Alphonse Kabiligi's killing. *See ibid*., paras. 1167, 2004, 2185, 2210, 2243.
[1505] Trial Judgement, paras. 2203, 2224, 2254.
[1506] Bagosora Notice of Appeal, pp. 8-10; Bagosora Appeal Brief, paras. 13, 172-240, 241, 313; Bagosora Reply Brief, paras. 64-76.
[1507] Bagosora Notice of Appeal, Ground 2(A); Bagosora Appeal Brief, paras. 186-190. *See also* Bagosora Reply Brief, para. 65.
[1508] Bagosora Notice of Appeal, Grounds 2(A)-(D), 2(F)-(I); Bagosora Appeal Brief, paras. 163, 164, 186-227. *See also* Bagosora Reply Brief, para. 65.
[1509] Bagosora Notice of Appeal, Ground 2(J); Bagosora Appeal Brief, paras. 167, 228-232.
[1510] *See supra*, para. 549.
[1511] Trial Judgement, para. 1253. *See also ibid*., para. 2033.
[1512] *See supra*, para. 377.

likewise reverses Bagosora's convictions based on the Mudende University killings.[1513] Bagosora's arguments developed under this ground of appeal regarding these crimes are therefore rendered moot and will not be addressed.

639. The Appeals Chamber also notes that Bagosora's arguments relating to his superior responsibility for the killing of the Belgian peacekeepers have already been addressed in connection with his Third Ground of Appeal,[1514] whereas his arguments concerning the killings committed at Kigali area roadblocks will be addressed below in connection with his Fourth Ground of Appeal.[1515]

1. Alleged Errors Relating to Duty to Prevent or Punish and Knowledge

640. Bagosora submits that the Trial Chamber erred in finding that the moment he gained general knowledge of the existence of attacks was the moment his duty to prevent specific attacks or punish the perpetrators thereof was triggered.[1516] He asserts that the Trial Chamber recognised the lack of evidence of his knowledge of certain specific attacks, which implies that he was not aware of who perpetrated the crimes.[1517] Bagosora also argues that, between 6 and 9 April 1994, he was handling simultaneously a vast number of crises and was assigned to political duties, and could therefore "not be everywhere at the same time and do everything at the same time", facts which were not considered by the Trial Chamber.[1518] At the appeal hearing, Bagosora claimed that there was absolutely no evidence that he knew that the crimes he was convicted of were about to be committed, and made specific arguments regarding his knowledge of the political killings.[1519] In response to one of the Judges' questions, Bagosora submitted that there was no proof of any report submitted to him concerning the crimes committed at the relevant time.[1520] Bagosora also contends that he was not aware that the Prime Minister was in any danger, and that he only discovered who killed her much later.[1521]

[1513] *See* Bagosora Appeal Brief, paras. 230-239.
[1514] *See supra*, Section IV.C.3.
[1515] *See infra*, Section IV.E.
[1516] Bagosora Appeal Brief, paras. 186, 190. *See also* Bagosora Reply Brief, paras. 72, 73.
[1517] Bagosora Appeal Brief, paras. 187, 188, *referring to* Trial Judgement, paras. 889, 890 (*Centre Christus*), 905 (Kibagabaga Mosque), 927 (Kabeza), 939 (Saint Josephite Centre), 962 (Augustin Maharangari), 971, 972 (Karama hill and Kibagabaga Catholic Church), 988, 989 (Gikondo Parish). Bagosora submits in particular that he was informed of the murders of Father Mahame (*Centre Christus*) and Augustin Maharangari only after they were committed and that he had no knowledge of who perpetrated the crimes. *See* Bagosora Appeal Brief, paras. 205-208. He further submits that the evidence also shows that some attacks were carried out by RPF soldiers "disguised as FAR soldiers". *See* Bagosora Appeal Brief, para. 226.
[1518] Bagosora Appeal Brief, paras. 192-195.
[1519] AT. 31 March 2011 pp. 46, 52, 58.
[1520] AT. 31 March 2011 p. 55.
[1521] *See* Bagosora Reply Brief, para. 54.

641. The Prosecution responds that Bagosora's contentions are unmeritorious and do not demonstrate any error warranting appellate intervention.[1522] It argues that the Trial Chamber did not find Bagosora to have general knowledge, but actual knowledge of each specific attack,[1523] and that it sufficiently identified the soldiers who participated in the massacres as his subordinates and found that he was aware that they were committing crimes.[1524] As regards the existence of possible reports, the Prosecution points out that Bagosora testified at trial that, as *directeur de cabinet*, he received reports about the movement of RPF agents on the ground, including reports from the Presidential Guard following the plane crash.[1525] It also submits that Bagosora observed that there were disturbances during his visit to the Presidential Guard camp after the plane crash on 6 April 1994, that he was in direct contact with the Presidential Guard during the relevant events, and that he was using the same radio-frequency as the Presidential Guard.[1526] It also refers to Defence Witness LMG's testimony that Bagosora used his portable radio equipment to receive information about the events "that were happening as they were happening".[1527] It is the Prosecution's submission that the only reasonable inference to draw from these facts is that Bagosora knew or had reason to know of the killings that occurred in the morning of 7 April 1994, in which the Presidential Guard played a significant role.[1528] The Prosecution adds that the fact that Bagosora told General Dallaire that there could be "*débordements*" and that certain elements could react very aggressively to the death of the President, as well as his testimony that, by 7 April 1994, "he was doing […] everything necessary to know what was happening on the ground and to identify areas where massacres were taking place" further demonstrate Bagosora's knowledge that the crimes were about to be committed.[1529]

642. The Appeals Chamber recalls that the duty to prevent arises for a superior from the moment he knows or has reason to know that his subordinate is about to commit a crime, while the duty to punish arises after the commission of the crime.[1530] As such, where a superior is found to have the material ability to prevent and punish crimes, the fact that he was, at the relevant time, assuming key responsibilities or handling a critical situation as serious as an armed conflict or the downfall of the institutions does not relieve him of his obligation to take the necessary and reasonable measures

[1522] Prosecution Response Brief (Bagosora), paras. 126, 127, 133, 134, 140, 141, 145, 153-156.
[1523] Prosecution Response Brief (Bagosora), paras. 128-131.
[1524] Prosecution Response Brief (Bagosora), paras. 144, 145.
[1525] AT. 1 April 2011 p. 4, *referring to* Bagosora, T. 2 November 2005 pp. 32, 33, 77.
[1526] AT. 1 April 2011 pp. 3, 4, *referring to* Bagosora, T. 2 November 2005 p. 74 *and* T. 8 November 2005 p. 11.
[1527] AT. 1 April 2011 p. 4, *referring to* Witness LMG, T. 18 July 2005 p. 63. The Prosecution further insisted on the open and notorious nature of the crimes. *See* AT. 1 April 2011 p. 3.
[1528] AT. 1 April 2011 pp. 4, 5.
[1529] AT. 1 April 2011 pp. 5-7, *referring to* Roméo Dallaire, T. 19 January 2004 pp. 29, 31, 32, 44; Bagosora, T. 2 November 2005 p. 53.
[1530] *Hadžihasanovi} and Kubura* Appeal Judgement, para. 260.

to prevent or punish the commission of crimes. Bagosora's argument in this respect is therefore ill-founded.

643. The question before the Appeals Chamber is whether Bagosora had sufficient knowledge of his subordinates' criminal conduct in Kigali and Gisenyi on 7, 8, and 9 April 1994 to trigger his duty as a superior to prevent their crimes or punish them. The Appeals Chamber will now examine this question, discussing first Bagosora's knowledge of the killings he was not specifically found to have ordered or authorised, before turning to his knowledge of his subordinates' responsibility for the killings of officials perpetrated in Kigali and for the Gisenyi town killings of 7 April 1994.

(a) *Centre Christus*, Kabeza, Kibagabaga Mosque, Saint Josephite Centre, Karama Hill, Kibagabaga Catholic Church, and Gikondo Parish

644. In its factual findings pertaining to the attacks at Kabeza, Kibagabaga Mosque, the Saint Josephite Centre, Karama Hill, Kibagabaga Catholic Church, and Gikondo Parish, the Trial Chamber suggested that Bagosora did not have specific knowledge of the attacks but general knowledge that killings were being perpetrated in Kigali by soldiers under his command. In respect of each of these attacks, the Trial Chamber stated:

> There is no evidence directly showing that Bagosora was aware of [the specific attack] […]. However, given the widespread killing throughout Kigali perpetrated by or with the assistance of soldiers, the Chamber is satisfied that Bagosora was aware that soldiers under his authority were participating in killings.[1531]

With respect to the killings perpetrated at *Centre Christus*, including the killing of Father Mahame, the Trial Chamber referred in its factual findings to Bagosora's specific knowledge that these crimes had been committed, relying on Bagosora's own admission that he was personally informed about the killings on the night of 7 April 1994.[1532]

645. When making its legal findings on Bagosora's liability under Article 6(3) of the Statute, the Trial Chamber stated that it was satisfied that Bagosora "had actual knowledge that his subordinates were about to commit crimes or had in fact committed them".[1533] While this statement was unclear, referring to "crimes" in general and to both prior and *post-facto* knowledge, the Trial Chamber's subsequent reasoning clarified that the Trial Chamber was ultimately satisfied, based on circumstantial evidence, that Bagosora had *actual knowledge* that his subordinates *were about to*

[1531] Trial Judgement, paras. 927 (Kabeza), 939 (Saint Josephite Centre), 972 (Karama Hill and Kibagabaga Catholic Church). *See also ibid*., para. 989 (Gikondo Parish), *referring to* "military personnel" *instead of* "soldiers". With respect to Kibagabaga Mosque, the Trial Chamber found that Bagosora was aware that soldiers under his authority "participated" in killings. *See ibid.*, para. 905.

[1532] *See* Trial Judgement, paras. 879, 889, 890.

[1533] Trial Judgement, para. 2038.

commit each of the specific attacks for which he was convicted. The Trial Chamber reasoned as follows:

> [I]t is clear that these attacks were organised military operations requiring authorisation, planning and orders from the highest levels. It is inconceivable that Bagosora would not be aware that his subordinates would be deployed for these purposes, in particular in the immediate aftermath of the death of President Habyarimana and the resumption of hostilities with the RPF, when the vigilance of military authorities would have been at its height. Furthermore, many of these crimes took place in Kigali where Bagosora was based […].[1534]

This reflects that, contrary to Bagosora's contentions, the Trial Chamber did not find that he only had general knowledge of the existence of attacks by members of the Rwandan army in Kigali and lacked specific knowledge. While the Trial Chamber found that there was no evidence "*directly* showing" that Bagosora was aware of the specific attacks, it ultimately found that there was sufficient circumstantial evidence to establish such knowledge as the only reasonable inference.

646. Bagosora generally argues that there was no evidence that he knew that the crimes he was convicted of were about to be committed, but fails to discuss the circumstantial evidence that the Trial Chamber expressly relied on to reach its conclusion. He does not address the Trial Chamber's reliance on the organised military nature of the attacks,[1535] his position of authority, the circumstances in which the crimes took place, and the fact that they occurred in Kigali where he was based. He further fails to specifically challenge the Trial Chamber's conclusion that it is inconceivable that he would not have known that his troops would be deployed for these purposes. As such, while Bagosora generally challenges the finding that he had such knowledge, he does not present specific arguments to show that the Trial Chamber erred in finding that the only reasonable inference available from the evidence was that he had actual knowledge that his subordinates were about to commit the crimes.

647. In the circumstances, the Appeals Chamber concludes that Bagosora has failed to demonstrate that the Trial Chamber erred in finding that he had actual knowledge that his subordinates were about to commit the crimes at *Centre Christus*, Kabeza, Kibagabaga Mosque, the Saint Josephite Centre, Karama Hill, Kibagabaga Catholic Church, and Gikondo Parish of which he was convicted. Such knowledge triggered Bagosora's duty to prevent and/or punish his subordinates' criminal conduct. In these circumstances, the Appeals Chamber need not consider the

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[1534] Trial Judgement, para. 2038. Reading the Trial Chamber's finding in context, the Appeals Chamber understands that it also applies to Bagosora's knowledge of the killing of Father Mahame at *Centre Christus*. Accordingly, the Appeals Chamber considers that the Trial Chamber found that, in addition to the direct evidence establishing that Bagosora knew that his subordinates had committed crimes at *Centre Christus*, there was circumstantial evidence establishing that he knew that these crimes were about to be committed.

[1535] The Appeals Chamber notes that Bagosora's argument that these crimes might have been committed by RPF soldiers, "disguised as FAR soldiers" is not substantiated.

alternative finding by the Trial Chamber that, in any event, Bagosora had reason to know of his subordinates' criminal conduct.[1536]

(b) Killings of Officials

648. While Bagosora concedes that he was informed of the killings of the Prime Minister and of other officials in the Kimihurura neighbourhood as of the evening of 7 April 1994,[1537] he submits that there is no evidence that he had prior knowledge of any of these killings.[1538] He argues that, in view of the commitment made by UNAMIR and the gendarmerie during the 6 April Meeting to jointly ensure the security of opposition leaders, he could not have assumed that they would have failed in their commitment.[1539] He also points out that the Prime Minister was supposed to be protected by both the Presidential Guard and UNAMIR.[1540]

649. In response, the Prosecution submits that, in light of widespread rumours in Kigali that the Prime Minister wanted to stage a *coup d'état* against President Habyarimana and Bagosora's own belief that she was the mastermind of the attack against the presidential plane, it would have been obvious to Bagosora that the Prime Minister would have been the target of the elements of the army that he described as reacting aggressively to the death of the President.[1541] The Prosecution argues that the only reasonable inference to be drawn from this is that Bagosora knew or must have known that the Prime Minister was about to be killed.[1542]

650. The Appeals Chamber recalls that it has found that the Trial Chamber erred in finding that Bagosora must have ordered or authorised these killings.[1543] As such, the Appeals Chamber considers that the Trial Chamber erred to the extent that it inferred Bagosora's knowledge that his subordinates were about to kill the officials from the finding that he ordered or authorised the

[1536] Trial Judgement, para. 2039:

> Furthermore, in the alternative, the Chamber notes that Bagosora also had reason to know that subordinates under his command would commit crimes. On the night of 6 April, Bagosora expressed to Dallaire during the Crisis Committee meeting that his main concern was keeping Kigali secure and calm […]. The next morning, Bagosora spoke with the United States Ambassador about the shootings that could be heard throughout Kigali the previous night […]. He witnessed first-hand the ongoing attack by Rwandan soldiers at Camp Kigali against the 10 Belgian peacekeepers […]. Moreover, he was informed on the evening of 7 April about the murder of the Prime Minister as well as other prominent or opposition figures, including Father Mahame […]. UNAMIR was receiving reports from military observers about targeted killings by military personnel […]. It is difficult to accept that similar reports were not being provided to Bagosora.

[1537] Bagosora, T. 8 November 2005 p. 47. *See also* AT. 31 March 2011 p. 60; Trial Judgement, paras. 752, 2039.
[1538] AT. 31 March 2011 p. 52.
[1539] AT. 31 March 2011 p. 58.
[1540] AT. 31 March 2011 p. 44.
[1541] AT. 1 April 2011 p. 8, *referring to* Bagosora, T. 7 November 2005 pp. 8, 9, 15, 24, 25. *See also* AT. 1 April 2011 p. 5, *referring to* Roméo Dallaire, T. 19 January 2004 pp. 29, 31, 32, 44.
[1542] AT. 1 April 2011 pp. 8, 9.

assaults. However, the Appeals Chamber recalls that in its legal findings pertaining to Bagosora's knowledge under Article 6(3) of the Statute, the Trial Chamber found that, in light of the fact that all attacks Bagosora was convicted of were "organised military operations requiring authorisation, planning and orders from the highest levels", it was "inconceivable that Bagosora would not be aware that his subordinates would be deployed for these purposes, in particular in the immediate aftermath of the death of President Habyarimana and the resumption of hostilities with the RPF, when the vigilance of military authorities would have been at its height".[1544]

651. Bagosora fails to address the reasoning which led the Trial Chamber to conclude that the only reasonable inference from the evidence was that he had actual knowledge that his subordinates were about to commit crimes against the officials, nor does he discuss the circumstantial evidence the Trial Chamber relied upon. His arguments regarding the commitment of UNAMIR and the gendarmerie to ensuring the security of opposition leaders, and that the Presidential Guard and UNAMIR were tasked with protecting the Prime Minister, fail to address the Trial Chamber's finding that he had actual knowledge that his troops were being deployed to conduct attacks against the Prime Minister and other officials residing in Kimihurura. The Appeals Chamber finds that Bagosora does not demonstrate that the Trial Chamber erred in so finding, particularly given the timing of the attacks, which started within hours of the killing of the President, the systematic nature of the attacks, and prominence of the victims. It recalls in this respect that the attacks were organised military operations against prominent officials, involving elite units of the Rwandan Armed Forces, at the time when Bagosora was at the top of the military chain of command and had effective control over the Rwandan Armed Forces.[1545]

652. Accordingly, the Appeals Chamber concludes that Bagosora has failed to demonstrate that the Trial Chamber erred in finding that he had actual knowledge that his subordinates were about to commit the crimes against Prime Minister Agathe Uwilingiyimana, Joseph Kavaruganda, Frédéric Nzamurambaho, Landoald Ndasingwa, and Faustin Rucogoza. Such knowledge triggered Bagosora's duty to prevent and/or punish his subordinates' criminal conduct.

[1543] *See supra*, para. 577.
[1544] Trial Judgement, para. 2038.
[1545] Trial Judgement, para. 723. *See also supra*, Sections IV.A *and* C.1.

(c) Gisenyi Town

653. Turning to Bagosora's knowledge of his subordinates' criminal conduct in Gisenyi town on 7 April 1994, the Appeals Chamber observes that the Trial Chamber appears to have inferred Bagosora's actual knowledge of their crimes from its inference that Bagosora "ordered or authorised" them.[1546] The Trial Chamber also relied on the organised military nature of the attacks, Bagosora's position of authority, the widespread and notorious nature of the killings implicating soldiers, and the circumstances in which the crimes took place.[1547] It further relied on the fact that the crimes took place in the vicinity of Gisenyi town where Nsengiyumva, Commander of the Gisenyi Operational Sector, was located.[1548]

654. The Appeals Chamber recalls that it has found that the Trial Chamber erred in finding that Nsengiyumva ordered the Gisenyi town killings and that there were other parallel killings involving soldiers under Nsengiyumva's command perpetrated at the same time in Gisenyi prefecture.[1549] Against this background, the Appeals Chamber finds that it was unreasonable for the Trial Chamber to have found as the only reasonable inference that, "in view of the centralised and hierarchical nature of the army and together with other parallel killings […] in Kigali", "these military operations were ordered or authorised by Bagosora".[1550] As such, the Appeals Chamber considers that the Trial Chamber erred to the extent that it inferred Bagosora's knowledge of his subordinates' criminal conduct in Gisenyi town from the finding that he ordered or authorised these military operations.

655. Nevertheless, in its legal findings pertaining to Bagosora's knowledge under Article 6(3) of the Statute, the Trial Chamber also found that in light of the fact that the attacks were "organised military operations requiring authorisation, planning and orders from the highest levels", it was "inconceivable that Bagosora would not be aware that his subordinates would be deployed for these purposes, in particular in the immediate aftermath of the death of President Habyarimana and the resumption of hostilities with the RPF, when the vigilance of military authorities would have been at its height".[1551]

656. As with the other killings discussed above, Bagosora fails to address the reasoning which led the Trial Chamber to conclude that the only reasonable inference available from the evidence

[1546] Trial Judgement, para. 1067.
[1547] Trial Judgement, para. 2038.
[1548] Trial Judgement, para. 2038.
[1549] *See supra*, paras. 303, 331, 348, 377.
[1550] Trial Judgement, para. 1067.
[1551] Trial Judgement, para. 2038.

was that he had actual knowledge that his subordinates from the Rwandan army were about to perpetrate killings in Gisenyi town on 7 April 1994.[1552] However, while the Appeals Chamber did not find error in such a finding concerning the crimes committed in Kigali where Bagosora was based, it considers that the Trial Chamber erred in finding that this was the only reasonable inference to be drawn with respect to the killings committed in Gisenyi town on 7 April 1994. In this regard, the Appeals Chamber notes that the killings in Gisenyi town were committed by a very limited number of soldiers from a different military operational sector in a distinct prefecture about a hundred kilometres away from where Bagosora was based. The Appeals Chamber further considers that the Trial Chamber's reliance on the fact that the crimes took place in the vicinity of Gisenyi town where Nsengiyumva was located was in no way conclusive as regards Bagosora's knowledge. As such, it is not convinced that a reasonable trier of fact could have found that the only reasonable conclusion was that Bagosora must have known that his subordinates were about to perpetrate killings in Gisenyi town on 7 April 1994.

657. The Trial Chamber also found, "in the alternative", that "Bagosora also had reason to know that subordinates under his command would commit crimes".[1553] In support of its finding, however, the Trial Chamber relied upon evidence specifically related to crimes perpetrated in Kigali. The Trial Chamber also reasoned that "[i]t is difficult to accept" that reports similar to those received by UNAMIR from military observers "were not being provided to Bagosora".[1554] The Appeals Chamber considers that this amounts to speculation on the part of the Trial Chamber. Such speculative reasoning could therefore not form the basis for a finding that Bagosora had reason to know that soldiers from the Rwandan army would commit crimes in Gisenyi town on 7 April 1994.

658. As a result of its finding below that Bagosora could not be held responsible for failing to punish any of the crimes for which he was convicted,[1555] the Appeals Chamber finds it unnecessary to discuss whether Bagosora acquired knowledge of his subordinates' crimes after they were committed.

[1552] Applying the same rationale which led it to conclude that the Trial Chamber erred in finding that the civilian attackers involved in the Gisenyi town killings were Nsengiyumva's subordinates within the meaning of Article 6(3) of the Statute, the Appeals Chamber considers that the civilian attackers could likewise not be said to have been Bagosora's subordinates. *See supra*, para. 295.
[1553] Trial Judgement, para. 2039.
[1554] Trial Judgement, para. 2039.
[1555] *See infra*, paras. 683-689, 691.

659. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber erred in finding that Bagosora had the requisite knowledge to be held responsible as a superior for the killings in Gisenyi town.

(d) Conclusion

660. Based on the above, the Appeals Chamber finds that Bagosora had sufficient knowledge of his subordinates' criminal conduct in Kigali on 7, 8, and 9 April 1994 to trigger his duty as a superior to prevent their crimes and/or punish them. It finds, however, that the Trial Chamber erred in finding that he had the requisite knowledge to be held responsible pursuant to Article 6(3) of the Statute for the killings perpetrated in Gisenyi town on 7 April 1994.

2. Alleged Errors Relating to Failure to Prevent or Punish

661. The Trial Chamber's finding on Bagosora's alleged failure to prevent or punish reads as follows:

> As noted above, these attacks were clearly organised and authorised or ordered at the highest level of the Rwandan military. Therefore, Bagosora failed in his duty to prevent the crimes because he in fact participated in them. There is also absolutely no evidence that the perpetrators were punished afterwards.[1556]

662. Bagosora asserts that by finding him responsible for having failed to prevent the attacks for which he was convicted pursuant to Article 6(3) of the Statute or punish their unidentified perpetrators when he did not know about these specific attacks, the Trial Chamber expected him to perform the impossible.[1557] He also contends that the Trial Chamber erred in failing to consider that, given that he held such a high level of authority and only had general knowledge of attacks, he could have done nothing more to prevent the commission of killings than give general directives, and that such general directives were issued.[1558]

663. Bagosora further submits that the Trial Chamber erred in law and in fact in holding that the absence of evidence of punishment was tantamount to evidence that no punishment was meted out, thereby reversing the burden of proof.[1559] He contends that the question before the Trial Chamber was not whether there was proof of punishment (or lack thereof), but whether the measures taken to

[1556] Trial Judgement, para. 2040.
[1557] Bagosora Appeal Brief, paras. 190-195. *See also ibid.*, paras. 204-208, 210, 215; Bagosora Reply Brief, paras. 65-69, 72, 73; AT. 31 March 2011 p. 48.
[1558] Bagosora Notice of Appeal, Ground 2(B); Bagosora Appeal Brief, paras. 190, 196-199. *See also* AT. 31 March 2011 p. 44.
[1559] Bagosora Notice of Appeal, Ground 2(F); Bagosora Appeal Brief, paras. 217-219; AT. 31 March 2011 p. 52. *See also* Bagosora Reply Brief, paras. 70, 71.

punish were reasonable.[1560] He also argues that the Trial Chamber failed to take into account the emergency situation, the fact that he was assigned to other duties, and that the army structures may not have been functioning properly.[1561] In addition, Bagosora submits that the Trial Chamber failed to consider that punishment could not be imposed before perpetrators were identified through investigations, which were ordered.[1562] Arguing that the obligation to punish commences only when the attacker is identified, he points out that there is no indication that he knew the identity of the soldiers who were involved in the attacks in question.[1563] In this regard, he further points to Gatsinzi's testimony that there was about a 50 percent chance of identifying the culprits.[1564] Bagosora adds that the Trial Chamber failed to consider that such a duty would only have existed for approximately 65 hours.[1565]

664. The Prosecution responds that Bagosora's contentions are unmeritorious and do not demonstrate any error warranting appellate intervention.[1566] It submits that the issue is not whether the measures taken were general in nature, but whether they were necessary and reasonable in the circumstances.[1567] According to the Prosecution, Bagosora provides no basis for why he only had to give general instructions as opposed to taking tangible and concrete steps to prevent subordinates' crimes or punish his culpable subordinates.[1568] It argues that, regardless of the short period during which he was a superior, Bagosora should have embarked on a genuine effort to deal with the crimes committed such as by ordering investigations, protesting against such occurrences, or issuing clear orders that crimes must stop, none of which he did.[1569] In this respect, the Prosecution notes that orders were issued and executed for the punishment of looters and argues that the same measures could have been taken in respect of the killings.[1570]

665. The Prosecution also responds that the Trial Chamber's statement regarding the lack of evidence of punishment was not meant to imply that Bagosora had a duty to provide such evidence,

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[1560] Bagosora Reply Brief, para. 71.
[1561] Bagosora Notice of Appeal, Grounds 2(G), 2(H); Bagosora Appeal Brief, paras. 220, 222, *referring to* Trial Judgement, para. 1460.
[1562] Bagosora Notice of Appeal, Ground 2(I); Bagosora Appeal Brief, paras. 163, 164, 200, 209, 224-227, 322. *See also* T. 31 March 2011 pp. 47, 48.
[1563] Bagosora Notice of Appeal, Ground 2(D); Bagosora Appeal Brief, paras. 202-204, 215, 216.
[1564] AT. 31 March 2011 p. 48.
[1565] Bagosora Notice of Appeal, Ground 2(C); Bagosora Appeal Brief, paras. 201, 212-214. Bagosora points out that he was not found to have authority over the Rwandan military after 9 April 1994. *See ibid.*, para. 213; Bagosora Reply Brief, para. 65.
[1566] Prosecution Response Brief (Bagosora), paras. 126, 127, 133, 134, 140, 141, 145, 153-156.
[1567] Prosecution Response Brief (Bagosora), para. 136.
[1568] Prosecution Response Brief (Bagosora), paras. 136-139, 142. The Prosecution submits that there was no action taken specifically to prevent killings in any of the meetings held on 6 and 7 April 1994. *See ibid*., para. 139.
[1569] AT. 31 March 2011 pp. 67, 69.
[1570] AT. 1 April 2011 pp. 10, 11, *referring to* Witness DM191, T. 9 May 2005 pp. 10-12 *and* Exhibit DK81.

but rather, that it was simply a statement of fact that no such evidence was on the record.[1571] It contends that it was open to the Trial Chamber to rely on direct or indirect evidence, such as Bagosora's direct participation in the crimes and the absence of evidence that he punished the perpetrators, to determine that his failure to punish was proven.[1572] It further submits that there was in fact evidence on the record that the perpetrators were not punished afterwards.[1573] In particular, the Prosecution points to Gatsinzi's testimony that when he assumed his post in Kigali, no investigations had yet occurred and further asserts that Gatsinzi only ordered investigations into the killings of the Belgian peacekeepers.[1574]

666. The Appeals Chamber will first discuss Bagosora's arguments in relation to the prevention of crimes and then those with respect to the punishment of culpable subordinates.

(a) Prevention of Crimes

667. The Trial Chamber found that "Bagosora failed in his duty to prevent the crimes because he in fact participated in them" since "these attacks were clearly organised and authorised or ordered at the highest level of the Rwandan military".[1575]

668. The Appeals Chamber recalls that, in its factual findings, the Trial Chamber found that Bagosora ordered the assaults on the Prime Minister and the official figures killed in the Kimihurura neighbourhood, and that he ordered or authorised the killings perpetrated in Gisenyi town, including the killing of Alphonse Kabiligi, at Nyundo Parish, and at Mudende University.[1576] However, the Appeals Chamber has found that the Trial Chamber erred in finding that Bagosora ordered or authorised the killings committed in Kigali, or that he could be held responsible for the killings committed in Gisenyi prefecture.[1577]

669. In relation to the other crimes for which Bagosora was found to bear superior responsibility, the Appeals Chamber observes that the Trial Chamber entered factual findings to the effect that Bagosora knew of these killings, but not that he ordered or authorised them.[1578] As such, absent any

[1571] Prosecution Response Brief, para. 147. *See also* AT. 1 April 2011 p. 9.
[1572] Prosecution Response Brief, para. 148.
[1573] AT. 1 April 2011 p. 10.
[1574] AT. 31 March 2011 pp. 68, 69.
[1575] Trial Judgement, para. 2040.
[1576] Trial Judgement, paras. 723 (Prime Minister), 752 (political officials in Kimihurura), 1067 (Gisenyi town), 1167 (Alphonse Kabiligi), 1204 (Nyundo Parish), 1253 (Mudende University). *See also ibid*., para. 2178 (Prime Minister and political officials in Kimihurura).
[1577] *See supra*, Sections IV.C *and* D.
[1578] Trial Judgement, paras. 889 (*Centre Christus*), 905 (Kibagabaga Mosque), 927 (Kabeza), 939 (Saint Josephite Centre), 972 (Karama Hill and Kibagabaga Catholic Church), 989 (Gikondo Parish). *See also ibid.*, para. 2038. The Appeals Chamber notes that, in its legal findings, the Trial Chamber referred to "parallel crimes being committed

further reasoning, the Trial Chamber's conclusive legal finding that "Bagosora failed in his duty to prevent the crimes because he in fact participated in them" since "these attacks were clearly organised and authorised or ordered at the highest level of the Rwandan military"[1579] is neither reasoned nor factually supported in relation to the killings committed at *Centre Christus*, Kabeza, Kibagabaga Mosque, the Saint Josephite Centre, Karama Hill, Kibagabaga Catholic Church, and Gikondo Parish.

670. The Appeals Chamber therefore finds that there is no finding or sufficient evidence that Bagosora ordered or authorised any of the killings for which he was found to bear superior responsibility. In view of this, the Appeals Chamber finds that the Trial Chamber erred in relying on the fact that Bagosora must have ordered or authorised the crimes to conclude that he bore superior responsibility for failing to prevent them.

671. Nevertheless, while the Trial Chamber could not have relied upon the finding that Bagosora must have ordered or authorised the crimes to find that he bore superior responsibility for failing to fulfil his duty to prevent them, Bagosora's convictions may be upheld if the Trial Chamber's factual findings support the conclusion that Bagosora failed to take the necessary and reasonable measures to prevent these crimes. In this regard, the Appeals Chamber considers that, when taken together, the Trial Chamber's findings that (i) Bagosora knew that his subordinates were about to commit the crimes, (ii) that the military – over which Bagosora exercised effective control – had the resources to prevent the crimes,[1580] and (iii) that to the extent that it lacked resources, it was because they were deployed in executing the crimes,[1581] support the Trial Chamber's conclusion that the only reasonable inference was that Bagosora failed to take the necessary and reasonable measures to prevent the commission of the crimes in Kigali for which he was convicted pursuant to Article 6(3) of the Statute.

672. With respect to Bagosora's submission that the Trial Chamber's findings about his level of authority and knowledge imply that he could only have given general directives, the Appeals Chamber recalls that a superior's duty is discharged when he has taken "necessary and reasonable"

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in Kigali […] which were also ordered or authorised by the highest military authority", but only cited Sections III.3.3 and III.3.5.6 of the Trial Judgement, thereby limiting the application of this statement to the killings of the Prime Minister, the political officials in Kimihurura, and Augustin Maharangari. *See ibid.*, paras. 2142, 2148, 2184.

[1579] Trial Judgement, para. 2040.

[1580] Trial Judgement, para. 2041 ("Finally, in view of their widespread and systematic nature, the Chamber categorically rejects that the crimes committed by Bagosora's subordinates were somehow spontaneous and that the military lacked resources to put them down while fighting the RPF.").

[1581] Trial Judgement, para. 2041 ("To the extent that [the military] lacked resources, it is because these very resources had been committed by military authorities to executing the crimes.").

measures in the context of a particular situation.[1582] Contrary to what Bagosora suggests, the existence of a crisis situation does not relieve the superior of his duty. Necessary and reasonable measures are such that can be taken within the competence of a commander as evidenced by the degree of effective control he wielded over his subordinates.[1583] It bears noting that what constitutes necessary and reasonable measures is not a matter of substantive law but of evidence.[1584]

673. Bagosora relies upon Exhibits DB66, DB67, and DB103 to demonstrate that he discharged his duty to prevent the crimes by issuing "general instructions".[1585] The Appeals Chamber notes that although the Trial Chamber considered these exhibits elsewhere in the Trial Judgement, it did not expressly consider whether these "general instructions" could have satisfied Bagosora's duty to prevent the crimes for which he was convicted.[1586]

674. The Appeals Chamber is not convinced that, had these exhibits been considered in relation to Bagosora's duty to prevent the crimes, a reasonable trier of fact could have found that they raised reasonable doubt regarding Bagosora's failure to take necessary and reasonable measures to prevent crimes he knew were about to be committed. Exhibit DB103 is a communiqué issued by the Ministry of Defence in the immediate aftermath of the President's death and which Bagosora signed in his capacity as *directeur de cabinet*. This communiqué called on the population to stay calm and remain at home until further notice and for the armed forces to remain vigilant.[1587] Exhibit DB67 is a communiqué issued on behalf of the Rwandan Armed Forces and signed by Bagosora as *directeur de cabinet* relaying the decisions taken at the 7 April ESM Meeting chaired by Bagosora. The communiqué addressed the creation of the Crisis Committee and conveyed the desire to restore calm and security throughout the country, but the only threat of punishment expressed was for acts of vandalism.[1588] Exhibit DB66 is the minutes of the 6 April Meeting chaired by Bagosora (as well

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[1582] *See Ori}* Appeal Judgement, para. 177; *Hadžihasanovi} and Kubura* Appeal Judgement, para. 151; *Halilovi}* Appeal Judgement, para. 63; *Bla{ki}* Appeal Judgement, para. 417.

[1583] *Bla{ki}* Appeal Judgement, para. 72. *See also Ori}* Appeal Judgement, para. 177; *Halilovi}* Appeal Judgement, para. 63.

[1584] *Ori}* Appeal Judgement, para. 177; *Hadžihasanovi} and Kubura* Appeal Judgement, para. 33; *Halilovi}* Appeal Judgement, para. 63; *Bla{ki}* Appeal Judgement, para. 72.

[1585] Bagosora Appeal Brief, paras. 197, 198, fn. 94. *See also* AT. 31 March 2011 p. 44. Bagosora also submits that the meetings held on 6 and 7 April 1994, in particular those held with UNAMIR, further indicate that attempts were made to restore security. *See* Bagosora Appeal Brief, paras. 198, 199; AT. 1 April 2011 p. 20. Bagosora refers to the "minutes of the meetings held on 6 and 7 April" as evidence, but does not point to any specific exhibit. *See* Bagosora Appeal Brief, para. 198. The Appeals Chamber understands that Bagosora is referring to Exhibit DB66.

[1586] *See* Trial Judgement, paras. 2040, 2041.

[1587] Exhibit DB103B1 (First communiqué of 7 April 1994) ("The Minister of Defence requests the people of Rwanda not to lose courage in the wake of this painful incident [*i.e.* the death of the Head of State] and to refrain from any actions that could undermine national security. He specially requests the Armed Forces to remain vigilant, to ensure the security of the people and to keep up the courage and clear-sightedness that they have always shown in difficult times. I also recommend to the population to stay at home and to await new orders.").

[1588] Exhibit DB67A (Second communiqué of 7 April 1994) ("[*L*]*es participants à la réunion ont pris les décisions et recommandations suivantes: 1. Mettre tout en œuvre en collaboration avec les autres services concernés, pour que la*

as the 7 April meeting with the SRSG), indicating that "[t]he purpose of the [6 April Meeting] was to take urgent security measures to forestall any upheaval, reassure the population, and maintain the peace during this period of power vacuum".[1589] While these exhibits show that general statements were made about restoring calm and security, the Appeals Chamber recalls that Bagosora, the highest military authority at the time with effective control over the military, had actual knowledge that his subordinates were about to commit each of the attacks.[1590] In these circumstances, the Appeals Chamber considers that the mere issuance of such general statements does not suffice to constitute "necessary and reasonable" measures of prevention. Furthermore, it recalls that a superior need not necessarily know the exact identity of his subordinates who perpetrate crimes in order to incur liability under Article 6(3) of the Statute.[1591]

675. The Appeals Chamber is also not persuaded by Bagosora's arguments that the fact that steps were taken to punish demonstrate that the Trial Chamber erred in finding that he failed to prevent the criminal conduct of his subordinates.[1592] The Appeals Chamber notes that, of the three exhibits Bagosora relies on,[1593] Exhibit DB274 is the only one to suggest that investigations had been ordered.[1594] Exhibit DB274, an audio-recording containing a portion of General Gatsinzi's interview with a journalist of Radio Rwanda of 10 April 1994, reveals that Gatsinzi notified the public on 10 April 1994 that investigations had been ordered.[1595] However, nothing in the exhibit

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situation dans le pays se normalise rapidement. À cet effet, les membres des Forces Armées sont invités instamment à se dépanner et à faire montre de retenue et de discipline pour réconforter la population et ramener le calme dans le pays. […] *4. Les cadres supérieurs des Forces Armées Rwandaises invitent la population à rester calme et à se refuser à toute politisation de nature à attirer les haines et les violences de tous ordres. La population, en particulier la jeunesse doit se garder des actes de vandalisme sous peine de s'exposer à une sévère répression. 5. Suite aux problèmes liés à l'insécurité, les participants à la réunion demandent aux autorités préfectorales d'examiner la situation de sécurité dans leurs ressorts y compris le couvre-feu si de besoin. Ils réitèrent leur invitation à la population de supporter courageusement les dures épreuves que nous traversons pour que le calme revienne sans tarder*.").

[1589] Exhibit DB66 (Minutes of the meeting of the *directeur de cabinet*, gendarmerie Chief of Staff, Ministry of Defence officers, army and gendarmerie senior staff on the night of 6-7 April 1994), para. 2.

[1590] *See supra*, paras. 524, 660.

[1591] *See Renzaho* Appeal Judgement, para. 64; *Muvunyi* Appeal Judgement of 29 August 2008, para. 55; *Blagojevi} and Joki}* Appeal Judgement, para. 287.

[1592] *See* Bagosora Appeal Brief, para. 200.

[1593] Bagosora Appeal Brief, paras. 164, 200, 209, 224, 227, *referring to* Exhibits DB256, DB274, DK75.

[1594] There is no reference to any investigations in Exhibit DB256. *See* Exhibit DB256 (Gatsinzi *Pro Justitia* Statement dated 16 June 1995). Exhibit DK75, a letter from Gatsinzi to the SRSG dated 17 April 1994, sets out proposals for restoring peace in Rwanda, including initiating investigations into the killing of the President, "the ensuing massacres and all other related incidents". While this letter shows an intention from the acting army Chief of Staff to conduct investigations into the massacres, it does not indicate that investigations had actually been initiated and could in any event not have served to deter any of the crimes committed between 7 and 9 April 1994. *See* Exhibit DK75 (Gatsinzi's letter to SRSG Jacques Roger Booh Booh, dated 17 April 1994), para. 3(b).

[1595] Exhibit DB274 (Audio-recording of Jean Kambanda's speech and portion of Marcel Gatsinzi's interview with a journalist of Radio Rwanda of 10 April 1994), track 2. The recording was played in court during Bagosora's testimony. *See* Bagosora, T. 8 November 2005 p. 76 ("It is very regrettable that the RPF resumed hostilities – hostilities by leaving their base at the CND to attack the Kimihurura military camp under the pretext that it was the soldiers of the Kimihurura camp, who carried out massacres among the population. As I said, it is not all the soldiers, it is only a few soldiers, indeed. But, perhaps, people who disguised themselves as soldiers – investigations have been ordered and they

indicates whether the alleged investigations were ordered during the 6 to 9 April 1994 period or whether Bagosora was aware of them during that period.[1596] The Appeals Chamber is in any event unable to determine which "subsequent attacks" these purported investigations "could have served to deter",[1597] or whether or when they were actually ordered or were in fact carried out. As such, no reasonable trier of fact could have found that this evidence raised a reasonable doubt regarding Bagosora's failure to take necessary and reasonable steps available to him to prevent the crimes of which he was convicted.

676. Similarly, the Appeals Chamber does not consider that Gatsinzi's testimony that he ordered investigations into the killing of the Belgian peacekeepers and that there was approximately a 50 percent probability of the investigations being successful[1598] raises reasonable doubt in relation to Bagosora's failure to take reasonable and necessary measures to prevent the commission of crimes. The applicable standard is not whether steps taken are likely to be successful but rather whether reasonable and necessary steps were taken at all. Furthermore, the Appeals Chamber notes that Gatsinzi's testimony only related to investigations into the killing of the Belgian peacekeepers, and did not address whether steps were taken in relation to the other crimes perpetrated during the relevant period.

677. With respect to Bagosora's argument that the Trial Chamber failed to consider that he only had superior authority for a period of approximately 65 hours, the Appeals Chamber recalls that he was not held liable for failing to prevent any crimes that were committed outside the three-day period during which he was found to exercise effective control over the Rwandan Armed Forces.

678. At the appeal hearing, Bagosora also pointed to Gatsinzi's testimony that, upon arriving in Kigali on 7 April 1994, Gatsinzi sent a telegram to the armed forces ordering commanders to prevent soldiers from committing acts of violence against the population, and to punish the perpetrators of any such acts.[1599] However, in light of Gatsinzi's interest in distancing himself from the crimes committed by his subordinates in Kigali while he was in command and the accompanying concerns about his credibility, as discussed above,[1600] and in the absence of

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will reveal the truth, but it is unfortunate that the RPF took up arms and resumed hostilities."). *See also* Exhibit DNS113 (Excerpts of transcripts of interview between Gatsinzi and a journalist from Radio Rwanda of 10 April 1994).

[1596] In relation to Exhibit DB274, Bagosora testified: "[Gatsinzi] said that he had ordered investigations for the purpose of knowing who had done what regarding the massacres. But what I can say is that I was not aware of the outcome of that investigation which he ordered." *See* Bagosora, T. 8 November 2005 p. 77.

[1597] Bagosora Appeal Brief, para. 200.

[1598] Marcel Gatsinzi, AT. 30 March 2011 p. 10.

[1599] AT. 31 March 2011 p. 44, *referring to* Marcel Gatsinzi, AT. 30 March 2011 p. 8.

[1600] *See supra*, para. 545.

corroborative evidence, as pointed out by Bagosora, the Appeals Chamber does not find Gatsinzi's evidence to be sufficiently reliable.

679. Finally, the Appeals Chamber considers that the Trial Chamber's finding that it "does not exclude that formal military structures and procedure were not always followed during the genocide" has no bearing on its conclusion regarding Bagosora's material ability to prevent his subordinates' criminal conduct on 7, 8, and 9 April 1994 and his failure to do so.

680. The Appeals Chamber concludes that Bagosora has failed to demonstrate that the Trial Chamber erred in finding that he failed in his duty to prevent the killings at Kabeza, Kibagabaga Mosque, the Saint Josephite Centre, Karama Hill, Kibagabaga Catholic Church, and Gikondo Parish, as well as the killings of Prime Minister Agathe Uwilingiyimana, Joseph Kavaruganda, Frédéric Nzamurambaho, Landoald Ndasingwa, and Faustin Rucogoza.

(b) Punishment of Culpable Subordinates

681. With respect to Bagosora's arguments about the duty to punish, the Appeals Chamber observes that the Trial Chamber did not expressly conclude whether Bagosora failed in his duty to punish his culpable subordinates. Rather, it merely noted that "[t]here is also absolutely no evidence that the perpetrators were punished afterwards".[1601] In contrast, the Trial Chamber clearly found that Bagosora failed to prevent the criminal conduct of his subordinates.[1602] The Appeals Chamber notes, however, that in its section on sentencing, the Trial Chamber referred to Bagosora's failure to punish as though a finding in this respect had been made.[1603] The Appeals Chamber is concerned that the Trial Chamber did not make any explicit finding on such an important element of Bagosora's criminal responsibility. It considers that the question arises as to whether the Trial Chamber actually found that Bagosora failed to discharge his duty to punish his culpable subordinates.

682. In any event, to the extent that the Trial Chamber intended to make such a finding, the Appeals Chamber finds that it erred.

683. The Appeals Chamber recalls that the duty to punish will be fulfilled when necessary and reasonable measures to punish perpetrators have been taken.[1604] What measures fulfil an accused's

[1601] Trial Judgement, para. 2040.
[1602] Trial Judgement, para. 2040.
[1603] *See* Trial Judgement, para. 2267 ("Bagosora's failure to prevent and punish the crimes with which he has been convicted set Rwanda on a course of further slaughter in the days which followed.").
[1604] *Bo{koski and Tar~ulovski* Appeal Judgement, para. 230; *Halilovi}* Appeal Judgement, para. 175.

duty to punish will be determined in relation to his material ability to take such measures.[1605] In certain circumstances, although the necessary and reasonable measures may have been taken, the result may fall short of the punishment of the perpetrators.[1606] Accordingly, the Appeals Chamber considers that the Trial Chamber's statement that "[t]here is absolutely no evidence that the perpetrators were punished afterwards" was insufficient, in itself, to establish that Bagosora failed to fulfil his duty to punish the crimes of which he was convicted. The Appeals Chamber considers that, given the absence of any further reasoning supporting the conclusion that Bagosora failed to fulfil his duty to punish culpable subordinates, the Trial Chamber failed to provide a reasoned opinion. In these circumstances, the Appeals Chamber has reviewed the Trial Chamber's factual findings and the relevant evidence on the record to determine whether a reasonable trier of fact could have found beyond reasonable doubt that Bagosora failed to take reasonable and necessary measures to punish his subordinates for the crimes committed.

684. The Appeals Chamber notes that the Trial Chamber did not find any direct evidence establishing that Bagosora failed to take steps to punish the perpetrators.[1607] A finding that Bagosora failed to punish his culpable subordinates could therefore only have been inferred from circumstantial evidence.

685. The Appeals Chamber has held that failure to prevent crimes or to punish the subordinates in question may be inferred from factors such as the continuing nature of violations.[1608] In the present case, however, the Appeals Chamber does not consider that the ongoing nature of the crimes and lack of evidence that perpetrators were punished afterwards conclusively establish that no action was taken to punish those responsible. In this regard, the Appeals Chamber recalls that

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[1605] *Bla{ki}* Appeal Judgement, para. 417.

[1606] *See Bo{koski and Tar~ulovski* Appeal Judgement, paras. 230 ("The Trial Chamber correctly held that the relevant question for liability for failure to punish is whether the superior took the necessary and reasonable measures to punish under the circumstances and that the duty to punish may be discharged, under some circumstances, by filing a report to the competent authorities."), 231; *Halilovi}* Appeal Judgement, para. 182 ("[…] the duty to punish includes at least an obligation to investigate possible crimes or have the matter investigated, to establish the facts, and *if the superior has no power to sanction, to report them to the competent authorities.*" (emphasis in original)).

[1607] At the appeal hearing, the Prosecution pointed to the evidence of Witnesses DM191/KVB19 and Gatsinzi as showing that Bagosora failed to take steps to punish the perpetrators. *See* AT. 1 April 2011 p. 10, *referring to* Witness DM191/KVB19, T. 9 May 2005 p. 16 *and* T. 28 September 2006 pp. 18, 19; AT. 31 March 2011 pp. 68, 69, *referring to* Marcel Gatsinzi, AT. 30 March 2011 p. 10. The Appeals Chamber notes that Witness DM191/KVB19's testimony indeed suggests that no measures were taken to punish the perpetrators of crimes. However, the Appeals Chamber notes that the witness testified that this was due to a lack of ability to do so both because the rules of discipline were no longer respected and because the judicial service and Prosecution Office were no longer operational. *See* Witness DM191, T. 9 May 2005 pp. 16-18; Witness KBV19, T. 28 September 2006 pp. 18, 19. Witness Gatsinzi testified that he was not aware of investigations being undertaken at the time beyond those he ordered into the killing of the Belgian peacekeepers. *See* Marcel Gatsinzi, AT. 30 March 2011 p. 10. However, as discussed above, the Appeals Chamber declines to rely on Gatsinzi's testimony given the concerns about his credibility (*see infra*, para. 545). In view of this, the Appeals Chamber does not consider that the evidence of Witnesses DM191/KVB19 and Gatsinzi alone could have established that Bagosora failed to take the necessary and reasonable measures to punish the crimes.

Bagosora was only found to have effective control of the Rwandan Armed Forces for a period of approximately 65 hours. In the Appeals Chamber's view, any investigations into the identity of the perpetrators and their subsequent punishment could reasonably have taken longer than 65 hours. It would therefore not have been reasonable to expect to have seen the results of investigations within this short period of time. Accordingly, it would not have been reasonable for the Trial Chamber to have inferred from these facts that no steps were taken to punish the perpetrators.

686. In noting that "these attacks were clearly organised and authorised or ordered at the highest level of the Rwandan military", the Trial Chamber appears to have considered that Bagosora's ordering or authorisation of the crimes implied that he intended the crimes to be committed and that it could thus be inferred that he would not have punished those responsible. However, the Appeals Chamber recalls that it has found that the Trial Chamber erred in finding that Bagosora must have ordered or authorised the crimes for which he was convicted pursuant to Article 6(3) of the Statute.[1609] In the same vein, the Appeals Chamber does not consider that the only reasonable inference to be drawn from Bagosora's awareness of the crimes was that he intended their commission and that he would therefore not have sought to punish the perpetrators. This could therefore not reasonably form a sufficient basis for a finding that Bagosora failed to take steps to punish the crimes for which he was convicted.

687. Against this background, the Appeals Chamber notes evidence on the record that investigations may have been ordered at the relevant time by General Marcel Gatsinzi, Bagosora's immediate subordinate at the time. The Appeals Chamber refers to the audio recording of Gatsinzi's interview of 10 April 1994 admitted as Exhibit DB274,[1610] and Gatsinzi's testimony that he ordered investigations into the killing of the Belgian peacekeepers upon his arrival to Kigali on 7 April 1994.[1611] The Trial Chamber did not consider Exhibit DB274 in relation to Bagosora's duty to punish those responsible for the crimes and was not apprised of Gatsinzi's testimony which was heard as additional evidence on appeal. The Appeals Chamber reiterates that nothing in Exhibit DB274 conclusively indicates whether the alleged investigations were ordered between 6 and 9 April 1994, whether Bagosora was aware of them during that period, or whether these investigations were in fact ordered or carried out.[1612] Likewise, the Appeals Chamber recalls its

[1608] *Muvunyi* Appeal Judgement of 29 August 2008, para. 62.
[1609] *See supra*, Sections IV.C *and* D.
[1610] *See supra*, para. 675.
[1611] AT. 30 March 2011 p. 10. The Appeals Chamber also notes that Gatsinzi testified that he was not aware of any other investigations having been ordered at the time of his arrival in Kigali, but considers that this does not establish that no investigations were ordered. *See idem*.
[1612] *See supra*, para. 675.

doubts about the reliability and credibility of Gatsinzi's testimony.[1613] Nevertheless, the Appeals Chamber considers that a reasonable trier of fact could have considered that this raised reasonable doubt about whether or not investigations were ordered.

688. In view of the Trial Chamber's lack of reasoning to support a finding that Bagosora failed to discharge his duty to punish culpable subordinates and the reasonable doubt that exists as to whether investigations were ordered by Bagosora's immediate subordinate at the time, Gatsinzi, the Appeals Chamber considers that no reasonable trier of fact could have concluded that the only reasonable inference was that Bagosora failed to take reasonable and necessary measures to punish the perpetrators of the crimes of which he was convicted.

689. As a result, the Appeals Chamber finds that the Trial Chamber erred to the extent that it intended to find that Bagosora failed to discharge his duty to punish his subordinates. This finding is without prejudice to Bagosora's convictions pursuant to Article 6(3) of the Statute insofar as Bagosora was found responsible for failing to carry out his duty to prevent the crimes.

(c) Conclusion

690. In light of the foregoing, the Appeals Chamber dismisses Bagosora's submissions that the Trial Chamber erred in finding that he failed to prevent the crimes committed against the Prime Minister and the officials in Kimihurura, and those committed at *Centre Christus*, Kabeza, Kibagabaga Mosque, the Saint Josephite Centre, Karama Hill, Kibagabaga Catholic Church, and Gikondo Parish.

691. However, to the extent that the Trial Chamber intended to find Bagosora responsible under Article 6(3) of the Statute for failing to fulfil his duty to punish culpable subordinates, the Appeals Chamber considers that it erred.

[1613] The Appeals Chamber notes, however, that the Prosecution did acknowledge that investigations were ordered by Gatsinzi. *See* AT. 31 March 2011 p. 69.

3. Alleged Failure to Give the Benefit of Reasonable Doubt

692. Bagosora submits that, taken together, all of his submissions regarding his knowledge of attacks, perpetrators, and duty to prevent or punish, raise reasonable doubt as to his criminal responsibility.[1614] He contends that the Trial Chamber therefore erred in law in failing to give him the benefit of reasonable doubt.[1615]

693. The Prosecution responds that Bagosora's claims are unmeritorious and relies on its previous submissions to contend that the Trial Chamber committed no error.[1616]

694. The Appeals Chamber considers that, to the extent that it intended to find that he failed in his duty to punish his culpable subordinates, the Trial Chamber failed to give Bagosora the benefit of reasonable doubt, and allows Bagosora's appeal in that respect. The Appeals Chamber has also found that the Trial Chamber erred in holding Bagosora responsible under Article 6(3) of the Statute for the killings perpetrated at Mudende University and in finding that Bagosora had the requisite knowledge to be held responsible as a superior for the killings perpetrated in Gisenyi town. However, the Appeals Chamber does not consider such errors to be attributable to a failure to give him the benefit of reasonable doubt. The Appeals Chamber further recalls that it has dismissed the remainder of Bagosora's arguments under this ground of appeal.

4. Conclusion

695. In conclusion, the Appeals Chamber finds that the Trial Chamber erred in holding Bagosora responsible under Article 6(3) of the Statute for the killings perpetrated at Mudende University on 8 April 1994 and in finding that Bagosora had the requisite knowledge to be held responsible as a superior for the killings perpetrated in Gisenyi town on 7 April 1994. Accordingly, the Appeals Chamber grants this part of Bagosora's Second Ground of Appeal and reverses the convictions entered against him under Counts 2, 4, 6, 8, and 10 of the Bagosora Indictment on the basis of the Mudende University and Gisenyi town killings.

696. The Appeals Chamber further finds that the Trial Chamber erred to the extent that it intended to find that Bagosora was responsible for failing to punish his culpable subordinates.

697. The Appeals Chamber dismisses the remainder of Bagosora's arguments under his Second Ground of Appeal, and affirms the Trial Chamber's findings that he is liable under Article 6(3) of

[1614] Bagosora Notice of Appeal, Ground 2(J); Bagosora Appeal Brief, paras. 228, 229, *referring to ibid*., paras. 172-227.
[1615] Bagosora Appeal Brief, para. 228.
[1616] Prosecution Response Brief (Bagosora), paras. 157, 158.

the Statute for failing in his duty to prevent the killings of Prime Minister Agathe Uwilingiyimana, Joseph Kavaruganda, Frédéric Nzamurambaho, Landoald Ndasingwa, and Faustin Rucogoza, as well as the crimes committed at *Centre Christus*, Kabeza, Kibagabaga Mosque, the Saint Josephite Centre, Karama Hill, Kibagabaga Catholic Church, and Gikondo Parish.

698. The Appeals Chamber will consider the impact, if any, of these findings in the section on sentencing.

E. Alleged Errors Relating to the Roadblocks (Ground 4)

699. The Trial Chamber found that roadblocks, manned primarily by civilians and, at times, military personnel, proliferated throughout Kigali from 7 April 1994 and were sites of open and notorious slaughter and sexual assaults.[1617] It concluded that Bagosora ordered the crimes committed between 7 and 9 April 1994 at roadblocks in the Kigali area.[1618] Accordingly, the Trial Chamber convicted Bagosora pursuant to Article 6(1) of the Statute for ordering genocide, as well as murder, extermination, and persecution as crimes against humanity, and violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II based on the killings and acts of rape, sexual violence, and mistreatment committed between 7 and 9 April 1994 at Kigali area roadblocks.[1619] It also found him liable as a superior for these crimes, but only took this into account in the determination of his sentence.[1620] The Trial Chamber further convicted Bagosora pursuant to Article 6(3) of the Statute for rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II based on the rapes committed at Kigali area roadblocks between 7 and 9 April 1994.[1621]

700. Bagosora submits that the Trial Chamber erred in concluding that the crimes at Kigali area roadblocks could only have been perpetrated on his orders.[1622] He further submits that the Trial Chamber erred in law and in fact in relation to his knowledge of these crimes and his obligation to punish the perpetrators, as well as in failing to consider the efforts made to find and punish them.[1623]

701. The Appeals Chamber notes that in both his Notice of Appeal and Appeal Brief, Bagosora submits that his arguments apply to the Trial Chamber's findings relating to roadblocks in Kigali

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[1617] Trial Judgement, paras. 1918-1924, 2033, 2035, 2123-2126.
[1618] Trial Judgement, para. 2126.
[1619] Trial Judgement, paras. 2158, 2186, 2194, 2213, 2245. The Appeals Chamber considers that the reference to the date of 6 April 1994 in relation to Bagosora's criminal responsibility for the killings perpetrated at roadblocks in paragraphs 2004, 2158, and 2245 of the Trial Judgement is a typographical oversight in light of the Trial Chamber's clear factual finding that the roadblocks were mounted from 7 April 1994. *See ibid.*, paras. 1919, 1922, 2123. *See also ibid*., paras. 2170, 2186, 2194, 2203, 2210, 2213.
[1620] Trial Judgement, paras. 2158, 2186, 2194, 2213, 2245, 2272.
[1621] Trial Judgement, paras. 2203, 2254. The Trial Chamber noted that Bagosora was charged with rape as a crime against humanity only under Article 6(3) of the Statute. *See ibid.*, fn. 2364. For the reason discussed above, the Appeals Chamber considers that the reference to the date of 6 April 1994 in paragraph 2254 of the Trial Judgement is a typographical oversight.
[1622] *See* Bagosora Notice of Appeal, Ground 3(B); Bagosora Appeal Brief, paras. 241, 261, 265. Bagosora specified that his previous submissions under his First, Second, and Third Grounds of Appeal apply in addition to the specific allegations of error raised under his Fourth Ground of Appeal. *See* Bagosora Notice of Appeal, p. 13; Bagosora Appeal Brief, para. 315.
[1623] Bagosora Notice of Appeal, Grounds 4(A)-(C); Bagosora Appeal Brief, paras. 316-322.

town and Kigali Region, and in "Nyundo in Gisenyi prefecture".[1624] However, the Appeals Chamber observes that Bagosora was neither indicted nor convicted in relation to roadblocks in Gisenyi prefecture and that none of the Trial Chamber's factual findings concerning the roadblocks erected in Gisenyi are relevant to his convictions.[1625]

1. Alleged Errors Regarding Ordering

702. Bagosora submits that the Trial Chamber erred in finding that the killings at the roadblocks could only have been perpetrated on his orders as there were other logical possibilities arising from the circumstantial evidence.[1626] He argues that the Trial Chamber failed to consider the possibility that other people, such as other high-ranking military officials, might have given the orders.[1627]

703. The Prosecution responds that the Trial Chamber did not commit any error in finding that the only reasonable conclusion was that Bagosora must have ordered or authorised these crimes.[1628]

704. The Trial Chamber, in its legal findings, found as the only reasonable inference that between 7 and 9 April 1994, Bagosora, in the exercise of his authority, ordered the crimes committed at Kigali area roadblocks.[1629] On this basis, it convicted him pursuant to Article 6(1) of the Statute.[1630]

705. The Appeals Chamber finds that the Trial Chamber's factual findings do not support its legal finding in this respect. In support of its legal finding, the Trial Chamber referred to a section of the Trial Judgement which does not specifically discuss Bagosora's role in the crimes perpetrated at Kigali area roadblocks, but only his active involvement in the military's development and implementation of a civil defence force in Rwanda before and during the relevant events.[1631]

[1624] Bagosora Notice of Appeal, p. 11 *and* heading Ground 4 at p. 13; Bagosora Appeal Brief, para. 241 *and* heading Ground 4 at p. 45.
[1625] *See* Trial Judgement, paras. 1929-1941, 2004, 2123-2126. Bagosora failed to clarify the issue at the appeal hearing. *See* AT. 31 March 2011 p. 52.
[1626] Bagosora Notice of Appeal, Ground 3(B); Bagosora Appeal Brief, paras. 241, 261, 265; Bagosora Reply Brief, paras. 117, 120.
[1627] Bagosora Notice of Appeal, Ground 3(B); Bagosora Appeal Brief, paras. 261-265. The Appeals Chamber recalls that it has already rejected Bagosora's contention that it would have been reasonable to conclude that the crimes could have been the work of clandestine networks. *See supra*, Section IV.C.1(a).
[1628] Prosecution Response Brief (Bagosora), paras. 165, 178, 179.
[1629] Trial Judgement, para. 2126 ("The Chamber has considered, as the only reasonable inference, that Bagosora in the exercise of his authority between 6 and 9 April 1994 ordered the crimes at Kigali area roadblocks (III.2.6.2)."). The Appeals Chamber recalls that the reference to the date of 6 April 1994 in relation to Bagosora's criminal responsibility for the killings perpetrated at roadblocks is a typographical oversight in light of the Trial Chamber's clear factual finding that the roadblocks were mounted from 7 April 1994. *See supra,* fn. 1619.
[1630] Trial Judgement, paras. 2158, 2186, 2194, 2213, 2245.
[1631] Trial Judgement, para. 2126, *referring to* Section III.2.6.2 ("Rwanda's Civil Defence System and Civilian Assailants"). In relation to roadblocks in particular, the Trial Chamber merely stated the following (*see ibid*., para. 495):

> With respect to the positions of roadblocks, manned exclusively by civilian personnel, the Chamber will consider the significance of their location, such as their presence in strategic areas and their proximity to public buildings or border crossings, where civilian or military forces would normally operate. The factual

The Appeals Chamber considers that this discussion does not provide support for the Trial Chamber's finding in relation to Bagosora's responsibility for the crimes at Kigali area roadblocks, particularly given that the Trial Chamber stated that the assessment of whether responsibility for a given event was attributable to military or civilian authorities would have to be undertaken in light of the factual context of each event.[1632]

706. In the specific section of the Trial Judgement containing the Trial Chamber's factual findings on the allegations pertaining to Kigali area roadblocks, the Trial Chamber stated that, although it did not have direct evidence of an explicit order emanating from the military or government to establish roadblocks,[1633] it was satisfied that "a majority of the roadblocks in Kigali were established and operated at the behest of or with the blessing of government or military authorities as part of its defensive effort".[1634] In view of this, it rejected the Defence submission "that the army was unable to put an end to the violence occurring at roadblocks".[1635] For the Trial Chamber, "there [was] no doubt that civilian and military authorities exercised some degree of control or influence over them".[1636] The Trial Chamber then concluded:

> As for Bagosora's responsibility, the Chamber recalls that he was the main authority in the Ministry of Defence from 6 to 9 April, with control over the Rwandan army and gendarmerie […]. It is inconceivable in view of the open and notorious slaughter at roadblocks that he would be unaware of the crimes being committed at them or the presence of military personnel at some of the primarily civilian ones, notwithstanding his denial to the contrary. In the Chamber's view, Bagosora is responsible for the crimes committed at roadblocks in the Kigali area during this period. This does not mean that other authorities are not also culpable for their role in establishing and operating them.[1637]

707. While the Trial Chamber discussed Bagosora's knowledge of the crimes committed at roadblocks and found him responsible, at no point did it actually discuss evidence that Bagosora must have ordered the crimes. In another part of its legal findings, it merely stated that "at least in their initial days, these roadblocks could only have existed with the authorisation of the Rwandan military".[1638] The Trial Chamber's factual findings appear to correspond only to those which would normally be entered in relation to superior responsibility.

708. In light of the foregoing, the Appeals Chamber considers that the Trial Chamber failed to provide a reasoned opinion for its finding that Bagosora was criminally responsible under

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context of a given event will guide the Chamber's assessment of whether primary responsibility for these installations is attributable to either military or civilian authorities.

[1632] Trial Judgement, para. 495.
[1633] Trial Judgement, para. 1921.
[1634] Trial Judgement, para. 1923.
[1635] Trial Judgement, para. 1923.
[1636] Trial Judgement, para. 1923.
[1637] Trial Judgement, para. 1924 (internal references omitted).
[1638] Trial Judgement, para. 2035.

Article 6(1) of the Statute for ordering the crimes committed at Kigali area roadblocks between 7 and 9 April 1994. The Appeals Chamber finds that, based on the Trial Chamber's factual findings, no reasonable trier of fact could have found that the only reasonable inference was that Bagosora ordered these crimes.

709. As a result, the Appeals Chamber finds that the Trial Chamber erred in finding Bagosora responsible for ordering the crimes perpetrated at Kigali area roadblocks between 7 and 9 April 1994 pursuant to Article 6(1) of the Statute. The Appeals Chamber recalls, however, that Bagosora was also found liable as a superior for these crimes.[1639] It now turns to consider Bagosora's submissions in this regard.

2. Alleged Errors Regarding Superior Responsibility

710. Bagosora submits that the Trial Chamber erred in law and in fact in assuming that, during the period from 6 to 9 April 1994, he knew of the killings committed at the roadblocks and of the identity of the perpetrators.[1640] He argues that knowing that there are roadblocks does not signify knowing what is happening at them.[1641] He also submits that the Trial Chamber erred in imposing on him an obligation to punish those who manned the roadblocks after 9 April 1994 for crimes committed before that date.[1642] In addition, Bagosora contends that the Trial Chamber erred in failing to consider that efforts were made to find and punish the perpetrators of the killings at the roadblocks.[1643] He argues that materials from Gatsinzi tendered into evidence prove that investigations were ordered to identify the criminals.[1644]

711. The Prosecution responds that the Trial Chamber committed no error in finding that Bagosora had actual knowledge of the massacres perpetrated at roadblocks, and that the alleged initiative to find and punish to which Bagosora refers is unsupported.[1645] It contends that there was an "expression of intention not followed with any action" which, in any event, was not mentioned by Bagosora but by Gatsinzi, and only related to incidents concerning the Presidential Guard from Kimihurura Camp.[1646] According to the Prosecution, there is no evidence whatsoever that Bagosora

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[1639] Trial Judgement, paras. 2158, 2186, 2194, 2213, 2245, 2272.
[1640] Bagosora Notice of Appeal, Ground 4(A); Bagosora Appeal Brief, para. 316. Bagosora also submits that the "same reasoning set out in the previous submission applies here". *See* Bagosora Appeal Brief, para. 317.
[1641] Bagosora Reply Brief, para. 120.
[1642] Bagosora Notice of Appeal, Ground 4(B); Bagosora Appeal Brief, paras. 318-320.
[1643] Bagosora Notice of Appeal, Ground 4(C), p. 13; Bagosora Appeal Brief, para. 321, *referring to* Trial Judgement, para. 1909.
[1644] Bagosora Appeal Brief, para. 322. *See also ibid*., paras. 164, 200, 209, 224, 227, fns. 80, 95, 96, 101, *referring to* Exhibits DB256, DB274, DK75.
[1645] Prosecution Response Brief (Bagosora), paras. 228-232, 235.
[1646] Prosecution Response Brief (Bagosora), para. 235, *referring to* Exhibit DB274.

took any action to prevent or punish the crimes that were committed at roadblocks in the Kigali area between 6 and 9 April 1994.[1647]

712. The Appeals Chamber recalls its finding under the section addressing Bagosora's Second Ground of Appeal that the Trial Chamber erred to the extent that it intended to find Bagosora criminally responsible for failing to punish his culpable subordinates.[1648] Bagosora's submissions in this respect are therefore moot and will not be examined. The Appeals Chamber will however address Bagosora's arguments relating to his duty to prevent.

713. Turning to Bagosora's arguments regarding his knowledge, the Appeals Chamber notes the Trial Chamber's finding that it was "inconceivable in view of the open and notorious slaughter at roadblocks that [Bagosora] would be unaware of the crimes being committed at them or [of] the presence of military personnel at some of the primarily civilian ones, notwithstanding his denial to the contrary".[1649] In the legal findings section of the Trial Judgement, the Trial Chamber further referred to the fact that Bagosora could not have been unaware that his subordinates "would be deployed for these purposes, in particular in the immediate aftermath of the death of President Habyarimana and the resumption of hostilities with the RPF, when the vigilance of military authorities would have been at its height", and that the crimes took place in Kigali, where Bagosora was based.[1650] While the Trial Chamber did not state so explicitly, the language it used in the Trial Judgement makes it clear that it found that the only reasonable inference was that Bagosora knew that his subordinates would commit the crimes for which he was convicted. In the alternative, the Trial Chamber found that Bagosora also had reason to know that subordinates under his command would commit crimes.[1651]

714. Bagosora does not address the rationale of the Trial Chamber's findings and fails to offer any argument in support of his assertion of error. He does not challenge the Trial Chamber's finding that "anyone travelling in Kigali in the early period of [the] conflict would […] have seen the crimes being committed at roadblocks",[1652] nor does he dispute its findings that he served as a point of contact to facilitate movement through Kigali area roadblocks, that militiamen were working in close coordination with military personnel at the roadblocks, and that civilian and military authorities exercised some degree of control or influence over the militia groups manning the

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[1647] Prosecution Response Brief (Bagosora), para. 236.
[1648] *See supra*, para. 691.
[1649] Trial Judgement, para. 1924.
[1650] Trial Judgement, para. 2038.
[1651] Trial Judgement, para. 2039.
[1652] Trial Judgement, para. 1920. *See also ibid.*, paras. 1924, 2123 ("These roadblocks were sites of open and notorious slaughter and sexual assault from 7 April.").

roadblocks.[1653] Accordingly, Bagosora fails to demonstrate that the Trial Chamber erred in finding that the only reasonable inference from the evidence was that he knew that his subordinates were committing crimes at Kigali area roadblocks on 7, 8, and 9 April 1994.

715. With respect to Bagosora's assertion that he did not know the identity of the perpetrators and could therefore not punish them, the Appeals Chamber recalls that a superior need not necessarily know the exact identity of his subordinates who perpetrate crimes in order to incur liability under Article 6(3) of the Statute.[1654]

716. In support of his assertion that efforts were made to find and punish the perpetrators of the killings at roadblocks, Bagosora points to paragraph 1909 of the Trial Judgement.[1655] In this paragraph, the Trial Chamber summarised the evidence of two high-ranking *Interahamwe*, Prosecution Witnesses A and BY, that they were instructed by government officials to go on a pacification tour to various roadblocks throughout Kigali with Rwandan army escorts allegedly provided by Bagosora "in order to instruct civilians to gather bodies for removal and stop the killings or face sanctions".[1656]

717. The Appeals Chamber considers that this evidence did not prevent the Trial Chamber from reaching the conclusion that Bagosora failed in his duty to prevent the crimes committed at Kigali area roadblocks between 7 and 9 April 1994. First, the Appeals Chamber emphasises that this "pacification tour" was allegedly arranged on 10 April 1994;[1657] even assuming that Bagosora provided army escorts with the awareness of the purposes of the tour and let alone that such a

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[1653] Trial Judgement, paras. 1922, 1923, 2033. *See also* Trial Judgement, para. 2035:

> Many of the Kigali area roadblocks were exclusively manned by civilians, but they were part of an extensive network in an area of strategic importance to the Rwandan army in its battle for Kigali with the RPF (III.2.6.2). They were at times alongside military roadblocks and positions or other barriers which had a soldier or gendarme at its head. These militiamen were referred to as providing for the civil defence of Kigali. Their purpose was ostensibly to identify enemy infiltrators. The Chamber recalls that as of 28 March 1994, a few days before the roadblocks were erected, the ongoing discussions by high-ranking military and civilian officials intended the civil defence efforts in Kigali to be directed by the area operational commander. The Chamber is mindful of its conclusion that militia groups became increasingly uncontrollable as the conflict progressed. However, at least in their initial days, these roadblocks could only have existed with the authorisation of the Rwandan military. The Chamber therefore finds that those manning them from 7 to 9 April 1994 were Bagosora's subordinates. This does not mean that other civilian or military leaders did not also exercise control over them.

[1654] *Renzaho* Appeal Judgement, para. 64 ("The Appeals Chamber has held that physical perpetrators of the crimes can be identified by category in relation to a particular crime site."); *Muvunyi* Appeal Judgement of 29 August 2008, para. 55; *Blagojevi} and Joki}* Appeal Judgement, para. 287.

[1655] Bagosora Notice of Appeal, Ground 4(C); Bagosora Appeal Brief, para. 321, fn. 131.

[1656] Trial Judgement, para. 1909.

[1657] *See* Trial Judgement, para. 1909; Witness BY, T. 2 July 2004 p. 44, T. 5 July 2004 p. 6, *and* T. 8 July 2004 p. 41 (closed session); Witness A, T. 1 June 2004 pp. 54, 56-61. Witness A also testified that when he reported to Édouard Karemera and Justin Mugenzi that there had been many killings in Kigali, they appeared pleased, and speculated that the tour was arranged because the international community was starting to send journalists. *See* Witness A, T. 1 June 2004 pp. 59-61.

pacification tour constituted a "reasonable and necessary" measure in the circumstances, it would not constitute evidence that Bagosora took steps to prevent the crimes committed at the roadblocks between 7 and 9 April 1994, unless it were shown that he ordered the provision of army escorts in that period. As such, it was not unreasonable for the Trial Chamber to reach the conclusion that Bagosora failed in his duty to prevent these crimes without expressly considering Witnesses A's and BY's evidence.

718. As to the "materials from Gatsinzi tendered into evidence" which would allegedly prove that investigations were ordered to identify the criminals,[1658] the Appeals Chamber recalls its finding above that the Trial Chamber erred to the extent that it intended to find Bagosora criminally responsible for failing to punish his culpable subordinates.[1659] As regards Bagosora's arguments under his Second Ground of Appeal that investigations "could have served to deter subsequent attacks",[1660] the Appeals Chamber reiterates that it is unable to determine which attacks these purported investigations could have served to deter or whether or when they were actually ordered or were in fact carried out.[1661] Bagosora has therefore not demonstrated that steps were taken to prevent the crimes perpetrated at Kigali area roadblocks for which he was convicted as a superior.

719. Accordingly, the Appeals Chamber finds that Bagosora has failed to demonstrate that the Trial Chamber erred in finding that he had the requisite knowledge to be held responsible under Article 6(3) of the Statute for the crimes committed at Kigali area roadblocks between 7 and 9 April 1994 and that he failed to fulfil his duty to prevent these crimes.

3. Conclusion

720. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber erred in finding Bagosora responsible pursuant to Article 6(1) of the Statute for ordering crimes committed at Kigali area roadblocks between 7 and 9 April 1994. Nonetheless, the Appeals Chamber finds that Bagosora has failed to demonstrate that the Trial Chamber erred in finding him liable as a superior for failing in his duty to prevent these crimes by his subordinates.

721. Accordingly, the Appeals Chamber grants Bagosora's Fourth Ground of Appeal in part and sets aside the finding that he is responsible under Article 6(1) of the Statute for ordering the crimes committed at Kigali area roadblocks. However, it finds him criminally responsible as a superior

[1658] Bagosora Appeal Brief, para. 322.
[1659] *See supra*, para. 691.
[1660] Bagosora Appeal Brief, para. 200.
[1661] *See supra*, para. 675.

pursuant to Article 6(3) of the Statute for genocide, and extermination and persecution as crimes against humanity, as well as violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II under Counts 2, 6, 8, and 10 of the Bagosora Indictment for failing to prevent his subordinates from participating in those crimes.[1662] The Appeals Chamber further affirms Bagosora's convictions entered under Counts 7 and 12 of the Bagosora Indictment pursuant to Article 6(3) of the Statute for rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. The Appeals Chamber will determine the impact, if any, of these findings on Bagosora's sentence in the appropriate section of this Judgement.

[1662] Although Bagosora could also be held criminally responsible as a superior for murder as a crime against humanity for these crimes, the Appeals Chamber recalls that cumulative convictions may not be entered for murder and extermination as crimes against humanity, and therefore does not enter them here. The Appeals Chamber refers to its discussion below on the matter. *See infra*, Section IV.G.

F. Alleged Errors Relating to the Sexual Violence Against the Prime Minister (Ground 5(A))

722. The Trial Chamber found Bagosora guilty of other inhumane acts as a crime against humanity pursuant to Article 6(3) of the Statute based, in part, on what it described as the sexual assault of Prime Minister Agathe Uwilingiyimana.[1663] The Trial Chamber found that on the morning of 7 April 1994, the Prime Minister's residential compound and the neighbouring compound where she was hiding came under attack by soldiers from the Presidential Guard and ESM.[1664] The Prime Minister was shot that morning, and her body was seen lying openly in the compound.[1665] The conviction for other inhumane acts connected with this event was based on the factual finding that a bottle was inserted into the Prime Minister's vagina after her death.[1666] The Trial Chamber found that this constituted a serious attack on human dignity.[1667]

723. Bagosora submits that the Trial Chamber erred in law by finding him guilty of the sexual assault of the Prime Minister because the conviction was based on actions taken after her death and sexual assault can be perpetrated only against a living person.[1668] He contends that the prohibition on sexual assault is meant to protect the sexual integrity of a person and there is no sexual integrity after death.[1669] He adds that the Trial Chamber's finding that the sexual assault was committed after death could constitute outrage upon a corpse, but that he was not charged with this offence.[1670]

724. The Prosecution responds, *inter alia*, that the Trial Chamber did not err in convicting Bagosora for other inhumane acts for the mistreatment of the Prime Minister's body.[1671] It submits that the category of "other inhumane acts" is a residual category of crimes against humanity and allows courts flexibility in assessing the conduct before them.[1672] The Prosecution maintains that the Trial Chamber correctly concluded that the attack on the Prime Minister constituted a serious attack on human dignity.[1673]

[1663] *See* Trial Judgement, paras. 2224, 2258.
[1664] Trial Judgement, paras. 701-703, 717.
[1665] Trial Judgement, para. 705. *See also ibid*., para. 2219.
[1666] Trial Judgement, paras. 2219, 2224.
[1667] Trial Judgement, para. 2222.
[1668] Bagosora Notice of Appeal, para. 5(A); Bagosora Appeal Brief, paras. 323, 324, 328. *See also* AT. 1 April 2011 p. 15. At the appeal hearing, Bagosora further argued that the *mens rea* for sexual assault could not apply to a dead body. *See* AT. 1 April 2011 p. 15.
[1669] Bagosora Appeal Brief, paras. 325-327, *citing Kunarac et al.* Appeal Judgement, para. 163; *Kvo~ka et al*. Trial Judgement, para. 172; *R. v. Richer*, [1993] Alberta Court of Appeal No. 503.
[1670] Bagosora Notice of Appeal, para. 5(A); Bagosora Appeal Brief, para. 328. *See also* Bagosora Appeal Brief, paras. 323-327.
[1671] Prosecution Response Brief (Bagosora), para. 238.
[1672] Prosecution Response Brief (Bagosora), paras. 239, 240; AT. 1 April 2011 p. 13.
[1673] *See* Prosecution Response Brief (Bagosora), paras. 242-245. The Prosecution further submits that the mental suffering associated with inhumane acts is not limited to the "primary victims" and that the Trial Chamber correctly found that the assault on the Prime Minister's body constituted a serious attack on human dignity and caused mental

725. The Appeals Chamber, Judge Pocar dissenting, finds that, underlying Bagosora's contentions is the fundamental question of whether he was charged with a serious attack on human dignity constituting the inhumane acts that he was ultimately convicted for under Count 9 of the Bagosora Indictment.

726. In this regard, the Appeals Chamber notes that Bagosora was found guilty on the basis of paragraph 6.9 of his Indictment,[1674] which reads:

> […] Prime Minister Agathe Uwilingiyimana was tracked down, arrested, sexually assaulted and killed by Rwandan Army personnel, more specifically, members of the Presidential Guard, the Para-Commando Battalion and the Reconnaissance Battalion. […]

Count 9 of the Bagosora Indictment charges Bagosora with inhumane acts as a crime against humanity pursuant to Article 6(3) of the Statute for the acts or omissions set out, *inter alia*, in paragraph 6.9.[1675]

727. The Appeals Chamber, Judge Pocar dissenting, observes that paragraph 6.9 of the Indictment clearly indicates that the Prime Minister was first sexually assaulted and subsequently killed. There is no ambiguity in this charge, and no reference to events taking place after the Prime Minister's murder. The Trial Chamber, however, though using confusing and misleading language, convicted Bagosora on the factual basis of mistreatment of the Prime Minister's body after her death.[1676] By definition these two sets of facts are distinct. The Appeals Chamber recalls that "Ɐwğhile it is possible to remedy the vagueness of an indictment by providing the defendant with timely, clear and consistent information detailing the factual basis Ɐunderpinningğ the charges, omitted charges can be incorporated into the indictment only by a formal amendment pursuant to Rule 50 of the Rules".[1677]

728. In these circumstances, the Appeals Chamber, Judge Pocar dissenting, concludes that, by finding Bagosora guilty of mistreating the Prime Minister's body after her death, the Trial Chamber

suffering to civilians viewing her body. Prosecution Response Brief (Bagosora), paras. 244, 245. *See also* AT. 1 April 2011 p. 14. In addition, the Prosecution argues that the Prime Minister was forcibly undressed before her death, which also constituted an inhumane act as a crime against humanity. *See* Prosecution Response Brief (Bagosora), paras. 238, 246-248; AT. 1 April 2011 p. 14.

[1674] Trial Judgement, para. 2219, *referring to The Prosecutor v. Théoneste Bagosora*, Case No. ICTR-96-7-I, Amended Indictment, 12 August 1999 ("Bagosora Indictment" or "Indictment" in this section), p. 60.

[1675] Bagosora Indictment, p. 60.

[1676] *See* Trial Judgement, paras. 2219, 2224.

[1677] *Ntagerura et al.* Appeal Judgement, para. 32. No relevant amendment was ever made to the Bagosora Indictment.

convicted Bagosora for criminal conduct with which he was not charged.[1678] Thus, Bagosora's conviction based on the defilement of the Prime Minister's corpse must be reversed.[1679]

729. In light of the foregoing, the Appeals Chamber need not address the parties' remaining contentions. The Appeals Chamber underscores that the desecration of Prime Minister Uwilingiyimana's corpse constituted a profound assault on human dignity meriting unreserved condemnation under international law.[1680] Such crimes strike at the core of national and human

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[1678] The Appeals Chamber notes that even if the Bagosora Indictment were considered to be merely vague, no curing took place. The Prosecution's post-indictment communications generally referred to the insertion of a bottle into the Prime Minister's body, without indicating whether the act was perpetrated before or after the Prime Minister's death. *See* Prosecution Pre-Trial Brief, Appendix A, Witnesses DA *and* DDF pp. 33, 55. At no point during the trial did the Prosecution allege that its case concerned the treatment of the Prime Minister's body after her death. An examination of the trial transcripts shows that relevant witnesses reported viewing the Prime Minister's assaulted body without testifying to the timing of the sexual abuse on her body. *See* Witness AE, T. 16 December 2003 pp. 42, 43; Witness DA, T. 18 November 2003 p. 49. The Appeals Chamber further notes that, in its Closing Brief, the Prosecution generally referred to the Prime Minister's genital mutilation, without discussing the details of the incident, limiting itself to stating that the evidence of witnesses observing the Prime Minister's mutilated dead body or learning of the mutilation afterwards put Bagosora on notice of the propensity of soldiers to commit acts of sexual violence. *See* Prosecution Closing Brief, paras. 155, 156. The Appeals Chamber also underscores that the broad and indeterminate scope of "other inhumane acts" makes it particularly important that charges brought and convictions entered under this rubric be set out with the utmost clarity, in order to respect the due process rights of the accused.

[1679] The Appeals Chamber notes that the Trial Chamber's conviction was entered solely on the basis of mistreatment of the Prime Minister's corpse, and that no reference is made in the Trial Judgement to allegations of sexual or other assault on the Prime Minister prior to her death. In this circumstance, the Appeals Chamber will not address the Prosecution's submission regarding potential evidence related to events prior to the Prime Minister's death.

[1680] In this regard, the Appeals Chamber notes that, in 1994, many domestic criminal codes, including the Rwandan criminal code, explicitly criminalised acts degrading the dignity of the corpse or interfering with a corpse. Any review of customary international law regarding this issue would need to take into account the large number of jurisdictions that criminalise degrading the dignity of or interfering with corpses. *See*, *e.g.*, Botswana, *Penal Code* (1964) Ch. 08:01, s. 138; Canada, *Criminal Code*, R.S., 1985, c.C-34, s. 182(b); Costa Rica, *Codigo Penal* (1971), art. 207; Ethiopia, *Penal Code*, (1957), art. 287(b); Germany, *Strafgesetzbuch* (*StGB*), 1998, s. 168 (this section was added in 1987); India, *Penal Code* (1860), s. 297; Kenya, *Penal Code* (1970) Ch. 63, s. 137; Japan, *Penal Code* (Act No. 45 of 1907), art. 190; Lithuania, *Criminal Code as amended* (1961), art. 335; New Zealand, *Crimes Act 1961* No. 43, art. 150(b); Nigeria, *Criminal Code Act* (1990), (Ch. 77), s. 242; United States of America (Oregon State), (1971), *ORS.166.087*; Pakistan, *Criminal Code* (1860), s. 297; Rwanda, *Décret-loi N°21/77 du 18 août 1977 instituant le Code pénal*, art. 352; Switzerland, *Code pénal suisse du 21 décembre 1937*, art. 262; Uganda, *Penal Code Act 1950* (Ch. 120), s. 120; Vietnam, *Penal Code* (1985), s. 246. Humanitarian law also prohibits the maltreatment of corpses. *See*, *e.g.*, The Laws of War on Land, Institute of International Law, Oxford, 9 September 1880, art. 19; Manual of the Laws of Naval War, Institute of International Law, Oxford, 9 August 1913, art. 85; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 6 July 1906, art. 3; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 27 July 1929, art. 3; Convention (X) of the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, The Hague, 18 October 1907, art. 16; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287, art. 16; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 12 December 1977, art. 34(1); Yves Sandoz, Christoph Swinarski and Bruno Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (Dordrecht: Martinus Nijhoff Publishers, 1987), para. 1307. The prohibition and criminalisation of maltreating corpses also extends to domestic military law. *See*, *e.g.*, regarding prohibition: Jean-Marie Henckaerts and Louise Doswald-Beck, eds., International Committee for the Red Cross, *Customary International Humanitarian Law*, Vol. II (Practice) (Cambridge: Cambridge University Press, 2009) ("ICRC Study on Customary International Humanitarian Law"), pp. 2663-2667, *referring to*: Australia, *Defence Force Manual* (1994), s. 998; Bosnia and Herzegovina, *Instructions to the Muslim Fighter* (1993), sec. c; Netherlands, *Military Manual* (1993), p. VI-2, s. 1817(1); Philippines, *Military Instructions* (1989), ss. 2, 4; Spain, *Royal Ordinance for the Armed Forces* (1978), art. 140; Switzerland, *Basic Military Manual* (1987), arts. 194(2), 200(f); United Kingdom, *Military Manual* (1958), s. 380; United Kingdom, *Law of Armed Conflict Manual* (1981), Annex A, p. 47, s. 15. *See*, *e.g.*, regarding criminalization: ICRC Study on Customary International Humanitarian Law, pp. 2665-2667, *referring to* Australia, *War Crimes Act*

identity. However, the Appeals Chamber finds, Judge Pocar dissenting, that Bagosora was not charged on this basis, and thus cannot be held legally responsible for this act.

730. Accordingly, the Appeals Chamber, Judge Pocar dissenting, concludes that the Trial Chamber erred in finding that Bagosora was guilty of other inhumane acts as a crime against humanity based on the defilement of the Prime Minister's corpse. The Appeals Chamber therefore reverses, Judge Pocar dissenting, Bagosora's conviction for other inhumane acts as a crime against humanity entered under Count 9 of the Bagosora Indictment with respect to this incident. It will consider the impact, if any, of this finding in the appropriate section of this Judgement.

(1945), s. 3 (xxxv); Ecuador, *Naval Manual* (1989), p. 6-5, s. 6.2.5; Italy, *Wartime Military Penal Code* (1941), art. 197; Netherlands, *Military Criminal Code as amended* (1964), art. 143; New Zealand, *Military Manual* (1992), s. 1704(5); Nigeria, *Manual on the Laws of War* (undated), s. 6; Switzerland, *Basic Military Manual* (1987), arts. 194(2), 200(f); Switzerland*, Military Criminal Code as amended* (1927), art. 140(2); United Kingdom, *Military Manual* (1958), s. 626(b); United States, *Field Manual* (1956), s. 504(c); United States, *Instructor's Guide* (1985), pp. 13, 14; Bangladesh, *International Crimes (Tribunal) Act* (1973), s. 3(2)(e); Ireland, *Geneva Conventions Act as amended* (1962), s. 4(1) and (4). Furthermore, in several trials following the Second World War, accused were convicted on charges of mutilating dead bodies. *See*, *e.g.*, *Kihuchi and Mahuchi case*, United States Military Commission at Yokohama, Japan, 20 April 1946; *Trial of Max Schmid*, United States General Military Government Court at Dachau, Germany, 19 May 1947, United Nations War Crimes Commission Law Reports, vol. XIII, pp. 151, 152; *Takehiko case*, Australian Military Court at Wewak, 30 November 1945. *See also Yochio and Other case*, United States Military Commission at the Mariana Islands, 2-15 August 1946; *Tisato case*, Australian Military Court at Rabaul, 2 April 1946; Law Reports of Trials of War Criminals, prepared by the United Nations War Crimes Commission, 1949, Volume XV, p. 134.

G. Alleged Error Relating to Cumulative Convictions (Ground 5(B))

731. The Trial Chamber found Bagosora guilty of murder, extermination, and persecution as crimes against humanity (Counts 4, 6, and 8, respectively) for the killings of Prime Minister Agathe Uwilingiyimana, Joseph Kavaruganda, Frédéric Nzamurambaho, Landoald Ndasingwa, and Faustin Rucogoza, as well as the killings perpetrated at *Centre Christus*, Kabeza, Kibagabaga Mosque, the Saint Josephite Centre, Karama Hill, Kibagabaga Catholic Church, and Gikondo Parish, and the killings committed between 7 and 9 April 1994 at Kigali area roadblocks.[1681]

732. Bagosora submits that the Trial Chamber erred in law in convicting him of both persecution and extermination as crimes against humanity based on the same killings.[1682] In support of his contention, he argues that the Prosecution conceded this ground in its response brief to Ntabakuze's appeal.[1683]

733. The Prosecution responds that cumulative convictions for extermination and persecution based on the same facts are permissible, and that Bagosora misrepresents its submissions in response to Ntabakuze's appeal.[1684]

734. In reply, Bagosora concedes that cumulative convictions for extermination and persecution based on the same facts are permissible and accordingly withdraws this submission from the present ground of appeal.[1685]

735. The Appeals Chamber confirms that cumulative convictions for extermination and persecution as crimes against humanity based on the same set of facts are permissible since each offence has a materially distinct element not contained in the other.[1686] Extermination requires proof that the accused caused the death of a large number of people, while persecution necessitates

[1681] Trial Judgement, paras. 2186, 2194, 2213, 2258. The Appeals Chamber recalls that it has found that the Trial Chamber erred in convicting Bagosora for the killings of Alphonse Kabiligi and of Augustin Maharangari, as well as the killings perpetrated in Gisenyi town, at Mudende University, and at Nyundo Parish. *See supra*, paras. 549, 573, 632, 633, 638, 659, 695.

[1682] Bagosora Notice of Appeal, p. 13; Bagosora Appeal Brief, para. 330.

[1683] Bagosora Notice of Appeal, para. 23, Ground 5(B); Bagosora Appeal Brief, paras. 331-333, *referring to* Prosecutor's Brief in Response to Aloys Ntabakuze's Appeal, 7 September 2009, paras. 5, 192. The Appeals Chamber recalls that Ntabakuze's appeal case was severed from that of Bagosora and Nsengiyumva on 30 March 2011.

[1684] Prosecution Response Brief (Bagosora), paras. 251, 252. The Prosecution submits that the issue there concerned cumulative convictions of extermination and murder. *See ibid.*, para. 252.

[1685] Bagosora Reply Brief, para. 126. Bagosora also "takes note of the Prosecution's concession that the conviction for murder and extermination for the same acts, as well as for murder and persecution for the same acts, is not allowed". In this regard, the Appeals Chamber notes that Bagosora's assertion that the Prosecution conceded that cumulative convictions for murder and persecution as crimes against humanity were not permissible is ill-founded; the Prosecution unequivocally submitted in its Response Brief to Nsengiyumva's appeal that these convictions were permissible. *See* Prosecution Response Brief (Nsengiyumva), para. 312.

evidence that an act or omission was in fact discriminatory and that the act or omission was perpetrated with the specific intent to discriminate.[1687]

736. Bagosora did not formally raise any error *vis-à-vis* his cumulative convictions for murder and extermination as crimes against humanity. However, the Appeals Chamber recalls its holding above in connection with Nsengiyumva's appeal that cumulative convictions for extermination and murder as crimes against humanity based on the same set of facts are not permissible because murder as a crime against humanity does not contain a materially distinct element from extermination as a crime against humanity.[1688] Accordingly, the Appeals Chamber finds, *proprio motu*, that the Trial Chamber erred in law in convicting Bagosora of both murder and extermination as crimes against humanity based on the same facts. In this context, the Appeals Chamber recalls that the more specific provision should be upheld.[1689] Consequently, the Appeals Chamber concludes that Bagosora's conviction for murder as a crime against humanity under Count 4 of the Bagosora Indictment pursuant to Article 6(3) of the Statute should be reversed, while his conviction for extermination under Count 6 of the Bagosora Indictment should be affirmed.

737. Considering the foregoing, the Appeals Chamber vacates Bagosora's convictions for murder as a crime against humanity under Count 4 of the Bagosora Indictment in relation to the killings of Prime Minister Agathe Uwilingiyimana, Joseph Kavaruganda, Frédéric Nzamurambaho, Landoald Ndasingwa, and Faustin Rucogoza, as well as the killings at committed at *Centre Christus*, Kibagabaga Mosque, Kabeza, the Saint Josephite Centre, Karama Hill, Kibagabaga Catholic Church, and Gikondo Parish. The Appeals Chamber will determine the impact, if any, of this finding on Bagosora's sentence in the following section.

[1686] *Nahimana et al.* Appeal Judgement, paras. 1026, 1027; *Stakić* Appeal Judgement, paras. 364, 367. *See also Krajišnik* Appeal Judgement, paras. 390, 391.
[1687] *Nahimana et al.* Appeal Judgement, paras. 1026, 1027; *Stakić* Appeal Judgement, paras. 364, 367.
[1688] *See supra*, para. 416.
[1689] *See supra*, fn. 961.

H. Impact of the Appeals Chamber's Findings on Sentencing (Ground 6)

738. Bagosora submits that the sentence imposed should be reduced "as will be determined by the Appeals Chamber upon review of the conviction".[1690] The Prosecution responds that in the absence of any elaboration of the error committed by the Trial Chamber, Bagosora's general prayer should be summarily dismissed.[1691]

739. The Appeals Chamber recalls that it has vacated all of Bagosora's convictions for murder as a crime against humanity under Count 4 of the Bagosora Indictment.[1692] It has also reversed Bagosora's convictions pursuant to Article 6(1) of the Statute for the killing of Augustin Maharangari, and his convictions pursuant to Article 6(3) of the Statute for the killing of Alphonse Kabiligi, the killings of the Belgian peacekeepers murdered before his visit to Camp Kigali, and the killings in Gisenyi town, at Nyundo Parish, and at Mudende University. Furthermore, the Appeals Chamber has set aside the finding that Bagosora was responsible under Article 6(1) of the Statute for ordering crimes committed at Kigali area roadblocks. It has nonetheless found him responsible as a superior pursuant to Article 6(3) of the Statute for those crimes. Finally, the Appeals Chamber has reversed, Judge Pocar dissenting, Bagosora's conviction for crimes against humanity (other inhumane acts) pursuant to Article 6(3) of the Statute for the defilement of the corpse of Prime Minister Agathe Uwilingiyimana.

740. The Appeals Chamber considers that the fact that Bagosora is no longer found guilty pursuant to Article 6(1) of the Statute does not reduce his culpability. The Appeals Chamber stresses in this regard that, in the circumstances of this case, superior responsibility under Article 6(3) of the Statute is not to be seen as less grave than criminal responsibility under Article 6(1) of the Statute. However, the Appeals Chamber, Judges Pocar and Liu dissenting, considers that the reversal of Bagosora's convictions for the killings of the peacekeepers murdered before his visit to Camp Kigali, Augustin Maharangari, Alphonse Kabiligi, and the killings perpetrated in Gisenyi town, at Nyundo Parish, and at Mudende University, as well as for the defilement of the corpse of the Prime Minister result in a reduction of his overall culpability which calls for a reduction of his sentence.

[1690] Bagosora Notice of Appeal, p. 14; Bagosora Appeal Brief, para. 334.
[1691] Prosecution Response Brief (Bagosora), para. 253.
[1692] The Appeals Chamber has affirmed Bagosora's conviction for murder under Count 5 for the killing of the peacekeepers. *See supra*, paras. 630, 634.

741. The Appeals Chamber, Judges Pocar and Liu dissenting, therefore grants Bagosora's Sixth Ground of Appeal, sets aside his sentence of imprisonment for the remainder of his life, and sentences him to a term of 35 years of imprisonment.

V. DISPOSITION

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

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

NOTING the written submissions of the parties and their oral arguments presented at the appeal hearing on 30 March, 31 March, and 1 April 2011;

SITTING in open session;

WITH RESPECT TO ANATOLE NSENGIYUMVA'S APPEAL

GRANTS Nsengiyumva's Second, Fourth, and Tenth Grounds of Appeal in part and **REVERSES** his convictions for genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II for aiding and abetting the crimes at Bisesero in the second half of June 1994;

GRANTS Nsengiyumva's Third and Sixth Grounds of Appeal in part, **SETS ASIDE** the finding that he is responsible under Article 6(1) of the Statute for ordering the killings in Gisenyi town on 7 April 1994, and, Judges Meron and Robinson dissenting, **FINDS** him responsible for those killings as a superior under Article 6(3) of the Statute;

GRANTS Nsengiyumva's Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Grounds of Appeal in part, and **REVERSES** his convictions for genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killings at Mudende University on 8 April 1994 and at Nyundo Parish between 7 and 9 April 1994, as well as his convictions for crimes against humanity and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killing of Alphonse Kabiligi;

GRANTS Nsengiyumva's Fourteenth Ground of Appeal in part, and **REVERSES** his conviction for murder as a crime against humanity in relation to the killings in Gisenyi town on 7 April 1994;

DISMISSES Nsengiyumva's appeal in all other respects;

AFFIRMS, Judges Meron and Robinson dissenting, Nsengiyumva's convictions for genocide, extermination and persecution as crimes against humanity, and violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for the killings in Gisenyi town on 7 April 1994;

SETS ASIDE the sentence of life imprisonment imposed on Nsengiyumva by the Trial Chamber, and, Judges Meron and Robinson dissenting, **IMPOSES** a sentence of 15 years of imprisonment, subject to credit being given under Rules 101(C) and 107 of the Rules for the period he has already spent in detention since his arrest on 27 March 1996;

WITH RESPECT TO THÉONESTE BAGOSORA'S APPEAL

GRANTS Bagosora's Third Ground of Appeal in part, and **REVERSES** his convictions for crimes against humanity and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killings of Alphonse Kabiligi, Augustin Maharangari, and the Belgian peacekeepers murdered before his visit to Camp Kigali, as well as his convictions for genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killings at Nyundo Parish between 7 and 9 April 1994;

GRANTS Bagosora's Second Ground of Appeal in part, and **REVERSES** his convictions for genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killings in Gisenyi town on 7 April 1994 and at Mudende University on 8 April 1994;

GRANTS Bagosora's Fourth Ground of Appeal in part, **SETS ASIDE** the finding that he is responsible under Article 6(1) of the Statute for ordering the crimes at Kigali area roadblocks between 7 and 9 April 1994, and **FINDS** him responsible for those crimes as a superior under Article 6(3) of the Statute;

GRANTS, Judge Pocar dissenting, Bagosora's Fifth Ground of Appeal in part, and **REVERSES**, Judge Pocar dissenting, his conviction for other inhumane acts as a crime against humanity in relation to the defilement of the corpse of Prime Minister Agathe Uwilingiyimana;

GRANTS, Judges Pocar and Liu dissenting, Bagosora's Sixth Ground of Appeal relating to sentencing;

DISMISSES Bagosora's appeal in all other respects;

REVERSES *proprio motu* Bagosora's conviction for murder as a crime against humanity under Count 4;

AFFIRMS Bagosora's convictions for:

- genocide, extermination and persecution as crimes against humanity, and violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killings at Kibagabaga Mosque, Kabeza, the Saint Josephite Centre, Karama Hill, Kibagabaga Catholic Church, Gikondo Parish, and Kigali area roadblocks;

- extermination and persecution as crimes against humanity, and violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killings of Prime Minister Agathe Uwilingiyimana, Joseph Kavaruganda, Frédéric Nzamurambaho, Landoald Ndasingwa, Faustin Rucogoza, as well as the killings at *Centre Christus*;

- murder as a crime against humanity and violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killings of the Belgian peacekeepers who were still alive when Bagosora visited Camp Kigali;

- rape as a crime against humanity in relation to the rapes committed at Kigali area roadblocks, the Saint Josephite Centre, and Gikondo Parish;

- other inhumane acts as crimes against humanity in relation to the stripping of female refugees at the Saint Josephite Centre and the "sheparding" of refugees to Gikondo Parish, where they were killed;

- outrages upon personal dignity as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the rapes at Kigali area roadblocks, the Saint Josephite Centre, and Gikondo Parish;

SETS ASIDE the sentence of life imprisonment imposed on Bagosora by the Trial Chamber, and, Judges Pocar and Liu dissenting, **IMPOSES** a sentence of 35 years of imprisonment, subject to credit being given under Rules 101(C) and 107 of the Rules for the period he has already spent in detention since his arrest on 9 March 1996;

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

ORDERS, in light of time served, Nsengiyumva's immediate release; and

ORDERS that, in accordance with Rules 103(B) and 107 of the Rules, Bagosora is to remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State where

his sentence will be served.

Judges Meron and Robinson append a joint dissenting opinion.
Judge Güney appends a partially dissenting opinion.
Judge Pocar appends a dissenting opinion.
Judges Pocar and Liu append a joint dissenting opinion.

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

______________________	______________________	______________________
Judge Theodor Meron, Presiding	Judge Patrick Robinson	Judge Mehmet Güney

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Judge Fausto Pocar	Judge Liu Daqun

Done this fourteenth day of December 2011 at Arusha, Tanzania.

VI. JOINT DISSENTING OPINION OF JUDGES MERON AND ROBINSON

1. In this Judgement, the Appeals Chamber enters convictions against Nsengiyumva, as a superior under Article 6(3) of the Statute, for the actions of three soldiers linked to killings in Gisenyi town on 7 April 1994.[1] The Majority's approach is based on, *inter alia*, its conclusion that the Trial Chamber did not err in finding that Nsengiyumva had knowledge of the soldiers' actions. In our view however, no reasonable Trial Chamber could find that this was the only reasonable inference to be drawn from the circumstantial evidence on the record. Accordingly, we respectfully disagree with the Majority's reasoning and with its decision to affirm Nsengiyumva's convictions as a superior with respect to the killings in Gisenyi town.

2. The Trial Chamber found that Nsengiyumva had knowledge of the killings in Gisenyi town based on: (i) its finding that he ordered the attacks;[2] (ii) its general characterisation of the crimes for which he was convicted as "organised military operations requiring authorisation, planning and orders from the highest levels"; (iii) its view that military authorities would be particularly vigilant on 7 April 1994 given the death of President Habyarimana and resumption of hostilities with the RPF; and (iv) the proximity of the crime scene to Gisenyi military camp.[3] The Majority upholds the Trial Chamber's findings that Nsengiyumva possessed the relevant knowledge, noting the Trial Chamber's conclusions regarding "organised military operations" at a time when military authorities would be vigilant, and the proximity of the attacks to Gisenyi military camp.[4]

3. We first observe that with respect to the Gisenyi town attacks, the Appeals Chamber has concluded that the Trial Chamber erred in finding Nsengiyumva responsible for ordering under Article 6(1), and instead enters convictions as a superior under Article 6(3).[5] We also note that the Appeals Chamber has reversed all of Nsengiyumva's convictions related to other crime sites.[6] The gravamen of the Majority's opinion is thus limited to Nsengiyumva's responsibility for the actions of three soldiers who, disguised in civilian clothes, joined a large group of civilians in perpetrating killings in the immediate aftermath of President Habyarimana's death.[7]

4. The Trial Chamber's general conclusion regarding "organised military operations" was based on the pattern of crimes for which it convicted Nsengiyumva, some involving a much larger number

[1] Appeal Judgement, paras 303, 742.
[2] Trial Judgement, para. 1065.
[3] Trial Judgement, para. 2082.
[4] Appeal Judgement, para. 298 (internal quotations omitted).
[5] Appeal Judgement, paras 284, 303.
[6] *See* Appeal Judgement, para. 742.
[7] *See* Appeal Judgement, para. 298; Trial Judgement, paras 1016, 1064.

of subordinates than those at issue in Gisenyi town.[8] It may well be reasonable to infer that a commander at a time of heightened vigilance would have to know about significant numbers of his subordinates participating in multiple crimes. However, all of Nsengiyumva's other convictions establishing a pattern of "organised military operations" have been reversed, and thus are no longer relevant to his knowledge of the Gisenyi town crimes. In this context, we consider it implausible that the only reasonable inference to be drawn from the limited remaining circumstantial evidence is that Nsengiyumva would have reason to know that three lower-level soldiers from one of the camps in his zone of command would disguise themselves in civilian clothes and commit crimes near their base.[9] It is entirely reasonable to interpret the remaining evidence on the record as demonstrating that the three soldiers took action without Nsengiyumva's knowledge. Finding otherwise comes dangerously close to imposing strict liability on military commanders for any and all crimes committed by subordinates, simply by virtue of the superior-subordinate relationship.[10]

5. In our view the geographical proximity of the killings to Gisenyi military camp is insufficient to justify the Majority's findings as to Nsengiyumva's knowledge. The evidence considered by the Trial Chamber was that the Gisenyi town killings were carried out primarily by a group of civilians, and that the three soldiers who joined this group were disguised as civilians.[11] Absent additional evidence, we cannot see how the only reasonable inference to be drawn from evidence regarding a group of individuals dressed as civilians committing crimes near Gisenyi military camp is that Nsengiyumva knew that three soldiers from one of the bases under his command would join these civilians.

6. We acknowledge that if Witness DO's testimony that the soldiers involved in the Gisenyi town killings met with Nsengiyumva is considered, the Majority's conclusion as to Nsengiyumva's knowledge would be reasonable.[12] Such reliance on Witness DO's testimony, however, is not possible. The Trial Chamber explicitly declined to accept Witness DO's "account of Nsengiyumva's participation in meetings in the absence of corroboration."[13] It noted, *inter alia*, Witness DO's status as an accomplice witness serving a life sentence in Rwanda, that Witness DO provided accounts that were at times definitively incorrect and contradictory,[14] and that he may

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[8] *See*, *e.g*., Trial Judgement, paras 1248-1252, 1823-1824, 2258.
[9] We note that in the days immediately following President Habyarimana's death, Nsengiyumva would have had multiple responsibilities, many of which might take precedence over accounting for three soldiers in one camp who were absent for a period during one day.
[10] *See Prosecutor v. Delali} et al*., Case No. IT-96-21-A, Appeal Judgement, 20 February 2001, para. 239.
[11] Trial Judgement, paras 1016, 1064.
[12] Trial Judgement, paras 1015, 1017.
[13] Trial Judgement, para. 1058.
[14] Trial Judgement, para. 1055.

have had an "interest in distancing himself from the crimes."[15] Just as the Appeals Chamber must give deference to the Trial Chamber's acceptance of certain parts of Witness DO's very problematic testimony, so must it defer to the Trial Chamber's conclusion that other parts of Witness DO's testimony are not credible.[16] We also note that although the three soldiers may have interacted with an officer from the Gisenyi military camp while committing crimes,[17] this does not demonstrate that the only reasonable inference available was that Nsengiyumva knew of their actions. The mere fact that the officer was within Nsengiyumva's chain of command does not establish knowledge.

7. We underscore that we would support finding that *one* reasonable interpretation of the evidence is that Nsengiyumva knew that the three soldiers would participate in the Gisenyi town killings. We cannot agree, however, with the Majority's finding that the Trial Chamber was reasonable in concluding that this was the *only* reasonable inference to be drawn from the circumstantial evidence. Accordingly, we respectfully dissent.

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

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Judge Theodor Meron	Judge Patrick Robinson

Dated this fourteenth day of December 2011 at Arusha, Tanzania

[Seal of the Tribunal]

[15] Trial Judgement, para. 1061.
[16] *See* Trial Judgement, paras 1058-1062.
[17] Appeal Judgement, para. 294.

VII. PARTIALLY DISSENTING OPINION OF JUDGE GÜNEY

1. In its Judgement in relation to Nsengiyumva, the Appeals Chamber is of the view that the failure of the Prosecution to specifically plead the Mudende University attack in the Indictment does not establish that it was not part of its case.[1] I am unable to agree with the Majority for the following reasons.

2. I believe that the Prosecution's failure to specifically plead the Mudende University attack in the Indictment and the Particulars suggests that it was not, as such, part of the Prosecution case at the time when the Indictment was issued and the Particulars were provided. The Prosecution is expected to know its case before proceeding to trial.[2] Considering that the Particulars were filed over two years before the commencement of trial, it is possible that in the period leading up to the trial, the Prosecution's strategy developed and that its case evolved.

3. I note that the Prosecution: (i) was in possession of Witness HV's statement as early as 1995;[3] (ii) failed to incorporate the relevant information into the Indictment in 1999; (iii) failed to add the information to the Indictment when specifically required to do so in 2000;[4] and (iv) eventually linked Witness HV's statement to Nsengiyumva only in the Supplement to the Prosecution Pre-Trial Brief in 2002.[5] In my view, the mere fact that Witness HV's statement was disclosed to the Defence in 1999 did not free the Prosecution from its obligation to add a specific reference to the events at Mudende University in the Indictment. Finally, I find that the Majority's position on Mudende University is not consistent with its approach to Bisesero. The Appeals Chamber finds that Nsengiyumva was not charged with the events of Bisesero and overturns the conviction on this basis.[6] I believe the failure of the Prosecution to include the Mudende University attack in the Indictment to be equally, if not more, serious than the one of Bisesero.

4. Consequently, I believe that when the Prosecution decided to pursue Nsengiyumva's criminal responsibility for the Mudende University attack, it should have sought leave to amend the Nsengiyumva Indictment pursuant to Rule 50 of the Rules in order to incorporate this charge.[7] It did not. I therefore consider that Nsengiyumva was not charged with the Mudende University attack.

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[1] Appeals Judgement, para. 163.
[2] *Muvunyi* Appeal Judgement, para. 18; *Ntagerura et al.* Appeal Judgement, para. 27; *Kupreškić et al*. Appeal Judgement, para. 92.
[3] *See* Exhibit DNS60C (Witness HV's Statement of 28 November 1995).
[4] Decision Ordering the Filing of Particulars, para. 23; Particulars, p. 3.
[5] *See* Supplement to the Prosecution Pre-Trial Brief, pp. 14-17.
[6] Appeals Judgement, paras. 173-186.
[7] *See Nahimana et al.* Appeal Judgement, para. 325; *Ntagerura et al.* Appeal Judgement, para. 32.

5. Since a trial chamber can only convict the accused of crimes that are charged in the indictment,[8] I would have found that the Trial Chamber erred in convicting Nsengiyumva for the crimes perpetrated at Mudende University, allowed this part of his appeal and reversed Nsengiyumva's convictions on the basis that he was not charged with the Mudende University killings. Although I would consequently not have discussed Nsengiyumva's ground of appeal in relation to the assessment of the evidence, I agree that the Trial Chamber also erred in this respect.

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

Judge Mehmet Güney

Done this fourteenth day of December 2011 at Arusha, Tanzania.

ƑSeal of the Tribunalğ

[8] *Kalimanzira* Appeal Judgement, para. 46; *Rukundo* Appeal Judgement, para. 29; *Ntagerura et al.* Appeal Judgement, para. 28.

VIII. DISSENTING OPINION OF JUDGE POCAR

1. In this Judgement, the Appeals Chamber reverses Bagosora's conviction for other inhumane acts as a crime against humanity entered under Count 9 of the Bagosora Indictment for the defilement of the corpse of Prime Minister Agathe Uwilingiyimana on the basis that the Trial Chamber convicted Bagosora for criminal conduct with which he was not charged.[1] I respectfully disagree with the reasoning and the conclusions of the Majority of the Appeals Chamber and its consequent reversal of Bagosora's conviction for this incident.

2. The Majority of the Appeals Chamber finds that, "underlying Bagosora's contentions is the fundamental question of whether he was charged with a serious attack on human dignity constituting the inhumane acts he was ultimately convicted for under Count 9 of his Indictment."[2] However, the Majority misconstrues Bagosora's submissions on appeal. In his appeal, Bagosora does not challenge that he was charged for this incident as other inhumane acts as a crime against humanity, or that he was charged with post-mortem sexual assault. Rather, he challenges the definition of sexual assault. More specifically, he argues that sexual assault can only be committed against a living person because the prohibition on sexual assault is meant to protect the sexual integrity of a person and there is no sexual integrity after death.[3] Bagosora asserts that, because the Prime Minister was already dead at the time of her sexual assault, he could only have been convicted for outrage upon a corpse.[4] Bagosora submits, however, that he was not charged with outrage upon a corpse and that accordingly he should not have been convicted for sexual assault of the Prime Minister after her death.[5]

3. Accordingly, Bagosora challenges characterisation of the crime and whether the underlying act was capable of fulfilling the elements of the crime charged rather than whether he was charged with, and on notice of, the allegation that the Prime Minister's corpse was defiled. The Majority's approach mischaracterises Bagosora's arguments and amounts to a *proprio motu* consideration of the issue, thus allowing the Majority to avoid the fundamental question.

4. Furthermore, even if the Appeals Chamber had been seised of the notice issue, I am of the view that the Majority's reading of the Indictment is unduly restrictive in finding that Bagosora was not charged with the sexual assault of the Prime Minister after her death as other inhumane acts as a

[1] Appeal Judgement, paras. 728, 730, 742.
[2] Appeal Judgement, para. 725.
[3] Bagosora Appeal Brief, paras. 325-327.
[4] Bagosora Notice of Appeal, para. 5(A); Bagosora Appeal Brief, paras. 324, 328.
[5] Bagosora Notice of Appeal, para. 5(A); Bagosora Appeal Brief, para. 323.

crime against humanity. As the Appeals Chamber noted,[6] Bagosora was found guilty pursuant to Count 9 of the Bagosora Indictment on the basis of, *inter alia*, paragraph 6.9 of his Indictment,[7] which reads:

> […] Prime Minister Agathe Uwilingiyimana was tracked down, arrested, sexually assaulted and killed by Rwandan Army personnel, more specifically, members of the Presidential Guard, the Para-Commando Battalion and the Reconnaissance Battalion. […]

The Majority finds that "paragraph 6.9 of the Indictment clearly indicates that the Prime Minister was first sexually assaulted and subsequently killed. There is no ambiguity in this charge, and no reference to events taking place after the Prime Minister's murder."[8] However, paragraph 6.9 of the Indictment does not clearly specify whether the Prime Minister was sexually assaulted before or after she was killed. As such, I do not consider that the wording of paragraph 6.9 of the Indictment limits the charge against Bagosora to the sexual assault of the Prime Minister prior to her death. I am of the view that the allegation charged can reasonably be read, and was indeed so read by the Trial Chamber and the parties, to encompass the sexual assault of the Prime Minister after her death.

5. I also note that the allegation in paragraph 6.9 of the Indictment was further supported by the inclusion in the Prosecution's Pre-Trial Brief of the summary of Witness DA's expected evidence which made reference to him seeing a bottle that was inserted into the Prime Minister's vagina.[9] The summary indicated that this witness's evidence would relate, *inter alia*, to the allegation of other inhumane acts as a crime against humanity.[10] Similarly, the summary of Witness DDF's expected evidence in the Prosecution's Pre-Trial Brief also made reference to the insertion of a bottle into the Prime Minister's vagina and it was indicated that this summary would relate to Bagosora and to murder and other inhumane acts as crimes against humanity.[11] Although none of the summaries indicates whether the act was perpetrated before or after the Prime Minister's death, I consider that the Indictment, along with these materials, provided Bagosora with sufficient information to properly prepare his defence against this allegation.

6. Furthermore, just as he did not raise any issue of notice for this incident on appeal, at trial Bagosora did not raise any challenge regarding the pleading of the sexual assault on the Prime Minister. In particular, he did not object that he was not on notice regarding the bottle inserted into

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[6] Appeal Judgement, para. 726.
[7] Trial Judgement, para. 2219, *referring to* Bagosora Indictment, p. 60.
[8] Appeal Judgement, para. 727.
[9] Prosecution Pre-Trial Brief, Summary of Witness DA's anticipated evidence, p. 33.
[10] *Idem*.
[11] Prosecution Pre-Trial Brief, Summary of Witness DDF's anticipated evidence, p. 55.

the Prime Minister's vagina when Witnesses DA and AE testified to that effect.[12] Bagosora also had the opportunity to cross-examine these two witnesses at length.[13] In these circumstances, I am of the view that Bagosora understood the charge against him and suffered no prejudice from the fact that paragraph 6.9 of the Indictment did not specify whether the sexual assault on the Prime Minister occurred prior to or after her death. I disagree that Bagosora was not on notice that he stood charged with the sexual assault of the Prime Minister as an inhumane act as a crime against humanity.

7. In the present case, the Majority attributes to Bagosora arguments which he simply did not make, as Bagosora does not challenge that he was not charged for the insertion of a bottle into the Prime Minister's vagina as other inhumane acts as a crime against humanity. Unlike his initial co-appellants, Bagosora deliberately chose not to appeal any questions relating to the indictment or lack of notice. Thus, the Majority raises *proprio motu* a highly contentious procedural issue, which was neither a point of contention on appeal nor at trial, without even giving the parties the opportunity to address it at the appeal hearing. In effect, the Majority substitutes its own reading of the Indictment for that of the Trial Chamber. In this respect, I believe the Majority of the Appeals Chamber not only arrives at the wrong conclusion, but also exceeds its jurisdiction and undermines the strict standard of appellate review.

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

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Judge Fausto Pocar

Done this fourteenth day of December 2011 at Arusha, Tanzania.

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[12] Witness AE, T. 16 December 2003 pp. 42, 43; Witness DA, T. 18 November 2003 p. 49.

[13] Witness AE, T. 16 December 2003 pp. 43-90, T. 17 December 2003 pp. 1-33; Witness DA, T. 5 December 2003 pp. 1-47, T. 8 December 2003 pp. 1-89, T. 10 December 2003 pp. 2-26.

IX. JOINT DISSENTING OPINION OF JUDGES POCAR AND LIU

1. In this Judgement, the Majority quashes Bagosora's sentence of life imprisonment and imposes a term of 35 years.[1] The only justification offered for such a monumental reduction in sentence is the decision to vacate a number of Bagosora's convictions.[2] In so doing, the Majority focuses exclusively on the reversal of a limited part of the Trial Chamber's verdict. In our view, such an approach is erroneous and contrary to past practice.[3] It disregards the catalogue of convictions that have been unanimously upheld on appeal and ignores the extreme gravity of Bagosora's culpability for:

(i) genocide, extermination and persecution as crimes against humanity, and violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killings at Kibagabaga Mosque, Kabeza, the Saint Josephite Centre, Karama Hill, Kibagabaga Catholic Church, Gikondo Parish, and Kigali area roadblocks;

(ii) extermination and persecution as crimes against humanity, and violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killings of Prime Minister Agathe Uwilingiyimana, Joseph Kavaruganda, Frédéric Nzamurambaho, Landoald Ndasingwa, Faustin Rucogoza, as well as the killings at *Centre Christus*;

(iii) murder as a crime against humanity and violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killings of the Belgian peacekeepers who were still alive when Bagosora visited Camp Kigali;

(iv) rape as a crime against humanity in relation to the rapes committed at Kigali area roadblocks, the Saint Josephite Centre, and Gikondo Parish;

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[1] Appeal Judgement, paras. 741, 742.

[2] Appeal Judgement, paras. 739, 740. In this regard, we note that in other cases, the Appeals Chamber has upheld sentences of life imprisonment despite its decision to quash significant convictions. *See*, *e.g.*, *Renzaho* Appeal Judgement, paras. 620-622. We further note that the Appeals Chamber imposed a 40-year sentence of imprisonment on Siméon Nchamihigo, notwithstanding its decision to overturn the majority of his most significant convictions. *See Nchamihigo* Appeal Judgement, paras. 402-405.

[3] Notably, in the *Renzaho* Appeal Judgement, the Appeals Chamber found that although "[the] reversals concern[ed] very serious crimes", it nevertheless considered "that the crimes for which Renzaho remains convicted are extremely grave. These crimes include genocide, murder as a crime against humanity, and murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. Consequently, [it found] that the reversals [did] not impact the sentence imposed by the Trial Chamber." *See Renzaho* Appeal Judgement, para. 620.

(v) other inhumane acts as crimes against humanity in relation to the stripping of female refugees at the Saint Josephite Centre and the "sheparding" of refugees to Gikondo Parish, where they were killed; and

(vi) outrages upon personal dignity as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the rapes at Kigali area roadblocks, the Saint Josephite Centre, and Gikondo Parish.

2. The Majority appears to concede that superior responsibility under Article 6(3) of the Statute is no less culpable than individual criminal responsibility under Article 6(1) of the Statute.[4] However, notwithstanding this concession, the Majority fails to provide persuasive reasons to justify its decision to significantly reduce the sentence for these numerous crimes. Such reduction may appear to suggest that, while the Majority cautiously articulates the principle of parity for convictions under Articles 6(1) and 6(3) of the Statute, it does not apply this principle in practice.

3. In the three decisive days from 7 to 9 April 1994, Bagosora was the acting Minister of Defence. As such, he assumed power of the highest military authority and exercised effective control over the Rwandan Armed Forces.[5] In this context, it is notable that the response to the immediate aftermath of the assassination of the President was undertaken by the military, which was the primary authority still functioning in the country at the time.[6] Thus, on the cusp of the carnage, Bagosora was in a position to intercede and, as a high ranking official with the means to avert the atrocities, it was incumbent on him to prevent the killings of countless civilians in the widespread attacks enumerated above, which he knew would ensue.

4. But, Bagosora declined to intervene.

5. Instead, he presided over the mass murder, mutilation, and rape of countless civilians whose sole offence was their ethnicity or political persuasion. Moreover, his abject failure to prevent these terrible atrocities during these first formative hours almost certainly set the pitch for the brutal bloodletting that ensued without pause in the barbaric hundred days of genocide.

6. In light of the above, we respectfully dissent and would have affirmed Bagosora's sentence of life imprisonment.

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[4] Appeal Judgement, para. 740. We note in this regard that the Majority appears to limit such concession to "the circumstances of this case". In our view, such parity always exists between Articles 6(1) and 6(3) of the Statute. Otherwise, foot soldiers would face the most stringent sentences while those at the top of the chain of command would be deemed less blameworthy, which we believe would be unjust.

[5] Appeal Judgement, paras. 432, 438-441, 443, 452, 459, 524.

[6] Appeal Judgement, para. 465. *See also* Appeal Judgement, para. 443.

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

Judge Fausto Pocar | Judge Liu Daqun

Done this fourteenth day of December 2011 at Arusha, Tanzania.

ƑSeal of the Tribunalğ

X. ANNEX A: PROCEDURAL HISTORY

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

A. Notices of Appeal and Briefs

2. Trial Chamber I of the Tribunal rendered the judgement in this case on 18 December 2008 and issued its written Trial Judgement in English on 9 February 2009. The French translation of the Trial Judgement was filed on 10 December 2009.[1]

1. Nsengiyumva's Appeal

3. On 15 January 2009, the Pre-Appeal Judge granted Nsengiyumva's request for an extension of time to file his notice of appeal from the filing of the written Trial Judgement.[2] On 2 March 2009, the Pre-Appeal Judge denied Nsengiyumva's request for a further extension of time to file his notice of appeal from the filing of the French translation of the Trial Judgement, but granted him leave to file his appeal brief within 45 days of the filing of the French translation of the Trial Judgement, and to file his brief in reply, if any, no later than 15 days from the date of the filing of the French translation of the Prosecution's response brief to his appeal.[3]

4. Nsengiyumva filed his initial notice of appeal on 13 March 2009.[4] On 16 April 2009, the Pre-Appeal Judge ordered Nsengiyumva to file a revised version of his initial notice of appeal in full compliance with Rule 108 of the Rules and the Practice Direction on Formal Requirements for Appeals from Judgement within seven days.[5] Nsengiyumva filed a first amended version of his notice of appeal on 23 April 2009.[6] On 25 May 2009, he was ordered to file a revised version of his first amended notice of appeal in compliance with the formal requirements applicable on appeal set out in the 16 April 2009 Decision,[7] which he did on 26 May 2009.[8]

5. On 11 January 2010, the Pre-Appeal Judge granted Nsengiyumva's request that the 45-day time-limit for filing his appeal brief starts running from 17 December 2009, the date on which he was served with the French translation of the Trial Judgement.[9] On 19 January 2010, Nsengiyumva

[1] *Jugement portant condamnation*, 10 December 2009.
[2] Decision on Anatole Nsengiyumva's Motion for Extension of Time for Filing Notice of Appeal, 15 January 2009.
[3] Decision on Anatole Nsengiyumva's Motion for Extension of Time for Filing Appeal Submissions, 2 March 2009.
[4] Nsengiyumva's Notice of Appeal, 13 March 2009.
[5] Decision on Prosecution Motion Requesting Compliance with Requirements for Filing Notices of Appeal, 16 April 2009 ("16 April 2009 Decision").
[6] Amended Nsengiyumva's Notice of Appeal, 23 April 2009.
[7] Decision on Prosecution Motion Regarding Nsengiyumva's Amended Notice of Appeal Filed on 23 April 2009, 25 May 2009.
[8] Nsengiyumva's Second Amended Notice of Appeal, 26 May 2009.
[9] Decision on Anatole Nsengiyumva's Motion for Extension of Time for Filing His Appeal Brief, 11 January 2010.

was granted an extension of 10,000 words for his appeal brief based on the particularly broad range of the factual and legal issues, some of which being of significant complexity or requiring the discussion of considerable parts of the voluminous trial record.[10]

6. On 29 January 2010, the Appeals Chamber granted in part Nsengiyumva's motion for leave to amend his second amended notice of appeal subsequent to receiving the French translation of the Trial Judgement.[11] Nsengiyumva filed his third amended notice of appeal on 1 February 2010, together with a confidential version of his appeal brief.[12]

7. The Prosecution filed its response brief to Nsengiyumva's appeal on 15 March 2010.[13]

8. On 23 June 2010, Nsengiyumva was granted leave to file his brief in reply within 15 days of service of the French version of the Prosecution's response brief to his appeal.[14] Nsengiyumva filed his brief in reply on 29 June 2010.[15]

2. Bagosora's Appeal

9. On 7 January 2009, Bagosora was granted leave to file his notice of appeal no later than 30 days from the date of the filing of the French translation of the Trial Judgement; his appeal brief no later than 75 days from the date of the filing of his notice of appeal; and his brief in reply, if any, no later than 15 days from the date of the filing of the French translation of the Prosecution's response brief to his appeal.[16]

10. Bagosora filed his notice of appeal on 8 January 2010,[17] and his appeal brief on 24 March 2010.[18] The Prosecution responded to Bagosora's appeal on 3 May 2010.[19] Bagosora filed his brief in reply on 27 July 2010.[20]

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[10] Decision on Anatole Nsengiyumva's Motion for Extension of Word Limit for His Appeal Brief, 19 January 2010.
[11] Decision on Anatole Nsengiyumva's Motion for Leave to Amend his Notice of Appeal, 29 January 2010. *See also* Order for Filing Supplement to Nsengiyumva's Motion for Leave to Amend the Notice of Appeal and for Expedited Filing, 19 January 2010.
[12] Nsengiyumva's Third Amended Notice of Appeal Pursuant to Appeals Chamber Decision of 28 January 2010, 1 February 2010; Nsengiyumva's Appeal Brief, confidential, 1 February 2010. Nsengiyumva filed the public version of his confidential appeal brief on 2 February 2010.
[13] Prosecutor's Brief in Response to Anatole Nsengiyumva's Appeal, 15 March 2010. The French translation was filed on 9 June 2010, and served on Nsengiyumva on 14 June 2010. *See* Proof of Service to Detainees, signed by Nsengiyumva on 14 June 2010.
[14] Decision on Anatole Nsengiyumva's Motion for Extension of Time for Filing his Brief in Reply, 23 June 2010.
[15] Brief in Reply to Respondent's Response Brief in Anatole Nsengiyumva's Appeal, 29 June 2010.
[16] Decision on Théoneste Bagosora's Motion for Extension of Time for Filing Appeal Submissions, 15 January 2009.
[17] Notice of Appeal Appellant: Théoneste Bagosora, originally filed in French on 8 January 2010, English translation filed on 2 March 2010.
[18] Théoneste Bagosora's Appellant's Brief, originally filed in French on 24 March 2010, English translation filed on 23 June 2010.

B. Severance of Ntabakuze's Case

11. The appeal case of Ntabakuze was initially joined to that of Bagosora and Nsengiyumva. Ntabakuze's case was severed from that of Bagosora and Nsengiyumva by oral decision of 30 March 2011.[21]

C. Assignment of Judges

12. On 14 January 2009, noting Bagosora's motion for extension of time to file his notice of appeal, the Presiding Judge of the Appeals Chamber assigned the following Judges to hear Bagosora's appeal: Judge Patrick Robinson (Presiding), Judge Mohamed Shahabuddeen, Judge Mehmet Güney, Judge Fausto Pocar, and Judge Liu Daqun.[22] Judge Robinson also designated Judge Mehmet Güney as Pre-Appeal Judge.[23]

13. On 15 January 2009, noting Nsengiyumva's motion for extension of time to file his notice of appeal, the Presiding Judge of the Appeals Chamber assigned the following Judges to hear Nsengiyumva's appeal: Judge Patrick Robinson (Presiding), Judge Mohamed Shahabuddeen, Judge Mehmet Güney, Judge Fausto Pocar, and Judge Liu Daqun.[24] Judge Mehmet Güney was designated as Pre-Appeal Judge.[25]

14. On 16 January 2009, the Presiding Judge of the Appeals Chamber assigned a single bench to hear all appeals filed in the *Bagosora et al.* case, composed of Judge Patrick Robinson (Presiding), Judge Mohamed Shahabuddeen, Judge Mehmet Güney, Judge Fausto Pocar, and Judge Liu Daqun, and designated Judge Mehmet Güney as Pre-Appeal Judge.[26]

15. On 27 January 2009, Judge Robinson replaced Judge Mohamed Shahabuddeen with Judge Theodor Meron.[27] On 17 November 2011, Judge Theodor Meron took office as Presiding Judge of the Appeals Chamber and accordingly replaced Judge Patrick Robinson as Presiding Judge in this case.

[19] Prosecutor's Brief in Response to Théoneste Bagosora's Appeal, 3 May 2010. The French translation was filed on 12 July 2010.
[20] Théoneste Bagosora's Reply to Prosecutor's Brief in Response, originally filed in French on 27 July 2010, English translation filed on 8 November 2010.
[21] AT. 30 March 2011 p. 2.
[22] Order Assigning Judges to a Case Before the Appeals Chamber and Assigning a Pre-Appeal Judge, 14 January 2009.
[23] *Idem.*
[24] Order Assigning Judges to a Case Before the Appeals Chamber and Assigning a Pre-Appeal Judge, 15 January 2009.
[25] *Idem.*
[26] Order Assigning Judges to a Case Before the Appeals Chamber and Assigning a Pre-Appeal Judge, 16 January 2009.
[27] Order Replacing a Judge in a Case Before the Appeals Chamber, 27 January 2009.

D. Judicial Notice

16. On 29 July 2010, Nsengiyumva filed a motion requesting the Appeals Chamber to take judicial notice of certain paragraphs of the *Bagaragaza* Sentencing Judgement.[28] The Appeals Chamber dismissed his motion on 29 October 2010.[29]

E. Motions for the Admission of Additional Evidence on Appeal

17. On 29 July 2010, Nsengiyumva filed two motions for the admission of additional evidence,[30] which the Appeals Chamber dismissed on 21 March 2011.[31]

18. On 25 August 2010, Bagosora requested the Appeals Chamber to order and compel Marcel Gatsinzi to testify *viva voce* in this case pursuant to Rule 115 of the Rules.[32] On 7 February 2011, the Appeals Chamber dismissed the motion, but ordered, *proprio motu* and pursuant to Rules 98 and 107 of the Rules, that Marcel Gatsinzi will be heard by it in relation to Bagosora's contention that the Trial Chamber violated his fair trial rights by failing to enforce a subpoena for Marcel Gatsinzi's live testimony.[33]

F. Appeal Hearing

19. The Appeals Chamber issued a Scheduling Order for the hearing of the appeals in this case on 27 January 2011.[34] On 10 February 2011, the Appeals Chamber issued an order to summon Marcel Gatsinzi to testify as a Chamber's witness in the context of the appeal hearing scheduled in this case.[35] It issued the order setting the timetable for the appeal hearing on 11 February 2011,[36] and an order inviting the parties to address a number of specific issues on 7 March 2011.[37] An amended timetable was issued on 29 March 2011 as a result of the postponement of Ntabakuze's oral arguments.[38] The parties' oral arguments were heard at the appeal hearing held on

[28] Nsengiyumva's Motion on Judicial Notice Pursuant to Rule 94 of the Rules of Procedure and Evidence, 29 July 2010.
[29] Decision on Anatole Nsengiyumya's Motion for Judicial Notice, 29 October 2010.
[30] Nsengiyumva's Confidential Motion on Additional Evidence in Relation to Witness DO Pursuant to Rule 115 of the Rules of Procedure and Evidence, confidential, 29 July 2010, *as corrected by* Corrigendum to Nsengiyumva's Confidential Motion on Additional Evidence in Relation to Witness DO Pursuant to Rule 115 of the Rules of Procedure and Evidence, 4 August 2010; Nsengiyumva's Urgent Motion on Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence (Witness Ignace Bagilishema), 29 July 2010.
[31] Decision on Anatole Nsengiyumva's Motions for the Admission of Additional Evidence, 21 March 2011.
[32] Appellant Théoneste Bagosora's Motion Seeking Leave to Present Additional Evidence, originally filed in French on 25 August 2010, English translation filed on 14 September 2010.
[33] Decision on Théoneste Bagosora's Motion for Admission of Additional Evidence, 7 February 2011.
[34] Scheduling Order, 27 January 2011.
[35] Order to Summon a Witness, 10 February 2011.
[36] Order Setting the Timetable for the Appeal Hearing, 11 February 2011.
[37] Order for the Preparation of the Appeal Hearing, 7 March 2011.
[38] Further Scheduling Order, 29 March 2011.

30 March, 31 March, and 1 April 2011 in Arusha, Tanzania. Marcel Gatsinzi was heard as a Chamber's witness at the hearing held in Arusha, Tanzania, on 30 March 2011.[39]

[39] AT. 30 March 2011 pp. 2-48.

XI. ANNEX B: CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. Tribunal

AKAYESU Jean-Paul

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

BAGARAGAZA Michel

The Prosecutor v. Michel Bagaragaza, Case No. ICTR-05-86-S, Sentencing Judgement, 17 November 2009 ("*Bagaragaza* Sentencing Judgement").

BAGILISHEMA Ignace

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Théoneste Bagosora et al. v. The Prosecutor, Case No. ICTR-98-41-A, Decision on Prosecution Motion Requesting Compliance with Requirements for Filing Notices of Appeal, 16 April 2009 ("16 April 2009 Decision").

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The Prosecutor v. Théoneste Bagosora et al., Case No. ICTR-98-41-T, Decision on Nsengiyumva Motion for Adjour[n]ment Due to Illness of the Accused, 17 November 2006 ("Decision Denying Adjournment").

The Prosecutor v. Théoneste Bagosora et al., Case No. ICTR-98-41-T, Decision on Nsengiyumva Motion for Exclusion of Evidence Outside the Scope of the Indictment, 15 September 2006 ("Decision on Exclusion of Evidence").

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The Prosecutor v. Théoneste Bagosora et al., Case No. ICTR-98-41-I, Decision on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, 29 November 2001 ("Decision on Protective Measures of 29 November 2001").

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KAJELIJELI Juvénal

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KAMBANDA Jean

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

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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 ("*Karemera et al.* Appeal Decision of 5 October 2007").

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NTAKIRUTIMANA Elizaphan and Gérard

The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004 ("*Ntakirutimana* Appeal Judgement").

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Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Judgement, 3 March 2000 ("*Blaškić* Trial Judgement").

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

"ČELEBIĆI"

Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement").

DERONJIĆ Miroslav

Prosecutor v. Miroslav Deronjić, Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005 ("*Deronjić* Judgement on Sentencing Appeal").

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Appeal Judgement”).

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Prosecutor v. Sefer Halilovi}, Case No. IT-01-48-T, Judgement, 16 November 2005 (“*Halilovi}* Trial Judgement”).

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Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (“*Kordić and Čerkez* Appeal Judgement”).

KRAJIŠNIK Momčilo

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A, Judgement, 17 March 2009 (“*Krajišnik* Appeal Judgement”).

KRSTI] Radislav

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KUNARAC et al.

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KUPREŠKIĆ et al.

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KVOČKA et al.

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Prosecutor v. Milomir Staki}, Case No. IT-97-24-A, Judgement, 22 March 2006 ("*Staki}* Appeal Judgement").

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TADI] Du{ko

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B. Defined Terms and Abbreviations

AT.	Transcript from hearings on appeal in the present case. All references are to the official English transcript, unless otherwise indicated.
Bagosora Appeal Brief	*Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Théoneste Bagosora's Appellant's Brief, 24 March 2010
Bagosora Closing Brief	*The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, *Corrigendum Mémoire final de la Défense de Théoneste Bagosora*, 25 May 2007
Bagosora Indictment	*The Prosecutor v. Théoneste Bagosora*, Case No. ICTR-96-7-I, Amended Indictment, 12 August 1999
Bagosora Notice of Appeal	*Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Notice of Appeal Appellant: Théoneste Bagosora, 8 January 2010
Bagosora Reply Brief	*Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Théoneste Bagosora's Reply to Prosecutor's Brief in Response Pursuant to Article 24 of the Statute of the Tribunal and Rule 113 of the Rules of Procedure and Evidence, 27 July 2010
CDR	*Coalition pour la défense de la République*
ESM	*École supérieure militaire* (Kigali)
ESO	*École des sous-officiers* (Butare)
FAR	*Forces armées rwandaises* (Rwandan Armed Forces)
MRND	*Mouvement révolutionnaire national pour la démocratie et le développement* Ƒbefore 5 July 1991ğ *Mouvement républicain national pour la démocratie et le développement* Ƒafter 5 July 1991ğ
Nsengiyumva Appeal Brief	*Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Nsengiyumva's Appeal Brief pursuant to Rule 111 of the Rules of Procedure and Evidence, public redacted version, 1 February 2010

Nsengiyumva Closing Brief	*The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Nsengiyumva Defence Confidential Unredacted Final Brief Pursuant to Rule 86(B) of the Rules of Procedure and Evidence, confidential, 23 April 2007, *as corrected by* Corrigendum to the - Nsengiyumva Defence Confidential Unredacted Final Brief Pursuant to Rule 86(B) of the Rules of Procedure and Evidence Filed on 23rd April 2007, confidential, 25 May 2007
Nsengiyumva Indictment *or* Indictment	*The Prosecutor v. Anatole Nsengiyumva*, Case No. ICTR-96-12-I, Amended Indictment, 12 August 1999
Nsengiyumva Notice of Appeal	*Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Nsengiyumva's Third Amended Notice of Appeal pursuant to Article 24, Rule 108 of the Rules of Procedure and Evidence, 1 February 2010
Nsengiyumva Reply Brief	*Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Brief in Reply to Respondent's Response Brief in Anatole Nsengiyumva's Appeal, 29 June 2010, *as corrected by* Corrigendum to Brief in Reply to Respondent's Response Brief in Anatole Nsengiyumva's Appeal, 04 August 2010
Nsengiyumva Witness List	*The Prosecutor v. Anatole Nsengiyumva*, Case No. ICTR-98-41-T, List of Defence Witnesses to be Called During the Trial, confidential, 3 January 2005
Particulars	*The Prosecutor v. Anatole Nsengiyumva*, Case No. ICTR-96-12-I, Particulars [Pursuant to the Decision on the Defence Motion on Defects in the Form of the Indictment Dated 15 May 2000], 25 May 2000
Prosecution	Office of the Prosecutor
Prosecution Closing Brief	*The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Prosecutor's Final Trial Brief, public redacted version, dated 1 March 2007, filed 2 March 2007
Prosecution Pre-Trial Brief	*The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-I, Prosecutor's Pre-Trial Brief, 21 January 2002
Prosecution Response Brief (Bagosora)	*Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Prosecutor's Brief in Response to Théoneste Bagosora's Appeal, 03 May 2010

Prosecution Response Brief (Nsengiyumva)	*Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Prosecutor's Brief in Response to Anatole Nsengiyumva's Appeal, 15 March 2010
PSD	*Parti social démocrate*
RPF	Rwandan (also Rwandese) Patriotic Front
Rules	Rules of Procedure and Evidence of the Tribunal
SRSG	Special Representative for the Secretary-General of the United Nations
Statute	Statute of the Tribunal established by Security Council Resolution 955 (1994)
Supplement to the Prosecution Pre-Trial Brief *or* Supplement	*The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-I, The Prosecutor's Pre-Trial Brief Revision in Compliance with the Decision on Prosecutor's Request for an Extension of the Time Limit in the Order of 23 May, 2002, and with the Decision on the Defence Motion Challenging the Pre-Trial Brief, Dated 23 May, 2002, 7 June 2002
T.	Transcript from hearings at trial in the present case. All references are to the official English transcript, unless otherwise indicated
Trial Chamber	Trial Chamber I of the Tribunal
Tribunal *or* ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994
UNAMIR	United Nations Assistance Mission for Rwanda
WVSS-P	Witnesses and Victims Support Section of the Prosecution