UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Florence Ndepele Mwachande Mumba
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Adama Dieng**

Judgement of: **23 May 2005**

JUVÉNAL KAJELIJELI
(Appellant)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-98-44A-A

JUDGEMENT

Counsel for the Appellant:

Prof. Lennox S. Hinds
Prof. Sherrie L. Russell-Brown
Ms. Juliette Chinaud

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. James Stewart

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal" respectively) is seized of an appeal by Juvénal Kajelijeli against the Judgement and Sentence rendered by Trial Chamber II on 1 December 2003 in the case of *The Prosecutor v. Juvénal Kajelijeli* ("Trial Judgement").[1]

I. INTRODUCTION

A. The Appellant

2. The Appellant, Juvénal Kajelijeli, was born on 26 December 1951 in Mukingo Commune, Rwinzovu Sector, Ruhengeri Prefecture, Rwanda.[2] The Appellant was *bourgmestre* of Mukingo Commune from 1988 to 1993 and was re-appointed to that post on 26 June 1994, remaining until mid-July 1994.[3] As *bourgmestre*, he exercised important responsibilities at the commune level: he represented executive power, had authority over civil servants, and could request intervention by commune police forces.[4] Furthermore, the Appellant was a leader of the *Interahamwe* with control over the *Interahamwe* in Mukingo Commune, and he had influence over the *Interahamwe* in Nkuli Commune.[5] The Appeals Chamber notes that the Amended Indictment, which forms the basis of the convictions, does not charge the Appellant for the 1994 genocide in Rwanda in its entirety.[6] The Trial Chamber's convictions rather ascribe him criminal responsibility related to selected incidents.

B. The Judgement and Sentence

3. The Trial Chamber convicted the Appellant pursuant to Article 6(1) of the Statute for ordering, instigating, and aiding and abetting crimes, as well as Article 6(3) for failing to prevent crimes committed in the communes of Nkuli, Mukingo, and Kigome, in particular at Byangabo Market, Busogo Hill, the Munyemvano compound and the Ruhengeri Court of Appeal in April 1994.[7] These crimes included genocide (Count 2) and extermination as a crime against humanity

[1] For ease of reference, two annexes are appended to this Judgement: Annex A - Procedural Background and Annex B - Cited Materials/Defined Terms.
[2] Trial Judgement, para. 5.
[3] Trial Judgement, paras. 6, 739.
[4] Trial Judgement, para. 277.
[5] Trial Judgement, para. 404.
[6] *See generally Kajelijeli*, Amended Indictment, 25 January 2001.
[7] Trial Judgement, paras. 817-845, 896-907.

(Count 6).[8] With respect to the events at Byangabo Market, he was further convicted of direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute (Count 4).[9] The Trial Chamber found that the Appellant was present at various sites where he directed *Interahamwe* mobs to massacre Tutsis in an effort to rid the Mukingo and Nkuli Communes of them.[10] He also played an instrumental role in transporting members of the *Interahamwe* militia and providing them with weapons.[11] This resulted in the deaths of more than 300 people.[12] The Trial Chamber sentenced the Appellant to imprisonment for the remainder of his life for the convictions on each of Counts 2 and 6, and to imprisonment for fifteen years for his conviction on Count 4, with all sentences to run concurrently, and with credit for time served.[13]

C. The Appeal

4. As indicated in the Appellant's Amended Notice of Appeal ("Amended Notice of Appeal") and his Brief on Appeal ("Appellant's Brief"), the Appellant is appealing against the convictions, the sentence, and the Trial Chamber's denial of three of his motions. He requests the Appeals Chamber to overturn the verdicts on Counts 2, 4, and 6 and release him, or, in the alternative, to order a retrial and release him on bail, or, in the alternative, to quash the sentence of imprisonment for life and replace it with a determinate sentence.[14] The Appellant has divided his grounds of appeal into four categories: errors of law, errors of fact, denial of motions, and appeal against the sentence. Within these categories, the Appeals Chamber has identified twenty-five grounds of appeal. All grounds of the appeal are reviewed and considered in the present Judgement.

D. Standards for Appellate Review

5. The Appeals Chamber recalls some of the requisite standards for appellate review pursuant to Article 24 of the Statute. This provision addresses errors of law which invalidate the decision and errors of fact which occasion a miscarriage of justice. It is settled jurisprudence in the Appeals Chamber of the ICTR and the ICTY that:

> A party alleging that there is an error of law must advance arguments in support of the contention and explain how the error invalidates the decision; but, if the arguments do not support the

[8] Trial Judgement, para. 942.
[9] Trial Judgement, paras. 856-861, 942.
[10] *See, e.g.*, Trial Judgement, paras. 832, 988.
[11] *See, e.g.*, Trial Judgement, paras. 824, 834.
[12] *See* Trial Judgement, paras. 822, 824, 834.
[13] Trial Judgement, paras. 968, 969.
[14] Amended Notice of Appeal, p. 28; Appellant's Brief, p. 5.

> 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.[15]

As regards errors of fact, it is well established that the Appeals Chamber will not lightly overturn findings of fact made by a Trial Chamber. "Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice."[16]

6. A party may not merely repeat on appeal arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted such error as to warrant the intervention of the Appeals Chamber.[17] Arguments of a party which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[18]

7. In order for the Appeals Chamber to assess a party's arguments on appeal, the appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the Judgement to which the challenges are being made.[19] Further, "the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies."[20]

8. Finally, it should be recalled that the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing.[21] Furthermore, the Appeals Chamber will dismiss arguments which are evidently unfounded without providing detailed reasoning.[22]

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[15] *Vasiljević* Appeal Judgement, para. 6 (internal citations omitted). *See also, e.g., Blaškić* Appeal Judgement, para. 14; *Niyitegeka* Appeal Judgement, para. 7; *Rutaganda* Appeal Judgement, para. 20; *Musema* Appeal Judgement, para. 16.
[16] *Krstić* Appeal Judgement, para. 40 (internal citations omitted). *See also, e.g., Blaškić* Appeal Judgement, paras. 16-19; *Niyitegeka* Appeal Judgement, para. 8.
[17] *Niyitegeka* Appeal Judgement, para. 9.
[18] *Niyitegeka* Appeal Judgement, para. 9. *See also, e.g., Blaškić* Appeal Judgement, para. 13; *Rutaganda* Appeal Judgement, para. 18.
[19] Practice Direction on Formal Requirements for Appeals from Judgement, para. 4(b). *See also Blaškić* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 10; *Vasiljević* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 19; *Kayishema and Ruzindana* Appeal Judgement, para. 137.
[20] *Vasiljević* Appeal Judgement, para. 12. *See also Blaškić* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 10; *Kunarac et al.* Appeal Judgement, paras. 43, 48.
[21] *Niyitegeka* Appeal Judgement, para. 11. *See also, e.g., Rutaganda* Appeal Judgement, para. 19; *Kunarac et al.* Appeal Judgement, para. 47.
[22] *Niyitegeka* Appeal Judgement, para. 11. *See also, e.g., Blaškić* Appeal Judgement, para. 13; *Vasiljević* Appeal Judgement, para. 12; *Rutaganda* Appeal Judgement, para. 19; *Kunarac et al.* Appeal Judgement, para. 48.

II. ALLEGED INCORRECT APPLICATION OF LAW TO THE FACTS OF THE CASE (GROUND OF APPEAL 4)

9. Under this ground of appeal, the Appellant alleges distinct errors relating to (i) the impact of trauma on the testimony of witnesses, (ii) use of different standards in the assessment of evidence, and (iii) misapplication of Rule 90(G) of the Tribunal's Rules of Procedure and Evidence ("Rules"). The Appeals Chamber considers each of these sub-grounds in turn.

A. Impact of Trauma

10. The Appellant submits that the Trial Chamber erred as a matter of law in accepting that the impact of trauma could explain "inconsistent witness statements, conflicts, contradictions and gaps in memory" of Prosecution witnesses upon whose testimony the Trial Chamber relied in its Judgement.[23] The Appellant concedes that some Prosecution witnesses who were victims or witnesses of atrocities may have experienced trauma in recollecting such events and that their evidence may have been affected by this trauma.[24] The Appellant argues, however, that none of the Prosecution witnesses upon whose testimony the Trial Chamber based its findings falls into this witness category and that, consequently, the impact of trauma cannot account for their inconsistent evidence.[25]

11. The Prosecution responds that the Trial Chamber was entitled to take the impact of trauma into account when assessing the reliability of Prosecution witnesses, and observes that the impugned passage from the Trial Judgement appears in a general section addressing matters of credibility.[26]

12. In making his submission on this point, the Appellant points to paragraph 37 of the Trial Judgement.[27] The impugned text reads as follows:

> The Chamber notes that many of the witnesses who have testified before it have seen and experienced atrocities. They, their relatives or their friends have in several cases, been the victims of such atrocities. The Chamber notes that recounting and revisiting such painful experiences is likely to affect the witness's ability to recount the relevant events in a judicial context. The Chamber also notes that some of the witnesses who testified before it may have suffered—and may have still continued to suffer—stress-related disorders.[28]

[23] Amended Notice of Appeal, para. 11; Appellant's Brief, paras. 61, 62.
[24] Appellant's Brief, para. 62.
[25] Appellant's Brief, para. 62.
[26] Respondent's Brief, para. 76.
[27] *See* Amended Notice of Appeal, para. 11; Appellant's Brief, para. 61.
[28] Trial Judgement, para. 37.

13. The Appeals Chamber considers that there is no error in the Trial Chamber's statements regarding the impact of trauma. First, despite the Appellant's suggestion, it was clearly proper for the Trial Chamber to address the issue of trauma in the first place: many of the witnesses on both sides had, for instance, directly observed atrocities, and others had been victims.[29] Indeed, several Defence witnesses specifically testified that they were traumatized (and this alone would justify the Trial Chamber's discussion, even if the Prosecution witnesses had not also suffered trauma).[30] Second, the Trial Chamber's commentary on this issue consists principally of direct quotations from the ICTY Appeals Chamber's Judgements in the *Kupreški}* and *^elebi}i* cases, which held that the Trial Chamber should take the likely distorting effects of trauma into account when considering witness testimony; that the Trial Chamber is free nonetheless to accept the fundamental features of testimony despite the impact of trauma; and that trauma may sometimes explain minor inconsistencies in testimony without necessarily impugning the credibility of the testimony as to the major events that occurred.[31] These principles are sound, and the Trial Chamber was correct to cite them.

B. Alleged Use of Different Standards in the Assessment of Evidence

14. The Appellant submits that the Trial Chamber erred in law when it based its Judgement "in whole" upon "the inconsistent testimony of murderers, thieves, and embezzlers, most of whom had been sanctioned by or arrested and detained by the Appellant" while "discrediting" the Appellant's alibi evidence on the ground that the Defence witnesses were biased in favour of the Appellant.[32] The Appellant argues that this demonstrates the Trial Chamber's application of a "double standard" in evaluating the evidence.[33]

15. The Appellant highlights that six Prosecution witnesses[34] upon whose evidence, in his view, the Judgement is based have been sanctioned or arrested by him and argues that they would "likely bear a grudge" against him and, therefore, that they were "likely to testify falsely".[35] The Appellant disputes the Trial Chamber's holding that it could not find any link between the criminal conduct of

[29] *See, e.g.*, Trial Judgement, paras. 498-508 (witnesses from both sides testifying regarding the murder of Rukara); 652-655, 662-665 (testimonies of rape victims).
[30] Trial Judgement, paras. 542, 580, 589.
[31] *See* Trial Judgement, paras. 37-40.
[32] Amended Notice of Appeal, paras. 12-17; Appellant's Brief, paras. 63-79.
[33] Appellant's Brief, para. 79.
[34] The Appellant does not identify who these six witnesses are (*see* Appellant's Brief, para. 64), but he does name the following seven Prosecution witnesses as "common criminals most of whom the Appellant himself had sanctioned or arrested and imprisoned": GBV, GBE, GBH, GAO, GDD, GDQ, GAP. *See* Appellant's Brief, para. 63 n. 3.
[35] Appellant's Brief, para. 79.

the witnesses, his role in sanctioning them, and any reason why the witnesses would bear a grudge against him or wish to testify against him falsely.[36]

16. Conversely, the Appellant notes, the Trial Chamber "chose to discredit" his alibi witnesses, Defence Witnesses LMR1 and JK312, because he was a close relative of one and had saved the life of the other.[37]

17. The Prosecution responds that it was the Trial Chamber's responsibility to weigh the evidence and choose between divergent testimonies and that, by raising the present issue, the Appellant is merely attempting to reargue his case before the Appeals Chamber.[38] The Prosecution highlights that the Trial Chamber considered the matter of bias of witnesses and provided careful reasons for its assessment of witnesses' credibility.[39]

18. A review of the Trial Chamber's assessment of the credibility of Prosecution witnesses reveals that the Chamber was alert to the issue of a possible bias of the witnesses against the Appellant and that it considered it in the overall assessment of their credibility.[40] The Appeals Chamber also recalls that having considered the allegations of the witnesses' bias, the Trial Chamber decided to treat the testimony of one of them, Witness GBV, with caution.[41] The bare allegation that a witness is a "common criminal" who is biased against the Appellant because the Appellant arrested or sanctioned the person for his alleged misdeeds does not, in itself, diminish the creditworthiness of the witness's testimony. In the view of the Appeals Chamber, the Appellant's submissions under the present ground of appeal do not show that the Trial Chamber erred in the assessment of the credibility of the witnesses alleged by the Appellant to be biased against him.

19. Furthermore, the Appellant's argument that the Trial Chamber "discredited" his alibi evidence because Defence witnesses were biased in his favour is based upon a misconstruction of the Trial Chamber's findings. The Appellant alleges that the Trial Chamber did not find Defence Witness JK312 credible, "in the main part", because the Appellant had once saved his life.[42] However, a review of the relevant portion of the Trial Judgement reveals that the Trial Chamber found the testimony of Witness JK312 not credible as regards the alibi on grounds of the external and internal inconsistency of his testimony as well as his demeanour during testimony; the fact that

[36] Amended Notice of Appeal, para. 13; Appellant's Brief, para. 65.
[37] Amended Notice of Appeal, para. 15; Appellant's Brief, paras. 67, 79.
[38] Respondent's Brief, para. 77.
[39] *See* Respondent's Brief, para. 77 n. 32.
[40] *See, e.g.*, Trial Judgement, paras. 146-156
[41] *See* Trial Judgement, para. 147.
[42] Amended Notice of Appeal, para. 15.

the Appellant once saved the witness was mentioned only as a "final point" in the detailed analysis of his testimony by the Trial Chamber.[43] As regards the Appellant's argument concerning Defence Witness LMR1, the Appeals Chamber observes that while the Trial Chamber noted the close relationship between Witness LMR1 and the Appellant, it did not reject the witness's testimony on this ground, but, rather, found that its scope was insufficient to preclude the Appellant's involvement in the alleged criminal acts.[44]

20. Finally, in his Appellant's Brief, the Appellant also argues that the Trial Chamber's findings with respect to the credibility of Defence Witnesses MEM and RGM are "other examples of its application of a double standard" in evaluating Defence evidence in the Trial Judgement.[45] Having considered the Appellant's arguments on this point as well as the relevant portions of the record, the Appeals Chamber does not consider the Trial Chamber's assessment of the credibility of these two witnesses as shedding any light on the allegation of a double standard in the Trial Chamber's evaluation of Defence evidence.

21. Accordingly, the appeal under this sub-ground is dismissed.

C. Alleged Misapplication of Rule 90(G) of the Rules

22. Lastly under this ground of appeal, the Appellant submits that the Trial Chamber erred in law in dismissing his attack on the credibility of Prosecution witnesses, particularly Witnesses GBV, GBE, GAO, GAS, and GAP, on the basis that the Appellant did not confront the witnesses with the allegations of a motive to give false testimony.[46] The Appellant charges that the Trial Chamber "misapplied this requirement from Rule 90(G)" of the Rules as amended on 27 May 2003 which stipulates, *inter alia*, the following:

> (ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.[47]

23. The Appellant alleges that in holding him to such a standard the Trial Chamber committed a legal error because this standard only came into force after the close of his trial. The Appellant recalls that during his trial Rule 90(G) of the Rules merely provided, in relevant part, that "[c]ross-examination shall be limited to points raised in the examination-in-chief or matters affecting the

[43] *See* Trial Judgement, para. 223; *see also* detailed discussion of Witness JK312's credibility *infra* Chapter V.
[44] *See* Trial Judgement, paras. 224, 227. Nevertheless, the Trial Chamber stated that it will consider "the full evidence adduced in relation to the alibi when making its findings." *Id.*, para. 231.
[45] Trial Judgement, para. 70.
[46] Amended Notice of Appeal, para. 18; Appellant's Brief, paras. 80-93.
[47] Appellant's Brief, para. 87.

credibility of the witness."[48] Therefore, the Appellant argues, he was under no obligation to put to the witnesses the allegations of a motive to give false testimony.[49]

24. The Prosecution responds that the Trial Chamber did not hold the Appellant to the standard prescribed in Rule 90(G)(ii) as amended after the close of the Appellant's trial.[50] Rather, the Prosecution submits, the Trial Chamber applied a measure of fairness and common sense.[51] In the view of the Prosecution, it is unfair to a witness to make allegations to discredit him or her without putting those allegations to the witness for a response.[52] Moreover, the Prosecution submits that a Trial Chamber cannot assess such allegations if it has not had the opportunity to observe the witness's reaction to them.[53]

25. As the Appellant correctly points out, in relation to Prosecution Witnesses GBV, GBE, GAO, GAS, and GAP, the Trial Chamber noted that the Appellant did not put to these witnesses his allegations concerning their credibility. The Trial Chamber addressed this point in paragraph 157 of the Judgement:

> The Chamber finds that there were many instances in which the Defence made no reference to these allegations about Prosecution witnesses during cross-examination of these witnesses, thus not giving the Witness an opportunity to answer on the record. This factor has been taken into account by the Chamber in making its findings on the Defence attack on the credibility of Prosecution Witnesses.

26. In the view of the Appeals Chamber, when weighing the Appellant's allegations going to the credibility of the Prosecution witnesses, the Trial Chamber was entitled to take into account the fact that the Appellant did not put such allegations to the witnesses for their reactions. Indeed, without the benefit of observing the witnesses' reactions to such allegations, the Trial Chamber was not in a position to determine whether there was merit in the Appellant's charges. Contrary to the Appellant's claim, there is no indication that the Trial Chamber based its position on this matter on the version of Rule 90(G) which came into effect after the Appellant's trial. Accordingly, this sub-ground of appeal is dismissed.

[48] Appellant's Brief, para. 90.
[49] Appellant's Brief, para. 92.
[50] Respondent's Brief, para. 78.
[51] Respondent's Brief, para. 78.
[52] Respondent's Brief, para. 79.
[53] Respondent's Brief, para. 79.

III. ALLEGED ERROR IN REJECTING EVIDENCE OF DEFENCE'S TUTSI WITNESSES THAT THE APPELLANT SAVED THEIR LIVES (GROUND OF APPEAL 5)

27. The Appellant submits that the Trial Chamber erred in law and fact when it decided to reject the testimony of Defence Witnesses RHU21, RHU26, ZLA, and JK312 that he had saved their lives.[54] The Appellant further contends that the Trial Chamber erred in finding that the evidence brought by these four Defence witnesses "did not sufficiently impeach the Prosecution evidence in connection with the *mens rea* element to make out a charge of genocide."[55] Specifically, the Appellant contends that the evidence that he was providing refuge to the four Tutsi witnesses on 8 April 1994, discredits Prosecution Witness GBH's claim that the Appellant and the *Interahamwe* were searching for Tutsi survivors to kill on the same date.[56]

28. The Prosecution responds that the Trial Chamber gave careful consideration to the testimony of the four witnesses in question, but concluded that even if their evidence were accepted, it would not have had a bearing on the Trial Chamber's final conclusion that the Appellant was involved in the killing of a large number of Tutsi victims with the specific intent to commit genocide.[57] The Prosecution observes that the Trial Chamber's findings in this regard were based on the testimony of several Prosecution witnesses, and not only on the testimony of Witness GBH, as alleged by the Appellant.[58] The Prosecution submits that the Trial Chamber's conclusion that the Appellant had the specific intent to commit genocide was correct because the Trial Chamber interpreted the Appellant's words and deeds against a demonstrated background or context of general purposeful action, instead of merely weighing those specific acts and deeds against each other.[59] According to the Prosecution, it was therefore reasonable for the Trial Chamber to hold that the Appellant's attacks on and killings of Tutsis outweighed any actions that he might have taken to help a very small number of Tutsi individuals.[60]

29. In the view of the Appeals Chamber, a review of the Trial Judgement reveals that the Trial Chamber did not reject the testimony of Witnesses RHU21, RHU26, ZLA, and JK312, as the

[54] Amended Notice of Appeal, paras. 19, 20; Appellant's Brief, para. 99.
[55] Amended Notice of Appeal, para. 20. *See also* Appellant's Brief, para. 99.
[56] Appellant's Brief, para. 102.
[57] Respondent's Brief, para. 85.
[58] Respondent's Brief, para. 85.
[59] Respondent's Brief, para. 91.
[60] Respondent's Brief, paras. 90, 91.

Appellant suggests. The Trial Chamber carefully considered the evidence of all four witnesses,[61] but found that it did not suffice to impeach the Prosecution's evidence regarding the Appellant's participation in the killings of Tutsis, and his specific intent to commit genocide.[62] The Trial Chamber's conclusion that the Appellant participated in the killing of Tutsis and that he had the specific intent to commit genocide was based on evidence of a series of Prosecution witnesses, and not only, as the Appellant suggests, on the evidence of Witness GBH.[63] Therefore, the Appellant's contention that the testimony of Witnesses RHU21, RHU26, ZLA, and JK312 outweighs and discredits the testimony of Witness GBH, is not persuasive. Accordingly, the Appeals Chamber finds that the Appellant has not demonstrated that the Trial Chamber's findings in this regard were unreasonable or erroneous and dismisses the present ground of appeal to this extent.

30. The Appeals Chamber also notes the Appellant's submission under this ground of appeal that the Trial Chamber erred in fact by mischaracterizing his Mukingo residence as belonging to Defence Witness SMR2 by referring to it as "her home", "her place", and "her house".[64] The Appellant argues that, in doing so, the Trial Chamber ignored his role in providing refuge to the Tutsi refugees,[65] and credited Witness SMR2, instead of him, with saving their lives.[66] The Appeals Chamber considers this submission below in connection with the appeal against the sentence where the Appellant has also raised this argument.[67]

[61] Trial Judgement, paras. 99-113.
[62] Trial Judgement, para. 115.
[63] *See* Trial Judgement, paras. 483, 624 (GAP); paras. 400, 491, 492, 499, 519, 531, 534, 545, 621, 695 (GAO); paras. 529, 708, 712-714 (GDQ); paras. 546, 553 (GBV); para. 591 (GBG and ACM); paras. 465, 469, 472, 476, 606-609, 695, 697 (GDD).
[64] Appellant's Brief, paras. 107, 108.
[65] Amended Notice of Appeal, paras. 21-23; Appellant's Brief, paras. 107, 108.
[66] Appellant's Brief in Reply, para. 26.
[67] *See infra* Chapter XXIII.

IV. ALLEGED ERROR IN REJECTING THE APPELLANT'S ARGUMENT THAT PROSECUTION WITNESSES WHO WERE ARRESTED BY HIM HAD A MOTIVE TO TESTIFY FALSELY (GROUND OF APPEAL 6)

31. The Appellant submits that the Trial Chamber erred in law and fact in finding that Prosecution Witnesses GBE, GBH, GAO, GDD, GDQ, and GBV were credible witnesses in spite of the fact that these witnesses had a motive to testify falsely against him.[68]

32. The Prosecution responds that the allegations of tainted motivation stem mainly from the Appellant's testimony and that, in most cases, the Appellant did not put these allegations to the witnesses in cross-examination, leaving the Trial Chamber without the opportunity to assess the witnesses' reactions to such allegations.[69]

33. The Appeals Chamber has already addressed this matter above under Ground of Appeal 4.[70] A review of the Trial Chamber's assessment of the credibility of Prosecution witnesses reveals that the Trial Chamber was alert to the issue of a possible bias of the witnesses against the Appellant and that it considered this matter in the overall assessment of their credibility.[71] The Appeals Chamber also recalls that having considered the allegations of the witnesses' bias, the Trial Chamber decided to treat the testimony of one of them, Witness GBV, with caution.[72] The bare allegation that a witness is biased against the Appellant because the Appellant arrested or sanctioned the person for his alleged misdeeds does not, in itself, diminish the credit of the witness's testimony. The Appeals Chamber finds that the Appellant's submissions under the present ground of appeal do not show that the Trial Chamber erred in the assessment of the credibility of the witnesses alleged by the Appellant to be biased against him.

34. Under this ground of appeal, the Appellant also argues that the credibility of Witnesses GAO, GDD, and GDQ suffered for additional reasons. The Appellant contends that since these three witnesses are incarcerated in Rwanda, they had a motive to testify falsely against him in exchange for a lighter sentence.[73] In the view of the Appeals Chamber, this is an unsubstantiated assertion in which the Appellant fails to identify any error on the part of the Trial Chamber.

[68] Amended Notice of Appeal, paras. 24-36; Appellant's Brief, paras. 110-130.
[69] Respondent's Brief, para. 93.
[70] *See supra* Chapter II.
[71] *See, e.g.*, Trial Judgement, paras. 146-156, 467, 704.
[72] *See* Trial Judgement, para. 147.
[73] Appellant's Brief, paras. 121, 124, 128.

35. The Appellant further submits that the Trial Chamber erred in finding Witness GAO credible, notwithstanding his "conflicting, contradictory and impeached testimony".[74] However, the Appellant fails to provide any detail to this argument and does not point the Appeals Chamber to any place in the record to support his claim. In such circumstances, the Appeals Chamber need not consider this submission further.[75]

36. Finally, the Appellant submits that the Trial Chamber erred in its legal and factual findings that Witness GDD was credible, failing to consider the testimony of Defence Witness JK27 that Witness GDD was a "thief, drunk, liar."[76] This argument is premised upon a misrepresentation of the facts. The Trial Judgement reflects that in assessing the credibility of Witness GDD, the Trial Chamber did consider the evidence of Witness JK27, including the allegations that Witness GDD was a liar who stole things from his family.[77] The Trial Chamber concluded its analysis as follows: "Having considered fully the testimony of Witness GDD viewed in the light of the evidence presented in the case as a whole, and taking into account the demeanour of the Witness during his testimony, the Chamber finds Witness GDD to be a credible witness."[78] The Appeals Chamber finds that the Appellant failed to show any error in this finding.

37. In view of the foregoing, the Appeals Chamber dismisses this ground of appeal in its entirety.

[74] Appellant's Brief, para. 120.
[75] Practice Direction on Formal Requirements for Appeals from Judgement, paras. 4(b), 13. *See also Blaškić* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 10; *Vasiljević* Appeal Judgement, paras. 11, 12; *Rutaganda* Appeal Judgement, para. 19; *Kayishema and Ruzindana* Appeal Judgement, para. 137.
[76] Appellant's Brief, paras. 123, 125.
[77] Trial Judgement, para. 467.
[78] Trial Judgement, para. 467.

V. ALLEGED ERROR IN ASSIGNING THE BURDEN OF PROOF ON ALIBI AND ASSUMPTION OF FACTS NOT IN EVIDENCE WITH RESPECT TO THE ALIBI (GROUND OF APPEAL 7)

38. The Appellant submits that the Trial Chamber committed an error of law with respect to the burden of proof regarding the alibi.[79] The Appellant then contends that the Trial Chamber erred in assessing the alibi evidence of Witnesses JK312 and JK27.[80] Each of these submissions is now addressed in turn.

A. Burden of Proof

39. According to the Appellant, the Trial Chamber erred in law by failing to require the Prosecution to disprove each alibi witness's testimony beyond reasonable doubt.[81] The Appellant submits that when an alibi is introduced, the Prosecution is required to "eliminate the reasonable possibility that the alibi is true."[82] The Appellant proposes that the Prosecution cannot be permitted to ignore the alibi evidence and rely on its case in chief, but, rather, that it must attack the alibi evidence.[83] The Appellant argues that the Prosecution failed to impeach his alibi witnesses, Witnesses JK312 and JK27, through cross-examination or rebuttal and that it thus did not meet its burden of proof with regard to the alibi evidence.[84]

40. The Prosecution responds that the Appellant has misstated the legal burden on the Prosecution in relation to an alibi.[85] Instead of having to disprove each alibi witness's testimony beyond reasonable doubt, the Prosecution has the burden to prove the Appellant's guilt beyond reasonable doubt in spite of the alibi evidence.[86] The Prosecution disagrees that there is any affirmative burden upon it to attack the alibi or to impeach alibi witnesses through cross-examination or rebuttal.[87] The Prosecution agreed during the hearing of the Appeal that although an alibi is not a specific defence, the Prosecution has the full burden of proving that the Appellant was at the crime site.[88] The Prosecution stated: "… it is clear that the Prosecutor has this burden of proof

[79] Amended Notice of Appeal, para. 37; Appellant's Brief, para. 131.
[80] Amended Notice of Appeal, paras. 38-49; Appellant's Brief, paras. 137-150.
[81] Appellant's Brief, para. 131.
[82] Appellant's Brief, para. 133, citing *^elebi}i Case* Appeal Judgement, para. 581.
[83] Appellant's Brief, paras. 132, 133.
[84] Appellant's Brief, para. 136.
[85] Respondent's Brief, para. 105.
[86] Respondent's Brief, paras. 107-110.
[87] Respondent's Brief, para. 109.
[88] *See* Appeal Hearing, T. 7 March 2005 pp. 29, 43-45.

beyond a reasonable doubt…. It really is a free evaluation of all of the evidence recognising which party has the burden of proof and the arrival at a conclusion of conviction…."[89]

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

> 165. As has been held by the Appeals Chamber in the *Čelebići Case*, the submission of an alibi by the Defence does not constitute a defence in its proper sense. The relevant section of the judgement reads:
>
> "It is a common misuse of the word to describe an alibi as a "Defence". If a defendant raises an alibi, he is merely denying that he was in a position to commit the crime with which he is charged. That is not a Defence in its true sense at all. By raising this issue, the defendant does no more that [*sic*] require the prosecution to eliminate the reasonable possibility that the alibi is true."
>
> 166. Therefore, as consistently held throughout the jurisprudence of the Tribunal and as asserted by the Defence, when an alibi is submitted by the Accused the burden of proof rests upon the Prosecution to prove its case beyond a reasonable doubt in all respects. Indeed, the Prosecution must prove "that the accused was present and committed the crimes for which he is charged and thereby discredit the alibi defence". If the alibi is reasonably possibly true, it will be successful.[90]

42. The Appeals Chamber finds no error in this statement. The Appeals Chamber has recently confirmed that when a defendant pleads an alibi, he is denying that he was in a position to commit the crimes with which he is charged because he was elsewhere than at the scene of the crime at the time of its commission.[91] The Appeals Chamber recalls that:

> It is settled jurisprudence before the two *ad hoc* Tribunals that in putting forward an alibi, a defendant need only produce evidence likely to raise a reasonable doubt in the Prosecution's case. The burden of proving beyond reasonable doubt the facts charged remains squarely on the shoulders of the Prosecution. Indeed, it is incumbent on the Prosecution to establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true.[92]

43. Nothing in the foregoing requires the Prosecution, however, specifically to disprove each alibi witness's testimony beyond reasonable doubt. Rather, the Prosecution's burden is to prove the accused's guilt as to the alleged crimes beyond reasonable doubt in spite of the proffered alibi. Accordingly, the Appeals Chamber cannot accept the Appellant's claim that the Trial Chamber erred by not requiring the Prosecution to so disprove the testimonies of Witnesses JK312 and JK27 and dismisses this sub-ground of appeal.

[89] Appeal Hearing, T. 7 March 2005 p. 44.
[90] Trial Judgement, paras. 165, 166 (internal citations omitted).
[91] *See Niyitegeka* Appeal Judgement, para. 60 citing *Kayishema and Ruzindana* Appeal Judgement, para. 106.
[92] *Niyitegeka* Appeal Judgement, para. 60 (internal citations omitted). *See also Čelebići Case* Appeal Judgement, para. 581; *Musema* Appeal Judgement, para. 202; *Kayishema and Ruzindana* Appeal Judgement, para. 113.

B. Alleged Errors Relating to Witness JK312

1. Credibility

44. The Appellant submits that the Trial Chamber committed four errors in assessing the credibility of Witness JK312. First, the Appellant submits, the Trial Chamber committed a gross error by "falsely ascribing testimony" to Witness JK312 that on 8 April 1994 he stood outside his house, "chit-chatting" with visitors, and then using this evidence to discredit him.[93] Second, the Appellant submits that the Trial Chamber erred when it arbitrarily found that Witness JK312's testimony that he walked to the Appellant's house on the morning of 7 April 1994 was implausible, despite a lack of evidence to support this finding.[94] The Appellant alleges that the Trial Chamber committed a third error in assessing the witness's testimony when it found that Witness JK312's testimony was purposefully evasive.[95] Finally, the Appellant submits that the Trial Chamber erred by failing to make any logical correlation between the witness's credibility and the fact that he saved Witness JK312's life in 1992.[96]

45. The Prosecution concedes that it is unable to find any reference in the record to Witness JK312's "chit-chatting" with visitors in front of his house on 8 April 1994, but submits that this characterization of the witness's testimony by the Trial Chamber does not undermine the fairness of the trial or make the conviction unsafe.[97] The Prosecution submits that this was only one of many factors considered by the Trial Chamber in determining Witness JK312's lack of credibility.[98] According to the Prosecution, in determining that the witness was not credible, the Trial Chamber also considered the following factors: the implausibility that the witness, a Tutsi, walked to the Appellant's house in the morning of 7 April 1994 to ask for assistance; the witness's purposeful evasiveness; the witness's demeanour, which indicated that he was more interested in protecting the Appellant than in giving straightforward answers; and the fact that the Appellant saved the witness's life in 1992.[99]

46. The Appeals Chamber notes that the Trial Chamber assessed the credibility and reliability of Witness JK312 as follows:

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[93] Trial Judgement, para. 206; Amended Notice of Appeal, paras. 39, 40; Appellant's Brief, para. 140.
[94] Amended Notice of Appeal, para. 45; Appellant's Brief, paras. 141, 142.
[95] Amended Notice of Appeal, para. 46; Appellant's Brief, paras. 143, 144.
[96] Amended Notice of Appeal, para. 48; Appellant's Brief, para. 147.
[97] Respondent's Brief, para. 114.
[98] Respondent's Brief, para. 115.
[99] Respondent's Brief, para. 115.

> The Chamber has considered the testimony of Defence Witness JK312, and finds that it is not credible as regards the alibi of the Accused. This witness testified that on 7 April 1994, he walked to the Accused's house to ask for assistance. As a Tutsi who was admittedly fearing for his life, the Chamber finds it implausible that he would have walked to the house of the Accused, especially in view of the fact that according to his own testimony, he was able to make a telephone call to the Accused that same morning, and discuss his safety and to request assistance. The Chamber found the Witness to be purposefully evasive when asked questions under cross-examination, in relation to the Accused's ability to assist him and the reason why it was the Accused that he went to for assistance. From the observations of the Chamber, it was apparent in the witness's demeanour that in answering these questions and others, the witness appeared more interested in protecting the Accused than in giving straightforward answers to questions put to him. Furthermore, in relation to the events of 8 April, the Chamber finds it highly unlikely that, at a time when Tutsis were being openly massacred, Defence witness JK312 could stand in front of his house and chit-chat with his visitors, especially since according to his own testimony he had only the previous day requested shelter from the Accused in a state of desperation. As a final point, the Chamber notes that according to the witness's own testimony, the Accused once saved the witness's life in 1992.[100]

47. The Appeals Chamber now considers in turn the alleged errors concerning the assessment of Witness JK312's credibility. A review of the Trial Judgement and relevant transcripts reveals that the Trial Chamber erroneously attributed to Witness JK312 evidence given by Witness JK311 that he "chit-chatted" with his friends outside his house on 8 April 1994. Paragraph 206 of the Judgement summarizes this evidence under the heading of Defence Witness JK312, but the related footnote refers to the closed session testimony of Witness JK311.[101]

48. The Appeals Chamber accordingly finds that the Trial Chamber erred by attributing a portion of the testimony of Witness JK311 to Witness JK312 and by taking such evidence into account in deciding that Witness JK312 was not credible as regards the alibi.

49. The Appeals Chamber now turns to the contention of error in finding it implausible that Witness JK312 walked to the Appellant's house. The Appellant contends that the Trial Chamber lacked evidence that would support such a finding. The Appeals Chamber cannot accept this argument. The Trial Chamber carefully explained the basis for its finding, namely that, by the witness's own admission, he feared for his safety, and that there was no need for the walk as Witness JK312 spoke with the Appellant over the telephone.[102] The Appellant has not shown that the Trial Chamber's finding on this point was unreasonable.

50. The Appeals Chamber next examines the Appellant's submission of error on the part of the Trial Chamber in finding Witness JK312 to have been purposefully evasive. The Appeals Chamber recalls the observation made at paragraph 223 of the Trial Judgement that Witness JK312 was

[100] Trial Judgement, para. 223.
[101] *See* Trial Judgement, para. 206 n. 303.
[102] *See* Trial Judgement, para. 223 ("As a Tutsi who was admittedly fearing for his life, the Chamber finds it implausible that he would have walked to the house of the Accused, especially in view of the fact that according to his own testimony, he was able to make a telephone call to the Accused that same morning, and discuss his safety and to request assistance.").

"purposefully evasive when asked questions under cross-examination, in relation to the Accused's ability to assist him and the reason why it was the Accused that he went to for assistance."[103] A review of the relevant portion of the transcript suggests that some of the witness's apparent "evasiveness" may have been due to interpretation difficulties.[104] However, the Appeals Chamber notes that the Trial Chamber's finding that the witness was being evasive when answering questions on cross-examination was also, significantly, based on the Trial Chamber's observation of the witness's demeanour.[105] The Appeals Chamber stresses that a Trial Chamber is best placed to evaluate the demeanour of witnesses giving live testimony. In view of this consideration, and giving due weight to the Trial Chamber's stated observation of the witness's demeanour, the Appeals Chamber is not in a position to conclude that the Trial Chamber's finding of purposeful evasiveness on the part of Witness JK312 was erroneous.

51. Finally, the Appeals Chamber finds that in assessing the credibility of Witness JK312, the Trial Chamber was entitled to take into account, among other factors, the fact that the Appellant had saved the witness's life.

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[103] Trial Judgement, para. 223.

[104] For example, the witness, who was testifying in French, gave an answer to a simple "why" question posed by the Prosecution in English, which appeared to be evasive:

> Q. Witness, you went to Mr. Kajelijeli for assistance that day. Why did you go to him?
>
> A. I said so this morning. I went to him in the morning on the 7th of April '94.
>
> Q. I said why.
>
> A. I went to him to ask him more information, but also to ask him for some help as he had done in the past. I thought he could help me once again.

T. 16 September 2002 p. 76 (emphasis added).

In the French version of the transcript, however, the exchange is slightly different. It is apparent from the French transcript that the witness was initially asked "when" he went to the Appellant's house and not "why" he went there:

> Q. Monsieur le Témoin, vous dites s'être rendu au domicile de Monsieur Kajelijeli pour solliciter une assistance. Quand est-ce que vous êtes allé à son domicile?
>
> LE TÉMOIN JK 312 : R. Je l'ai dit ce matin, je suis allé chez lui, dans la matinée, et en date du 7 avril 94.
>
> Q. J'ai demandé quelle raison... pour quelle raison vous êtes allé chez lui?
>
> R. Je suis allé pour lui demander, exactement... pour avoir de plus amples informations, mais aussi, pour lui demander secours aussi. Comme il l'avait fait dans le passé, j'espérais alors qu'il pouvait m'aider, une fois encore.

T. 16 September 2002 p. 135 (emphasis added).

[105] *See* Trial Judgement, para. 223 ("From the observations of the Chamber, it was apparent in the witness's demeanour that in answering these questions and others, the witness appeared more interested in protecting the Accused than in giving straightforward answers to questions put to him.").

52. Having considered the alleged errors in the Trial Chamber's assessment of the credibility of Witness JK312, the Appeals Chamber finds that it has not been shown that no reasonable trier of fact could have reached the same finding. Although the Trial Chamber erred by attributing a portion of Witness JK311's testimony to Witness JK312 and then took such evidence into account in weighing the credibility of Witness JK312, the Appeals Chamber finds that the Trial Chamber's credibility assessment of Witness JK312 was otherwise careful and detailed and that its conclusion was based on appropriate factors, such as weighing the witness's demeanour and considering the plausibility of his testimony, which have not been undermined on appeal. Accordingly, the Appeals Chamber dismisses this sub-ground of appeal.

2. Factual Errors

53. The Appellant submits that the Trial Chamber erred by failing to take due note of the specific times when Witness JK312 called him, and the times when the witness arrived at and left from the Appellant's home in Nkuli in the morning of 7 April 1994.[106]

54. The Prosecution responds that the times provided by Witness JK312 were imprecise and that they were mere "estimates", the witness having admitted that "everything seemed to be in a dream that morning and he had difficulty concentrating and focusing on specific events."[107] As a result, the Prosecution argues that it was reasonable for the Trial Chamber not to regard timing as a critical aspect of Witness JK312's testimony.[108]

55. The Appeals Chamber notes that in reviewing the evidence of Witness JK312, the Trial Chamber did not specify the times given by the witness.[109] However, the Appeals Chamber recognizes that the witness's time references were made in the context of a situation he described as "chaos" and during which he had difficulty concentrating and focusing.[110] Additionally, the Appeals Chamber notes that Witness JK312 himself characterized his recollections of time as "estimates".[111] Considering that the time references provided by the witness were thus not reliable

[106] Amended Notice of Appeal, para. 38; Appellant's Brief, paras. 137, 138.
[107] Respondent's Brief, para. 116.
[108] Respondent's Brief, para. 116.
[109] *See* Trial Judgement, paras. 110, 196, 222.
[110] *See* T. 16 September 2002 pp. 68, 69, 71, 72.
[111] T. 16 September 2002 p. 94:

> Q. The Prosecutor, before the break, had said to you, how could you explain that you remembered the times, for example, when you made a call to Kajelijeli when you heard of the President's death, when you went to his house and the time that you left there?
>
> A. You know, when I was scared in a scary situation, I was aware, I am a person who is aware of things. Can you imagine that I cover a distance of 400, 500 metres, and I was able to calculate the time I spent. I left

and, moreover, that the Trial Chamber considered Witness JK312 to be not credible as to the Appellant's alibi, the Appeals Chamber finds that the omission of the Trial Chamber to note the times given by the witness did not constitute an error that could have occasioned a miscarriage of justice. Accordingly, the Appeals Chamber dismisses this sub-ground of appeal.

C. Alleged Errors Relating to Witness JK27

56. The Appellant submits that the Trial Chamber erred by failing to make findings in respect of the testimony of Witness JK27 that he saw the Appellant at the commune office and at his home on three occasions on 7 April 1994.[112] The Appellant argues that the Trial Chamber's failure to make any specific finding concerning the credibility of Witness JK27 undermines the findings and verdict of the Trial Chamber.[113]

57. The Prosecution responds that the Trial Chamber did consider and make a finding on Witness JK27's testimony, as evidenced by paragraphs 221 and 225 of the Judgement.[114] The Prosecution further argues that a Trial Chamber is not required to articulate every step of its reasoning and that the Appellant has failed to show that no reasonable tribunal of fact could have reached a conclusion of guilt beyond a reasonable doubt, after taking Witness JK27's evidence into account.[115]

58. The Appeals Chamber notes that the Trial Chamber's consideration of Witness JK27's evidence concerning the alibi is found in paragraphs 194, 221, and 225 of the Judgement and reads as follows:

> 194. **Defence Witness JK27** testified that at around 7:30am on the morning of 7 April 1994, he took a bus to his parents' home in Nkuli. Defence Witness JK27 testified that upon arrival at his parents' home he first saw the Accused at around 9:00am, then at 11am while the Accused was at the *bureau communal*, and then at 3:00pm in front of the [Accused's] house talking to others.[116] The Witness testified that he saw the Accused clearly and that there were no structures or objects to interfere with his vision.
>
> 221. Defence Witness JK27 stated that he saw the Accused on three occasions on the 7 April 1994, twice at the Nkuli *Commune* Office, at 9:00am and at 11:00am. And thereafter once in front of his house, which is nearby, at around 3:00pm.

> immediately as soon as I got to my sitting room. There was a clock in the sitting room. I saw it. But, then, from that time onwards all that I did is estimations. So this is why I said it took me 20 to 30 minutes. You see, these are estimations, these are estimates; however, given that I had other things to do than look at the clock every time, so part of my confidence -- I do hope anyway I have responded to your question, sir.

[112] Amended Notice of Appeal, para. 49; Appellant's Brief, paras. 148, 149.
[113] Appellant's Brief, para. 150.
[114] Respondent's Brief, para. 119.
[115] Respondent's Brief, para. 118.
[116] T. 17 September 2002 p. 105.

> 225. Having considered the evidence of the alibi witnesses in relation to the events of 6 and 7 April 1994, the Chamber finds that the alibi is not credible in relation to these days.

59. The Appeals Chamber notes that while the Trial Chamber recalled Witness JK27's evidence and ultimately found the alibi for the period included in that evidence not credible, the Trial Chamber did not explicitly state its position on the credibility of Witness JK27. The Appeals Chamber is mindful of the position expressed in the *Musema* Appeal Judgement that a Trial Chamber "is not required to set out in detail why it accepted or rejected a particular testimony."[117] The Appeals Chamber in *Musema* explained the Trial Chamber's duty in this regard as follows:

> In the first place, the task of weighing and assessing evidence lies with the Trial Chamber. Furthermore, it is for the Trial Chamber to determine whether a witness is credible or not. Therefore, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. But the Trial Chamber's discretion in weighing and assessing evidence is always limited by its duty to provide a "reasoned opinion in writing," although it is not required to articulate every step of its reasoning for each particular finding it makes. The question arises as to the extent that a Trial Chamber is obliged to set out its reasons for accepting or rejecting a particular testimony. There is no guiding principle on this point and, to a large extent, testimony must be considered on a case by case basis.[118]

60. In the circumstances of the present case, the Appeals Chamber finds that the Trial Chamber discharged its duty in respect of assessing the testimony of Witness JK27. As paragraphs 194 and 221 of the Trial Judgement demonstrate, the Trial Chamber reviewed the witness's evidence and, in paragraph 225, concluded that the alibi attested to by Witnesses JK27, JK312, and LMR1 was not credible. While this finding could have been elaborated by inclusion of a discussion of Witness JK27's credibility, the Trial Chamber's failure to do so falls short of violating the Appellant's right to a "reasoned opinion", which does not ordinarily demand a detailed analysis of the credibility of particular witnesses. In *Musema*, for instance, the Appeals Chamber held that a Trial Chamber is not necessarily required even to "*refer to* any particular evidence or testimony in its reasoning," much less give specific reasons for discrediting it.[119] The ICTY Appeals Chamber has also so held.[120] What *is* required is for the Trial Chamber to provide clear, reasoned findings of fact as to each element of each crime charged[121] -- a requirement that may be satisfied by a number of different approaches to the assessment of particular evidence, depending on the circumstances. For instance, a Trial Chamber may provide a general overview of how it assessed the credibility of witnesses without detailing each step of that analysis witness-by-witness;[122] or it may focus principally on the witnesses whose testimony is most relevant to the critical questions it must

[117] *Musema* Appeal Judgement, para. 20.
[118] *Musema* Appeal Judgement, para. 18 (internal citations omitted).
[119] *Musema* Appeal Judgement, para. 20 (emphasis added) ("This is particularly so in the evaluation of witness testimony, including inconsistencies and the overall credibility of a witness.").
[120] *Kvočka et al.* Appeal Judgement, para. 23; *^elebi}i Case* Appeal Judgement, paras. 483, 485, 498.
[121] *Kordi} and ^erkez* Appeal Judgement, para. 383; *Kvočka et al.* Appeal Judgement, para. 23.

decide. The Trial Chamber here combined both approaches, commencing with an introductory discussion of its methodology,[123] describing in some detail the testimony of each witness, and explaining the reasons for its credibility assessments of those it deemed most important while providing more conclusory statements regarding others.

61. Under some circumstances, a reasoned explanation of the Trial Chamber's assessment of a particular witness's credibility *is* a crucial component of a "reasoned opinion" – for instance, where there is a genuine and significant dispute surrounding a witness's credibility and the witness's testimony is truly central to the question whether a particular element is proven. So, for instance, the ICTR and ICTY Appeals Chambers have both held that where a finding that the accused was present at a crime scene is based on identification evidence from a single eye-witness under stress or other conditions likely to undermine accuracy, that witness's credibility must be discussed – a requirement that reflects the well-demonstrated infirmities of such eye-witness testimony.[124]

62. No such special circumstances are present here. Witness JK27 is one of many witnesses on both sides who testified to the Appellant's whereabouts on 7 April 1994. The Trial Chamber might reasonably have decided that, even if there was no inherent reason to doubt Witness JK27's testimony if considered alone, when it was considered alongside all the other testimony, the overall weight of the evidence proved beyond a reasonable doubt that the Appellant was where the Prosecution said he was at each of the crucial times. And indeed, the Trial Judgement provides a reason that, even if assumed to be true, Witness JK27's alibi testimony is not irreconcilable with the Prosecution's case: the distances between the relevant locations are short and "the Accused was in a position to move around from one place to another within the communes of Mukingo and Nkuli within a short space of time."[125] Witness JK27 testified only to having seen the Appellant at three discrete times, not to his continuous presence in Nkuli during that day; the testimony thus does not provide a complete "alibi" even taken at face value.[126] For this reason, Witness JK27's testimony was not so centrally important that the Trial Chamber was required to assess its credibility in detail;

[122] *Rutaganda* Appeal Judgement, paras. 217, 228.
[123] *See* Trial Judgement, paras. 37-44.
[124] *Bagilishema* Appeal Judgement, para. 75; *Kupreški} et al.* Appeal Judgement, paras. 39, 40, 135.
[125] Trial Judgement, para. 696 ("Furthermore, the Chamber notes that all the major sites in Mukingo and Nkuli *communes* where the Accused is alleged to have been involved are within short distances of each other. The Chamber finds that during the events alleged to have happened from 6 April to 14 April 1994, the Accused was in a position to move around from one place to another within the *communes* of Mukingo and Nkuli within a short space of time. The evidence presented by the Defence regarding difficulty of movement is of little persuasive value. According to the evidence before it, the Chamber finds no impossibility in the Accused's presence at several different locations within the Nkuli or Mukingo *Communes* on the same day or evening.").
[126] Even if the various witnesses provided somewhat varying accounts of where the Appellant was at certain particular times of the day, such inconsistencies are to be expected in witness recollections of stressful situations and need not all be explained by the Trial Chamber. *See Kvočka et al.* Appeal Judgement, para. 23 ("Considering the fact that minor inconsistencies commonly occur in witness testimony without rendering it unreliable, it is within the discretion of the Trial Chamber to evaluate it and to consider whether the evidence as a whole is credible, without explaining its decision in every detail.").

and even if the Trial Chamber were deemed to have erred, that error would not provide a reason to disturb the Judgement. Accordingly, the Appeals Chamber dismisses the present and last sub-ground raised under this ground of appeal.

VI. ALLEGED ERROR IN FINDINGS WITH RESPECT TO THE DISTRIBUTION OF TUTSI PROPERTIES TO *INTERAHAMWE* (GROUND OF APPEAL 8)

63. The Appellant submits that the Trial Chamber erred in its factual finding that he was involved in the distribution of Tutsi properties to the *Interahamwe*.[127] Additionally, the Appellant contends that the Trial Chamber failed to provide a reasoned analysis of this finding, which, according to him, is erroneous and against the weight of the evidence.[128] In his reply, the Appellant also argues that the Trial Chamber ignored the testimony of Witnesses RHU23, MEM, and RGM.[129] Finally, the Appellant argues that the Trial Chamber erred in finding Witness GAP credible given internal conflicts and contradictions between his prior statements and trial testimony.[130]

64. The Prosecution responds that the Trial Chamber's finding that Tutsi properties were distributed to the *Interahamwe* and that the Appellant was involved in this is based on an examination of the testimony of each relevant witness.[131] The Prosecution further notes that the Appellant did not point to any contradictions between the prior statements of Witness GAP and his testimony.[132]

65. A review of the Trial Judgement reveals that, in respect of the distribution of Tutsi properties to the *Interahamwe* and the Appellant's role in this, the Trial Chamber took into account the testimony of Prosecution Witnesses GDQ, GAP, and GAO, and Defence Witnesses RHU23, RGM, MEM, as well as that of the Appellant.[133] The Appeals Chamber consequently finds no support for the Appellant's contention that the Trial Chamber ignored the testimony of the Defence witnesses or that it failed to provide a reasoned opinion on this point.

66. Under this ground of appeal, the Appellant also argues that the Trial Chamber erred in finding Witness GAP to be credible. To support this argument, the Appellant points the Appeals Chamber to two paragraphs of the Trial Judgement in which the Trial Chamber set out the evidence of Witness GAP concerning a matter not related to the distribution of Tutsi properties.[134] The Appeals Chamber is at a loss to understand how these paragraphs, which say nothing about the Trial

[127] Amended Notice of Appeal, paras. 51, 52; Appellant's Brief, para. 152.
[128] Appellant's Brief, para. 153.
[129] Appellant's Brief in Reply, para. 44.
[130] Amended Notice of Appeal, para. 50; Appellant's Brief, para. 151.
[131] Respondent's Brief, para. 123.
[132] Respondent's Brief, para. 122.
[133] Trial Judgement, para. 313-320.
[134] *See* Amended Notice of Appeal, para. 50; Appellant's Brief, para. 151 referring to Trial Judgement, paras. 251, 252.

Chamber's views on Witness GAP's credibility, could demonstrate an error on the part of the Trial Chamber. Additionally, the Appeals Chamber notes that despite his allegations under this ground of appeal, the Appellant makes no attempt to show any internal conflicts or contradictions between Witness GAP's prior statements and his testimony or any particular error of the Trial Chamber in evaluating his credibility.

67. The Appeals Chamber therefore finds that the Appellant has failed to show that the Trial Chamber erred in finding that he played a role in the distribution of Tutsi properties to the *Interahamwe*. Consequently, this ground of appeal is dismissed.

VII. ALLEGED ERROR IN FINDING THAT THE APPELLANT WAS ACTIVELY INVOLVED IN THE TRAINING OF *INTERAHAMWE* (GROUND OF APPEAL 9)

68. The Appellant submits that the Trial Chamber erred in its factual finding that he was actively involved in the training of the *Interahamwe*.[135] The Appellant argues that this finding is largely based upon the "vague" eye-witness testimony of Witness GBH[136] which has not been confirmed by other non-detained Prosecution witnesses, such as Witnesses GBE, GBV, GBG, and ACM who, in the Appellant's view, "ought to have seen" such training if it had taken place.[137] Additionally, the Appellant disputes the Trial Chamber's characterisation of Witness GBH's testimony on his association with the *Interahamwe* as "detailed".[138]

69. The Appellant further submits that the Trial Chamber erred by mischaracterising "major irreconcilable differences" in the testimony of Witnesses GAP, GDD, and GAO concerning *Interahamwe* training as "minor ambiguities".[139] According to the Appellant, the Trial Chamber erred in finding testimonies of Witnesses GDD, GAO, and GBE on his involvement in *Interahamwe* training to be credible.[140] The Appellant also submits that the Trial Chamber erred in basing its factual findings on the evidence of Witness GBV whose testimony was vague and lacked credibility and Witness GAP who lacked credibility and whose testimony was not corroborated.[141] The Appellant argues that if *Interahamwe* training did take place in public, as alleged by the detained Witnesses GAP, GDD, and GAO, then the Prosecution should have been able to produce evidence of this from non-detained witnesses.[142]

70. Finally, the Appellant contends that in reaching the conclusion that he was involved in *Interahamwe* training, the Trial Chamber ignored the testimony of all Defence witnesses, especially Witness RGM.[143] The Appellant highlights that Defence Witnesses RGM, MEM, TLA, RHU23, and RHU31 testified that they were not aware of *Interahamwe* training in the given area.[144]

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[135] Amended Notice of Appeal, paras. 53-66; Appellant's Brief, paras. 157-171.
[136] Amended Notice of Appeal, para. 64; Appellant's Brief, paras. 157, 159.
[137] Appellant's Brief, paras. 159, 162.
[138] Amended Notice of Appeal, para. 66; Appellant's Brief, para. 171.
[139] Amended Notice of Appeal, para. 65; Appellant's Brief, paras. 158, 163, 164, 165.
[140] Amended Notice of Appeal, paras. 53-55, 61.
[141] Amended Notice of Appeal, paras. 59, 62.
[142] Appellant's Brief, paras. 160, 161, 170.
[143] Appellant's Brief, para. 168.
[144] Amended Notice of Appeal, para. 63; Appellant's Brief, para. 169.

71. The Prosecution responds that the Trial Chamber's finding on this point is based on the strength of the corroborating testimony of four witnesses, Witnesses GBH, GDD, GAO, and GAP and that the Appellant fails to demonstrate any error on the part of the Trial Chamber in respect of its finding that the Appellant was involved in the training of the *Interahamwe*.[145]

72. A review of the relevant portion of the Trial Judgement reveals that the Trial Chamber considered the testimony of numerous Prosecution and Defence witnesses before reaching its conclusion that the Appellant was involved in the training of the *Interahamwe*.[146] The Appellant contends that the Trial Chamber's conclusion on this point is largely based on the testimony of Witness GBH. It is apparent, however, that the Trial Chamber founded its conclusion on the evidence given by Witnesses GBH, GDD, GAO, and GAP.[147] The Appeals Chamber notes that the Appellant contends that there are "irreconcilable differences" among the testimony of Witnesses GAP, GDD, and GAO concerning *Interahamwe* training, but fails to indicate any specific discrepancy or point the Appeals Chamber to any place in the record that might support his claim.

73. The Appellant also asserts that Witnesses GDD, GAO, GBE, GBV, and GAP lacked credibility. However, in the submissions made in respect of the present ground of appeal, the Appellant fails to explain why these witnesses lacked credibility or provide any support for his argument. In such circumstances, the Appeals Chamber cannot consider these submissions further.

74. In support of his claim that the Trial Chamber erred in making the present finding, the Appellant also argues that other, non-detained witnesses ought to have seen such trainings and that the Prosecution should have been able to produce their evidence. In the view of the Appeals Chamber such an argument cannot support a claim of an error on the part of the Trial Chamber. It would be entirely speculative and inappropriate for the Tribunal to enter into a consideration of what other evidence could have been brought. The Trial Chamber assessed the relevant evidence before it and made its decision on such basis. A contention of error on the part of a Trial Chamber cannot be substantiated by an assertion that other evidence ought to have been led.

75. Finally, the Appeals Chamber does not accept the Appellant's argument that the Trial Chamber "ignored" the testimony of all Defence witnesses, particularly Witness RGM, on the issue of *Interahamwe* training. In the Trial Judgement, the Trial Chamber clearly noted the relevant evidence of several Defence witnesses, including the testimony of Witnesses RGM, JK312, and MEM, to the effect that they were not aware of any military training of the *Interahamwe* in

[145] Respondent's Brief, paras. 127-131.
[146] *See* Trial Judgement, paras. 333-395.

Mukingo Commune.[148] While the Trial Chamber did not expressly recall the testimony of Witnesses RHU31 and RHU23 that they were not aware of *Interahamwe* training in their area, it does not necessarily follow that the Trial Chamber failed to consider this evidence in reaching its conclusion.[149] Furthermore, the Appeals Chamber considers that evidence of witnesses that they were unaware of *Interahamwe* training in their area does not necessarily controvert evidence of witnesses who testified to the existence of such training.

76. The Appeals Chamber therefore finds that the Appellant has failed to show any error on the part of the Trial Chamber relating to this ground of appeal and, accordingly, dismisses the present ground in its entirety.

[147] Trial Judgement, para. 400.
[148] *See* Trial Judgement, para. 367. *See also* Trial Judgement, para. 393 (noting the evidence of Witness TLA that there was no military training of youths at the Isimbi house).
[149] *See Musema* Appeal Judgement, para. 20 ("It does not necessarily follow that because a Trial Chamber did not refer to any particular evidence or testimony in its reasoning, it disregarded it.").

VIII. ALLEGED ERRORS IN FINDING THAT THE APPELLANT EXERCISED LEADERSHIP AND EFFECTIVE CONTROL OVER THE *INTERAHAMWE* AND THAT HE HAD THE AUTHORITY TO STOP THE KILLINGS IN MUKINGO, NKULI, AND KIGOMBE COMMUNES (GROUNDS OF APPEAL 10 AND 21)

77. Grounds of Appeal 10, alleged error in finding that the Appellant exercised leadership and effective control over the *Interahamwe*,[150] and 21, alleged error in finding that the Appellant had the authority to stop the killings in Mukingo, Nkuli, and Kigombe Communes,[151] raise related issues concerning the Appellant's superior position over the *Interahamwe.* Consequently, the Appeals Chamber considers them together in the present chapter.

A. The Parties' Submissions

78. The Appellant submits that the Trial Chamber erred in law and fact in its findings concerning his superior responsibility over the *Interahamwe* in Mukingo, Nkuli, and Kigombe Communes.[152] The Appellant argues that the Trial Chamber's findings were in error because they were against the weight of the evidence ignoring the testimony of the most credible witness on the issue – Defence Witness RGM, who he claims was the "undisputed" president of the *Interahamwe* in Mukingo Commune[153] – while considering the insufficient evidence of Prosecution Witnesses GBV, ACM, GBG, GDQ, GAP, GBH, GAO, GDD, GDF, and GBE to be probative.[154]

79. The Appellant contends that the Prosecution failed to adduce the necessary evidence to demonstrate beyond reasonable doubt that he had effective control over subordinates, as required by the jurisprudence of the Tribunal.[155] In particular, the Appellant points out that the Prosecution failed to prove that the *Interahamwe* was a civilian militia exercising a similar discipline to the military or that the Appellant exercised the requisite trappings of authority such as an awareness of a chain of command, the practice of issuing and obeying orders, or the expectation that

[150] Amended Notice of Appeal, paras. 67-76; Appellant's Brief, paras. 172-194; Appellant's Brief in Reply, paras. 47-49.
[151] Amended Notice of Appeal, paras. 129-131; Appellant's Brief, paras. 347-354; Appellant's Brief in Reply, paras. 95, 96. The Appeals Chamber notes that although the Appellant does not refer to Kigombe Commune in the title of his Ground of Appeal 21, he contests the findings of the Trial Chamber with regard to Kigombe Commune as well in the text of his Notice of Appeal and Brief.
[152] Appellant's Brief, paras. 172-194 referring to Trial Judgement, paras. 404, 609, 626, 739, 781.
[153] Amended Notice of Appeal, para. 68; Appellant's Brief, para. 189.
[154] Appellant's Brief, paras. 176, 177, 350, 351, 353.
[155] Appellant's Brief, paras. 178-188, 190-193; Appellant's Brief in Reply, paras. 47-49.

insubordination may lead to disciplinary sanctions.[156] Instead, according to the Appellant, the Prosecution merely produced broad allegations of his leadership, which cannot prove that he exercised effective control over the *Interahamwe*.[157]

80. The Prosecution responds that the Appellant has failed to demonstrate that the Trial Chamber erred in finding a superior-subordinate relationship between him and the *Interahamwe* or that he had effective control over the *Interahamwe*.[158] The Prosecution argues that the Appellant misinterprets the requirements for proving command responsibility of a civilian superior under Article 6(3) of the Statute.[159] The Prosecution submits that the Trial Chamber applied the correct test and properly found that it had been satisfied.[160] Additionally, the Prosecution notes that regardless of whether the Appellant incurs liability under Article 6(3) of the Statute, he continues to incur criminal responsibility for his individual acts pursuant to Article 6(1) of the Statute.[161]

B. Concurrent Convictions under Article 6(1) and Article 6(3) of the Statute

81. The Appeals Chamber recalls that under Count 2, genocide, and Count 6, extermination as a crime against humanity, the Trial Chamber found the Appellant responsible both individually, pursuant to Article 6(1) of the Statute, and as a superior, pursuant to Article 6(3).[162] The Appeals Chamber notes that the convictions for individual and superior responsibility under each of these counts are based on the same facts.[163] The jurisprudence of the ICTY Appeals Chamber provides that concurrent conviction for individual and superior responsibility in relation to the same count based on the same facts constitutes legal error invalidating the Trial Judgement.[164] The Appeals

[156] Appellant's Brief, paras. 185-187.
[157] Appellant's Brief, paras. 180, 190-194.
[158] Respondent's Brief, paras. 132, 133, 136-139.
[159] Respondent's Brief, para. 140.
[160] Respondent's Brief, paras. 142, 145.
[161] Respondent's Brief, para. 146.
[162] Trial Judgement, paras. 842, 843, 905, 906.
[163] *See* Trial Judgement, paras. 842, 843, 905, 906.
[164] In *Kordić and Čerkez*, the ICTY Appeals Chamber stated the following in that regard:

> The provisions of Article 7(1) and Article 7(3) of the Statute connote distinct categories of criminal responsibility. However, the Appeals Chamber considers that, in relation to a particular count, it is not appropriate to convict under both Article 7(1) and Article 7(3) of the Statute. Where both Article 7(1) and Article 7(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber should enter a conviction on the basis of Article 7(1) only, and consider the accused's superior position as an aggravating factor in sentencing. … The Appeals Chamber therefore considers that the concurrent conviction pursuant to Article 7(1) and Article 7(3) of the Statute in relation to the same counts based on the same facts, as reflected in the Disposition of the Trial Judgement, constitutes a legal error invalidating the Trial Judgement in this regard.

Kordić and Čerkez Appeal Judgement, paras. 34, 35 (citations omitted). *See also Blaškić* Appeal Judgement, paras. 91, 92.

Chamber endorses this position. Accordingly, the Appeals Chamber vacates the Appellant's convictions for genocide and extermination as a crime against humanity under Counts 2 and 6 in so far as they are based on a finding of superior responsibility under Article 6(3).

C. Whether the Appellant Held a Superior Position

82. However, in spite of vacating the Appellant's convictions made on the basis of Article 6(3) responsibility, the Appeals Chamber considers that it is still necessary to determine, for purposes of sentencing, whether the Trial Chamber was correct in its finding that the Appellant held a *de facto* superior position as a civilian over the *Interahamwe*. The ICTY Appeals Chamber has held that in relation to a particular count where a Trial Chamber has convicted an accused under the legal requirements of both Articles 7(1) and 7(3) of the ICTY Statute, "a Trial Chamber should enter a conviction on the basis of Article 7(1) only, and consider the accused's superior position *as an aggravating factor* in sentencing."[165] Indeed, "where the Trial Chamber finds that both direct responsibility and responsibility as superior are proved […] the Trial Chamber *must* take into account the fact that both types of responsibility were proved in its consideration of the sentence."[166] Clearly, before taking an accused's superior position into account at sentencing, the Trial Chamber must have found that the accused's superior position was proven at trial. As held by the ICTY Appeals Chamber, "only those matters which are *proved beyond reasonable doubt* against an accused may be the subject of an accused's sentence or taken into account in aggravation of that sentence."[167] The Appeals Chamber agrees with these holdings.

1. The Trial Chamber's Test for Establishing a Superior-Subordinate Relationship

83. The Appellant argues that the Trial Chamber erred in law in finding that the Appellant exercised a superior-subordinate relationship over the *Interahamwe* without having any evidence before it demonstrating that his exercise of *de facto* authority as a civilian was "accompanied by the trappings of the exercise of *de jure* authority."[168] The Appellant submits that such "trappings" include "awareness of a chain of command, the practice of issuing and obeying orders and the expectation that insubordination may lead to disciplinary action."[169] By way of example, the Appellant argues that the Prosecution should have been required to prove that the *Interahamwe*

[165] *Kordić and Čerkez* Appeal Judgement, para. 34 quoting *Blaškić* Appeal Judgement, para. 91.
[166] *Čelebići Case* Appeal Judgement, para. 745 (emphasis added).
[167] *Čelebići Case* Appeal Judgement, para. 763 (emphasis added).
[168] Appellant's Brief, paras. 183, 184 quoting *Čelebići Case* Trial Judgement, paras. 183, 646.
[169] Appellant's Brief, paras. 185 (quoting *Čelebići Case* Trial Judgement, para. 646),186, 187, 191.

operated as a civilian militia that had a similar structure or exercised a similar system of discipline to the military.[170]

84. The Appeals Chamber notes that the Trial Chamber applied the following test for establishing that a superior-subordinate relationship existed between the Appellant and the *Interahamwe*:

> The test for assessing a superior-subordinate relationship, pursuant to Article 6(3), is the existence of a *de jure* or *de facto* hierarchical chain of authority, where the accused exercised effective control over his or her subordinates as of the time of the commission of the offence. The cognisable relationship is not restricted to military hierarchies, but may apply to civilian authorities as well.[171]

85. The Appeals Chamber recalls that a superior is one who possesses power or authority over subordinates either *de jure* or *de facto*; it is not necessary for that power or authority to arise from official appointment.[172] Furthermore, it is settled both in ICTR and ICTY jurisprudence that the definition of a superior is not limited to military superiors; it also may extend to *de jure* or *de facto* civilian superiors.[173] The Appeals Chamber finds that the Trial Chamber correctly incorporated these elements into its definition of a superior.

86. Furthermore, the Appeals Chamber recalls that a superior-subordinate relationship requires that it be found beyond reasonable doubt that the accused was able to exercise effective control over his or her subordinates.[174] Under the effective control test, superiors, whether military or civilian, must have the *material* ability to prevent or punish criminal conduct.[175] The Appeals Chamber further finds that the Trial Chamber correctly articulated this effective control test in its definition of the superior-subordinate relationship.

87. The Appeals Chamber rejects the Appellant's argument that in order to establish "effective control" by a *de facto* civilian superior it is required that there be an additional finding that the superior exercised the trappings of *de jure* authority or that he or she exercised authority comparable to that applied in a military context. The Appeals Chamber recalls its holding in *Bagilishema* that under the "effective control" test, there is no requirement that the "control exercised by a civilian superior must be of the same *nature* as that exercised by a military

[170] Appellant's Brief, paras. 186, 191; Appellant's Brief in Reply, para. 49.
[171] *See* Trial Judgement, para. 773.
[172] *Bagilishema* Appeal Judgement, para. 50 citing *Čelebići Case* Appeal Judgement, para. 192.
[173] *Bagilishema* Appeal Judgement, para. 51; *see also Čelebići Case* Appeal Judgement, paras. 196, 197.
[174] *Bagilishema* Appeal Judgement, para. 52.
[175] *Čelebići Case* Appeal Judgement, para. 256 (internal citations omitted) (emphasis added); *see also Bagilishema* Appeal Judgement, para. 51 quoting *Musema* Trial Judgement, para. 135.

commander."[176] Rather, "it is sufficient that, for one reason or another, the accused exercises the required 'degree' of control over his subordinates, namely that of *effective* control."[177] Likewise, the Appeals Chamber finds that there is no requirement of a finding that a *de facto* civilian superior exercised the trappings of *de jure* authority generally. What is essential is that the *de facto* civilian superior possessed the requisite *degree* of effective control. Of course, evidence that a *de facto* civilian superior exercised control in a military fashion or similar in form to that exercised by *de jure* authorities may strengthen a finding that he or she exercised the requisite degree of effective control. However, the Appeals Chamber concludes that neither is necessary for establishing effective control.

2. The Trial Chamber's Application of the Superior-Subordinate Relationship Test

88. Next, the Appellant argues that the Trial Chamber erred in its findings that he was a leader with effective control over the *Interahamwe* in Mukingo and Nkuli Communes from 1 January 1994 to July 1994 and that, as such, he had the authority to prevent or stop the killings that occurred in Mukingo, Nkuli, and Kigombe Communes in April 1994. According to the Appellant, these findings were against the weight of the evidence presented at trial.[178]

89. The Appeals Chamber finds that the Appellant has failed to demonstrate that the Trial Chamber's reliance upon the testimony of Witnesses GBV, ACM, GBG, GDQ, GAP, and GBH as evidence of his leadership role or its reliance upon the testimony of Witnesses GAO, GBV, GDQ, GDD, ACM, GDF, GBE, and GBG to establish that the Appellant was seen to have issued orders to attackers to kill Tutsis was unreasonable or occasioned a miscarriage of justice. The Appellant makes general assertions that the testimony of these witnesses lacked credibility or reliability in that they were vague or contradictory and that their testimonies consisted of "fabrications, exaggeration and lies"[179] without establishing that no reasonable Trial Chamber could have relied upon such testimony to find the Appellant's exercise of effective control. In addition, the Appeals Chamber finds that the Appellant has failed to show the Trial Chamber's error in finding his superior relationship over the *Interahamwe*. The Appellant merely states that the testimony of the Defence witnesses outweighs that of the Prosecution witnesses, and only mentions the testimony of Defence Witness RGM in particular, asserting that Witness RGM was the most credible witness on the issue

[176] *Bagilishema* Appeal Judgement, para. 55.
[177] *Bagilishema* Appeal Judgement, para. 55 (emphasis added).
[178] Amended Notice of Appeal, para. 68; Appellant's Brief, paras. 176, 177, 189, 194, 350, 351, 353, referring to Trial Judgement, paras. 404, 609, 626, 739, 781.
[179] Appellant's Brief, paras. 176, 177, 353.

of the Appellant's leadership role over the *Interahamwe* in Mukingo Commune.[180] Again, the Appellant fails to specifically demonstrate how the Trial Chamber erred in the weighing process and, instead, lists in a footnote all of the witnesses he presented at trial to challenge the Prosecutor's contention that he was present and participated in attacks in Mukingo, Nkuli, and Kigombe Communes.[181] The Appeals Chamber emphasizes that an appeal is not a trial *de novo* and that it is not for the Appeals Chamber to reassess all of the evidence presented at trial with regard to the issue at hand on the basis of these general assertions alone.

90. Furthermore, the Appeals Chamber finds that the Trial Chamber did make the requisite factual findings to conclude, beyond reasonable doubt, that the Appellant exercised *de facto* effective control over the *Interahamwe* as a civilian. The Appeals Chamber recalls that in *Kayishema and Ruzindana*, one of the Appellants was found to have exercised *de facto* superior control over the *Interahamwe* on the basis of evidence which identified him as "leading, directing, ordering, instructing, rewarding and transporting" the assailants to carry out attacks.[182] The Appeals Chamber in that case affirmed the Trial Chamber's holding that such evidence demonstrated that he played a "pivotal role" in leading the execution of the massacres.[183] Likewise, in this case, the Trial Chamber found *inter alia* that the assailants in the attacks in Nkuli and Mukingo Communes reported back daily to the Appellant on what had been achieved; the Appellant instructed the *Interahamwe* to kill and exterminate Tutsis and ordered them to dress up and start the work; the Appellant directed the *Interahamwe* from Byangabo Market to Rwankeri *Cellule* to join that attack; the Appellant transported armed assailants; the Appellant ordered and supervised attacks; the Appellant bought beers for the *Interahamwe* while telling them that he hoped they had not spared anyone; and the Appellant played a vital role in organizing and facilitating the *Interahamwe* in the massacre at Ruhengeri Court of Appeal by procuring weapons, rounding up the *Interahamwe* and facilitating their transportation.[184]

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[180] The Appeals Chamber rejects the Appellant's assertion in his Notice of Appeal that the Trial Chamber "ignored" the testimony of Witness RGM. *See* Appellant's Amended Notice of Appeal, para. 68. The Appeals Chamber notes that in para. 527 of the Trial Judgement, the Trial Chamber carefully assessed the credibility of Witness RGM and found him to be unreliable with regard to his testimony on the presence of the Appellant at the scenes of the crimes because he seemed to deliberately remove the Appellant from any of the events with which he was charged. Nevertheless, the Trial Chamber found that Witness RGM did provide detailed and informed evidence with regard to many of the events at issue in the trial and took the witness's testimony into account several times throughout the Trial Judgement. *See, e.g.*, Trial Judgement, paras. 538-541, 564, 600, 615, 621, 633, 635, 678, 700. The Appeals Chamber finds that the Appellant fails to demonstrate how the Trial Chamber's conclusions with regard to the testimony of Witness RGM were unreasonable. *See also* discussion of Witness RGM *infra* Chapter XI.

[181] *See* Appellant's Brief, para. 353 n. 204.

[182] *Kayishema and Ruzindana* Appeal Judgement, para. 299.

[183] *Kayishema and Ruzindana* Appeal Judgement, para. 299.

[184] Trial Judgement, para. 739. *See also* Trial Judgement, paras. 531, 559, 597, 625.

91. On the basis of the foregoing, the Appeals Chamber affirms the Trial Chamber's conclusion that the evidence adduced at trial established beyond reasonable doubt that the Appellant held a *de facto* superior position as a civilian over the *Interahamwe*. Consequently, the Trial Chamber was obliged to take the Appellant's superior position into account as an aggravating factor at sentencing.

IX. ALLEGED ERROR IN FINDING THAT THE APPELLANT WAS PRESENT AT THE CANTEEN IN NKULI COMMUNE ON 6 APRIL 1994 (GROUND OF APPEAL 11)

92. The Appellant submits that the Trial Chamber erred in finding Prosecution Witness GDD to be credible and in relying on his uncorroborated testimony.[185] While the Appellant acknowledges that corroboration is not required as a general rule considering, in his view, that there were discrepancies between the witness's prior written statements, that the witness committed serious crimes before April 1994, and that he had a "clear motive" to testify falsely, the Appellant argues that the Trial Chamber should have required corroboration of his testimony before relying on it to find that the Appellant participated in a meeting at Nkuli canteen on 6 April 1994 as well as in a distribution of weapons at the Nkuli Commune office between 5 and 6 a.m. on 7 April 1994.[186]

93. The Prosecution responds that the Appellant has failed to demonstrate any error on the part of the Trial Chamber in considering and rejecting the argument, made at trial, that Witness GDD had a motive to testify falsely.[187] The Prosecution further points out that the Trial Chamber has considered the alleged inconsistencies between the witness's written statements and submits that the Appellant is merely attempting to reargue his case on appeal.[188]

94. Under Ground of Appeal 6 addressed above, the Appeals Chamber has already considered and dismissed the Appellant's submission that the Trial Chamber erred in finding Witness GDD to be credible.[189] Accordingly, arguments taken into account in connection with that ground of appeal need not be revisited here. The Appellant makes two additional claims under the present ground of appeal: that Witness GDD "expected something in return" for his testimony and that his witness statements reveal inconsistencies.

95. The Appeals Chamber notes that during cross-examination at trial, Witness GDD admitted that when he was first approached by Prosecution investigators, he asked what he could receive for providing information to them.[190] However, when the investigator told the witness that there was nothing the Tribunal could do for him, Witness GDD expressed his disappointment but agreed to

[185] Amended Notice of Appeal, paras. 77-83.
[186] Appellant's Brief, paras. 195-207.
[187] Respondent's Brief, para. 149.
[188] Respondent's Brief, para. 150.
[189] *See supra* Chapter IV.
[190] T. 3 October 2001 p. 134.

provide truthful information.[191] In the view of the Appeals Chamber, there is nothing in this which would support a claim that the Trial Chamber erred in finding Witness GDD to be credible. Rather, the exchange between the witness and the investigator shows that when Witness GDD agreed to provide information to Prosecution investigators, he did so with the clear understanding that he would receive no "help" in return.

96. The Appeals Chamber now turns to the claim of inconsistent written statements. The Appellant highlights that Witness GDD's first statement, from June 2000, does not mention the Appellant's role in convening the night-time meeting in Nkuli Commune on 6 April 1994 and his activities in the morning on 7 April 1994, whereas his second statement, given in July 2000, does allege these activities. The Appellant appears to argue that the Trial Chamber's decision to credit the testimony of Witness GDD in spite of the discrepancies between the two statements shows that the Trial Chamber failed to exercise caution in assessing his credibility.[192] The Appeals Chamber finds that the fact that he did not identify the Appellant on the first occasion does not make his testimony unreliable. Moreover the jurisprudence of this Tribunal recognizes that a Trial Chamber has the discretion to accept a witness's evidence, notwithstanding inconsistencies between said evidence and his or her previous statements, as it is up to the Trial Chamber to determine whether an alleged inconsistency is sufficient to cast doubt on the evidence of the witness concerned.[193] The Appeals Chamber notes that during cross-examination, Defence counsel questioned Witness GDD about the discrepancies in the two written statements at length and that the witness explained the omissions.[194] In reaching the conclusion that Witness GDD was credible, the Trial Chamber recalled the Defence arguments concerning the differences between the witness's statements as well as his explanation for them.[195] The Appeals Chamber therefore finds that on appeal, the Trial Chamber's acceptance of Witness GDD's explanations has not been shown to be unreasonable.

97. Accordingly, the Appeals Chamber concludes that the Appellant has failed to show that the Trial Chamber erred in finding Witness GDD to be credible and in relying on his uncorroborated testimony. The appeal raised under this ground is therefore dismissed.

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[191] T. 3 October 2001 p. 134. ("Well, I told him -- I asked him, you know, if I were to give you information, what would it be my interest, or what interest I derive from it? He told me there wouldn't be anything because ICTR -- how should I put it? Yes, thank you. So he told me that ICTR could not issue instructions or go against instructions issued by Court in Rwanda. So I said, thank you. I am disappointed because I would want to be released, but since ICTR cannot do anything about my case, well, I will tell you the truth.").
[192] Appellant's Brief, paras. 199, 201-203.
[193] *Rutaganda* Appeal Judgement, para. 443. *See also Musema* Appeal Judgement, para. 89; *^elebi}i Case* Appeal Judgement, para. 497; *Kupreški} et al.* Appeal Judgement, para. 156.
[194] *See* T. 4 October 2001 pp. 68-100.
[195] Trial Judgement, para. 467.

X. ALLEGED ERROR IN FINDING THAT THE APPELLANT WAS PRESENT AT THE MUKINGO COMMUNE OFFICE ON THE MORNING OF 7 APRIL 1994 (GROUND OF APPEAL 12)

98. The Appellant submits that the Trial Chamber erred in law and fact in failing to take Witness GAP's testimony and written statements as a whole into consideration in making findings concerning the events at the Mukingo Commune office in the morning of 7 April 1994.[196] The Appellant also argues that the Trial Chamber erred in law and fact in accepting Witness GAP's testimony of the events notwithstanding the internal contradictions and inconsistencies in his written statements and trial testimony, and contradictions with other witnesses.[197] In particular, the Appellant submits that in assessing the credibility of Witness GAP, the Trial Chamber failed to consider the fact that his testimony conflicted with that of Witness RHU31.[198] Additionally, the Appellant submits that the Trial Chamber erred in assessing the credibility of Witness GAP by not bearing in mind that the witness had a motive to lie because he could expect to receive benefits from testifying and, through his testimony, obtain the conviction of the Appellant.[199]

99. The Prosecution responds that the Appellant has failed to identify any errors made by the Trial Chamber in respect of the credibility assessment of Witness GAP.[200] According to the Prosecution, the Appellant has failed to indicate what conflicts exist between the testimonies of Witnesses GAP and RHU31 and submits that in a case of conflict, it falls to the Trial Chamber to decide which testimony carries more weight.[201] Finally, the Prosecution observes that the Trial Chamber considered the testimony of Witness GAP in relation to that of Witness RHU31 and argues that the Appellant has failed to demonstrate any error in the Trial Chamber's consequent finding.[202]

100. The Appeals Chamber notes that in contesting the Trial Chamber's acceptance of Witness GAP's evidence concerning the events in Mukingo in the morning of 7 April 1994, the Appellant alleges, *inter alia*, "internal contradictions and inconsistencies with the witness' [*sic*] prior statements [and] trial testimony".[203] However, the Appellant does not point to any particular

[196] Amended Notice of Appeal, para. 84; Appellant's Brief, para. 208.
[197] Amended Notice of Appeal, para. 86; Appellant's Brief, para. 210.
[198] Amended Notice of Appeal, para. 85; Appellant's Brief, para. 209.
[199] Appellant's Brief, para. 211.
[200] Respondent's Brief, para. 154.
[201] Respondent's Brief, paras. 155, 156.
[202] Respondent's Brief, para. 157.
[203] Appellant's Brief, para. 210.

contradiction or inconsistency, leaving the Appeals Chamber unable to assess the merit of this argument.

101. The Appellant also submits that Witness GAP's testimony contradicted testimonies of other witnesses, namely Witness RHU31, and that the Trial Chamber failed to consider this in assessing the credibility of Witness GAP. The Appellant notes that Witness RHU31 testified that when he arrived at the Mukingo Commune office around 8.30 a.m. on 7 April 1994, neither Witness GAP nor the *bourgmestre* was then present and that they did not come there before the witness left at 11 a.m.[204] The Appellant asserts, however, that the Defence confronted Witness GAP with his pre-trial statement in which, according to the Appellant, the witness stated that in the morning of 7 April 1994 the *bourgmestre* ordered him to remain at the commune office "that day".[205] The Appellant appears to argue that Witness GAP's credibility has been undermined by the discrepancy between his pre-trial statement that he was ordered to remain at the commune office on 7 April 1994 and Witness RHU31's testimony that he did not see Witness GAP there between 8.30 and 11 a.m. The Appeals Chamber considers that the Appellant failed to present this argument in a clear manner and with proper references to the record.[206] This does not assist the Appeals Chamber in considering the merits of the Appellant's argument and, significantly, such a manner of presenting an appeal is not in compliance with the Practice Direction on Formal Requirements for Appeals from Judgements.[207] From the Appellant's submission it nevertheless appears that the Defence confronted the witness with his written statement in court and the Appeals Chamber therefore infers that the Trial Chamber was aware of this issue when considering the testimony of Witness GAP.

102. The Appeals Chamber notes that the Trial Chamber considered differences between the testimonies of Witnesses GAP and RHU31.[208] However, the Trial Chamber found the testimony of Witness RHU31 about the events of the morning of 7 April 1994 "to be of questionable value", given the context of the situation to which the testimony was related.[209] As the trier of fact, a Trial Chamber has to choose between divergent accounts of a particular event.[210] In the present instance, considering all the relevant evidence, the Trial Chamber decided to accord greater weight to the testimony of Witness GAP than to that given by Witness RHU31. In the view of the Appeals Chamber, the Appellant has not shown this decision to be in error.

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[204] Appellant's Brief in Reply, para. 58.
[205] Appellant's Brief in Reply, para. 57.
[206] *See* Appellant's Brief in Reply, n. 39.
[207] *See* Practice Direction on Formal Requirements for Appeals from Judgements, paras. 4(b), 9.
[208] *See* Trial Judgement, para. 481.
[209] Trial Judgement, para. 481.
[210] *Rutaganda* Appeal Judgement, para. 21.

103. Finally, the Appellant asserts that the Trial Chamber failed to bear in mind that Witness GAP had a motive to lie because he could expect to receive benefits from testifying against the Appellant. In support of this proposition, the Appellant recalls the witness's statement at trial that were he to take the Appellant back to Rwanda, he would be "a free man".[211] Indeed, the Appeals Chamber notes, the witness made such a statement during cross-examination.[212] However, placed in the context of the rest of the witness's testimony on this point, the witness appears to have been referring to the fact that he committed the crimes for which he is now detained on the orders of the Appellant and that if, indeed, the Appellant were present in Rwanda he, rather than the witness, would be charged with the offences. In any event, the witness expressly refuted the Defence counsel's suggestion that the Rwandan authorities told him that he would be set free if he would testify against the Appellant or that the authorities made any promises to him before he proceeded to testify at the Tribunal.[213] Accordingly, the Appeals Chamber finds that the Appellant has failed to establish that Witness GAP had a motive to lie in his testimony against the Appellant.

104. The Appeals Chamber holds that it has not been established that the Trial Chamber failed to take Witness GAP's evidence as a whole into consideration when making findings relating to the events at the Mukingo Commune office in the morning of 7 April 1994 and that the Appellant has not shown that the Trial Chamber erred in finding Witness GAP to be credible and in accepting his testimony. Accordingly, this ground of appeal is dismissed.

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[211] Appellant's Brief, para. 211 citing T. 3 December 2001 p. 48.
[212] T. 3 December 2001 p. 48.
[213] T. 3 December 2001 pp. 48-50. *See also* T. 4 December 2001 pp. 78, 79 (re-examination):

> Q. Thank you very much. Now, I want to ask you -- I want you to tell this court about the charges you currently face in Rwanda. You told this court, in cross-examination, that you were not facing the death penalty and you also told this court that you are not likely to be imprisoned. Were you, in any way, asked by the Rwandan authorities to come and testify in this court in return for a lighter sentence?
>
> A. No, the Rwandan authorities have not made any promise to me. They never promised to give me a lighter sentence. Besides, I'm very sure that I'll be found innocent, because all the charges brought against me, in fact, should have been brought against Kajelijeli, because he is the one who committed the acts that are being charged to me.

XI. ALLEGED ERROR IN FINDING THAT THE APPELLANT WAS PRESENT AT BYANGABO MARKET ON THE MORNING OF 7 APRIL 1994 (GROUND OF APPEAL 13)

105. The Appellant submits that the Trial Chamber erred in fact in finding that he assembled *Interahamwe* at Byangabo market in the morning of 7 April 1994 and instructed them to exterminate the Tutsi.[214] In support of this submission, the Appellant alleges several errors on the part of the Trial Chamber in evaluating the evidence.

A. Witness GAO

106. The Appellant argues that the Trial Chamber erred in law and fact in holding as "insignificant" contradictions and inconsistencies between the testimonies of Witnesses GAO, GBV, GDQ, and GBE.[215] The Appellant particularly highlights alleged inconsistencies between the testimonies of Witnesses GAO and GBV, such as that Witness GBV claimed that a certain Rukara was killed with a club with nails, while Witness GAO claimed that he was killed with a small axe;[216] that contrary to the testimony of Witness GBV, Witness GAO testified that there was no need for the *Interahamwe* to go home to put on their uniforms since they were already wearing them;[217] and that Witness GAO testified that it was Lt. Mburuburengero rather than the Appellant who ordered the killing of Tutsi, whereas Witness GBV did not mention any inciting speech from Lt. Mburuburengero.[218]

107. The Appellant alleges other errors of the Trial Chamber relating to the assessment of Witness GAO's credibility. The Appellant asserts that the Trial Chamber erred in finding Witness GAO credible despite his admission of false statements, contradictions between trial testimony and prior statements, and impeachment of his testimony by expert forensic evidence.[219] The Appellant contends that Witness GAO's confession to the Rwandan authorities entered into evidence as Defence Exhibit 8c is at odds with the witness's testimony before the Tribunal in several important respects.[220]

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[214] Amended Notice of Appeal, para. 104; Appellant's Brief, para. 212.
[215] Amended Notice of Appeal, para. 88; Appellant's Brief, para. 218.
[216] Appellant's Brief, para. 214.
[217] Appellant's Brief, para. 214.
[218] Appellant's Brief, para. 217.
[219] Amended Notice of Appeal, para. 91; Appellant's Brief, paras. 221, 222.
[220] Appellant's Brief, para. 215; Appellant's Brief in Reply, para. 61.

108. Finally, in respect of Witness GAO, the Appellant argues that in paragraph 523 of the Judgement, the Trial Chamber erred in law by requiring the Prosecution merely to prove the "possibility" of the Appellant's guilt rather than applying the "beyond reasonable doubt" standard when it evaluated Witness GAO's testimony of the Appellant's presence at Byangabo on the morning of 7 April 1994.[221]

109. The Prosecution responds that the alleged inconsistencies concerning Witnesses GAO, GDQ, and GBV were considered and reconciled by the Trial Chamber.[222] This, in the Prosecution's view, is also the case with the alleged inconsistencies between Witness GAO's prior statements and in-court testimony; the Trial Chamber considered these arguments and chose to prefer the witness's testimony over his written statements.[223] The Prosecution submits that the Appellant has failed to argue that this was an unreasonable approach for the Trial Chamber to take.[224] Additionally, the Prosecution argues that the Trial Chamber has not erred in assessing Witness GAO's testimony in paragraph 523 of the Trial Judgement; rather, the Trial Chamber found that it was possible for both the Appellant and Lt. Mburuburengero to be at Byangabo market at the same time giving orders.[225]

110. A review of the Trial Chamber's assessment of the evidence related to the events at Byangabo market in the morning of 7 April 1994 reveals that the Trial Chamber carefully considered the testimonies as well as the credibility of the witnesses. The Trial Chamber considered discrepancies between the various accounts of the events and reconciled them to reach findings that, in the view of the Appeals Chamber, have not been shown to be unreasonable. The Appeals Chamber finds that the Appellant's submissions in this regard and in respect of the credibility of Witnesses GAO, GBV, GDQ, and GBE under this ground of appeal have been insufficient to show an error on the part of the Trial Chamber. For instance, the Appellant argues that testimonies of Witnesses GAO and GBV differed as to the specific type of weapon used to kill Rukara. While this is true, the Appellant has not shown why the Trial Chamber's characterization of this difference as "insignificant and not affecting the Witness's credibility" is erroneous. The Appeals Chamber notes that the Trial Chamber reached this conclusion after considering the evidence related to the killing as a whole.[226] The Appeals Chamber considers that, taken in this context, the finding that the discrepancy is insignificant cannot be held to be unreasonable.

[221] Amended Notice of Appeal, para. 92; Appellant's Brief, para. 219.
[222] Respondent's Brief, para. 160.
[223] Respondent's Brief, para. 160.
[224] Respondent's Brief, para. 160.
[225] Respondent's Brief, para. 161.
[226] *See* Trial Judgement, para. 519.

111. In respect of the Appellant's claim of error concerning the finding that Witness GAO was credible despite contradictions between his prior statements and in-court testimony, the Appeals Chamber notes the detailed consideration given to this matter in the Trial Judgement.[227] The Trial Chamber took account of the Appellant's arguments concerning the witness's credibility and analyzed the issue as follows:

> The Witness explained in court that he could not read the written documents produced on his behalf, nor authorize their content. When confronted with an illiterate Witness such as is the case with Witness GAO, the Chamber gives considerably more weight to the Witness's in-court testimony than to written statements. In this case, the Chamber is satisfied that the Witness's demeanour and his responses to the questions on the stand, were satisfactory both in explaining the discrepancies between the written documents and the oral testimony and in providing reliable information as to his eye-witness testimony regarding the killings in Byangabo Market and at the Ruhengeri Court of Appeal.[228]

112. This discussion reveals that faced with discrepancies between prior statements and testimony, the Trial Chamber was persuaded to credit the testimony after considering a host of factors, including the witness's demeanour and responses to questions on the stand. The Appeals Chamber finds that the Appellant has not shown the approach taken by the Trial Chamber to be unreasonable or erroneous.

113. The Appeals Chamber also finds that the Appellant's final argument relating to Witness GAO under this ground of appeal is devoid of merit. Referring to paragraph 523 of the Trial Judgement, the Appellant contends that the Trial Chamber erred as a matter of law in applying the standard of "possibility" rather than "beyond reasonable doubt" in evaluating Witness GAO's testimony of the Appellant's presence at the Byangabo market.[229] The Appeals Chamber notes that paragraph 523 of the Trial Judgment does not concern the proof of the fact that the Appellant was at the market at the relevant time, rather, it concerns the Trial Chamber's finding that Lt. Mburuburengero was in all likelihood present at the market in the morning of 7 April 1994. The Trial Chamber only referred to "possibility" when it observed that Lt. Mburuburengero's presence "does not rule out the *possibility* that the Accused was also there that morning."[230] In the subsequent section of the Trial Judgment, the Trial Chamber proceeded to consider whether the Appellant indeed was at the market. Accordingly, the Appeals Chamber holds that the Trial Chamber did not apply the standard of "possibility" as to the presence of the Appellant at Byangabo market.

[227] *See* Trial Judgement, para. 522.
[228] Trial Judgement, para. 522.
[229] *See* Amended Notice of Appeal, para. 92.
[230] Trial Judgement, para. 523 (emphasis added).

B. Witness GDQ

114. The Appellant alleges that the Trial Chamber erred in law and fact in inferring facts not in evidence, namely that Witness GDQ saw the Appellant at the same time as the other witnesses, and in failing to reconcile conflicts between the testimonies of Witnesses GDQ and GDD as to the whereabouts of the Appellant in the morning of 7 April 1994.[231]

115. The Appeals Chamber notes that at paragraph 525 of the Judgement, the Trial Chamber stated: "Prosecution Witness GDQ placed the Accused at the market that morning but could not recall the time. However, it is reasonable to infer that the time is the same as the sightings by Witnesses GAO and GBV, as GDQ saw the Accused arrive just before Rukara was killed."[232] The Appeals Chamber recalls that Witnesses GAO and GBV testified to seeing the Appellant in the vicinity of the market around the time when Rukara was killed. Noting that the Trial Chamber linked sighting the Appellant to the time immediately preceding Rukara's killing, the approximate time when Witnesses GAO and GBV also saw the Appellant,[233] the Appeals Chamber is at a loss to understand the Appellant's contention that the Trial Chamber has "inferred a fact not in evidence" by concluding that Witness GDQ saw the Appellant around the same time as the other two witnesses. In the view of the Appeals Chamber, therefore, the Appellant has not shown that the Trial Chamber erred in this regard.

116. The Appeals Chamber considers that the Appellant's argument concerning the conflict between the testimonies of Witnesses GDQ and GDD is not presented in a manner which would enable the Appeals Chamber to assess its merit. Moreover, the Appellant introduces this argument for the first time in his Brief in Reply.[234] The Appellant asserts that Witness GDQ testified "that at 6:30 a.m. on April 7, 1994 he saw Appellant driving his vehicle and traveling from his home in Rwinzovu where his second wife resided on his way to Byangabo Market."[235] The Appellant continues: "If GDQ is to be believed his testimony conflicts with that of Witness GDD who claimed that at the same time Appellant was awakened from his home in Nkuli and was supervising the distribution of weapons at the commune office before embarking for Mukingo."[236] In support of

[231] Amended Notice of Appeal, para. 93; Appellant's Brief, para. 220; Appellant's Brief in Reply, paras. 62, 65.
[232] Trial Judgement, para. 525.
[233] *See* Trial Judgement, paras. 499, 500.
[234] The Appeals Chamber recalls that the Appellant's Brief in Reply is to be "limited to arguments in reply to the Respondent's Brief". Practice Direction on Formal Requirements for Appeals from Judgement, para. 6. The Appellant has not identified which argument from the Respondent's Brief this submission is in reply to and, indeed, it does not appear that the Prosecution has addressed this matter in the Respondent's Brief.
[235] Appellant's Brief in Reply, para. 62.
[236] Appellant's Brief in Reply, para. 62.

this, the Appellant cites paragraph 485 of the Trial Judgement.[237] In that paragraph, the Trial Chamber summarized the testimony of Witness GDD, in relevant part, as follows: "Prosecution Witness GDD testified that the Accused provided weapons to the young militants at the Nkuli *bureau communal* between 5:00am and 6:00am on 7 April 1994, before he left for Mukingo *commune*."[238] It is not apparent from this where the alleged conflict lies. As stated above, "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."[239]

C. Witness GBE

117. The Appellant submits that the Trial Chamber erred in law and fact in failing to evaluate the contradictions between testimonies of Witnesses GBE and GDQ concerning the presence of Witness MEM and the absence of the Appellant at Byangabo in the morning of 7 April 1994.[240]

118. The Appellant correctly points out that Witness GBE testified that he was an eye-witness of the killing of Rukara and that he did not see the Appellant in the morning of 7 April 1994.[241] Witness GDQ testified that Rukara was killed in the presence of the Appellant.[242] The Trial Chamber was aware of these accounts and noted in the Judgement that several witnesses testified that they were at the market and did not see the Appellant there.[243] After considering the whole of the evidence relating to the events at Byangabo market in the morning of 7 April 1994, including events immediately preceding those which took place at the market,[244] the Trial Chamber concluded that the Appellant was then present at the market.[245] Therefore, while the Trial Chamber did not specifically mention the difference between the testimonies of Witnesses GBE and GDQ, the Appeals Chamber finds that the Trial Chamber's conclusion in respect of the Appellant's presence at the market has not been shown to be unreasonable.

D. Witness MEM

119. The Appellant submits that the Trial Chamber erred in law and fact when it failed to acknowledge the testimony of Witness MEM concerning the fact that the Appellant was not present

[237] *See* Appellant's Brief in Reply, n. 45.
[238] Trial Judgement, para. 485.
[239] *Vasiljević* Appeal Judgement, para. 12. *See also Blaškić* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 10; *Kunarac et al.* Appeal Judgement, paras. 43, 48.
[240] Amended Notice of Appeal, para. 94; Appellant's Brief, para. 213.
[241] *See* Trial Judgement, para. 503.
[242] *See* Trial Judgement, para. 501.
[243] *See* Trial Judgement, para. 526.
[244] *See* Trial Judgement, para. 529.

at Byangabo.[246] The Appellant also argues that the Trial Chamber erred in law and fact in finding that Witness MEM's testimony was tainted and in failing to take note that Witnesses GBE and GAO corroborated Witness MEM's testimony about his role at Byangabo, thereby enhancing his credibility.[247] Finally, in respect of Witness MEM, the Appellant contends that the Trial Chamber erred in law and fact in assuming facts that were not in evidence concerning Witness MEM's ability to see the Appellant at Byangabo in the morning of 7 April 1994.[248]

120. The Prosecution responds that the Appellant fails to demonstrate that the Trial Chamber's finding that Witness MEM might not have been able to see the Appellant at the market from his vantage point was in error.[249] The Prosecution recalls that Witness TLA testified that when Witness MEM fled from the market he came to a house next to the one occupied by Witness TLA and that the two men spoke over the wall separating the two houses.[250] According to the Prosecution, Witness TLA testified that he was not able to see the whole of the Byangabo market from his house.[251] In the Prosecution's view, considering that the two houses were next to each other and that Witness TLA could not see all of the market from his house, it was reasonable for the Trial Chamber to conclude that Witness MEM might not have seen all of the market from his house.[252] In any event, the Prosecution submits that the Trial Chamber found that Witness MEM was not telling the whole truth about the relevant events and asserts that the Appellant failed to demonstrate that this finding was unreasonable.[253]

121. The Appeals Chamber finds that the Appellant's submission that the Trial Chamber failed to acknowledged the testimony of Witness MEM that the Appellant was not present at Byangabo in the morning of 7 April 1994 is not well grounded. First, the Trial Chamber recalled this testimony when summarizing Witness MEM's testimony.[254] Second, in assessing the witness's evidence, the Trial Chamber stated: "He claims not to have seen the Accused at the market that morning."[255] The Trial Chamber had Witness MEM's evidence relating to the events at Byangabo before it and

[245] Trial Judgement, para. 530.
[246] Amended Notice of Appeal, para. 87.
[247] Amended Notice of Appeal, paras. 89, 90; Appellant's Brief, paras. 213, 230, 232; Appellant's Brief in Reply, para. 70.
[248] Amended Notice of Appeal, para. 95; Appellant's Brief, para. 233; Appellant's Brief in Reply, paras. 72, 73.
[249] Respondent's Brief, para. 164.
[250] Respondent's Brief, para. 166.
[251] Respondent's Brief, para. 166.
[252] Respondent's Brief, para. 166.
[253] Respondent's Brief, para. 167.
[254] Trial Judgement, para. 511 ("Defence Witness MEM testified that he did not see the Accused at Byangabo Market at the time of Rukara's beating. The Witness confirmed that he did not see the Accused, the Accused's vehicle or the communal vehicle in or around Byangabo Market between 6:30am and 4:00pm on 7 April 1994.").
[255] Trial Judgement, para. 526.

summarized it in the Judgement at length;[256] however, the Trial Chamber found that the witness was "not telling the whole truth" about the events of the morning of 7 April 1994.[257] In the view of the Appeals Chamber, the Appellant has not shown that the Trial Chamber erred in its evaluation of the credibility of Witness MEM. Additionally, the Trial Chamber's conclusion that Witness MEM could not have had a clear view of the entire market from his house has not been shown to be unreasonable. Such a conclusion is not an assumption of facts not in evidence, it is a conclusion based on the evidence on the record.

E. Witness RGM

122. The Appellant submits that the Trial Chamber erred in law and fact in finding that Witness RGM was not a credible witness despite the fact that he played a central role in the events at Byangabo and was not impeached by the Prosecution.[258]

123. The Prosecution responds by noting that the Appellant has failed to specify any reason why the Trial Chamber erred in assessing the credibility of Witness RGM or why that finding was unreasonable.[259]

124. The Appeals Chamber observes that upon setting out the evidence relevant to the events at Byangabo market in the morning of 7 April 1994, the Trial Chamber proceeded to assess the credibility of individual witnesses who testified about the events. In respect of Witness RGM, the Trial Chamber concluded that he was not a credible witness with regard to the presence of the Appellant at any of the events involved in the case.[260] The Trial Chamber acknowledged his key role in the atrocities and found Witness RGM to be informative of the events and their surrounding circumstances.[261] However, the Trial Chamber concluded that "Witness RGM's mission in testifying was to remove the Accused from the events with which the Prosecution charges him."[262] The Appeals Chamber considers that as the trier of fact and with the benefit of observing witnesses testify before it, the Trial Chamber was well positioned to assess the credibility of individual witnesses against the whole of the evidence and finds that the Appellant has not shown that the finding in respect of Witness RGM's credibility was unreasonable.

[256] *See* Trial Judgement, paras. 495, 509-511.
[257] Trial Judgement, para. 526.
[258] Amended Notice of Appeal, para. 96; Appellant's Brief, paras. 224-228; Appellant's Brief in Reply, paras. 68, 69.
[259] Respondent's Brief, para. 163.
[260] Trial Judgement, para. 527.
[261] Trial Judgement, para. 527.
[262] Trial Judgement, para. 527.

F. Witness MLNA

125. The Appellant argues that the Trial Chamber erred in law and fact in ignoring the totality of the testimony of Witness MLNA in finding that although Witness MLNA was at Byangabo at the relevant time, he "might have" missed the Appellant, and in applying the standard of "might have" rather than "beyond reasonable doubt" in this finding.[263]

126. The Prosecution submits that the Appellant has misunderstood the Trial Chamber's use of the words "might have"; in its view this does not go to any standard, but rather relates to the admission of Witness MLNA that it was possible that the Appellant could have been at the market and that Witness MLNA missed him.[264]

127. With regard to the Appellant's contention that the Trial Chamber ignored the totality of the evidence of Witness MLNA, the Appeals Chamber notes that in mounting this challenge, the Appellant has failed to specify which aspect of the testimony the Trial Chamber may have missed and how doing so has occasioned a miscarriage of justice. In such circumstances, the Appeals Chamber cannot proceed to consider the merits of this submission.

128. Pointing to paragraph 528 of the Trial Judgement, the Appellant also contends that the Trial Chamber applied a standard of "might have" rather than "beyond reasonable doubt" in assessing the evidence. The Appeals Chamber finds that this argument is premised upon a misunderstanding of the impugned text. The Trial Chamber employed the words "might have" not as a standard of proof of the Appellant's guilt, but in recalling Witness MLNA's own admission that the Appellant may have been at the market and that the witness "might have" missed him.[265] A Trial Chamber is entitled, when reviewing the evidence, to say what "might have" been the case, in the process of coming to a final assessment of what was proved beyond reasonable doubt. The Appeals Chamber therefore finds no merit in the present submission.

G. Witness TLA

129. The Appellant submits that the Trial Chamber erred in law and fact in failing to acknowledge the testimony of Witness TLA that the Appellant was not present at Byangabo and address whether celebrations took place at the Appellant's bar on 7 April 1994, and in failing to evaluate the witness's testimony contradicting Witness GAO's evidence of the Appellant's presence

[263] Amended Notice of Appeal, paras. 97, 98; Appellant's Brief, paras. 238, 239; Appellant's Brief in Reply, para. 76.
[264] Respondent's Brief, paras. 170-172.
[265] *See* Trial Judgement, paras. 528, 496.

at the bar in the morning of 7 April 1994 and contradicting the testimony of Witness GBE concerning the events of that day.[266]

130. The Prosecution responds by noting that when a Trial Chamber does not specifically address a testimony of a witness, it cannot be assumed that the Chamber did not consider it.[267] In any event, the Prosecution argues, the Trial Chamber did consider the evidence of Witness TLA, as is clear from paragraph 532 of the Trial Judgement.[268] The inference therefore must be drawn that the Trial Chamber considered the evidence of Witness TLA in relation to the totality of the evidence in concluding that the Appellant was at Byangabo market on the morning of 7 April 1994.[269]

131. In respect of the Appellant's submission that the Trial Chamber failed to acknowledge the testimony of Witness TLA and failed to address contradictions between his testimony and that of Witnesses GAO and GBE, the Appeals Chamber notes that the Trial Judgement contains a lengthy summary of Witness TLA's testimony relating to the events at Byangabo market on 7 April 1994.[270] Additionally, at paragraph 532, the Trial Chamber specifically mentioned evidence given by Witness TLA. The Appeals Chamber therefore cannot accept the submission that the Trial Chamber did not acknowledge the witness's testimony.

132. While the Trial Chamber did not specifically refer to Witness TLA's testimony concerning the events at the Appellant's bar, it cannot be concluded that the Trial Chamber failed to consider this evidence. This is particularly so because in the present instance, the Trial Chamber has taken care in the Judgement to set out the witness's testimony in detail and noted it in the paragraph immediately following the one in question here.[271] The Appeals Chamber considers it reasonable to conclude that the Trial Chamber, having seen the witnesses give their testimonies and having found Witnesses GAO and GBE to be credible, decided to prefer their evidence concerning the events over the testimony of Witness TLA.[272]

133. For the foregoing reasons, the Appeals Chamber dismisses this ground of appeal in its entirety.

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[266] Amended Notice of Appeal, paras. 87, 99, 102, 103; Appellant's Brief, paras. 233-236; Appellant's Brief in Reply, para. 75.
[267] Respondent's Brief, para. 168.
[268] Respondent's Brief, para. 169.
[269] Respondent's Brief, para. 169.
[270] Trial Judgement, paras. 513-516.
[271] *See* Trial Judgement, para. 532.
[272] *See Čelebići Case* Appeal Judgement, para. 481.

XII. ALLEGED ERROR IN FINDING THAT THE APPELLANT WAS PRESENT DURING THE KILLINGS AT RWANKERI ON THE MORNING OF 7 APRIL 1994 (GROUND OF APPEAL 14)

134. The Appellant submits that the Trial Chamber erred in its legal and factual findings that the Prosecution met the burden of proving beyond reasonable doubt that he participated and directed the *Interahamwe* in the attacks against Tutsi civilians in Rwankeri Cellule.[273] In support of this submission, the Appellant raises several arguments.

135. The Appellant argues that testimonies of Witnesses GAO and GBV concerning the weapons available to the *Interahamwe* are inconsistent.[274] The Appellant submits that the Trial Chamber accepted the testimony of Witness GBV that the attackers at Rwankeri were armed with weapons including guns.[275] In contrast, the Appellant argues, Witness GAO testified that the attacking *Interahamwe* had no guns and that the Appellant facilitated their obtaining weapons from Major Bizabarimana.[276] The Appellant also submits that the Trial Chamber erred in law and fact in crediting the "illogical" testimony of Witness GBV that he saw weapons in the vehicle driven by the Appellant because if that were the case, then there would have been no need for the Appellant to obtain weapons from Major Bizabarimana.[277] The Appellant further argues that if Witness GBV is to be believed, there was no need for Witness RGM to request weapons from the Appellant since the *Interahamwe* were already armed.[278] He also submits that "since soldiers were armed and on the scene, there was no need for RGM to request that Appellant obtain weapons from Major Bizibarimana as testified by GAO."[279]

136. The Appellant submits that Witness GAO's confession contradicted his testimony since the witness claimed that soldiers used guns and grenades to kill Tutsis at Rwankeri and did not mention the Appellant's involvement in the killings at Rwankeri.[280]

137. The Appellant further submits that the Trial Chamber erred in law and fact by ignoring the contradictory testimonies of Witnesses GBV, GAP, and RHU31 concerning whether the Appellant was driving the commune vehicle in the morning of 7 April 1994.[281]

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[273] Appellant's Brief, para. 240.
[274] Appellant's Brief, para. 247.
[275] Appellant's Brief in Reply, para. 77.
[276] Appellant's Brief in Reply, para. 78.
[277] Appellant's Brief, para. 248.
[278] Appellant's Brief, para. 249.
[279] Appellant's Brief, para. 256.
[280] Appellant's Brief, para. 249; Appellant's Brief in Reply, para. 79.

138. The Appellant argues that the Trial Chamber erred in law and fact in making no findings with respect to the testimony of Witnesses RGM, MLNA, and RHU23 that the Appellant was not present at Rwankeri in the morning of 7 April 1994.[282] He submits that Witnesses RGM and MLNA confirmed that they did not see the Appellant or his vehicle at Rwankeri, thereby contradicting Witnesses GAO and GBV.[283]

139. The Appellant submits that the Trial Chamber erred in law and fact by failing to take note of the testimony of Witness TLA who contradicted Witnesses GAO and GBE concerning the events of 7 April 1994.[284] The Appellant notes that the Trial Chamber relied on Witness GBE in making a finding that the Appellant was drinking with the *Interahamwe* at his bar during the day on 7 April 1994 whereas Witness TLA testified that the bar was closed all day.[285]

140. Referring to paragraph 548 of the Trial Judgement, the Appellant argues that the Trial Chamber erred in law and fact in crediting the testimony of Witness GBH that the Appellant was looking for Tutsi survivors on 8 April 1994.[286]

141. Finally, the Appellant submits that the Trial Chamber failed to take a balanced approach to evaluating the testimonies of Defence as opposed to Prosecution witnesses.[287]

142. The Prosecution responds that under this ground of appeal, the Appellant merely repeats arguments made at trial without demonstrating any error on the part of the Trial Chamber.[288] In respect of the Appellant's submission that the testimony of Witnesses GAO and GBV regarding weapons are inconsistent, the Prosecution responds that there is no inconsistency and that the Appellant's argument is premised on speculation that because he had obtained arms from one source, he would not have also obtained them from another source.[289]

143. The Prosecution submits that contrary to the Appellant's assertion, no conflict exists in the testimony of Witnesses GAP and GBV concerning the commune vehicle.[290] Moreover, the Prosecution submits, Witness RGM's testimony that he did not see the Appellant or his vehicle at

[281] Amended Notice of Appeal, para. 107; Appellant's Brief, para. 251; Appellant's Brief in Reply, paras. 82, 83.
[282] Amended Notice of Appeal, paras. 105, 108, 109; Appellant's Brief, para. 253; Appellant's Brief in Reply, para. 81.
[283] Appellant's Brief, paras. 257, 260.
[284] Appellant's Brief, para. 261.
[285] Appellant's Brief, paras. 263, 264; Appellant's Brief in Reply, para. 81.
[286] Amended Notice of Appeal, para. 106.
[287] Appellant's Brief, para. 252.
[288] Respondent's Brief, para. 174.
[289] Respondent's Brief, para. 176.
[290] Respondent's Brief, para. 180.

Rwankeri on 7 April 1994 is not evidence that the Appellant was not there and it does not contradict the testimony of Witnesses GAO or GBV.[291]

144. As for the testimony of Witnesses MLNA and TLA, the Prosecution submits that the Trial Chamber found neither to have been a reliable witness and that, even if their testimonies were relied upon, they would not have proven that the Appellant was not at Rwankeri at the relevant time.[292] In response to the Appellant's submissions concerning the differing testimonies of Witnesses GBE and TLA about events at the Appellant's bar, the Prosecution notes that the Trial Chamber found Witness GBE reliable in view of the fact that unlike Witness TLA, he gave detailed evidence relating to this event.[293]

145. In respect of the Appellant's allegation of an inconsistency in the testimony of Witnesses GAO and GBV concerning weapons available to the *Interahamwe*, the Appeals Chamber observes that Witnesses GAO and GBV were describing two different situations. Witness GAO was referring to an attack at Rwamikeri in Rwankeri where the Appellant was not present at the time the *Interahamwe* decided they needed guns to overcome the Tutsi there,[294] whereas Witness GBV's testimony concerns the situation at Rudatinya's house, where the Appellant was present and where the attackers were armed with weapons including guns.[295] In light of this, the Appeals Chamber does not see how such testimony of Witnesses GAO and GBV could be inconsistent; it appears that one group of attackers initially lacked guns while the other group, with the Appellant, already had some. Additionally, the Appellant has failed to show how the Trial Chamber erred in accepting Witness GBV's testimony that he saw weapons in the Appellant's vehicle. The Appellant argues that Witness GBV's testimony on this point was "illogical" because if it were true, then the Appellant would not have needed to request weapons from Major Bizabarimana. The Appeals Chamber considers that inasmuch as this argument is based on speculation, it cannot substantiate a challenge to the Trial Chamber's finding. Moreover, considering the context as presented in the record, the Appeals Chamber finds nothing unreasonable or erroneous in the Trial Chamber's acceptance of this evidence.

146. The Appeals Chamber is not in a position to consider the merits of the Appellant's argument that Witness GAO's confession in Rwanda contradicted his testimony during the Appellant's trial because the Appellant did not provide any reference to the record in support of this point.

[291] Respondent's Brief, para. 181.
[292] Respondent's Brief, para. 182.
[293] Respondent's Brief, para. 182.
[294] Trial Judgement, para. 545; T. 23 July 2001 pp. 26-28.
[295] Trial Judgement, para. 546.

147. The Appellant submits that the Trial Chamber ignored the contradictory testimony of Witnesses GBV, GAP, and RHU31 as to whether the Appellant drove the commune vehicle in the morning of 7 April 1994. The Appeals Chamber notes that Witness GAP stated that the commune vehicle, a red Toyota Hi-Lux, was parked at the commune office on 7 April 1994,[296] whereas Defence Witness RHU31 testified that the vehicle was not at the commune office at 8.30 a.m. on that day,[297] and Witness GBV testified that the Appellant drove the vehicle in the morning of 7 April 1994.[298] The Appellant therefore correctly submits that the testimonies on this point are inconsistent. However, the Appeals Chamber considers that it cannot be concluded that the Trial Chamber "ignored" this inconsistency. A Trial Chamber is not obliged to explain in its judgement every step of its reasoning.[299] In the present instance, it was not unreasonable for the Trial Chamber to find that on 7 April 1994 the Appellant was moving around in the red Toyota vehicle belonging to the commune, given the evidence on the record, including that of Witness GBE.[300]

148. The Appellant asserts that the Trial Chamber committed a legal and factual error in failing to make findings in respect of the testimony of Witnesses RGM, MLNA, and RHU23 that the Appellant was not present at Rwankeri at the relevant time. As recalled in connection with the preceding ground of appeal, the Trial Chamber found Witness RGM to be not credible with respect to the Appellant's presence at any of the events involved in the case and the Appeals Chamber has affirmed that finding.[301] Accordingly, the Appeals Chamber finds that the Appellant's present submission in respect of Witness RGM is not well founded. As concerns the testimony of Witness MLNA, the Appeals Chamber recalls that the Trial Chamber summarized it in the Judgement at some length, including noting that the Appellant was not among a group of 300 to 400 people proceeding towards Rwankeri and Busogo Hill to kill Tutsis.[302] While the Trial Chamber did not specifically address Witness MLNA's evidence in its findings, it is clear that it decided to prefer the testimony of Witnesses GAO, GBV, and GBE.[303] The Appeals Chamber reiterates that a Trial Chamber need not explain every step of its reasoning.[304] Moreover, it appears that Witness MLNA's testimony on this point was not of a nature capable of changing the Trial Chamber's

[296] T. 4 December 2001 p. 61.
[297] Trial Judgement, para. 518.
[298] Trial Judgement, para. 551.
[299] *Niyitegeka* Appeal Judgement, paras. 115, 124; *Bagilishema* Appeal Judgement, para. 88; *Musema* Appeal Judgement, para. 18; *Kayishema and Ruzindana* Appeal Judgement, para. 165; *Čelebići Case* Appeal Judgement, para. 481; *Furundžija* Appeal Judgement, para. 69.
[300] *See* Trial Judgement, para. 557.
[301] Trial Judgement, para. 527. *See supra* Chapter XI.
[302] Trial Judgement, paras. 542, 543.
[303] *See* Trial Judgement, paras. 544-549.
[304] *Niyitegeka* Appeal Judgement, paras. 115, 124; *Bagilishema* Appeal Judgement, para. 88; *Musema* Appeal Judgement, para. 18; *Kayishema and Ruzindana* Appeal Judgement, para. 165; *Čelebići Case* Appeal Judgement, para. 481; *Furundžija* Appeal Judgement, para. 69.

finding and, accordingly, any failure to take account of it in reaching that finding could not have constituted an error occasioning a miscarriage of justice, justifying revision of the finding on appeal. Finally, while the Appellant correctly states that the Trial Chamber did not make a finding in respect of Witness RHU23's testimony concerning the Appellant's alleged absence from Rwankeri, the Appellant failed to point the Appeals Chamber to the parts of the record supporting this proposition, leaving it unable to consider the merit of this submission further.

149. Under the present ground of appeal the Appellant repeats his submission made in respect of Witness TLA under Ground of Appeal 13. The Appeals Chamber need not consider this submission anew and refers to its findings made above.[305]

150. In his Amended Notice of Appeal, referring to paragraph 548 of the Trial Judgement, the Appellant submits that the Trial Chamber "erred in law and fact in crediting Witness GBH that the Appellant was looking for Tutsi survivors on April 8, 1994 and inspecting dead bodies."[306] This is the Appellant's entire submission on this point. The Appeals Chamber emphasizes that, as a starting point, the appealing party must identify the alleged error. Because the Appellant failed to do so, the Appeals Chamber cannot consider this submission further.

151. Lastly, under this ground of appeal, the Appeals Chamber cannot consider the Appellant's submission that the Trial Chamber failed to take a balanced approach to the evidence because the Appellant did not develop this argument in any way, cited no examples of disparate treatment, and provided no references to the Judgement or to the record.

152. For the foregoing reasons, the Appeals Chamber finds that this ground of appeal is not founded and, therefore, dismisses it in its entirety.

[305] *See supra* Chapter XI.
[306] Amended Notice of Appeal, para. 106.

XIII. ALLEGED ERROR IN FINDING THAT THE APPELLANT WAS PRESENT DURING THE KILLINGS AT MUNYEMVANO'S COMPOUND (GROUND OF APPEAL 15)

153. The Appellant submits that the Trial Chamber erred in law and fact when it found that on 7 April 1994 he was present at Munyemvano's compound in Rwankeri and that he supervised and commanded the attacks that took place there.[307] Such a finding, according to the Appellant, was against the weight of the evidence.[308] The Appellant supports this claim with the following arguments.

154. The Appellant submits that the Trial Chamber erred in law and fact in setting aside the testimonies of Witnesses MLCF, RHU25, RHU23, RHU29, and KAA concerning the fact that he was not present at Munyemvano's compound and in accepting as credible the contradictory testimony of Witnesses ACM and GBG.[309] The Appellant argues that the Trial Chamber erred in law and fact when it "ignored" the testimony of Witnesses RHU29 and RHU23, and in finding credible the testimony of Witnesses ACM and GBG concerning killings at the compound on 7 April 1994.[310]

155. The Appellant contends that the testimonies of Witnesses ACM and GBG are so contradictory on crucial points that they are irreconcilable.[311] The Appellant notes that Witness GBG contradicted Witness ACM by testifying that he did not see Tutsis being assembled and marched from the compound and that, after the killings at the compound, *Interahamwe* started shooting and destroying houses.[312] In the Appellant's view, Witness GBG also contradicted Witness ACM in testifying that he did not see the Appellant dressed in an *Interahamwe* uniform.[313] The Appellant further alleges that Witness ACM contradicted Witness GBG by testifying that she saw Ndayambaje shoot and kill a certain Gateyiteyi whereas Witness GBG testified that Gateyiteyi was shot by the Appellant.[314]

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[307] Amended Notice of Appeal, para. 115; Appellant's Brief, para. 265.
[308] Amended Notice of Appeal, para. 115; Appellant's Brief, para. 265.
[309] Amended Notice of Appeal, para. 114; Appellant's Brief, para. 290. Although the Amended Notice of Appeal refers to Witness "GBE", it is clear from the Appellant's Brief and from the cited text of the Trial Judgement that the Appellant is referring to Witness "GBG".
[310] Amended Notice of Appeal, paras. 110, 112, 113; Appellant's Brief in Reply, para. 86.
[311] Appellant's Brief, para. 267.
[312] Appellant's Brief, paras. 274, 284.
[313] Appellant's Brief, para. 275.
[314] Appellant's Brief, para. 287.

156. The Appellant also submits that contradictions exist between the written statements of Witness ACM and her testimony in court.[315] For instance, according to the Appellant, Witness ACM never stated in her written statements that she witnessed any killings at Busogo Parish whereas at trial she testified that she saw the Appellant supervising the killings there.[316]

157. The Prosecution responds that such differences as there may be in the testimony of Witnesses ACM and GBG concerning the attack on Tutsis at the compound are due to the witnesses' different vantage points.[317] Other differences, such as whether the Appellant was dressed in an *Interahamwe* uniform, are in the view of the Prosecution "insignificant" and do not affect the core of their testimonies.[318] In respect of the alleged contradictions between Witness ACM's written statements and her testimony, the Prosecution responds that rather than contradictions they are omissions and that, in any event, Witness ACM testified that her statements were not read back to her after she had been interviewed and that she noticed errors in the statements for the first time when the statements were read to her in Arusha.[319] Finally, the Prosecution responds that rather than "ignore" the testimony of Witnesses RHU23 and RHU29, the Trial Chamber considered them and found them to be unpersuasive, and argues that Witnesses RHU23, RHU25, and RHU29 were evasive and that their evidence was internally contradictory.[320]

158. As the Appellant points out, the testimonies of Witnesses ACM and GBG concerning the events at Munyemvano's compound on 7 April 1994 differ in several respects. The Appeals Chamber notes that after summarizing their testimonies relating to the events at the compound, the Trial Chamber noted the differences between their accounts.[321] Taking into consideration the fact that Witnesses ACM and GBG were victims of the attack at the compound, the Trial Chamber stated: "Although there are differences between the testimonies of Prosecution Witness GBG and ACM—such as a difference between the numbers of attackers given, and the type of attire the Accused was wearing—the Chamber can make an allowance, as both Witnesses were in fear of their lives, and the Witnesses' attention would have been otherwise focused than paying attention to details."[322] The Appeals Chamber observes, however, that the Trial Chamber made this allowance only in respect of differences not directly relating to the Appellant's role in or responsibility for the events. Noting that Witness GBG identified the Appellant as the person who shot Gateyiteyi,

[315] Appellant's Brief, paras. 277, 281.
[316] Appellant's Brief, para. 286.
[317] Respondent's Brief, para. 186.
[318] Respondent's Brief, paras. 187, 189.
[319] Respondent's Brief, paras. 190, 193, 195.
[320] Respondent's Brief, para. 197.
[321] *See* Trial Judgement, paras. 592-594.
[322] Trial Judgement, para. 595.

whereas Witness ACM testified that Gateyiteyi was killed by Ndayambaje, the Trial Chamber declined to rely on their testimonies and found that the identity of Gateyiteyi's killer had not been established.[323] It thus appears that the Trial Chamber credited the testimonies of these witnesses to the extent to which they corroborated each other. The Appeals Chamber finds that the Appellant has not shown this to be an erroneous or an unreasonable approach.

159. In respect of the Appellant's submission relating to contradictions between Witness ACM's written statements and her testimony in court, the Appeals Chamber recalls that the witness explained that she signed the statements without having them read to her and that she did not notice errors in them until arriving to testify at the Tribunal.[324] In light of this explanation, which the Appellant does not now contest, the Trial Chamber's acceptance of her testimony cannot be held to have been erroneous or unreasonable.

160. Accordingly, in the view of the Appeals Chamber, it has not been established that the Trial Chamber erred in assessing the weight of the evidence given by Witnesses ACM and GBG in connection with the events at Munyemvano's compound on 7 April 1994.

161. The Appellant also submits that the Trial Chamber erred in "ignoring" or "setting aside" testimonies of Witnesses MLCF, RHU25, RHU23, RHU29, and KAA that the Appellant was not at the compound on 7 April 1994. The Appeals Chamber notes that the Trial Chamber recalled and summarized at length the testimony of each of these witnesses in the Judgement.[325] The Appellant has failed to refer the Appeals Chamber to the record, citing only paragraph 597 of the Trial Judgement where the Trial Chamber made the finding that the Appellant was present during the attack at Munyemvano's compound. As it is incumbent on the appealing party to identify the alleged errors and support its claims with arguments and references, in the present instance the Appellant, at a minimum, should have specified the passages in the testimony of Witnesses MLCF, RHU25, RHU23, RHU29, and KAA, which he believes support his claim.

162. Referring to the Trial Judgement, the Appeals Chamber notes that Witness MLCF stated that he did not see the Appellant among the attackers at Busogo Parish Convent on 7 April 1994.[326]

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[323] Trial Judgement, para. 595.
[324] T. 11 December 2001 p. 87 ("A. I signed my statement soon after I made it. Q. Did they read the statement back to you in Kinyarwandan and ask you whether or not that statement was truthful and accurate? A. No, when I made my statement, it was not re-read to me -- it was not read back to me. I had confidence in these people. They said they had -- they had written down the statement I gave to them, and I signed without it being read back to me."). *See also* T. 11 December 2001 p. 98; T. 12 December 2001 p. 17.
[325] *See* Trial Judgement, paras. 579-581 (MLCF); 573, 574, 577, 578 (RHU25); 575, 582, 583 (RHU23); 584, 585 (RHU29); 587-590 (KAA).
[326] Trial Judgement, para. 581.

Witness RHU25 testified that he did not see the Appellant at the convent on 7 April 1994.[327] Witness KAA testified that he did not see the Appellant at Busogo Parish during the massacre on 7 April 1994.[328] It does not appear that Witnesses MLCF, RHU25, or KAA referred to Munyemvano's compound or to the Appellant's presence or absence from there. Consequently, and noting the inadequate manner in which the Appellant presented this argument, it is not clear how the testimony of Witnesses MLCF, RHU25, and KAA could lend support to the Appellant's contention that he was not at Munyemvano's compound at the relevant time.

163. The Appeals Chamber notes that Witnesses RHU23 and RHU29 did testify that by the morning of 7 April 1994 the inhabitants of Munyemvano's compound had already fled to Busogo.[329] However, the Trial Chamber found that these witnesses "gave unpersuasive accounts that there was no massacre that occurred at Munyemvano's compound" and declined to accept their testimonies.[330] In the view of the Appeals Chamber, it has not been established that the Trial Chamber, upon seeing all the witnesses testify and upon reviewing the relevant evidence, erred or acted unreasonably in preferring the testimonies of Witnesses ACM and GBG over those of Witnesses RHU23 and RHU29.

164. Accordingly, this ground of appeal is dismissed.

[327] Trial Judgement, para. 578.
[328] Trial Judgement, para. 590.
[329] Trial Judgement, paras. 582 (RHU23), 584 (RHU29).
[330] Trial Judgement, para. 596.

XIV. ALLEGED ERROR IN MAKING NO FINDING ON THE APPELLANT'S PRESENCE DURING KILLINGS AT BUSOGU CONVENT (GROUND OF APPEAL 16)

165. The Appellant submits that the fact that the Trial Chamber made no finding that he was present at the Busogo Parish Convent during the killings on 7 April 1994 is inconsistent with its finding that he was present at Munyemvano's compound.[331] The Appellant argues that since the Trial Chamber relied on Witness ACM to make findings in respect of the Appellant's involvement in the events at Munyemvano's compound, and since Witness ACM also claimed in her trial testimony that she saw the Appellant at Busogo Parish supervising the killings, it is "unreasonable for any trier of fact after evaluating the testimony as a whole to reach a finding that the proofs established beyond a reasonable doubt that Appellant was present and participated in the killings at either Munyemvano's compound or the Busogo Parish."[332]

166. The Prosecution responds that, if anything, this shows that the Trial Chamber exercised caution in making findings concerning the Appellant's presence at massacre sites.[333]

167. After reviewing the Trial Chamber's findings concerning the events at Munyemvano's compound and Busogo Parish, the Appeals Chamber is unable to find merit in the Appellant's present argument. As discussed in connection with the preceding ground of appeal, it appears that the Trial Chamber accorded probative value to Witness ACM's testimony going to the Appellant's role in or responsibility for events when it was corroborated. A Trial Chamber is entitled to rely on any evidence it deems to have probative value and it may accept a witness's testimony only in part if it considers other parts of his or her evidence not reliable or credible.[334] Therefore, the Trial Chamber cannot be considered to have erred when it accepted Witness ACM's corroborated testimony of the Appellant's role at Munyemvano's compound while, at the same time, preferring not to rely on her uncorroborated evidence to find that the Appellant also played a role in the events at Busogo Parish. Accordingly, this ground of appeal is dismissed.

[331] Amended Notice of Appeal, para. 116; Appellant's Brief, para. 299.
[332] Appellant's Brief, paras. 303, 304.
[333] Respondent's Brief, para. 198.
[334] *Musema* Appeal Judgement, para. 82.

XV. ALLEGED ERROR IN ACCEPTING TESTIMONY OF WITNESS GDD THAT HE KILLED TUTSIS ON THE APPELLANT'S ORDERS (GROUND OF APPEAL 17)

168. The Appellant submits that the Trial Chamber erred in law and fact in accepting the uncorroborated testimony of Witness GDD that on 8 April 1994 he killed members of a Tutsi family in Nkuli Commune.[335] The Appellant argues that Witness GDD's veracity "was called into question by virtue of the fact of his criminal records, his reputation in the community for dishonesty and the inconsistencies between his statements given to the ICTR investigators and his trial testimony."[336] In consideration of this, the Appellant contends, the Trial Chamber's failure to view Witness GDD's testimony with "great caution" and not requiring corroboration was erroneous.[337]

169. The Prosecution responds that the only discrepancy raised by the Appellant between Witness GDD's testimony and his prior statements was credibly explained during cross-examination.[338]

170. As recently stated in the *Niyitegeka* case, "[t]he Appeals Chamber has consistently held that a Trial Chamber is in the best position to evaluate the probative value of evidence and that it may, depending on its assessment, rely on a single witness's testimony for the proof of a material fact."[339] The Appeals Chamber notes that the Trial Chamber carefully considered the challenges to Witness GDD's credibility in the Trial Judgement and found this witness to be credible.[340] The Appeals Chamber recalls that it previously dismissed the Appellant's submissions that the Trial Chamber erred in finding Witness GDD to be credible.[341] Having reviewed Witness GDD's testimony and the Trial Chamber's assessment of his credibility, the Appeals Chamber cannot identify any error of the Trial Chamber in accepting and relying on Witness GDD's testimony without corroboration. Therefore, this ground of appeal is dismissed.

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[335] Amended Notice of Appeal, para. 117; Appellant's Brief, para. 305.
[336] Appellant's Brief, para. 307.
[337] Appellant's Brief, para. 308.
[338] Respondent's Brief, para. 201.
[339] *Niyitegeka* Appeal Judgement, para. 92. *See also, e.g.*, *Rutaganda* Appeal Judgement, para. 29; *Musema* Appeal Judgement, paras. 36-38; *^elebi}i Case* Appeal Judgement, para. 506; *Aleksovski* Appeal Judgement, paras. 62-63; *Kupreški} et al.* Appeal Judgement, para. 33.
[340] Trial Judgement, para. 467.
[341] *See supra* Chapters IV and IX.

XVI. ALLEGED ERROR IN FINDING THAT THE APPELLANT FACILITATED KILLINGS AT THE RUHENGERI COURT OF APPEAL (GROUND OF APPEAL 18)

171. The Appellant asserts that the Trial Chamber erroneously found that he played a vital role as an organizer and facilitator of the *Interahamwe* and other attackers in connection with the attack at the Ruhengeri Court of Appeal on 14 April 1994 by procuring weapons, "rounding up" *Interahamwe*, and facilitating their transportation by buying petrol for their vehicles.[342] In this regard, the Appellant submits that the Trial Chamber erred in law and fact in accepting as credible the uncorroborated testimony of Witness GAO concerning events that took place on 14 April 1994.[343] In support of this submission, the Appellant argues that neither Witness GAO's 7 May 1999 statement nor his 2 February 1999 confession letter to the Rwandan authorities mentions the attack at the Ruhengeri Court of Appeal.[344] Additionally, the Appellant contends that had he indeed provided weapons to Witness GAO, the witness would have included this information in his confession or in his prior statement.[345] The Appellant further submits that Witness GAO's testimony that the Appellant was at Byangabo on 14 April 1994 contradicts the testimony of Witness RGM.[346] Finally, the Appellant argues that the Trial Chamber failed to give a reasoned basis for its decision on the credibility of Witness RGM.[347]

172. The Prosecution responds that while claiming an error of law and fact, the Appellant merely seeks a re-examination of evidence adduced at trial without showing how the Trial Chamber committed an error of law or an error of fact leading to a miscarriage of justice.[348] The Prosecution submits that while relying partly on the eye-witness evidence of Witness GAO, the Trial Chamber considered testimonies of other witnesses, both Prosecution and Defence, including Witnesses GAP, RGM, FBM, as well as the Appellant.[349] The Prosecution recalls that Witness RGM corroborated a number of the facts testified to by Witness GAO, including the use of two Daihatsu vehicles during the attack at the Ruhengeri Court of Appeal.[350] As for the alleged omission of the attack at the Court of Appeal from Witness GAO's prior statement and confession, the Prosecution argues that the fact of the attack is not contested and that, in any event, Witness GAO explained his

[342] Amended Notice of Appeal, paras. 119-121; Appellant's Brief, para. 318.
[343] Amended Notice of Appeal, para. 118; Appellant's Brief, para. 309.
[344] Appellant's Brief, paras. 310, 311.
[345] Appellant's Brief, para. 312.
[346] Appellant's Brief, paras. 312-314; Appellant's Brief in Reply, para. 88.
[347] Appellant's Brief, paras. 315-317.
[348] Respondent's Brief, para. 203.
[349] Respondent's Brief, para. 205.
[350] Respondent's Brief, para. 210.

prior statements during cross-examination.[351] Moreover, the Prosecution submits, the Trial Chamber's decision to discount Witness RGM's testimony concerning the Appellant's absence during the relevant events was well reasoned and supported by the record.[352]

173. The Appellant submits that Witness GAO's testimony that the Appellant was at Byangabo on 14 April 1994 is contradicted by Witness RGM's testimony. The Appeals Chamber recalls that it affirmed the Trial Chamber's finding that Witness RGM was not credible with regard to the presence of the Appellant at any of the sites involved in the case.[353] Moreover, the Appeals Chamber finds that the contradiction now alleged between the testimony of Witnesses GAO and RGM is not founded on the record. In the part of the record to which the Appellant points in support of the present argument Witness GAO testified as follows:

> And Kajelijeli came to the petrol -- Rwanda petrol station which belonged to a certain Baheza Esdras. … And Kajelijeli was there with Baheza, Esdras, together with the Chief Warrant Officer Karorero. At the time, I was on the road on the upper side of that petrol station, and Kajelijeli spoke to me personally. He asked me to go and assist the others. I replied that I did not have the tools. He said, "Don't worry, come with me. Get on board the vehicle. The tools are available, and you will be given them". So, I went on board the vehicle. He was on the steering, and sitting by him was the Chief Warrant Officer Karorero. Baheza remained -- stayed behind at the petrol station. So, I went on board the vehicle. Kajelijeli was driving. And so we move right up to Nkuli. … When we got to the home of the chief warrant officer, we got down from that vehicle and the chief warrant officer gave me four grenades. … So, we continued on our way, and we got to the house of the chairman of the CDR. He was known as Gervais. … The purpose of our visit was to seek reinforcements, you know, from other members of the CDR. We secured reinforcements. And we went back down, and when we got to petrol -- Rwanda Petrol Station, it was Kajelijeli who bought petrol for us personally. After taking petrol, we went down right to Byangabo. When we got to Byangabo, I gave one of the Chinese made grenades to …. And other Interahamwes got on board the vehicle and we went to the Court of Appeal to kill.[354]

174. During cross-examination, Witness GAO specified that after purchasing petrol, the Appellant remained at the petrol station: "The last place where I saw Kajelijeli before our departure to the Court of Appeal was the Pétrole Rwanda petrol station after he had paid for the petrol."[355] From Witness GAO's testimony, it appears that after purchasing petrol the Appellant stayed at the petrol station while Witness GAO went "down" to Byangabo where he gave a grenade to Witness RGM and then proceeded to the Court of Appeal. Contrary to the Appellant's argument, Witness GAO did not claim that the Appellant went to the Byangabo market on the day of the attack at the Court of Appeal and, therefore, Witness RGM's testimony that he did not see the Appellant at Byangabo during that day does not contradict Witness GAO's testimony.

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[351] Respondent's Brief, para. 207.
[352] Respondent's Brief, paras. 211, 212.
[353] *See* Trial Judgement, para. 527. *See also supra* Chapter XI.
[354] T. 23 July 2001 pp. 40, 41.
[355] T. 24 July 2001 pp. 64, 65.

175. In addressing the Trial Chamber's alleged failure to provide a reasoned basis for its decision on Witness RGM's credibility, the Appeals Chamber recalls its earlier finding made in connection with Ground of Appeal 13.[356] Under that ground of appeal, the Appeals Chamber found that the Appellant has not shown that the Trial Chamber erred in its finding concerning Witness RGM's credibility. The Appeals Chamber also recalls that a Trial Chamber is not required to set out in detail why it accepted or rejected a particular testimony.[357] Nevertheless, the Trial Judgement in the present case reflects that the Trial Chamber evaluated Witness RGM's credibility carefully and that it reached a reasoned conclusion that has not been shown to be erroneous or unreasonable on appeal.

176. In support of his argument that accepting the uncorroborated testimony of Witness GAO was legally and factually erroneous, the Appellant submits under this ground of appeal that Witness GAO's prior statement and confession letter do not mention the Ruhengeri Court of Appeal attack and that the witness "would have" included in these statements that the Appellant provided him with weapons, if it indeed were true. The Appeals Chamber considers that the Appellant's present line of argument is not convincing. First, to suggest that if something were true a witness would have included it in a statement or a confession letter is obviously speculative and, in general, it cannot substantiate a claim that a Trial Chamber erred in assessing the witness's credibility. Moreover, the Appellant presented this argument to the Trial Chamber, as reflected in the Trial Judgment,[358] and on appeal he has failed to show how the Trial Chamber erred in considering it. Second, the Appellant has not explained how the fact that, in his view, Witness GAO's prior statement or confession letter do not mention the Ruhengeri Court of Appeal attack undermines the witness's credibility. The Appeals Chamber notes that Witness GAO testified about the attack, and the fact that an attack indeed took place there was confirmed by Prosecution Witness GAP as well as Defence Witnesses RGM and FMB and the Appellant himself.[359]

177. Regarding the Appellant's facilitation of the killings at the Ruhengeri Court of Appeal, the Appeals Chamber finds that the Trial Chamber considered the evidence concerning the relevant events with care and with regard for the credibility of the witnesses tendering it. Despite the arguments submitted by the Defence against the credibility of Witness GAO, the Trial Chamber accorded weight to his testimony about these events because he was an eye-witness and because

[356] *See supra* Chapter XI.
[357] *Musema* Appeal Judgement, para. 20.
[358] Trial Judgement, para. 619.
[359] *See* Trial Judgement, paras. 613-617.

other evidence on the record, particularly that of Defence Witness RGM, corroborated important aspects of his testimony.

178. Accordingly, the Appeals Chamber dismisses this ground of appeal.

XVII. ALLEGED ERROR IN FINDING THAT THE APPELLANT WAS PRESENT AT A ROADBLOCK DURING THE KILLING OF KANOTI'S WIFE (GROUND OF APPEAL 19)

179. The Appellant submits that the Trial Chamber erred in law and fact in finding that Witness GDQ was a credible witness concerning the death of a wife of a certain Kanoti, notwithstanding the fact that his testimony was impeached by Witness MLNL.[360] In support of the present submission, the Appellant argues that Witness MLNL contradicted Witness GDQ's testimony that Kanoti's wife was killed at a road-block by testifying that Kanoti's second wife, a Tutsi, was alive in March 2000.[361] The Appellant points out that the Trial Chamber drew incorrect conclusions from the testimony of Witness MLNL concerning Kanoti's wives.[362] The Appellant further submits that the Trial Chamber erred in finding that a road-block was set up in front of Witness GDQ's house on 8 April 1994;[363] that a Tutsi woman and her son were singled out and killed there on 8 April 1994;[364] and that the Appellant was then present at the road-block and that he said: "No Tutsi should survive in Mukingo".[365] The Appellant also submits that the Trial Chamber erred in failing to require the Prosecution to prove its case beyond reasonable doubt when it accepted the possibility that Witness GDQ did not correctly identify the victim as Kanoti's wife.[366] Finally, the Appellant argues that Witness GDQ testified falsely that he did not participate in the killing of Tutsis during the events in April 1994 which, according to him, is apparent from the confession letter of Witness GAO indicating that on 7 April 1994 Witness GDQ was in the company of refugees armed with weapons "and they pointed out the hiding place of a Tutsi girl who was subsequently killed."[367]

180. The Prosecution responds that the Appellant "mischaracterizes" the Trial Chamber's finding which was that a woman thought to be Tutsi and her son were singled out and killed, rather than that a wife of Kanoti was killed.[368] In respect of Witness GDQ, the Prosecution recalls that he was

[360] Amended Notice of Appeal, para. 122; Appellant's Brief, para. 319.
[361] Appellant's Brief, paras. 323, 324.
[362] Appellant's Brief in Reply, paras. 91-93.
[363] Amended Notice of Appeal, para. 124.
[364] Amended Notice of Appeal, para. 123.
[365] Amended Notice of Appeal, para. 125.
[366] Appellant's Brief, paras. 325, 326.
[367] Appellant's Brief, paras. 320, 321.
[368] Respondent's Brief, para. 215.

subjected to cross-examination during trial and that although he denied participating in a specific crime referred to by counsel, he admitted that he was charged with participation in the genocide.[369] Finally, the Prosecution appears to deny that Witness MLNL contradicted Witness GDQ's testimony by pointing out the confusion regarding the number of wives that Kanoti had.[370]

181. The Appeals Chamber notes that the Appellant has failed to develop or substantiate his submissions made in the Amended Notice of Appeal that the Trial Chamber erred in finding that a road-block was set up in front of Witness GDQ's house on 8 April 1994, that a Tutsi woman and her son were singled out and killed there on that date, and that the Appellant was then present at the road-block and that he said: "No Tutsi should survive in Mukingo".[371] Consequently, the Appeals Chamber will not further address these submissions.

182. The Appeals Chamber recalls that at trial the Defence challenged the credibility of Witness GDQ by arguing that Witness MLNL contradicted his testimony that Kanoti's wife was killed on 8 April 1994 because Witness MLNL saw her alive in the year 2000.[372] The Trial Chamber considered this challenge and observed that the possibility exists that Witness GDQ misidentified the victim of the killing as Kanoti's wife.[373] The Trial Chamber also took into account the fact that Witness MLNL testified that Kanoti had married several times and that it could have been a different or previous wife of Kanoti who was killed at the road-block.[374] Accordingly, the Trial Chamber found that the identity of the woman killed at the road-block had not been proven.[375] However, the Trial Chamber concluded that the doubt about the victim's identity did not damage Witness GDQ's credibility in respect of the killing in general.[376] The Appeals Chamber recalls Witness MLNL's testimony that Kanoti "got married in a vague manner"[377] and that "Kanoti normally married from time to time. He took a wife today, he left her tomorrow, he took another and that is how he was."[378] In the view of the Appeals Chamber, considering the record, the Trial Chamber did not act unreasonably or erroneously in concluding as it did.

[369] Respondent's Brief, para. 216.
[370] Respondent's Brief, para. 217.
[371] *See* Amended Notice of Appeal, para. 125.
[372] Trial Judgement, para. 713.
[373] Trial Judgement, para. 713.
[374] Trial Judgement, para. 713.
[375] Trial Judgement, para. 713.
[376] Trial Judgement, para. 713.
[377] T. 11 December 2002 pp. 59, 60.
[378] T. 11 December 2002 p. 62.

183. Next, the Appellant appears to allege an error on the part of the Trial Chamber in failing to require the Prosecution to prove its case beyond reasonable doubt. The Appellant submits as follows:

> The Chamber in its finding failed to require the Prosecution to prove its case beyond a reasonable doubt by finding that there was a "distinct possibility that Kanoti's wife" was seen alive in 2000. The Chamber also found that there was "also the possibility that witness GDQ did not correctly identify as Kanoti's wife the woman who accompanied Kanoti that day." … The Appellant submits that the burden of proof is on the Prosecutor to prove each and every element of the crime against Appellant. The Trial Chamber erred in failing to hold the Prosecutor to her burden of proof beyond a reasonable doubt.[379]

184. The Appeals Chamber notes that in this submission the Appellant fails to identify the alleged error. He appears to argue that the Trial Chamber committed a legal error in respect of the burden of proof required for the Prosecution's case. However, the Appellant himself described the burden as a requirement to prove "each and every element of the crime" against him. The victim's identity, however, is not necessarily an element of the crime and, consequently, the alleged error cannot be a legal error relating to the burden of proof. In the circumstances under consideration here, the question of the victim's identity could only be an issue to be considered in the assessment of Witness GDQ's credibility. As discussed above, the Trial Chamber took this issue into consideration in weighing the witness's credibility in respect of the killing of the woman and its conclusion about Witness GDQ's credibility in respect of this event has not been shown to be erroneous. The Appeals Chamber holds that, having found the witness's testimony about the event to be credible, the Trial Chamber was entitled to find that the events were proven beyond reasonable doubt while, in the exercise of caution, declining to extend that finding to the identity of the victim.

185. Finally, the Appellant asserts that Witness GDQ testified falsely that he did not participate in the killing of Tutsis during April 1994.[380] The Appellant submits that the falsehood of this testimony is proven by the contents of the confession letter of Witness GAO where Witness GDQ is identified as participating in the events.[381] The Appeals Chamber cannot accept this assertion. The Appeals Chamber recalls that Witness GAO disowned parts of the confession letter referred to and that he explained at length why the letter did not truthfully describe the events.[382] In the view of the Appeals Chamber, this confession letter cannot be used to successfully challenge the credibility of

[379] Appellant's Brief, paras. 325, 326.
[380] Appellant's Brief, para. 320.
[381] Appellant's Brief, para. 320.
[382] T. 26 November 2001 pp. 104-126; T. 27 November 2001 pp. 6-92; T. 28 November 2001 pp. 63-79.

another witness. Moreover, during re-cross-examination Witness GAO specifically rejected the part of the confession letter upon which the Appellant relies in support of his present argument.[383]

186. Accordingly, the Appeals Chamber dismisses this ground of appeal.

[383] T. 27 November 2001 pp. 18, 19.

XVIII. ALLEGED ERROR IN FINDING THAT THE APPELLANT WAS PRESENT AND PARTICIPATED IN THE OVERALL KILLINGS IN MUKINGO COMMUNE (GROUND OF APPEAL 20)

187. The Appellant submits that the Trial Chamber erred in the following factual findings because they were against the weight of the evidence: (i) that on 7 April 1994, the Appellant participated in an attack on Tutsi civilians at Busogo Hill, Rwankeri Cellule, Mukingo Commune;[384] (ii) that on 7 April 1994, the Appellant ordered, supervised, and participated in the attacks and killings of Tutsis in their homes or places of shelter in Mukingo Commune;[385] and (iii) that on 7 April 1994, the Appellant and the director of ISAE bought beer for the *Interahamwe* and the Appellant told the *Interahamwe* that he hoped they had not spared anyone.[386]

188. The Prosecution responds that under the present ground of appeal the Appellant merely repeats arguments made in other submissions on appeal.[387]

189. The Appeals Chamber now considers the Appellant's submissions in turn. The Appellant alleges a factual error on the part of the Trial Chamber in finding that on 7 April 1994 he participated in an attack on Tutsi civilians at Busogo Hill in Rwankeri. In support of this submission, the Appellant argues that whereas the Trial Chamber relied on the testimony of Witnesses GAO and GBV to reach its finding, the Appellant called witnesses who testified that while killings took place at Busogo Hill on the date in question, the Appellant was not then present.[388] The Appellant underpins this argument with a reference to the testimony of a single Defence witness, Witness RGM.[389] The Appeals Chamber recalls the discussion under Ground of Appeal 14 relating to the Appellant's claim that the Trial Chamber erred in finding that the Appellant was present during the killings at Rwankeri in the morning of 7 April 1994 as well as its consideration of the Trial Chamber's assessment of Witness RGM's credibility in Grounds of Appeal 13 and 18.[390] As discussed therein, the Trial Chamber found Witness RGM to be not credible with respect to the Appellant's presence at or absence from any of the events involved in the case and, on appeal, this finding has not been shown to be erroneous or unreasonable. The Appellant advances no additional arguments under this ground of appeal to show that the Trial Chamber erred in the assessment of Witness RGM's credibility or, indeed, to show anything

[384] Amended Notice of Appeal, para. 126; Appellant's Brief, para. 327.
[385] Amended Notice of Appeal, para. 127; Appellant's Brief, para. 330.
[386] Amended Notice of Appeal, para. 128; Appellant's Brief, para. 341.
[387] Respondent's Brief, para. 220.
[388] Appellant's Brief, para. 328.
[389] *See* Appellant's Brief, n. 199.

substantiating his assertion that the weight of the evidence favours an opposite finding to the one made by the Trial Chamber. The Appeals Chamber finds that the Appellant has failed to present arguments under the present ground of appeal which would justify an appellate interference with the Trial Chamber's impugned finding.

190. The Appellant next alleges a factual error in the finding that on 7 April 1994 he ordered, supervised, and participated in attacks on and killings of Tutsis in Mukingo Commune. In support of this submission, the Appellant merely reiterates some of his arguments made in connection with his earlier submissions concerning the events at Byangabo centre, Rwankeri, Munyemvano's compound, and in respect of an 8 April 1994 killing at a road-block in front of Witness GDQ's house[391] without any references to the record and, indeed, without adding anything further. The Appeals Chamber need not revisit these arguments. It suffices to recall the findings made under Grounds of Appeal 13, 14, 15, and 19.[392] The Appeals Chamber finds that under the present ground of appeal the Appellant has not submitted anything to show that the Trial Chamber reached the impugned finding against the weight of the evidence.

191. Finally, the Appellant submits that the Trial Chamber erred in fact when it found that in the evening of 7 April 1994, the Appellant and the director of ISAE bought beer for the *Interahamwe* and that the Appellant told them that he hoped that they had not spared anyone. The Appellant supports his submission by asserting that this finding is based on the testimony of Witness GAO which, in his view, is a "complete fabrication" from a witness whose credibility has been "seriously damaged."[393] The Appellant notes that Witness RHU23 testified that the ISAE canteen where the gathering was said to have taken place was in fact closed the entire day and that Witness RHU23 was the only person with the key to access it.[394] The Appellant also notes that Witness GDD, who in his view likewise lacks credibility, testified that in the evening of that day the Appellant was celebrating with the *Interahamwe* at a different location and that if Witnesses GAO and GDD were to be believed, the Appellant was celebrating at two different places at the same time.[395]

192. The Appeals Chamber notes that under this ground of appeal, the Appellant does not present any support for his proposition that Witness GAO's testimony was a fabrication and that the witness's credibility has been damaged. In these circumstances, the Appeals Chamber can only

[390] *See supra* Chapters XI, XVI.
[391] The Appellant makes no attempt to explain how findings about this event, which took place on 8 April 1994, could support his contention of an error in the Trial Chamber's findings of his responsibility for events that took place on 7 April 1994.
[392] *See supra* Chapters XI, XII, XIII, XVII.
[393] Appellant's Brief, paras. 342, 344.
[394] Appellant's Brief, para. 343.

recall that the Appellant has not prevailed under other grounds of appeal in which he alleged that Witness GAO's testimony was not credible.[396]

193. The Appeals Chamber notes that the Trial Chamber took into account Witness RHU23's testimony that he did not see the Appellant at the ISAE canteen in the evening of 7 April 1994.[397] However, after assessing Witness RHU23's appearance in court, the Trial Chamber found his testimony to lack credibility.[398] The Appellant does not argue under this ground of appeal that the Trial Chamber erred in its assessment of Witness RHU23's credibility and makes no effort to show such an error.

194. Finally, the Appeals Chamber recalls that the Trial Chamber addressed the alleged incompatibility of Witness GDD's and Witness GAO's testimony concerning the Appellant's whereabouts in the evening of 7 April 1994. After taking the evidence into account, the Trial Chamber found as follows:

> The Chamber notes that the Prosecution evidence apparently places the Accused in two different locations on the same evening of 7 April 1994. Witness GAO places the Accused at celebrations happening at the ISAE. Witness GDD places the Accused at the Nkuli *commune* office. This raises the issue of the mobility of the Accused. The Chamber has considered the evidence of the witnesses carefully, as well as examined the exhibits tendered at trial. Some of this evidence bears on the matter of distances and the correlation of localities. The distances are short between these places. The Chamber notes that Kajelijeli was an important figure in the community: he possessed a vehicle of his own and, according to his own testimony, the necessary documents permitting mobility. Having considered the totality of the evidence, the Chamber finds that during the evening of 7 April 1994, the Accused was in a position easily to commute the distance involved in a travel between the ISAE and the Nkuli *commune* office, thus enabling him to attend both places in the same evening.[399]

195. The Appeals Chamber finds that the Appellant has not shown any error in the finding of the Trial Chamber on this point.

196. Accordingly, the Appeals Chamber dismisses this ground of appeal in its entirety.

[395] Appellant's Brief, para. 345.
[396] *See* Grounds of Appeal 6, 9, 13, 14, 18.
[397] *See* Trial Judgement, para. 699.
[398] Trial Judgement, para. 701.
[399] Trial Judgement, para. 695.

XIX. ALLEGED ERROR IN DENYING A MOTION CONCERNING THE ARBITRARY ARREST AND ILLEGAL DETENTION OF THE APPELLANT (GROUND OF APPEAL 22)

197. Under this ground of appeal, the Appellant submits that the Trial Chamber committed an error of law in dismissing his preliminary motions challenging the Tribunal's temporal and personal jurisdiction. In particular, he emphasizes that the Trial Chamber's dismissal of his motion challenging the Tribunal's personal jurisdiction on the basis of the illegality of his arrest and detention, amongst other alleged human rights violations ("Decision of 8 May 2000"),[400] was in error.[401] The Appellant contends that the Appeals Chamber should now review these Trial Chamber decisions because his interlocutory appeals against them were dismissed on procedural grounds. The Appellant argues that because the Appeals Chamber has never considered the merits of his jurisdictional objections on appeal, it is not barred by the doctrine of *res judicata* from doing so now.[402] Finally, the Appellant submits that upon review, the Appeals Chamber should find that this Tribunal lacks jurisdiction over his case.[403] Alternatively, the Appellant seeks to have the evidence obtained by the Prosecution subsequent to his alleged illegal arrest and detention suppressed.[404]

198. In response, the Prosecution raises four objections to this ground of appeal. First, the Prosecution claims that the Appellant is precluded under the doctrine of *res judicata* from presenting this ground, which raises, *de novo*, issues that are similar to those already brought before the Appeals Chamber and disposed of on interlocutory appeal. This ground, the Prosecution submits, amounts to an abuse of the appeals procedure.[405] Second, the Prosecution contends that this ground is inadmissible because the Appellant fails to explain how the Trial Chamber erred either in law or in fact or what was the impact of any alleged error on the Trial Chamber's findings of guilt against him.[406] Third, and without prejudice to its first two objections to this ground, the Prosecution argues that, on the merits, the Decision of 8 May 2000 was correct in finding that the Appellant was neither arbitrarily arrested nor illegally detained under the Tribunal's Statute and

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[400] *Kajelijeli*, Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing ("Decision of 8 May 2000").
[401] The Appeals Chamber notes that while the heading of this ground of appeal suggests that the Appellant is only challenging the Trial Chamber's Decision of 8 May 2000 on personal jurisdiction, he, in fact, is also challenging a later decision on jurisdiction by the Trial Chamber as to its temporal jurisdiction: *Kajelijeli*, Decision on the Defence Motion Objecting to the Jurisdiction of the Tribunal ("Decision of 13 March 2001"). *See* Appellant's Brief, para. 371.
[402] Amended Notice of Appeal, para. 132; Appellant's Brief, paras. 355-372; Appellant's Brief in Reply, paras. 97, 98.
[403] Appeal Hearing, T. 7 March 2005 p. 12.
[404] Appeal Hearing, T. 7 March 2005 p. 13.
[405] Respondent's Brief, paras. 230, 235-247.
[406] Respondent's Brief, paras. 231, 248-252.

Rules. Furthermore, the Prosecution claims that the Appellant was not denied the right to challenge the legality of his arrest.[407] Finally, the Prosecution argues that even if the Appeals Chamber were to find that there were some irregularities in the Appellant's arrest and detention, the Appellant's rights were in no way egregiously violated such that the Tribunal is deprived of jurisdiction.[408]

A. Procedural History

199. Before addressing the Appellant's arguments under this ground of appeal, the Appeals Chamber considers it useful to recall the procedural history with regard to the adjudication of the Appellant's previous challenges to the Tribunal's jurisdiction. The Appellant first filed a *pro se* motion on 9 November 1998 challenging the Tribunal's personal jurisdiction on grounds that his arrest and initial detention in Benin and his subsequent detention in the United Nations Detention Facility ("UNDF") were illegal. After hearing oral submissions from the parties, the Trial Chamber denied the Appellant's motion in its Decision of 8 May 2000, finding that none of the Appellant's rights had been violated under the Tribunal's Statute and Rules with regard to the his arrest, his right to be informed of the charges against him, his right to an initial appearance without delay, and his right to counsel. The Appellant filed a notice of appeal against this decision, which the Appeals Chamber dismissed. In its decision of 10 August 2000, the Appeals Chamber found that the notice lacked specificity in that it did not mention any ground of appeal or the relief sought, and that the Appellant failed to cure this deficiency within the deadline it had set for doing so ("Decision of 10 August 2000").[409]

200. Thereafter, the Appellant filed a second challenge to the Tribunal's jurisdiction in a motion contesting the Amended Indictment that was issued against him. The Appellant again argued that the Trial Chamber lacked personal jurisdiction because his arrest and detention were unlawful.[410] Furthermore, the Appellant contested the Trial Chamber's temporal jurisdiction on grounds that the factual allegations in the Amended Indictment occurred before 1994 and thus, were in violation of Articles 1 and 7 of the Tribunal's Statute.[411] The Trial Chamber rejected, in its Decision of 13

[407] Respondent's Brief, paras. 233, 253-269.
[408] Respondent's Brief, paras. 234, 270-277.
[409] *See Kajelijeli*, Order, 10 August 2000. *See also Kajelijeli*, Scheduling Order, 26 July 2000; *Kajelijeli*, Order (On Motion to Grant Relief from Dismissal of Appeal), 12 December 2000.
[410] *See* Decision of 13 March 2001, para. 1.
[411] *See* Decision of 13 March 2001, para. 1. Article 1 of the Tribunal's Statute provides, in relevant part, that "[t]he International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law . . . between 1 January 1994 and 31 December 1994 . . . ." Article 7 of the Tribunal's Statute states that ". . . [t]he temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994."

March 2001, the Appellant's arguments in this second motion with regard to personal jurisdiction as being barred by its Decision of 8 May 2000 disposing of those same arguments ("Decision of 13 March 2001").[412] The Trial Chamber also rejected the Appellant's arguments challenging its temporal jurisdiction because under the well-established case law of the Tribunal, indictments may refer to events or crimes occurring before 1994 as long as the Trial Chamber does not find the accused accountable for crimes committed prior to 1994.[413] On interlocutory appeal of this decision, the Appeals Chamber affirmed, on 16 November 2001, the Trial Chamber's reasoning with regard to its temporal jurisdiction over the Appellant's case ("Decision of 16 November 2001").[414] The Appeals Chamber declined to comment on the Appellant's arguments contesting the Tribunal's personal jurisdiction noting that an appeal on that issue had already been dismissed.[415] The Appeals Chamber indicated that at a later stage in the trial, the Appellant could raise before the Trial Chamber all issues relating to his fundamental rights and any demands for reparation.[416]

B. The Appellant's Jurisdictional Objections and Preclusive Effects of Prior Appeals Chamber Decisions

201. The Appeals Chamber now considers whether, in light of its Decision of 10 August 2000 and its Decision of 16 November 2001, it may nevertheless reconsider the arguments addressed therein in considering the Appellant's submission under this ground of appeal that the Trial Chamber erred in rejecting them and in finding that it had jurisdiction.

202. The parties have addressed the effects of these prior interlocutory appeals decisions by reference to the doctrine of *res judicata*. This doctrine refers to a situation when "a final judgement on the merits" issued by a competent court on a claim, demand or cause of action between parties constitutes an absolute bar to "a second lawsuit on the same claim" between the same parties.[417] The doctrine of *res judicata* is not directly applicable to this case, because it applies not to the effects of prior interlocutory appeals decisions on further proceedings in the same case, but instead

[412] Decision of 13 March 2001, para. 6.
[413] Decision of 13 March 2001, para. 5.
[414] Decision of 16 November 2001, p. 4.
[415] Decision of 16 November 2001, p. 4.
[416] Decision of 16 November 2001, p. 4.
[417] Black's Law Dictionary (8th ed. 2004). A limited exception to the doctrine of *res judicata* barring review of final judgements is found under Article 25 of the Statute and Rules 120 and 121 of the Rules whereby a final judgement may be reviewed when a new fact is discovered that was not known at the time of the original proceedings either before the Trial or Appeals Chambers, could not have been discovered through the exercise of due diligence, and could have been a decisive factor in reaching the final decision.

to the effects of final *judgements* in one case on proceedings in a subsequent and different case.[418] However, a similar principle applies to cases like this one: the Appeals Chamber ordinarily treats its prior interlocutory decisions as binding in continued proceedings in the same case as to all issues definitively decided by those decisions. This principle prevents parties from endlessly relitigating the same issues, and is necessary to fulfil the very purpose of permitting interlocutory appeals: to allow certain issues to be finally resolved before proceedings continue on other issues.

203. There is an exception to this principle, however. In a Tribunal with only one tier of appellate review, it is important to allow a meaningful opportunity for the Appeals Chamber to correct any mistakes it has made.[419] Thus, under the jurisprudence of this Tribunal, the Appeals Chamber may reconsider a previous interlocutory decision under its "inherent discretionary power" to do so "if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice."[420]

204. The Appeals Chamber holds that its interlocutory decision of 16 November 2001 rejected, on its merits, the Appellant's argument concerning the Tribunal's temporal jurisdiction. The Appellant is thus precluded from re-litigating that issue now. The Appellant has not demonstrated that this is an exceptional case meriting discretionary reconsideration; it has not demonstrated a "clear error" in the Appeals Chamber's reasoning, nor the necessity of reconsideration to prevent an injustice.

205. Likewise, the Appeals Chamber finds that the Appellant may not re-litigate the issue of the Tribunal's personal jurisdiction. The Appeals Chamber squarely held, in its 16 November 2001 decision, that the Appellant procedurally lost his entitlement to raise his personal jurisdiction objection by failing to file a sufficiently specific notice of appeal, even after the Appeals Chamber had allowed him extra time to do so after his initial failure. This holding disposed of the personal jurisdiction objection. The Appellant has not demonstrated any cause to reconsider this determination on a discretionary basis: there is no clear error in the Appeals Chamber's reasoning, nor is reconsideration necessary to prevent an injustice.

206. As will be discussed *infra* in detail, the Appeals Chamber does find that the Appellant's rights were in fact violated during his initial arrest and detention prior to his initial appearance.

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[418] Under this Tribunal's jurisprudence, interlocutory appeal decisions are not considered "final judgements" unless they terminate the proceedings between the parties, which is not the case here. *See Barayagwiza*, Decision (Prosecutor's Request for Review or Reconsideration), paras. 49, 51.
[419] *Cf. ^elebi}i Case* Sentencing Appeal Judgement, paras. 48-60.
[420] *Nahimana et al*, Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, p. 2.

However, even if it were to reconsider the issue of its personal jurisdiction, the Appeals Chamber does not find that these newly and more detailed submitted breaches rise to the requisite level of egregiousness amounting to the Tribunal's loss of personal jurisdiction. The Appeals Chamber is mindful that it must maintain the correct balance between "the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law."[421] While a Chamber may use its discretion under the circumstances of a case to decline to exercise jurisdiction, it should only do so "where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity."[422] For example, "in circumstances where an accused is very seriously mistreated, maybe even subject to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment."[423] However, those cases are exceptional and, in most circumstances, the "remedy of setting aside jurisdiction, will . . . be disproportionate."[424] The Appeals Chamber gives due weight to the violations alleged by the Appellant; however, it does not consider that this case falls within the exceptional category of cases highlighted above.

207. On the basis of the foregoing, the Appeals Chamber dismisses the Appellant's submission that it should reconsider the decisions rejecting his objections to the jurisdiction of this Tribunal.

C. The Appellant's Arrest and Detention

208. However, the Appeals Chamber deems it appropriate to step in *proprio motu* in order to consider whether, for other reasons, the Trial Chamber committed an error of law in the Trial Judgement in light of its Decision of 8 May 2000.[425] In particular, the Appeals Chamber will determine whether the Trial Chamber erred in failing to find that the Appellant's fundamental rights during his arrest and detention were violated and, if so, whether he is entitled to some remedy other than the Appellant's request that his case be dismissed for lack of personal jurisdiction.[426]

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[421] *Dragan Nikolić*, Decision on Interlocutory Appeal Concerning Legality of Arrest, para. 30.
[422] *Barayagwiza*, Decision, 3 November 1999, para. 74.
[423] *Dragan Nikolić*, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, para. 114, affirmed by *Dragan Nikolić*, Decision on Interlocutory Appeal Concerning Legality of Arrest, paras. 28, 30.
[424] *Dragan Nikolić*, Decision on Interlocutory Appeal Concerning Legality of Arrest, para. 30.
[425] *Niyitegeka* Appeal Judgement, para. 7. *See also Rutaganda* Appeal Judgement, para. 20; *Musema* Appeal Judgement, para. 16.
[426] The Appeals Chamber notes that the Appellant failed to argue this issue before the Trial Chamber even after being directed to do so by the Appeals Chamber in its interlocutory Decision of 16 November 2001. However, the Appeals Chamber considers that this oversight by the Appellant does not bar it from considering the issue here *proprio motu*. The Appeals Chamber is convinced by the Appellant's argument at the Appeal Hearing that he failed to raise that argument because he did not understand the Decision of 16 November 2001 as finding that he was illegally arrested and detained, contrary to the Trial Chamber's Decision of 8 May 2000, and thus that he was entitled to seek some form of

209. In the following review of the Trial Chamber's findings, the Appeals Chamber will rely upon the relevant provisions found in the sources of law for this Tribunal, *i.e.*, its Statute, the Rules and customary international law[427] as reflected *inter alia* in the International Covenant on Civil and Political Rights ("ICCPR").[428] The Appeals Chamber will also refer to the relevant provisions found in regional human rights treaties as persuasive authority and evidence of international custom, namely, the African Charter on Human and Peoples' Rights ("ACHPR"),[429] the European Convention on Human Rights ("ECHR"),[430] and the American Convention on Human Rights ("ACHR").[431]

1. Alleged Violations during Period from Arrest in Benin until Transfer to Arusha

210. The Appeals Chamber notes that the undisputed facts surrounding the Appellant's initial arrest and detention in Benin until his transfer to Arusha, Tanzania ("first period of arrest and detention") are as follows. On 8 May 1997, the Appellant arrived in Benin where he subsequently applied to the United Nations High Commissioner for Refugees ("UNHCR") for recognition of his claim to refugee status.[432] On 5 June 1998, the Appellant was arrested at the request of the Tribunal's Office of the Prosecutor by Benin authorities in the home of Joseph Nzirorera without an arrest warrant and was placed into custody.[433] The next day, on the 6th of June, the Prosecution sent a letter to the Ministry of Justice of Benin requesting the Appellant's arrest.[434] On 12 June 1998, the Appellant was questioned by two investigators from the Prosecution. Over two months later, on 24 August 1998, the Prosecution filed a request before a Judge of the Tribunal for an order for transfer and provisional detention of the Appellant.[435] On 29 August 1998, a Judge of the Tribunal confirmed an indictment against the Appellant and several other accused and issued an Order and arrest warrant for the Appellant's transfer from Benin to the UNDF in Arusha, Tanzania.[436] Finally, on 7 September 1998, the Appellant was released from the custody of Benin authorities and handed

alternative remedy. *See* Appeal Hearing, T. 7 March 2005 p. 15. The Appellant stated that had he so understood, he would have raised the question of an alternative remedy before the Trial Chamber. *Id.*

[427] *See Barayagwiza*, Decision, 3 November 1999, para. 40.

[428] International Covenant on Civil and Political Rights, 999 U.N.T.S. 171.

[429] African [Banjul] Charter on Human and Peoples' Rights, 21 I.L.M. 58 (1982).

[430] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222.

[431] American Convention on Human Rights, 1144 U.N.T.S. 123.

[432] *See* UNHCR Attestation for Mr. Juvénal Kajelijeli dated 11 September 1997, Annex to Appellant's *pro se* Requête portant sur l'arrestation arbitraire et la detention illégale du suspect Juvénal Kajelijeli, 9 November 1998, filed 20 November 1998.

[433] Decision of 8 May 2000, Preamble and paras. 3, 16.

[434] Annex to Appellant's *pro se* Requête portant sur l'arrestation arbitraire et la detention illégale du suspect Juvénal Kajelijeli, 9 November 1998, filed 20 November 1998. *See also* Decision of 8 May 2000, para. 13.

[435] Prosecution Request for an Order for Transfer and Provisional Detention under Rule 40*bis*, 24 August 1998.

over to the Tribunal, arriving at the UNDF on 9 September 1998. In total, the Appellant was in the custody of the authorities of Benin from the date of his initial arrest until his transfer to the custody of the Tribunal for 95 days. During this period, the Appellant was in the custody of Benin authorities for 85 days before being served with an arrest warrant or a confirmed indictment.

(a) The Parties' Submissions

211. The Appellant submits that, contrary to the Trial Chamber's findings in its Decision of 8 May 2000, his rights as protected under this Tribunal's Statute and Rules as well as international human rights law were violated during his first period of arrest and detention in Benin. First, the Appellant argues that his arrest and detention were unlawful under Rule 40 of the Rules and were arbitrary. He maintains that this is evidenced by the fact that he was arrested without a warrant. Furthermore, the Appellant contends that although the Prosecution made a request to the Benin authorities for his arrest, the Prosecution has failed to show that it had any reliable information, prior to his arrest on 5 June 1998, tending to show that he may have committed crimes within the Tribunal's jurisdiction and thus could be considered a suspect. The Appellant argues that the only reason he was seized on 5 June 1998 was because he was in the presence of a suspect for whom the Prosecution had the requisite reliable information, Joseph Nzirorera. Therefore, the Appellant contends that his arrest and subsequent detention in Benin were unlawful under the Tribunal's Statute and Rules and under Article 9(1) of the ICCPR.[437]

212. Second, the Appellant argues that his rights to be informed promptly of the reason for his arrest as well as of the charges against him under Article 9(2) of the ICCPR were violated during this first period of arrest and detention. The Appellant states that when he was arrested, he asked the Benin authorities as to the reasons for his arrest and was told that he would be informed of them at some later time. The Appellant notes that it was not until after 29 August 1998 that he was served in Benin with copies of a warrant for his arrest, an order of surrender, an order of confirmation and non-disclosure, and a redacted version of the amended indictment from the Tribunal. The Appellant argues that his right to be informed promptly of the charges against him in a language he understands was violated because of all of these documents, only the redacted and amended indictment was in French and that, because of the redactions, his name was not on the indictment nor was he able to understand the charges against him.[438]

[436] Decision of 8 May 2000, Preamble; Mandat d'Arrêt et Ordonnance de Placement en Détention, 29 août 1998.
[437] Appeal Hearing, T. 7 March 2005 pp. 8-10.
[438] Appeal Hearing, T. 7 March 2005 pp. 10, 11.

213. Finally, the Appellant contends that during his questioning by the Prosecution on 12 June 1998, his right as a suspect to assistance of counsel under Rule 42 of the Tribunal's Rules was violated.[439]

214. The Prosecution responds that the Appellant fails to show that the Trial Chamber committed an error when it found that the Appellant's rights were not violated during his first period of arrest and detention in Benin. The Prosecution submits that under Rule 40 of the Rules, a warrant of arrest is not mandatory when arresting a suspect. Rule 40 empowers the Prosecution to request a State, either orally or in writing, to arrest a suspect and place him in custody in cases of urgency. In this case, the Prosecution states that it acted on reliable information with regard to the Appellant's role in committing crimes within the Tribunal's jurisdiction when it requested Benin to arrest the Appellant. The Prosecution argues that the Appellant's contention that it only obtained incriminating information on the Appellant subsequent to the 5 June 1998 arrest is mere speculation to be given no weight. Finally, the Prosecution argues that the length of the Appellant's detention in Benin was not unlawful under Rule 40*bis* in that he was served with an indictment within 90 days.[440]

215. The Prosecution further responds that the Appellant fails to demonstrate that the Trial Chamber erred when it found that he had been promptly informed of the charges against him during this first period of detention. The Prosecution notes that the Appellant was served with a copy of the redacted indictment in French at the same time as being served with a warrant for his arrest and contends that the Appellant's claim that he could not understand the charges as being against him in the redacted indictment, is without merit.[441]

216. Finally, the Prosecution argues that the Appellant fails to show that the Trial Chamber was in error when it found that his right to counsel during his interview with the Prosecution during this first period of detention was not violated because of the Appellant's waiver. The Prosecution notes that under Rule 42(B), a suspect being investigated may waive the right to counsel. The Prosecution points out that the Appellant's waiver is proven by the tapes of the interview and the Appellant accepted the integrity of those tapes at trial. Thus, the Prosecution contends that the Trial Chamber committed no error in finding waiver of the right to counsel.[442]

[439] Appeal Hearing, T. 7 March 2005 p. 12.
[440] Respondent's Brief, paras. 254-257.
[441] Respondent's Brief, para. 268.
[442] Respondent's Brief, para. 260.

(b) Discussion

217. The Appeals Chamber first finds that, for the most part during the Appellant's first period of arrest and detention, the Appellant was a "suspect" within the meaning of the Rules and thus the provisions within the Tribunal's Statute and Rules pertaining to the rights of suspects were applicable to him. Under Rule 2 of the Rules, a suspect is defined as a "person concerning whom the Prosecutor possesses reliable information which tends to show that he may have committed a crime over which the Tribunal has jurisdiction." A suspect becomes an "accused'' upon confirmation of an indictment against him in accordance with Rule 47,[443] which, in this case, occurred on 29 August 1998, prior to the Appellant's arrival in Arusha on 9 September 1998.

218. Under Rule 40 of the Rules, the Prosecution may request a State, as a matter of urgency, for provisional measures to arrest a suspect, place him into custody and to take all measures necessary to prevent escape of that suspect in accordance with the State's obligations under Article 28 of the Tribunal's Statute.[444] Article 28 of the Statute requires States to cooperate fully with the Tribunal in its investigation and prosecution of persons accused of committing serious violations of international humanitarian law and to provide assistance, without undue delay, when requested for the arrest and detention of persons.[445] This obligation was first mandated by the Security Council under Resolution 955 when it established this Tribunal pursuant to Chapter VII of the Charter of the United Nations.[446]

219. The Appeals Chamber notes that the Statute and Rules of the Tribunal are silent with regard to the manner and method in which an arrest of a suspect is to be effected by a cooperating State under Rule 40 of the Rules at the urgent request of the Prosecution. For example, no mention is made of ensuring the suspect's right to be promptly informed of the reasons for his or her arrest or the right to be promptly brought before a Judge.[447] It is for the requested State to decide how to implement its obligations under international law.[448]

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[443] *See* Rules 2(A), 47(H)(ii).
[444] *See* Rule 40(A)(i) and (iii).
[445] *See* Statute, art. 28(1) and (2)(d).
[446] U.N. Security Council Resolution 955, para. 2.
[447] Rule 40(A)(i) of the Rules merely states that "[i]n case of urgency, the Prosecutor may request any State: (i) To arrest a suspect and place him in custody…."
[448] U.N. Security Council Resolution 955, para. 2, provides, in pertinent part that:

> all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary *under their domestic law to implement the provisions* of the present resolution and the Statute, including the obligation of States to comply with requests for assistance … under Article 28 of the Statute…. (emphasis added).

220. The Appeals Chamber finds that under Rule 40 of the Rules, the Prosecution and Benin had overlapping responsibilities during the first period of the Appellant's arrest and detention in Benin. This flows from the rationale that the international division of labour in prosecuting crimes must not be to the detriment of the apprehended person. Under the prosecutorial duty of due diligence, the Prosecution is required to ensure that, once it initiates a case, "the case proceeds to trial in a way that respects the rights of the accused."[449] With regard to the responsibility of the Benin authorities, the Appeals Chamber is mindful of the fact that a cooperating State, when effecting an urgent arrest and detention pursuant to the Prosecution's request under Rule 40 of the Rules, must strike a balance between two different obligations under international law. First, the State is required under Security Council Resolution 955 and Article 28 of the Tribunal's Statute to comply fully without undue delay with any requests for assistance from the Tribunal in fulfilling the weighty task of investigating and prosecuting persons accused of committing serious violations of international humanitarian law. On the other hand, the cooperating State still remains under its obligation to respect the human rights of the suspect as protected in customary international law, in the international treaties to which it has acceded,[450] as well as in its own national legislation.

221. Therefore, a shared burden exists with regard to safeguarding the suspect's fundamental rights in international cooperation on criminal matters. A Judge of the requested State is called upon to communicate to the detainee the request for surrender (or extradition) and make him or her familiar with any charge, to verify the suspect's identity, to examine any obvious challenges to the case, to inquire into the medical condition of the suspect, and to notify a person enjoying the confidence of the detainee[451] and consular officers.[452] It is, however, not the task of that Judge to inquire into the merits of the case. He or she would not know the reasons for the detention in the absence of a provisional or final arrest warrant issued by the requesting State or the Tribunal. This

[449] *Barayagwiza*, Decision, 3 November 1999, paras. 91, 92.
[450] In this regard, the Appeals Chamber notes that the Republic of Benin acceded to the ICCPR on 12 March 1992 and to the ACHPR on 20 January 1986.
[451] Numerous international bodies have condemned incommunicado detention. *See* Standard Minimum Rules for the Treatment of Prisoners, art. 92; U.N. Human Rights Commission Resolutions 1998/38, para. 5, and 1997/38, para. 20; U.N. Commission on Human Rights, Report of the Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punishment, para. 926(d); Inter-American Commission on Human Rights, Annual Report of the Inter-American Commission, 1982-1983; *Mukong v. Cameroon*, para. 9.4; *El-Megreisi v. Libyan Arab Jamahiriya*, para. 5.4; *Suárez Rosero Case*, para. 91 (describing detainee's being cut off from communication with his family as cruel, inhuman, and degrading treatment). *See also* Art. 104(4) of the German Constitution (the "Grundgesetz"): "A relative or a person enjoying the confidence of the person in custody *shall* be notified without delay of any judicial decision imposing or continuing a deprivation of freedom." (Emphasis added). The rationale behind this constitutional norm is that it is an inalienable duty to inform relatives or good friends of a person as to any deprivation of liberty. This provision is based upon lessons learned in Germany from World War II whereby legal safeguards must exist such that never again should the judiciary be able to abuse its power by causing human beings to just disappear.

responsibility is vested with the judiciary of the requesting State, or in this case, a Judge of the Tribunal, as they bear principal responsibility for the deprivation of liberty of the person they requested to be surrendered.

222. Accordingly, the Prosecution is under a two-pronged duty. The request to the authorities of the cooperating State has to include a notification to the judiciary, or at least, by way of the Tribunal's primacy, a clause reminding the national authorities to promptly bring the suspect before a domestic Judge in order to ensure that the apprehended person's rights are safeguarded by a Judge of the requested State as outlined above. In addition, the Prosecution must notify the Tribunal in order to enable a Judge to furnish the cooperating State with a provisional arrest warrant and transfer order.

223. In this context, the Appeals Chamber recalls the words of Judge Vohrah, which, although made in relation to the status of an accused, apply to suspects as well:

> if an accused is arrested or detained by a state at the request or under the authority of the Tribunal even though the accused is not yet within the actual custody of the Tribunal, the Tribunal has a responsibility to provide whatever relief is available to it to attempt to reduce any violations as much as possible.[453]

(i) The Arrest and the Right to be Promptly Informed of the Reasons for the Arrest

224. Under international human rights law, Article 9 of the ICCPR establishes that everyone has the right to liberty and security of person and no one shall be subject to arbitrary arrest and deprivation of liberty without due process of law. Article 5(1)(c) of the ECHR specifies that "the lawful arrest . . . of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so,'' is permissible, but only where it is effected according to due process of law.[454] With regard to being informed of the reasons for the arrest, Article 9(2) of the ICCPR stipulates that everyone who is arrested shall be informed promptly in a language he or she understands of the reason for the arrest and shall also be informed promptly of any charge against him or her.[455]

[452] *See* Vienna Convention on Consular Relations, art. 36(b).
[453] *Semanza*, Decision, 31 May 2000, Declaration of Judge Lal Chand Vohrah, para. 6.
[454] *See also* ACHR, Art. 7(1), (3).
[455] Article 9(2) of the ICCPR states that "[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.'' *See also* ECHR, art. 5(2).

225. In this case, the Trial Chamber found that the Appellant's arrest as a suspect in Benin was not arbitrary and was in accordance with due process of law.[456] The Trial Chamber held that under Rule 40 of the Rules, there was no requirement that the Prosecutor provide a warrant of arrest or even have evidence that the Appellant may have committed a crime within the jurisdiction of the Tribunal when requesting Benin to urgently arrest the Appellant. As to the manner and execution of the arrest pursuant to the Prosecutor's request, the Trial Chamber held that responsibility lies with the cooperating State to organize, control, and carry out the arrest in accordance with its domestic law. The Trial Chamber found that there was no violation of the Appellant's right to be promptly informed of the reasons for his arrest and of the charges against him. The Trial Chamber noted that responsibility for promptly informing the Appellant of the reasons for his arrest lay with the Benin authorities, and it was disputed whether or not information was passed to the Appellant at the time of his arrest. Furthermore, the Trial Chamber found that the Appellant was immediately informed of the charges against him because, after the indictment was confirmed against him on 29 August 1998, he was served a copy of his arrest warrant and the redacted indictment shortly thereafter while still in Benin prior to his transfer to the UNDF on 9 September 1998.[457]

226. The Appeals Chamber does not agree. Although the Appellant was lawfully apprehended pursuant to Rule 40 of the Rules, the manner in which the arrest was carried out was not according to due process of law because the Appellant was not promptly informed of the reasons for his arrest. As held by the Appeals Chamber in *Semanza*, a suspect arrested at the behest of the Tribunal has a right to be promptly informed of the reasons for his or her arrest, and this right comes into effect from the moment of arrest and detention.[458] Before providing the reasons for this conclusion, the Appeals Chamber first notes that in making an urgent Rule 40 request, the Prosecution is not required to provide the suspect with a copy of a warrant for the arrest.[459] Furthermore, the Appeals Chamber finds that in this case, the Appellant's right to freedom from an arrest contrary to due process of law was not violated due to the lack of an arrest warrant by the Prosecution or the Benin authorities, given the exigencies of the circumstances in which he was arrested. Nevertheless, the Appeals Chamber does not agree with the Trial Chamber that the Prosecution was not required to have evidence tending to show that the Appellant may have committed crimes within this Tribunal's jurisdiction at the time it made its Rule 40 request to the Benin authorities. By making a

[456] The Appeals Chamber notes that the Trial Chamber failed to say anything in its Decision of 8 May 2000 on whether the Appellant's detention subsequent to his arrest in Benin prior to the issuance of the indictment against him on 29 August 1998 was unlawful.
[457] Decision of 8 May 2000, paras. 42-44.
[458] *Semanza*, Decision, 31 May 2000, para. 78.
[459] *See Semanza*, Decision, 31 May 2000, n. 106 citing *Barayagwiza*, Decision, 3 November 1999.

Rule 40 request for the urgent arrest of a *suspect*, the Prosecution is, by definition under Rule 2 of the Rules, making the claim that it possesses "reliable information which tends to show that he may have committed a crime over which the Tribunal has jurisdiction." Indeed, in this case, the Prosecution represented in its request letter of 6 June 1998 to the Benin authorities only that it had "compelling and consistent evidence of [the Appellant's] participation in crimes committed in the Republic of Rwanda between 1st January and 31st December 1994."[460]

227. With regard to the manner in which the Appellant's arrest was carried out, the Appeals Chamber first finds that the arrest was lawfully initiated under Rule 40 of the Rules. The Appeals Chamber notes that the parties agreed that, on 5 June 1998, the Appellant was arrested by the Benin authorities at the urgent request of the Prosecution. At the time of the Appellant's arrest by the Benin authorities in the home of Joseph Nzirorera, two ICTR investigators were also present.[461] Although the Prosecution concedes that the Appellant is correct in that his discovery was fortuitous, the Appeals Chamber is convinced by the Prosecution's argument that his subsequent arrest under Rule 40 was not made on the basis that he was in the presence of a known accused. The Prosecution argues that as the ICTR investigators were in the process of investigating the case of Joseph Nzirorera with regard to crimes committed in Ruhengeri Prefecture, they had reliable information on the Appellant as a suspect due to his prominence in Mukingo Commune in Ruhengeri Prefecture. The Appellant failed to address this argument. However, the Appeals Chamber notes that it is disputed whether the Appellant was promptly informed of the reasons for his arrest. The Appellant claims in this appeal that at the time of the arrest, he asked the Benin authorities as to the reasons for his arrest and was informed that he would find them out at a later date.[462] The Prosecution failed to rebut this argument.[463] Consequently, the Appeals Chamber finds that in the absence of any evidence to the contrary, the Appellant's right to be informed of the reasons as to why he was being deprived of his liberty was not properly guaranteed.

(ii) The Appellant's Detention in Benin

228. Subsequent to a suspect's arrest by a cooperating State under Rule 40 of the Rules, Rule 40*bis* allows for the Prosecution, within a reasonable period of time, to request a Judge of this Tribunal to issue an order for the transfer of the suspect from the custody of that State to the custody of the Tribunal for purposes of provisional detention prior to issuance of an arrest warrant

[460] Appeal Hearing, T. 7 March 2005 p. 51.
[461] Appeal Hearing, T. 7 March 2005 pp. 10, 48.
[462] Appeal Hearing, T. 7 March 2005 p. 11.

and indictment against the suspect by a Judge.[464] That request shall include any provisional charges against the suspect and a summary of the material on which the Prosecution relies for those charges, and shall be served upon the suspect along with the Judge's order granting the request as soon as possible upon transfer.[465] The Judge's order shall include the grounds for ordering the transfer, including the reasons why he or she thinks that there is reliable information tending to show that the suspect may have committed a crime within the Tribunal's jurisdiction.[466]

229. Under international human rights law, no one shall be subject to arbitrary detention without due process of law pursuant to the right to liberty and security of person as found in Article 9 of the ICCPR.[467] Subsequent to arrest and detention, everyone has the right to be informed promptly in a language he or she understands of the nature and cause of the charges against him or her pursuant to Articles 9(2) and 14(3)(a) of the ICCPR.[468] The suspect's right to be promptly informed of the charges against him or her serves two purposes: 1) it "counterbalances the interest of the prosecuting authority in seeking continued detention of the suspect" by giving the suspect "the opportunity to deny the offence and obtain his release prior to the initiation of trial proceedings"; and 2) it "gives the suspect information he requires in order to prepare his defence."[469] Generally, international human rights standards view provisional detention of a suspect without charge as an exception, rather than the rule.[470] However, such detention is lawful under international law as long as it is as short as possible, not extending beyond a reasonable period of time.[471] The Human Rights Committee has found that pre-trial detention of a suspect without appearance before a Judge and without charge for 42 days is unreasonable under Article 9 of the ICCPR.[472] On this issue, the Appeals Chamber recalls that as an exception, in light of the complexity of the charges faced by accused persons before this Tribunal, provisional detention of a suspect without being formally

[463] *See* Respondent's Brief, paras. 268, 269.
[464] *See generally* Rule 40*bis*.
[465] Rule 40*bis* (E).
[466] *See* Rule 40*bis* (A), (B), (D), (E).
[467] Article 9(1) of the ICCPR states that:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law….

See also ACHR, art. 7(1), (3); ACHPR, art. 6.
[468] *See also* ECHR, art. 6(3)(a); ACHR, art. 7(4).
[469] *Barayagwiza*, Decision, 3 November 1999, paras. 80, 81.
[470] *See* U.N. Human Rights Committee, General Comment No. 8, para. 3; *Barayagwiza*, Decision, 3 November 1999, para. 62.
[471] *See* U.N. Human Rights Committee, General Comment No. 8, para. 3; *Barayagwiza*, Decision, 3 November 1999, para. 63.

charged for a maximum of 90 days is warranted under the law of this Tribunal so long as the protections provided for the suspect's rights under Rules 40 and 40*bis* of the Rules are adhered to.[473]

230. In addition, Article 9 of the ICCPR provides that upon arrest and provisional detention, everyone has the right to be brought promptly before a Judge or official authorized to exercise judicial power.[474] The Human Rights Committee has interpreted Article 9 to mean that any delay in being brought before a Judge should not exceed a few days.[475] The Human Rights Committee has decided that under this article, four-days' delay is too long,[476] let alone lapses of 11 days, 22 days, or ten weeks.[477] Article 5(3) of the ECHR also requires that the suspect be brought promptly before a Judge or officer able to exercise judicial power upon arrest. The European Court of Human Rights has specified that two days' delay under this article is permissible;[478] however, four days and six hours constitute a violation even in complex cases, let alone one week or longer.[479]

231. Although the Trial Chamber did not discuss the legality of the Appellant's detention in Benin in its 8 May 2000 decision, the Appeals Chamber finds that it erred in failing to find that his detention in Benin for a total of 85 days without charge and without being brought promptly before a Judge was clearly unlawful and was in violation of his rights under the Tribunal's Statute and Rules as well as international human rights law. The Appeals Chamber finds that the Prosecution is responsible for these violations because it failed to make a request within a reasonable time under Rules 40 and 40*bis* for the Appellant's provisional arrest and transfer to the Tribunal. Moreover, its request would have included the provisional charges, which would then have been served on the Appellant.[480] Although Rules 40 and 40*bis* do not explicitly state how long a suspect may permissibly remain in the provisional custody of a cooperating State pursuant to a Rule 40 request, the Appellant's prolonged detention in Benin was unreasonable. The evidence on the record indicates that the Appellant was never informed by a Judge of the charges against him, even

[472] *See Campbell v. Jamaica*, para. 7.1. *See also Valentini de Bazzano v. Uruguay*, paras. 9, 10 (finding that eight months provisional detention without charge was in violation of Article 9(2)); *Carballal v. Uruguay*, paras. 2.2, 2.5, 13 (deciding that 1 year detention between arrest and formal filing of charges was in violation of Article 9(2)).
[473] *Barayagwiza*, Decision, 3 November 1999, para. 62.
[474] Article 9(3) of the ICCPR states that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release...." *See also* ACHR, art. 7(5).
[475] *See* U.N. Human Rights Committee, General Comment No. 8, para. 2.
[476] *Freemantle v. Jamaica*, para. 7.4.
[477] *Lobban v. Jamaica*, para. 8.3; *Casafranca v. Peru*, para. 7.2; *Jones v. Jamaica*, para. 9.3.
[478] *Graužinis v. Lithuania*, para. 25.
[479] *Brogan and Others v. The United Kingdom*, paras. 6, 62; *Tepe v. Turkey*, paras. 64-70; *Öcalan v. Turkey*, para. 106.
[480] Rule 40*bis*(A) and (E).

provisionally, until sometime between 29 August 1998 and 7 September 1998, when he was formally served with an arrest warrant and a copy of the redacted indictment against him from the Tribunal.[481] The Appeals Chamber does not accept that 85-days' delay after a suspect's arrest may be considered "prompt" or "immediate" within the meaning of this Tribunal's Statute or Rules.[482] Additionally, although 90 days may be permissible for the finalizing of a formal indictment, 85 days of provisional detention without even an informal indication of the charges to be brought against the suspect is not reasonable under international human rights law, given that nothing less than an individual's fundamental right to liberty is at issue. While it is true that the Appellant was served with the arrest warrant and redacted indictment within days of their issuance by a Judge of this Tribunal on 29 August 1998, at a minimum, the Appellant should have been informed as soon as possible after his arrest on 5 June 1998 of any reliable information possessed by the Prosecution with regard to why he was considered a suspect and as to any provisional charges against him.[483] The Appeals Chamber considers that the Prosecution was able to directly request the Benin authorities to do so on its behalf, given that it stated that when it sent its request letter of 6 June 1998 to the Benin authorities, it had compelling and consistent evidence of the Appellant's participation in the commission of crimes in Rwanda.[484]

232. Furthermore, the Appeals Chamber finds that as a result of the Prosecution's failure to make a Rule 40*bis* transfer and provisional detention request within a reasonable period of time, the Appellant was not promptly brought before a Judge, either of this Tribunal or in Benin during the first period of his detention of 95 days. The Appeals Chamber notes that there are important purposes underlying the right to be promptly brought before a Judge in the requested State, *inter alia*: to allow for the suspect to be informed of the provisional charges against him or her; to ascertain the identity of the detained suspect;[485] to ensure that the suspect's rights are being respected while in detention; and to give the suspect an opportunity to voice any complaints. The Appeals Chamber considers that this violation of the Appellant's right is not solely attributable to

[481] The Appeals Chamber rejects the Prosecution's argument that its duty to inform the suspect as soon as possible of the reasons why he or she is considered a suspect and of any provisional charges against him or her was fulfilled by its questioning of the Appellant on 12 June 1998. *See* Appeal Hearing, T. 7 March 2005 p. 51.
[482] *Cf. Semanza*, Decision, 31 May 2000, para. 87 (finding that 18 days' delay between the time the Appellant was taken into custody and informed of the charges brought against him by the Prosecution constituted a violation of the Appellant's right to be promptly informed of the nature of the charges against him).
[483] *See Semanza*, Decision, 31 May 2000, n. 104 (*citing Barayagwiza*, Decision, 3 November 1999).
[484] Appeal Hearing, T. 7 March 2005 p. 51.
[485] For example, Milan and Miroslav Vuckovic were transferred to the ICTY instead of Predrag and Nenad Banovic, *see Sikirica et al.*, None [*sic*] Parties Milan and Miroslav Vuckovic's Motion for an Order Compelling Discovery, 2 September 1999. *See also Kolundzija*, Order on Non-Party Motion for Discovery, 29 September 1999. Similarly, Agim Murtezi was brought before the ICTY on the basis of an indictment in which the true identity of the perpetrator was uncertain, *see Limaj et al.*, Order to Withdraw the Indictment against Agim Murtezi and Order for His Immediate Release, 28 February 2003.

the Prosecution. The Appeals Chamber notes in this context that the Benin Constitutional Court found, in response to a motion filed by the Appellant before it on 24 August 1998, that his detention from 5 June 1998 to 7 September 1998 by the Benin Director of Police and the Benin General Public Prosecutor Office, was in violation of the Constitution of Benin.[486] Nevertheless, although the violation is not solely attributable to the Tribunal, it has to be recalled that it was the Prosecution, thus an organ of the Tribunal, which was the requesting institution responsible for triggering the Appellant's apprehension, arrest and detention in Benin.

233. The Appeals Chamber emphasizes that "it is important that Rule 40 and Rule 40*bis* be read together" and restrictively interpreted.[487] The purpose of Rule 40 and Rule 40*bis* is to place time limits on the provisional detention of a suspect prior to issuance of an indictment[488] and to ensure that certain rights of the suspect are respected during that time. The Appeals Chamber considers that it is not acceptable for the Prosecution, acting alone under Rule 40, to get around those time limits or the Tribunal's responsibility to ensure the rights of the suspect in provisional detention upon transfer to the Tribunal's custody under Rules 40 and 40*bis*, by using its power under Rule 40 to keep a suspect under detention in a cooperating State.[489] The Appeals Chamber notes the Prosecution's submission, made at the Appeal Hearing, that the 95-days' delay in the Appellant's transfer to the custody of this Tribunal was due to the fact that the period in which the Appellant was arrested was an extremely busy one for the Prosecution with numerous ongoing investigations against dozens of suspects and numerous indictments being drafted simultaneously.[490] While the Appeals Chamber is sympathetic to the workload carried by the Prosecution at that time, in no way does this fact justify the Appellant's arbitrary provisional detention in Benin without charge for 85 days, and detention in Benin without appearance before a Judge for a total of 95 days.

(iii) The Appellant's Right to Counsel during Questioning

234. Under Article 17 of the Tribunal's Statute, the Prosecution has the power to question suspects. When questioned, a suspect has the right to assistance of counsel, and legal assistance shall be assigned to him or her if he or she does not have sufficient means to pay for counsel.[491]

[486] Decision DCC 00-064, The Constitutional Court, Republique du Benin, 24 October 2000. Article 18(4) of the Benin Constitution stipulates that "no one can be held for a period beyond 48 hours without a decision from a Magistrate to whom the person is presented, this timeframe can only be exceeded exceptionally as provided for by law and that cannot exceed a period of eight days."
[487] *Barayagwiza*, Decision, 3 November 1999, paras. 46, 53.
[488] *Barayagwiza*, Decision, 3 November 1999, paras. 46, 53.
[489] *Barayagwiza*, Decision, 3 November 1999, paras. 46, 53.
[490] Appeal Hearing, T. 7 March 2005 p. 52.
[491] Article 17 provides, in relevant part that:

This right to counsel during questioning is restated in Rule 42 of the Rules. Rule 42 also provides that a suspect may voluntarily waive that right but that questioning will cease if the suspect later expresses the desire for assistance of counsel, and will only resume once counsel has been provided.[492]

235. The Trial Chamber found that prior to his interrogation by the Prosecution on 12 June 1998, the Appellant waived his right to counsel under Rule 42(B). The Trial Chamber noted that the Appellant accepted the integrity of the tapes recording that interview. Furthermore, the Trial Chamber considered that the Appellant conceded that he had been informed of his rights prior to the interview and subsequently waived his right to counsel. Thus, the Trial Chamber concluded that because the Appellant voluntarily waived his right to counsel during questioning, there had been no violation of the Appellant's rights under Rule 42 of the Rules.[493]

236. The Appeals Chamber finds that the Trial Chamber did not err in finding that there was no violation of the Appellant's rights during the interrogation of 12 June 1998. The Appeals Chamber notes that on appeal, the Appellant did not challenge the Trial Chamber's conclusion that there had been voluntary waiver or his concession of the same, and only summarily stated that his right to counsel had been violated under Rule 42. The Appeals Chamber sees no reason to further discuss the apparently undisputed question whether the waiver was voluntary.

> 2. The Prosecutor shall have the power to question suspects . . . to collect evidence and to conduct on-sight investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.
>
> 3. If questioned, the suspect shall be entitled to be assisted by Counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it . . . .

[492] Rule 42 of the Rules states, in relevant part, that:

> (A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands:
>
> > (i) The right to be assisted by counsel of his choice or to have legal assistance assigned to him without payment if he does not have sufficient means to pay for it; . . .
>
> (B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

[493] Decision of 8 May 2000, paras. 37-39.

2. Alleged Violations during Period from Transfer to Arusha until Initial Appearance

237. With regard to the Appellant's detention at the UNDF in Arusha until his initial appearance before this Tribunal ("second period of detention"), the Appeals Chamber notes that the undisputed facts are as follows. After being transferred to the seat of the Tribunal on 9 September 1998, proceedings were initiated the following day, 10 September 1998, to assign counsel to the Appellant.[494] A separate initial appearance for the Appellant was scheduled for 19 October 1998. On 14 October 1998, the Prosecution filed a redacted indictment for the purpose of a joint initial appearance by the Appellant and several others scheduled for 24 November 1998.[495] Both the separate and joint initial appearances were subsequently postponed. On 9 November 1998, the Appellant filed a *pro se* Motion challenging the illegality of his arrest and detention.[496] Finally, on 2 February 1999, Professor Lennox Hinds was assigned as counsel on the Appellant's behalf. Following assignment of counsel, an initial appearance was rescheduled for 10 March 1999, but was postponed at the request of counsel. Eventually, the Appellant's first initial appearance was held on 7 and 8 April 1999. Thus, the Appellant was in the custody of the Tribunal for a total of 211 days prior to any initial appearance during which he was without assigned counsel for 147 days.

(a) The Parties' Submissions

238. The Appellant submits that his rights under the Tribunal's Rules and Directives were violated during the second period of detention. First, the Appellant argues that his right to counsel was unconscionably violated when considering that he remained in detention for 147 days before Defence counsel was assigned to him. He contends that the Trial Chamber erred in its decision of 8 May 2000 in finding that his right to counsel was not violated on the basis of his lack of cooperation with the Tribunal's Registry in the assignment of counsel. The Appellant points out that under the Tribunal's Rules and Directives, duty counsel could have been assigned to him in the interim. As a consequence of not having counsel during this period, the Appellant notes that he had to file his first challenge to the Tribunal's jurisdiction in November 1998 *pro se*.[497]

239. Second, the Appellant submits that his right to an initial appearance before a Trial Chamber or a Judge without delay upon transfer to the Tribunal's custody under Rule 62 of the Rules was

[494] Memorandum by Deputy Chief of the Tribunal's Legal and Defence Facility Management ("LDFMS"), 10 December 1999; *see also* Decision of 8 May 2000, para. 25.
[495] Decision of 8 May 2000, Preamble.
[496] Appellant's *pro se* Requête portant sur l'arrestation arbitraire et la detention illégale du suspect Juvénal Kajelijeli, 9 November 1998, filed 20 November 1998.
[497] Appeal Hearing, T. 7 March 2005 p. 12.

violated. The Appellant argues that the delay in assigning him permanent counsel was no excuse for delaying his initial appearance given that duty counsel could have been assigned to him for the specific purpose of representing him at the appearance. As a consequence, the Appellant notes that he was unconscionably prevented from raising before a Judge any issues he had with regard to violation of his rights or to his case generally for 211 days.[498]

240. The Prosecution responds that the Appellant fails to show that the Trial Chamber erred in finding that his right to counsel was not violated upon transfer to Arusha. The Prosecution submits that a Trial Chamber may take into consideration the conduct of the accused or counsel as a factor when determining whether there has been undue delay in the assignment of counsel. The Prosecution notes that an indigent accused has no absolute right to counsel of his or her choice and that the Appellant's conduct, by repeatedly choosing counsel not on the Registrar's list, contributed to the delay. The Prosecution argues that the Appellant fails to rebut the Trial Chamber's finding that he frustrated serious efforts by the Registry to secure assigned counsel on his behalf, a process which the Registry initiated as soon as the Appellant was transferred to Arusha.[499]

241. Finally, the Prosecution responds that the Appellant fails to demonstrate any error on the part of the Trial Chamber in finding that his right to an initial appearance under Rule 62 was not violated. The Prosecution contends that the delay was not unreasonable in light of the Appellant's frustration of the Registry's efforts to assign him counsel. The Prosecution argues that because the Appellant requested counsel, because Rule 62(A)(i) requires the Trial Chamber to satisfy itself that the right of an accused to counsel is respected, and because an initial appearance under Rule 62 is a significant step in the proceedings before the Tribunal that includes, among other things, the entry by an accused of a plea, assignment of counsel to the Appellant was necessary prior to holding the initial appearance. Furthermore, the Prosecution points out that the importance of counsel at the initial appearance is evidenced by the fact that once the Appellant was assigned counsel, counsel further postponed the appearance in order to examine the indictment for irregularities. This postponement, in the Prosecution's view, is further evidence that the delay was not unreasonable. Finally, the Prosecution submits that even if the delay in holding the initial appearance is not entirely imputable to the Appellant,[500] the delay itself caused him no material prejudice because

[498] Appeal Hearing, T. 7 March 2005 pp. 12, 13.
[499] Respondent's Brief, paras. 261, 263.
[500] The Appeals Chamber notes that the Prosecution concedes that it bears some responsibility for the scheduling of the initial appearance, although the Prosecution contends that "primary responsibility ... rests with the Registry." The Prosecution points out that because the Appellant was initially named in an indictment with seven co-accused, the

throughout this time, the Appellant was fully aware of the charges against him and the Registry made all attempts to ensure protection of his rights.[501]

(b) Discussion

242. The Appeals Chamber recalls its previous finding that during the second period of detention in Arusha, the Appellant had the status of an accused under Rules 2 and 47 of the Rules and thus, all of the provisions in the Tribunal's Statute and Rules relevant to the rights of an accused applied.[502]

(i) The Right to Counsel

243. Under Article 20(4)(d) of the Tribunal's Statute and Rules 44*bis*(D) and 45 of the Rules, an accused is entitled, as a minimum guarantee, to assistance of counsel of his or her own choosing.[503] Where an accused is indigent, the Tribunal's Registry shall assign counsel to him or her without requiring payment, according to established procedure.[504]

244. The Trial Chamber held that there was no violation of the Appellant's right to counsel because "it was clear that serious efforts were made by the Registry to secure an assigned Counsel for the Accused [and] that the Accused frustrated these efforts by selecting Counsel whose names were not on the Registrar's drawn up list," among other delay tactics. Thus, in the Trial Chamber's view, the Appellant abused his right to counsel in his failure to follow established procedure.[505]

245. The Appeals Chamber finds that the Trial Chamber erred in this finding. Rule 44*bis* of the Rules clearly obliges the Registrar to provide a detainee with duty counsel, with no prejudice to the accused's right to waive the right to counsel. It constitutes a violation of Rule 44*bis* of the Rules and provision 10*bis* of the Directive on the Assignment of Defence Counsel not to assign duty counsel, in spite of ongoing efforts to assign counsel of choice in light of the outstanding initial appearance. Also, the wording of Rule 44*bis*(D) is sufficiently clear ("unrepresented at any time") to find that such a duty exists from the very moment of transfer to the Tribunal and is not confined to purposes of the initial appearance only.

Registry was seeking to organize an initial appearance for all of the accused and was attempting to first assign counsel to represent each of the accused. *See* Respondent's Brief, paras. 262, 265.

[501] Respondent's Brief, paras. 262-267.

[502] *See supra* para. 217.

[503] *See also* ICCPR, art. 14(3)(d); ECHR, art. 6(3)(c); ACHR, art. 8(2)(d).

[504] *See* Directive on the Assignment of Defence Counsel.

[505] Decision of 8 May 2000, paras. 40, 41.

(ii) The Right to an Initial Appearance

246. Under Article 19(3) of the Statute and Rule 62 of the Rules, once an accused is taken into the custody of the Tribunal, the accused is to appear before a Trial Chamber or a Judge *without delay* to be formally charged. The Trial Chamber or Judge shall read the accused the indictment, satisfy itself that the rights of the accused are being respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea.

247. The Trial Chamber found that the Appellant's right to an initial appearance without delay was not violated because the record reflects that the Appellant contributed to the delay in assignment of counsel and thus was to blame for the delay in the scheduling of his initial appearance.[506]

248. The Appeals Chamber does not agree with the Trial Chamber in this regard. The difficulties in assigning the Appellant counsel in this case should not have been an obstacle for the Tribunal to ensure that the Appellant's initial appearance was scheduled without delay. The Appeals Chamber agrees with the Prosecution that it is important and indeed ideal for an accused to have the assistance of counsel at the initial appearance to provide guidance, in particular, for entering a plea. Furthermore, the Appeals Chamber considers that Rule 62(A)(i) states that at the initial hearing, the Trial Chamber or Judge shall "[s]atisfy itself or himself that the right of the accused to counsel is respected." In addition, the Trial Chamber or Judge could ordered assignment of duty counsel to the Appellant for purposes of representation at the initial appearance and would have had the opportunity to facilitate the Registry's further attempts to assign the Appellant counsel.

249. Furthermore, the Appeals Chamber notes that apart from the assignment of counsel issue and the Appellant's role in creating delay, the Registry conceded that in this case, the initial appearance was also delayed in part due to the fact that the Appellant had been jointly indicted with several other accused. It was difficult at the time for the Tribunal's Court Management Section to find a date acceptable to all, with all being duly represented by counsel.[507]

250. The Appeals Chamber emphasizes that Rule 62 is unequivocal that an initial appearance is to be scheduled without delay. There are other purposes for an initial appearance apart from entering a plea including: reading out the official charges against the accused, ascertaining the

[506] Decision of 8 May 2000, para. 45.
[507] Decision of 8 May 2000, para. 28 referring to the written brief of 7 February 2000 filed by Mr. Antoine Mindua, a representative of the Registry.

identity of the detainee,[508] allowing the Trial Chamber or Judge to ensure that the rights of the accused while in detention are being respected, giving an opportunity for the accused to voice any complaints, and scheduling a trial date or date for a sentencing hearing, in the case of a guilty plea, without delay.[509] The Appeals Chamber therefore finds that, under the plain meaning of Rule 62, the 211-day delay between the Appellant's transfer to the Tribunal and the initial appearance before a Judge of this Tribunal constitutes extreme undue delay.

3. Conclusion

251. On the basis of the foregoing, the Appeals Chamber concludes that during the first period of the Appellant's arrest and detention, the Appellant's rights were violated as follows. First, the Appellant's right to be informed of the reasons for his arrest at the time of his arrest as required under Article 9(2) of the ICCPR was not properly ensured. Second, the Appellant was arbitrarily detained in Benin for 85 days without an arrest warrant and a transfer order from the Tribunal being submitted to the Benin authorities by the Prosecution within a reasonable time and without being promptly informed of the charges against him in violation of Rule 40 of the Rules and Articles 9(2) and 14(3)(a) of the ICCPR. Finally, the Appellant was detained in Benin for a total of 95 days without being brought before a Judge or an official acting in a judicial capacity in clear violation of Article 9 of the ICCPR.

252. In this case, irrespective of any responsibility of Benin for violations of the Appellant's rights during the first period of arrest and detention, on which this Tribunal does not have competence to pronounce, the Appeals Chamber finds that fault is attributable to the Prosecution for violations to the Appellant's rights during this first period of arrest and detention. The Prosecution failed to effect its prosecutorial duties with due diligence out of respect for the Appellant's rights following its Rule 40 request to Benin. Thus, the Appellant is entitled to a remedy from the Tribunal.

253. With regard to the violations of the Appellant's right to counsel and to an initial appearance without delay during the second period of his detention in the custody of the Tribunal, the Appeals Chamber finds that responsibility for those violations is attributable to the Tribunal, notwithstanding any attribution of fault to the Appellant. Under Article 19(1) of the Tribunal's

[508] *See supra* n. 484.
[509] *See generally* Rule 62.

Statute, the Appellant's right to an expeditious trial before this Tribunal that fully respects his rights as an accused is absolute. The Appellant, therefore, is entitled to a remedy in this Judgement.[510]

4. The Remedy

254. Having found that the Trial Chamber erred in its Trial Judgement in failing to find that the Appellant's fundamental rights were violated during his arrest and detention prior to his initial appearance due to its decision of 8 May 2000, the Appeals Chamber now turns to the issue of an appropriate remedy.

255. The Appeals Chamber recalls that it has already considered that dismissing this case for lack of jurisdiction as a remedy would be disproportionate.[511] However, the Appeals Chamber reiterates that any violation of the accused's rights entails the provision of an effective remedy pursuant to Article 2(3)(a) of the ICCPR. The Appeals Chamber considers that under the jurisprudence of this Tribunal, where the Appeals Chamber has found on interlocutory appeal that an accused's rights have been violated, but not egregiously so, it will order the Trial Chamber to reduce the accused's sentence if the accused is found guilty at trial.[512] With this in mind, the Appeals Chamber will take into consideration its findings here on violations of the Appellant's rights when it turns to the task of determining the Appellant's sentence in this Judgement in order to provide for an appropriate remedy.

[510] *Cf. Barayagwiza*, Decision, 3 November 1999, para. 73.
[511] *See supra* para. 206.
[512] *See Semanza*, Decision, 31 May 2000, para. 129; *Barayagwiza*, Decision (Prosecutor's Request for Review or Reconsideration), para. 75.

XX. ALLEGED ERROR IN DENYING MOTIONS SEEKING DISCLOSURE OF PRIOR STATEMENTS AND EXCLUSION OF THE TESTIMONY OF DETAINED PROSECUTION WITNESSES (GROUND OF APPEAL 23)

256. The Appellant submits that the Trial Chamber committed errors of law in denying two interlocutory Defence motions relating to prior statements of detained Prosecution Witnesses GAO, GDD, GAP, and GDQ.[513] In the first decision, the Trial Chamber denied the Appellant's request that the Prosecution be ordered to disclose, pursuant to Rule 68 of the Rules, prior statements given by detained witnesses to Rwandan authorities on the basis that the Prosecution was not shown to be in possession of such statements.[514] In the second decision, the Trial Chamber dismissed the Appellant's motion to exclude the evidence given by the detained Prosecution witnesses on the ground that the Defence had the opportunity to cross-examine the witnesses.[515]

257. The Appellant first argues that these prior statements should have been disclosed by the Prosecution to the Defence pursuant to Rule 68 because they "could affect the credibility of the Prosecution's witnesses."[516] According to the Appellant, since the Prosecution knew that the Prosecution witnesses were arrested and had either confessed or given other statements to the Rwandan authorities, it was obligated either to obtain these statements or to confirm that the statements did not exist.[517] The Appellant submits that the Trial Chamber also erred in simply accepting the Prosecution's assertion that it did not have any such statements in its possession, rather than ordering the Prosecution to make efforts to ascertain whether such statements existed.[518] In the Appellant's view, the Trial Chamber's failure to order the Prosecution to ascertain whether such statements existed in Rwanda prejudiced his right to a fair trial by shifting the burden of obtaining exculpatory information in the possession of Prosecution witnesses onto the Defence.[519] The Appellant explains that he was able to obtain the statements of Witnesses GAO and GDD, but that he was then forced to expend considerable resources to authenticate these documents, which were challenged by the Prosecution.[520]

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[513] Appellant's Brief, paras. 373-377.
[514] *Kajelijeli*, Decision on Kajelijeli's Urgent Motion and Certification with Appendices in Support of Urgent Motion for Disclosure of Materials Pursuant to Rule 66(B) and Rule 68 of the Rules of Procedure and Evidence, 5 July 2001.
[515] *Kajelijeli*, Decision on Kajelijeli's Motion to Exclude Statements and Testimonies of Detained Witnesses, 14 June 2002.
[516] Appellant's Brief, para. 373.
[517] Appellant's Brief, para. 373.
[518] Appellant's Brief, para. 374.
[519] Appellant's Brief, paras. 374, 375.
[520] Appellant's Brief, para. 376.

258. The Appellant also alleges that, in spite of repeated applications and notwithstanding the Trial Chamber's powers under Article 28 of the Statute and the Agreement on Cooperation and Judicial Assistance between the Tribunal and the Rwandan government, the Trial Chamber did not assist the Defence in its efforts to obtain and authenticate the prior statements given by Prosecution witnesses to Rwandan authorities.[521]

259. Finally, the Appellant submits that the Trial Chamber should have excluded the testimonies of these detained witnesses or exercised extreme caution in evaluating them.[522] The Appellant contends that the Trial Chamber, by failing to do so, prejudiced the Appellant who was unable to introduce evidence tending to further impact the credibility of Witnesses GDD, GAP, and GDQ based upon their prior statements.[523]

260. The Prosecution responds that this ground of appeal does not meet the requirements of Article 24 of the Statute, and is therefore inadmissible.[524] The Prosecution argues that the Appellant fails to explain how the Trial Chamber erred in its assessment of the credibility of the witnesses in question, and fails to identify the impact of this evidence on the final verdict.[525] The Prosecution also argues that the Appellant has misread the Prosecutor's obligation under Rule 68.[526]

A. The Ruling that Rule 68 Only Requires Disclosure of Evidence in the Custody and Control of the Prosecution

261. At trial, the Defence sought disclosure, pursuant to Rule 68, of "copies of any agreements between witnesses, particularly those convicted and serving sentences in Rwanda and the Tribunal and/or the government of Rwanda concerning their testimony" as well as "all documents related to trial testimony, plea agreements and/or statements made by those convicted individuals in connection with their trials, pleas, or sentencing in Rwanda."[527] The Prosecution denied being in possession of such items.[528] In the impugned Decision of 5 July 2001, the Trial Chamber dismissed

[521] Appellant's Brief, para. 376.
[522] Appellant's Brief, para. 377.
[523] Appellant's Brief, para. 377.
[524] Respondent's Brief, para. 278.
[525] Respondent's Brief, para. 278.
[526] Respondent's Brief, para. 280.
[527] *Kajelijeli*, Decision on Kajelijeli's Urgent Motion and Certification with Appendices in Support of Urgent Motion for Disclosure of Materials Pursuant to Rule 66(B) and Rule 68 of the Rules of Procedure and Evidence, para. 10.
[528] *Kajelijeli*, Decision on Kajelijeli's Urgent Motion and Certification with Appendices in Support of Urgent Motion for Disclosure of Materials Pursuant to Rule 66(B) and Rule 68 of the Rules of Procedure and Evidence, para. 11.

the motion, reasoning that Rule 68 only requires disclosure of evidence in the custody or control of the Prosecution.[529]

262. The Appeals Chamber recalls that the ICTY Appeals Chamber has affirmed that the Prosecution has the obligation to determine whether evidence is exculpatory under Rule 68.[530] This Appeals Chamber follows that position and considers that in order to allege a breach of Rule 68, the Defence must first establish that the evidence was in the possession of the Prosecution, and then must present a *prima facie* case which would make probable the exculpatory nature of the materials sought.[531] If the Defence satisfies the Tribunal that the Prosecution has failed to comply with its Rule 68 obligations, then the Tribunal must examine whether the Defence has been prejudiced by that failure before considering whether a remedy is appropriate.[532]

263. The Appeals Chamber finds that in the present case, the Appellant has failed to demonstrate that the Trial Chamber erred in finding that the Prosecution was not in possession of any prior statements the detained witnesses may have given to the Rwandan authorities. The Appellant rather appears to argue that since the detained witnesses were called by the Prosecution, it was the Prosecution's duty to obtain the statements. The Appeals Chamber does not accept such an extension of the scope of Rule 68.

B. Assistance to the Appellant in Obtaining the Prior Statements of Detained Prosecution Witnesses

264. The Appeals Chamber notes that, contrary to the assertions of the Appellant, the trial record reveals that the Trial Chamber did take steps to assist the Appellant in obtaining the statements of the four detained Prosecution witnesses.

265. Witness GAO initially testified before the Trial Chamber from 23 to 25 July 2001. During his examination, Witness GAO made reference to a confession or plea agreement with the Rwandan authorities, but stated that that document was in Rwanda.[533] The Trial Chamber ordered that this statement should be made available to the Defence and indicated that the Defence could seek

[529] *Kajelijeli*, Decision on Kajelijeli's Urgent Motion and Certification with Appendices in Support of Urgent Motion for Disclosure of Materials Pursuant to Rule 66(B) and Rule 68 of the Rules of Procedure and Evidence, para. 14.
[530] *Bla{ki}* Appeal Judgment, para. 268.
[531] *See Bla{ki}* Appeal Judgment, para. 268.
[532] *See Krsti}* Appeal Judgement, para. 153.
[533] T. 24 July 2001 p. 113.

assistance from the Registry or the Chamber in securing it.[534] The following day, the Trial Chamber denied a Defence request for a subpoena as being premature.[535] The Trial Chamber reiterated that if the Defence was unable to obtain the document, then it should seek assistance from the Trial Chamber.[536] On 2 November 2001, the Trial Chamber ordered the recall of Witness GAO for further examination on his statements to the Rwandan authorities.[537] The Trial Chamber also ordered the Prosecution "to make all possible efforts to obtain, and to provide the Defense with the prior statements made before the Rwandan Authorities of detained witnesses GDD, GDQ, and GAP".[538]

266. Witness GAO was recalled from 26 to 28 November 2001. During his testimony, the Defence tendered six purported prior statements of the witness for identification. The witness questioned the authenticity and veracity of these documents and the Prosecution moved to have them excluded under Rule 95 on grounds of doubts about their quality and the means by which they were obtained.[539] Three of these documents were subsequently admitted into evidence.[540] The Prosecution informed the Tribunal that it had received a letter from the Prosecutor General of Rwanda stating that the files of the detained witnesses could not be made available in this case because doing so would seriously compromise the security and safety of survivors and potential witnesses and would compromise the investigation and prosecution of suspects still at large.[541]

267. The Appeals Chamber finds that the Appellant has not demonstrated any error on the part of the Trial Chamber in respect of this sub-ground of appeal. The Trial Chamber issued orders aimed at assisting the Defence in obtaining the prior statements from Rwanda. Instead of requesting further assistance from the Trial Chamber, in the form of subpoenas or other orders addressed to the Rwandan authorities, the Defence sought exclusion of the witnesses' testimonies.

[534] T. 24 July 2001 pp. 14, 15, 113-115.
[535] T. 25 July 2001 pp. 28, 29.
[536] T. 25 July 2001 pp. 28-30.
[537] *Kajelijeli*, Decision on Juvénal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO, para. 23.
[538] *Kajelijeli*, Decision on Juvénal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO, para. 23.
[539] T. 28 November 2001 pp. 6-14.
[540] T. 28 November 2001 p. 55; Trial Judgement, para. 31; *Kajelijeli*, Decision on Kajelijeli's Request to Admit into Evidence the Statements of GAO, 1 July 2003.
[541] T. 28 November 2001 pp. 4, 5.

C. The Decision Not to Exclude Evidence of Detained Witnesses

268. After the appearances of Witnesses GAO, GDD, GDQ, and GAP,[542] the Defence moved to have their testimonies excluded from evidence on the basis that the Defence still had not received their prior statements to the Rwandan authorities and that the Defence, therefore, had not been able to complete their cross-examination.[543] On 14 June 2002, the Trial Chamber held that the witnesses' testimonies were properly admitted into evidence and that the Defence had not demonstrated that this evidence prejudiced Kajelijeli's right to a fair trial.[544] The Trial Chamber noted that the weight to be accorded to the evidence of these witnesses would be determined at a later stage.[545]

269. The Appeals Chamber notes that the broad structure of Rule 89 authorizes the Trial Chamber to admit any relevant evidence which it deems to have probative value. The Trial Chamber in the present case clearly indicated to the Appellant that the eventual weight to be accorded to the evidence would be assessed later, presumably at the time of deliberation in preparation of the judgement after hearing the submissions of the parties. The Appeals Chamber finds no error in such an approach.

270. The Appeals Chamber finds that the Appellant has failed to show that the Trial Chamber erred in its decision not to exclude the evidence of the four detained Prosecution witnesses. Moreover, the Appeals Chamber observes that the Appellant has failed to show in this ground of appeal that any error the Trial Chamber may have committed in this regard has resulted in any legal or factual error in the Trial Judgement.

271. Accordingly, this ground of appeal is dismissed.

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[542] Witness GDD testified from 2 to 4 October 2001. Witness GAP testified from 28 November to 4 December 2001. Witness GDQ testified from 5 to 6 December 2001. Before each of these witnesses was excused, the Defence reserved the right to recall them once their prior statements were received. T. 4 October 2001 p. 163; T. 5 October 2001 p. 34; T. 4 December 2001 p. 119; T. 6 December 2001 pp. 61, 62.

[543] Requête en Extrême Urgence de la Défense aux fins d'Exclusion de la Cause des Déclarations et depositions des témoins détenus GDD, GDQ, GAP et GAO, 18 April 2002.

[544] *Kajelijeli*, Decision on Kajelijeli's Motion to Exclude Statments and Testimonies of Detained Witnesses, paras. 11-13.

[545] *Kajelijeli*, Decision on Kajelijeli's Motion to Exclude Statments and Testimonies of Detained Witnesses, para. 13.

XXI. ALLEGED ERROR IN DENYING A MOTION SEEKING ADMISSION INTO EVIDENCE OF A RENTAL RECEIPT (GROUND OF APPEAL 24)

272. The Appellant submits that the Trial Chamber erred in law and fact by denying a Defence motion to admit a rental receipt into evidence pursuant to Rule 92*bis* of the Rules after the close of the Defence case.[546] The Defence sought to admit the receipt in order to disprove a Prosecution allegation that the Appellant participated in a committee to distribute Tutsi property.[547] Defence Witness RHU23 testified that he rented abandoned land for which he received a rental receipt, which the Defence used to support its theory that abandoned Tutsi property was rented by the commune authorities in compliance with the applicable laws of Rwanda.[548]

273. According to the Appellant, the Trial Chamber contradicted itself in the impugned decision by finding both that the Defence was not able to introduce the receipt into evidence at the time of Witness RHU23's testimony because it had been accidentally left in Rwanda, and that the Defence "offers no explanation why it did not attempt to introduce this information as evidence during the Defence case."[549] The Appellant also submits that the Trial Chamber erred in its translation of the receipt, and thereby failed to understand its probative value.[550] The Appellant points out that the receipt clearly states that it is for "*igisinde*", which translates to "rent of a land".[551] In the Appellant's view, this demonstrates that the document is probative because it corroborates the Appellant's testimony and tends to refute the Prosecution's allegations.[552]

274. The Prosecution responds that the Appellant cannot reargue the motion before the Appeals Chamber, without demonstrating how the Trial Chamber committed an error of law invalidating its decision or an error of fact leading to a miscarriage of justice.[553] The Prosecution disagrees with the Appellant's translation of the word *igisinde*.[554] The Prosecution argues that nothing in the receipt, even read in accordance with the Appellant's proposed translation, supports the Appellant's position that Witness RHU23 rented "Tutsi abandoned land."[555]

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[546] Appellant's Brief, paras. 378-387; *Kajelijeli*, Decision on Kajelijeli's Motion to Admit Into Evidence Rental Receipts of Witness RHU23 Pursuant to Rule 92 *bis* (A), 1 July 2003.
[547] Appellant's Brief, paras. 378-382.
[548] Appellant's Brief, paras. 379-381.
[549] Appellant's Brief, para. 384.
[550] Appellant's Brief, paras. 385-387.
[551] Appellant's Brief, para. 386.
[552] Appellant's Brief, para. 387.
[553] Respondent's Brief, para. 300. The Prosecution cites to *Rutaganda* Appeal Judgement, paras. 15, 18, 20; *Kupreškić et al.* Appeal Judgement, para. 27; *Bagilishema* Appeal Judgement, para. 10; *Musema* Appeal Judgement, para. 18.
[554] Respondent's Brief, para. 303.
[555] Respondent's Brief, para. 303.

275. The Appeals Chamber notes that in the decision on the motion, the Trial Chamber admonished the Defence for bringing the motion to admit further evidence after the close of its case, without offering any further explanation for the delay.[556] The Trial Chamber then observed that the Defence made no arguments as to how the rental receipt, which is not a statement of a witness, could be admitted pursuant to Rule 92*bis*.[557] Finally, the Trial Chamber found that the document lacked probative value because the document did not appear to be a receipt for the sale or rent of land.[558]

276. The Appeals Chamber finds that the Appellant's submission that the impugned decision is contradictory, because it finds both that the witness forgot the receipt in Rwanda and that the Defence failed to provide a reason for the delay, is without merit. Witness RHU23 testified that he still had a receipt for a rental transaction in 1994.[559] In a document submitted in support of the motion to have the receipt admitted into evidence, Defence counsel explained that the witness inadvertently left the receipt in Rwanda and that the Defence was therefore unable to introduce the receipt into evidence during Witness RHU23's testimony.[560] No explanation was offered for the delay between the witness's return to Rwanda and the filing of the motion. In the view of the Appeals Chamber, a reasonable interpretation of the Trial Chamber's decision discloses no contradiction. The Trial Chamber merely noted the proffered reason why the receipt was not adduced at the time of the witness's testimony and then observed that the Defence had failed to provide any reason why it did not seek to adduce the receipt during its case, which closed on 24 April 2003, approximately seven months after Witness RHU23 testified.

277. The Appeals Chamber finds that the Appellant has failed to demonstrate that the Trial Chamber erred in rejecting the admission of the document pursuant to Rule 92*bis*(A).[561] The Appeals Chamber notes that in seeking the admission of the receipt, the Defence specifically relied on Rule 92*bis*, without, however, meeting the admissibility requirements prescribed therein. The Appellant's suggestion that the receipt could be construed as a written statement of Witness RHU23

[556] *Kajelijeli*, Decision on Kajelijeli's Motion to Admit into Evidence Rental Receipts of Witness RHU23 Pursuant to Rule 92 *bis* (A), paras. 4, 7.
[557] *Kajelijeli*, Decision on Kajelijeli's Motion to Admit into Evidence Rental Receipts of Witness RHU23 Pursuant to Rule 92 *bis* (A), para. 5.
[558] *Kajelijeli*, Decision on Kajelijeli's Motion to Admit into Evidence Rental Receipts of Witness RHU23 Pursuant to Rule 92 *bis* (A), para. 6.
[559] T. 25 September 2002 p. 40.
[560] Certification in Support of Extremely Urgent Motion to Admit Into Evidence RHU-23's Rental Receipt Pursuant to Rule 92 *bis* (A), 10 June 2003, para. 3.

within the meaning of Rule 92*bis*(A) is unpersuasive.[562] The receipt is not a written statement of a witness and does not comply with any of the other requirements of admissibility under Rule 92*bis*.

278. The Appellant has also challenged the Trial Chamber's finding that the receipt did not appear *prima facie* to be a receipt for the sale or rental of land. The Appeals Chamber has not been supplied with a definitive translation of the word *igisinde*, without which it is impossible to determine whether the Trial Chamber erred in its own translation. However, even accepting the Appellant's translation, it has not been shown that the Trial Chamber's translation, and its subsequent finding that the document was inadmissible because it was not probative, had any effect on the outcome of its decision. Before discussing the probative value of the document, the Trial Chamber had already found that the Defence had failed to make its case for the admission of the document under Rule 92*bis*(A).[563]

279. Moreover, the Appellant has failed to show that the Trial Chamber's rejection of the document had any effect on the factual findings in the Trial Judgement. In the Judgement, the Trial Chamber concluded that it was "satisfied that Tutsi properties were distributed to the *Interahamwe* and that the Accused was involved in the distribution," though it did not find any specific dates of distribution.[564] In reaching this conclusion, the Trial Chamber relied on the evidence of a number of witnesses including Prosecution Witness GAP, who testified that on 9 April 1994 the Appellant began distributing Tutsi land to the *Interahamwe*,[565] and on Prosecution Witness GAO, who testified that the Appellant set up a committee and began to sell Tutsi property between 12 and 14 April 1994.[566] The Trial Chamber also referred to the testimony of Witness RHU23, but found elsewhere in the Judgement that Witness RHU23 lacked credibility, noting that his testimony was "filled with exaggerations and inconsistencies on important points".[567]

280. Even if the Appeals Chamber were to accept the Appellant's translation of the document in question, the Appellant has not demonstrated that the Trial Chamber erred in law in refusing to admit it. Moreover, the Appellant has not shown that the Trial Chamber's error of fact, if any, occasioned a miscarriage of justice. Accordingly, the appeal under this ground is dismissed.

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[561] Certification in Support of Extremely Urgent Motion to Admit into Evidence RHU-23's Rental Receipt Pursuant to Rule 92 *bis* (A), para. 5.
[562] Brief in Reply, para. 104.
[563] *Kajelijeli*, Decision on Kajelijeli's Motion to Admit into Evidence Rental Receipts of Witness RHU23 Pursuant to Rule 92 *bis* (A), para. 5.
[564] Trial Judgement, para. 323.
[565] Trial Judgement, para. 314.
[566] Trial Judgement, para. 315.

[567] Trial Judgement, para. 701.

XXII. ALLEGED ERRORS CONCERNING THE BURDEN AND STANDARD OF PROOF AND THE PROVISION OF A REASONED OPINION (GROUNDS OF APPEAL 1, 2, 3)

281. The Appellant raises three grounds of appeal which fail to meet the requisite standards for consideration by the Appeals Chamber pursuant to Article 24 of the Statute or which do not merit a reasoned opinion in writing.[568] Such grounds are set out in this chapter.

A. Alleged Error Concerning the Burden of Proof (Ground of Appeal 1)

282. The Appellant submits that the Trial Chamber erred in law in failing to apply the correct test to the evidence before it: that in order to make a finding of guilt it must be satisfied beyond reasonable doubt that the Prosecution proved the guilt.[569] The Appellant further submits that the Trial Chamber committed a legal error in assuming that the Defence had to prove his case and that it had to disprove the Prosecution's case.[570] The Prosecution responds that the Trial Chamber committed no error in respect of the burden of proof and that it did not shift this burden away from the Prosecution to the Defence.[571]

283. The Appeals Chamber notes that the Appellant's submissions on this point are presented in very general terms, without identifying any decision of the Trial Chamber that was incorrect as a matter of law and without making any reference to the record. The only exception is the Appellant's submission on the burden of proof relating to the alibi, in respect of which the Appellant presented more detailed submissions. The Appeals Chamber has addressed that matter above under Ground of Appeal 7.[572] The remainder of the submissions presented under this ground of appeal are dismissed for vagueness.

B. Alleged Error Concerning the Standard of Proof (Ground of Appeal 2)

284. The Appellant submits that the Trial Chamber erred in law by failing to require the Prosecution to prove its case beyond reasonable doubt, by failing to scrutinize the credibility of questionable witnesses, and by failing to require corroboration of Prosecution evidence given by a single witness.[573] The Appellant further submits that the Trial Chamber erred as a matter of law in

[568] For a discussion of the applicable standards, *see supra* Chapter I.
[569] Amended Notice of Appeal, para. 2; Appellant's Brief, para. 23.
[570] Amended Notice of Appeal, paras. 3, 4; Appellant's Brief, para. 23.
[571] Respondent's Brief, paras. 45-55.
[572] *See supra* Chapter V.
[573] Amended Notice of Appeal, paras. 5-7.

applying a higher standard of proof to evidence given by Defence witnesses than to evidence provided by Prosecution witnesses.[574] The Prosecution responds that contrary to the Appellant's submission, the Trial Chamber took a more exacting approach to the standard of proof than is required: it applied the standard at the fact-finding stage to every individual evidentiary component of the Prosecution's case rather than merely to the determination of the ultimate issues, the elements of each offence, as required.[575]

285. The Appeals Chamber observes that under this ground of appeal, the Appellant fails to point to any decision of the Trial Chamber that was incorrect as a matter of law and that no reference is made to the record. In such circumstances, the Appeals Chamber is not in a position to consider this matter further and, accordingly, dismisses this ground of appeal in its entirety.

C. Alleged Error in Failing to Provide a Reasoned Opinion (Ground of Appeal 3)

286. The Appellant submits that the Trial Chamber erred in law by failing to provide a reasoned opinion.[576] The Appellant recalls that in *Kupreškić* the ICTY Appeals Chamber held that the "reasoned opinion" requirement includes a difficult circumstances doctrine pursuant to which the duty to articulate adequate reasoning is stronger when the conviction is based on the uncorroborated testimony of a single witness who made an identification in trying circumstances.[577] The Appellant contends that as in *Kupreškić*, in this case, the Trial Chamber had an "enhanced duty" to provide a reasoned opinion because most of the Prosecution witnesses were detainees convicted of crimes of "moral turpitude" and, in many cases, it was the Appellant who was responsible for their arrest and detention.[578] In the Appellant's view, the Trial Chamber failed to satisfy this "enhanced duty".[579] Furthermore, the Appellant submits that the Trial Chamber relied on evidence that could not have been accepted by any reasonable tribunal, given that it was uncorroborated evidence of detained witnesses with criminal histories, and that the Appellant had played a role in many of their arrests.[580]

287. The Prosecution responds that the Appellant's present submission is only an attempt to reargue his case on appeal.[581] The Prosecution argues that the Appellant's reliance on *Kupreškić* is misguided since one of the critical issues in that case was the reliability of credible witnesses

[574] Amended Notice of Appeal, para. 8.
[575] Respondent's Brief, paras. 62, 63.
[576] Amended Notice of Appeal, para. 9.
[577] Appellant's Brief, para. 53.
[578] Appellant's Brief, paras. 54, 55.
[579] Appellant's Brief, para. 55.
[580] Appellant's Brief, paras. 57-59.
[581] Respondent's Brief, para. 68.

bearing on eye-witness identification in difficult conditions, a situation which does not exist in this case.[582]

288. The Appeals Chamber observes that the Appellant fails to point to any place in the Trial Judgement where the Trial Chamber allegedly erred by failing in its "enhanced duty" to provide a reasoned opinion. Further, the Appellant appears to complain not about the Trial Chamber's failure to articulate reasons for its findings, but rather about the findings themselves, again, however, without identifying where in the Trial Judgement such errors were made and without any reference to the record.[583] Issues related to the Trial Chamber's factual findings are addressed above in this Judgement to the extent that they were properly raised under other grounds of appeal. Because the present ground of appeal fails to identify the portions of the Trial Judgement in which the Trial Chamber allegedly failed to provide a reasoned opinion, and instead makes general, unsupported arguments about the lack of credibility of the Prosecution evidence and the Trial Chamber's alleged error in relying upon it, the Appeals Chamber considers this ground of appeal to be unsubstantiated and vague and, accordingly, dismisses it.

[582] Respondent's Brief, paras. 70-72.
[583] *See* Appellant's Brief, para. 59.

XXIII. SENTENCING

289. The Appeals Chamber recalls that at trial, the Appellant was convicted for genocide (Count 2); direct and public incitement to commit genocide (Count 4); and extermination as a crime against humanity (Count 6).[584] The Trial Chamber sentenced the Appellant to imprisonment for the remainder of his life for Count 2 as well as Count 6, and to imprisonment for fifteen years for his conviction on Count 4, with all three sentences to run concurrently.[585] The Trial Chamber then reduced the Appellant's fifteen-year sentence under Count 4 by five years, five months and twenty-five days as credit for time served pursuant to Rule 101(D) of the Rules.[586]

290. The combined effect of Article 23 of the Statute and Rule 101 of the Rules is *inter alia* that,[587] in imposing a sentence, the Trial Chamber shall consider the following factors: (i) the general practice regarding prison sentences in the courts of Rwanda; (ii) the gravity of the offences or totality of the conduct;[588] (iii) the individual circumstances of the accused, including aggravating and mitigating circumstances; and (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served.[589] The Appeals Chamber recalls, however, that the factors to be taken into account by the Trial Chamber at sentencing as listed in these provisions are by no means exhaustive.[590] Finally, it shall credit the accused for any time spent in detention pending transfer to the Tribunal, trial, or appeal.

291. The Appeals Chamber further recalls that under Article 24 of the Statute, its review of the Trial Chamber's determination of a sentence on appeal is of a corrective nature only rather than a *de novo* sentencing proceeding. The role of the Appeals Chamber is limited to correcting errors of law invalidating a decision and errors of fact that have occasioned a miscarriage of justice.[591] When determining a sentence, a Trial Chamber has considerable, though not unlimited, discretion on account of its obligation to individualize penalties to fit the individual circumstances of an accused

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[584] Trial Judgement, para. 942.
[585] Trial Judgement, paras. 968, 969.
[586] Trial Judgement, para. 970. The Appeals Chamber notes that this credit encompassed the total period the Appellant was in custody pending surrender and trial, including his period of arrest and detention in Benin prior to transfer to the custody of the Tribunal. *See* Trial Judgement, paras. 965-967.
[587] *Cf. Blaškić* Appeal Judgement, para. 679.
[588] *Čelebi}i Case* Appeal Judgement, para. 429.
[589] Statute, art. 9(3).
[590] *Musema* Appeal Judgement, para. 380 citing *^elebi}i Case* Appeal Judgement, para. 718; *Furundžija* Appeal Judgement, para. 238. *See also Blaškić* Appeal Judgement, para. 680.
[591] *Akayesu* Appeal Judgement, paras. 178, 408 citing *^elebi}i Case* Appeal Judgement, paras. 724-725; *Kayishema and Ruzindana*, Appeal Judgement, para. 320; *Musema* Appeal Judgement, para. 15. *See also Dragan Nikolić* Sentencing Appeal Judgement, para. 8.

and to reflect the gravity of the crimes for which the accused has been convicted.[592] Consequently, as a general rule, the Appeals Chamber will not substitute a sentence for that of a Trial Chamber, unless "it believes that the Trial Chamber has committed an error in exercising its discretion, or has failed to follow applicable law."[593] The appellant in principle bears the burden of demonstrating that there has been a discernible error in the exercise of the Trial Chamber's discretion by showing that "(a) the Trial Chamber either took into account what it ought not to have, or failed to take into account what it ought to have taken into account in the weighing process involved in the exercise of its discretion; and (b) if it did, that this resulted in a miscarriage of justice."[594] As long as the Trial Chamber has observed the proper limits of the discretionary framework afforded to it at sentencing without committing any discernible errors, the Appeals Chamber will not intervene.[595]

A. Appeal against the Sentence (Ground of Appeal 25)

292. The Appellant argues under Ground of Appeal 25 that the Trial Chamber erred in sentencing him to imprisonment for life because it failed to accept, as a mitigating factor,[596] all of the evidence proffered by the Appellant in support of his contention that he saved the lives of Tutsis.[597] Consequently, the Appellant requests the Appeals Chamber to quash his sentence and to substitute the sentence with a determinate one.[598]

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[592] *^elebi}i Case* Appeal Judgement, para. 717; *Vasiljević* Appeal Judgement, para. 9; *Blaškić* Appeal Judgement, para. 680; *Dragan Nikolić* Sentencing Appeal Judgement, para. 9.

[593] *Serushago* Sentencing Appeal Judgement, para. 32. *See also Aleksovski* Appeal Judgement, para. 187; *Tadić* Sentencing Appeal Judgement, paras. 20-22; *^elebi}i Case* Appeal Judgement, para. 725; *Blaškić* Appeal Judgement, para. 680.

[594] *Serushago* Sentencing Appeal Judgement, para. 23. *See also Kayishema and Ruzindana* Appeal Judgement, para. 366; *Dragan Nikolić* Sentencing Appeal Judgement, para. 9.

[595] *Aleksovski* Appeal Judgement, para. 187; *Furund`ija* Appeal Judgement, para. 239; *Tadi}* Sentencing Appeal Judgement, para. 22; *^elebi}i Case* Appeal Judgement, para. 725; *Jelisi}* Appeal Judgement, para. 99; *Serushago* Sentencing Appeal, para. 32; *Akayesu* Appeal Judgement, para. 409; *Dragan Nikolić* Sentencing Appeal Judgement, para. 9.

[596] The Appeals Chamber notes that in his Amended Notice of Appeal, at paras. 139, 140, the Appellant raised two additional sub-grounds of appeal under this ground with respect to alleged errors by the Trial Chamber in giving weight to the following aggravating factors at sentencing: 1) that the Appellant directed and participated in the killings in various locations in Ruhengeri Prefecture; and 2) that the Appellant used his considerable influence to bring people together to commit massacres and acted as a bridge between military and civilian spheres to for the purpose of attacking and massacring Tutsi civilians. However, the Appellant failed to raise these alleged errors again in his Brief, Brief in Reply or at the Appeal Hearing, or to develop any specific arguments or cite to any authorities in support of his contention that the Trial Chamber committed error in this regard. Thus, the Appeals Chamber declines to consider these sub-grounds, finding that the Appellant's right to appeal as to them is waived. *See Kayishema and Ruzindana* Appeal Judgement, para. 46.

[597] Amended Notice of Appeal, paras. 135-138; Appellant's Brief, paras. 394-404; Brief in Reply, paras. 108, 109. *See also* Trial Judgement, para. 968.

[598] Appellant's Brief, paras. 403, 404.

293. Specifically, the Appellant contends that the Trial Chamber erred in making the following findings[599] when considering his alleged mitigating circumstances:

(i) that the allegation that the Appellant saved Tutsis prior to 1 January 1994 may not be considered as a mitigating circumstance;

(ii) that the "handful of Tutsi civilians" who received shelter at the home of the Appellant's second wife should not be credited to the Appellant but to his wife; and

(iii) that the testimony of Witness JK312 that the Appellant assisted in the evacuation of a Tutsi family on or about 8 April 1994, while accepted by the Trial Chamber, was insufficient to mitigate the Appellant's sentence.[600]

294. In considering an appeal alleging errors with regard to the Trial Chamber's consideration of mitigating circumstances, the Appeals Chamber recalls that under Rule 101(B)(ii) of the Rules, a Trial Chamber is *required* to take into account any mitigating circumstances in determining a sentence.[601] Neither the Statute nor the Rules exhaustively define the factors which may be considered as mitigating factors. Consequently, under the jurisprudence of this Tribunal, the category of mitigating circumstances has been left open and "what constitutes a mitigating circumstance is a matter for the Trial Chamber to determine in the exercise of its discretion."[602] The burden of proof which must be met by an accused with regard to mitigating circumstances is not, as with aggravating circumstances, proof beyond reasonable doubt,[603] but proof on the balance of probabilities -- the circumstance in question must exist or have existed "more probably than not".[604] Once a Trial Chamber determines that certain evidence constitutes a mitigating circumstance, the decision as to the weight to be accorded to that mitigating circumstance also lies within the wide discretion afforded to the Trial Chamber at sentencing.[605]

1. Alleged Failure to Consider that the Appellant Allegedly Saved Lives of Tutsis before 1 January 1994

295. The Appeals Chamber first turns to the Appellant's allegation that the Trial Chamber erred in law in failing to consider as a mitigating circumstance the fact that he allegedly saved Tutsis

[599] *See* Trial Judgement, paras. 948-951.
[600] Amended Notice of Appeal, paras. 135-138; Appellant's Brief, para. 401; Brief in Reply, para. 108.
[601] *Serushago* Sentencing Appeal Judgement, para. 22. *See also Musema* Appeal Judgement, para. 395.
[602] *Musema* Appeal Judgement, para. 395.
[603] *^elebi}i Case* Appeal Judgement, para. 763.
[604] *^elebi}i Case* Appeal Judgement, para. 590.
[605] *Niyitegeka* Appeal Judgement, para. 266, referring to *Musema* Appeal Judgement, para. 396 and *Kayishema and Ruzindana* Appeal Judgement, para. 366.

before 1 January 1994 as a mitigating circumstance. The Prosecution does not contest the factual basis for this argument.[606]

296. In this regard, the Trial Chamber held at paragraph 948 of the Trial Judgement that:

> [it] will not consider as a mitigating circumstance the fact that Kajelijeli had allegedly saved Tutsi lives before 1994. First, the Chamber notes that this time period is outside the Chamber's jurisdiction. And, secondly, the Prosecution was, at the instance of objections from the Defence, prevented from leading the inquiry into Kajelijeli's possible involvement in Tutsi deaths and mistreatment prior to 1994, with the result that this subject matter was not fully explored at trial.

297. Before reviewing this conclusion, the Appeals Chamber notes that the Appellant has failed to put forward any arguments as to *why* the Trial Chamber's decision at paragraph 948 of the Trial Judgement was in error or to identify any case law in support thereof, contrary to the requirements of Rule 111 of the Rules.[607] The Appellant simply states that the Trial Chamber's failure to consider this alleged mitigating circumstance on the basis of the Tribunal's temporal jurisdiction was in error and resulted in a manifestly unfair and unjust sentence against him.[608] On this basis alone, the Appeals Chamber is entitled to find that the Appellant's claim fails.[609] However, on issues of alleged errors of law, the Appeals Chamber, as the final arbiter of law, has discretion to consider issues raised on appeal even in the absence of substantial arguments by the parties.[610] Because an appeal relating to the Trial Chamber's alleged failure to take account of a mitigating circumstance under the Rules is a matter of law,[611] the Appeals Chamber decides to exercise its discretionary power to consider this part of the Appellant's ground of appeal on its merits.

298. The Appeals Chamber does not agree with the Trial Chamber's conclusion that the Appellant's allegation that he saved Tutsis prior to 1994 could not be taken into account as a mitigating circumstance simply on the basis that events prior to 1 January 1994 are outside the Tribunal's temporal jurisdiction. It is true that Articles 1 and 7 of the Tribunal's Statute limit the scope of the Tribunal's temporal jurisdiction from 1 January to 31 December 1994. However, that temporal framework refers to the Tribunal's competence *to prosecute and try* serious violations of

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[606] The Prosecution merely generally asserts that 1) the Appellant has failed to demonstrate any error made by the Trial Chamber with respect to its finding that there are no circumstances to mitigate the culpability of the Appellant; 2) according to the Tribunal's jurisprudence the fact that an accused has saved Tutsi lives does not automatically serve as a mitigating factor in sentencing; 3) even if the Trial Chamber had considered this a mitigating factor, the sentence imposed by the Trial Chamber reflects the gravity of the crimes of which the Appellant was found guilty and falls well within its discretionary framework. *See* Respondent's Brief, paras. 308-311, 314.

[607] Rule 111 of the Rules states that "[a]n Appellant's brief *setting out all the arguments and authorities* shall be filed…. " (Emphasis added).

[608] Amended Notice of Appeal, para. 135; Appellant's Brief, paras. 401, 403; Brief in Reply, paras. 108, 109.

[609] *Akayesu* Appeal Judgement, para. 404 citing *Kambanda* Appeal Judgement, para. 98.

[610] *Akayesu* Appeal Judgement, para. 404 citing *Kambanda* Appeal Judgement, para. 98.

[611] *Kambanda* Appeal Judgement, para. 116.

international humanitarian law such that no one may be indicted for a crime that occurred outside that prescribed timeframe.[612] This provision does not bar the introduction of such evidence at *sentencing*, although prior acts of the defendant, as explained below, are rarely considered probative for sentencing purposes in any event.

299. However, the Appeals Chamber finds that the Trial Chamber's conclusion that the Appellant's allegation that he saved Tutsis prior to 1 January 1994 could not be taken into account as a mitigating circumstance because the "subject matter was not fully explored at trial" was within the bounds of its discretion. As noted above, a mitigating circumstance proffered by the accused has to be proven on the balance of probabilities.[613] Furthermore, once a mitigating factor has been determined to exist, the decision as to the weight to be accorded the mitigating circumstance lies within the wide discretion afforded to the Trial Chamber in its sentencing determination. Proof of mitigating circumstances "does not automatically entitle the Appellant to a 'credit' in the determination of the sentence; it simply requires the Trial Chamber to consider such mitigating circumstances in its final determination".[614]

300. In this case, four witnesses testified to the Appellant saving Tutsis prior to 1994.[615] However, the Trial Chamber considered that during the Prosecution's case, the Defence continuously objected to or attempted to limit[616] the Prosecution's questions put to its witnesses with regard to any bad conduct of the Appellant towards Tutsis prior to 1994, citing the Tribunal's temporal jurisdiction as a bar to such questioning.[617] As a consequence, the Trial Chamber found that the issue of the Appellant's conduct prior to 1994 towards Tutsis, whether good or bad, was not fully explored or determined at trial.[618] The Trial Chamber correctly concluded that it was not able to take into account and ascribe weight to the four witnesses' testimonies as evidence on this issue given that the Prosecution had not been able to fully present evidence to the contrary, thereby testing the credibility and probative value of that evidence on this particular question. The Appeals Chamber finds that the Trial Chamber's conclusion was properly within the bounds of its discretion.

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[612] *See generally Simba*, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, 29 July 2004; *Ngeze and Nahimana*, Decision on the Interlocutory Appeals, 5 September 2000. *See also Kajelijeli*, Arrêt (Appel de la Décision Du 13 mars 2001 Rejetant la "Defence Motion Objecting to the Jurisdiction of the Tribunal"), 16 November 2001.
[613] *See supra* para. 294.
[614] *Niyitegeka* Appeal Judgement, para. 267.
[615] *See* Trial Judgement, paras. 101, 104 (ZLA); 102, 107 (RHU26); 105 (SMR2); 106 (RHU21).
[616] *See, e.g.*, T. 11 December 2001 pp. 11-16.
[617] *See* Trial Judgement, para. 114.
[618] *See* Trial Judgement, paras. 114, 948.

301. In any event, the Trial Chamber found that if it did accept the Appellant's proffered evidence in this regard as mitigating, the weight of that evidence, even when taken together with the Appellant's alleged good conduct towards Tutsis during the events of April 1994, was insufficient to impeach the Prosecution evidence going to the Appellant's intent to kill Tutsis and his acts of killing Tutsis.[619] Under the circumstances of this case, the Appeals Chamber finds that the Trial Chamber's decision to give little weight to the testimony of the four Defence witnesses who testified as to the Appellant's pre-1994 good conduct towards Tutsis was within the wide discretion given to the Trial Chamber at sentencing. This conclusion is warranted in light of the totality of the evidence in support of the grave offences for which the Appellant was convicted and when considering that under the jurisprudence of this Tribunal and the ICTY, evidence of prior conduct, good or bad, is rarely considered probative.[620]

2. Alleged Failure to Credit the Appellant for the Provision of Refuge to Tutsi Civilians in his Mukingo Home

302. The Appeals Chamber next considers the Appellant's allegation that the Trial Chamber erred in law and fact by concluding that no credit is due to him for the "handful of Tutsi civilians"

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[619] *See* Trial Judgement, para. 115.

[620] For example, in *Kupreškić*, the Trial Chamber held that:

> (i) generally speaking, evidence of the accused's character prior to the events for which he is indicted before the International Tribunal is not a relevant issue inasmuch as (a) by their nature as crimes committed in the context of widespread violence and during a national or international emergency, war crimes and crimes against humanity may be committed by persons with no prior convictions or history of violence, and that consequently evidence of prior good, or bad, conduct on the part of the accused before the armed conflict began is rarely of any probative value before the International Tribunal, and (b) as a general principle of criminal law, evidence as to the character of an accused is generally inadmissible to show the accused's propensity to act in conformity therewith.

Kupreškić et al., Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, 17 February 1999 (emphasis added); c*f. Bagilishema* Trial Judgement, para. 116; *Ntakirutimana* Trial Judgement, para. 732; *Niyitegeka* Trial Judgement, para. 375.

The ICTY Appeals Chamber in *Kupreškić* affirmed the Trial Chamber's decision not to accord much weight to evidence of prior measures taken by Appellant Josipović to care for Muslims in jeopardy, such as lending an HVO army vest to a Muslim and stopping soldiers from killing a Muslim; of prior acts to promote positive relations with his Muslim neighbors despite the conflict; and of the Appellant's prior good character in not displaying any nationalist or ethnic prejudices as mitigating circumstances. *Kupreškić et al.* Appeal Judgement, paras. 428, 430.

Likewise, in *Niyitegeka*, the Appeals Chamber found that the Trial Chamber did not erroneously conclude that the appellant's case "was not one of the exceptional cases where due consideration and weight ought to be given to the evidence of [prior] good character." *Niyitegeka* Appeal Judgement, para. 264. The Appeals Chamber found that the Trial Chamber did not exceed its discretion in giving little weight to evidence that the appellant "proved courageous" and "saved […] refugees' lives" in light of the gravity of the crimes the appellant was found to have committed. *Niyitegeka* Appeal Judgement, paras. 265, 266, citing *Niyitegeka* Trial Judgement, paras. 494, 496.

who received shelter in his Mukingo home.[621] The Appellant argues that the Trial Chamber mischaracterized his Mukingo home as "the home of his second wife", thus disregarding the testimony of Witnesses RHU21 and RHU26 that they owed their lives and those of their family members to him for providing them refuge at *his* Mukingo home for up to two months as well as the testimony of Witness SMR2 that the Appellant instructed his wife to protect and shelter these Tutsis. The Appellant characterizes this finding as "incredible", along with its corollary that the Appellant's wife should deserve credit for providing shelter in the Mukingo home to the Tutsi civilians in question, not him.[622]

303. The Prosecution responds that it can accept that the Mukingo home belonged to the Appellant. However, the Prosecution points out that the day the Tutsi civilians arrived at that home, the Appellant was not there and it was the wife, not the Appellant, who decided to shelter them without consulting him. According to the Prosecution, when the Appellant arrived at the home, his wife told him that *she* had visitors and the Appellant only spent a few moments in the house before leaving. Thus, the Prosecution contends that the Trial Chamber's finding that credit for sheltering these Tutsis belongs to the Appellant's wife was not unreasonable. In any event, the Prosecution maintains that saving these Tutsis could not in any way, as a mitigating circumstance, outweigh the culpability of the Appellant and prevent the Trial Chamber from deciding the sentence as it did.[623]

304. In paragraph 950 of the Trial Judgement the Trial Chamber found that:

> no credit is due to Kajelijeli on the basis that a handful of Tutsi civilians received shelter at the home of Kajelijeli's second wife. The Chamber finds that it was the wife that took these refugees in and stayed with them, and not Kajelijeli. Hence, any credit due in this regard will more appropriately go to the wife of Kajelijeli, and not to Kajelijeli himself.

305. The Appeals Chamber notes that the Trial Chamber summarized the testimony of Witness RHU21 with regard to his seeking shelter in the Mukingo home as follows:

> **Defence Witness RHU21**, a Tutsi male, testified that the Accused had saved his life twice. The first time was in 1990, when the Witness was arrested by the authorities of his *cellule* and was transferred and detained at the Mukingo *bureau communal*; the Accused had the Witness released. The Witness testified that the second time the Accused saved the Witness' life was in April 1994, when he sought shelter at the home of the Accused in Mukingo *commune*. The witness, upon learning of the death of President Habyarimana on 6 April 1994 at home, immediately became afraid because it was being said that the Tutsis and their accomplices had brought down the plane. The Witness went to find shelter at house [*sic*] of the Accused because of his previous show of humanity. After a few hours in the bush, the Witness arrived at the Accused's house at 2:00am The Witness testified that he was with his first wife. The Witness testified that the Accused's wife showed them a room where they would spend the daytime hours during the month-and-a-half the

[621] Amended Notice of Appeal, para. 136.
[622] Amended Notice of Appeal, paras. 136-138; Appellant's Brief, para. 401.
[623] Appeal Hearing, T. 7 March 2005 p. 54.

> witness and his wife remained at the home of the Accused. The Witness confirmed that another person, a Tutsi woman, and her baby also sought refuge at the home of the Accused.[624]

306. The Appeals Chamber further notes the testimony of Witness RHU26 as to her reasons for seeking shelter at the Mukingo home, the summary of which reads as follows:

> **Defence Witness RHU26** testified that she was frightened after learning of the death of the President and decided to flee her home, carrying her child on her back. The Witness sought refuge at the home of the Accused because "He was a good man." The Witness explained that she was referring to the assistance the Accused gave Tutsis in 1992, when he had gathered the Tutsi at the ISAE and fetched gendarmes from Ruhengeri to ensure their safety. The Witness testified that she saw the Accused's wife when she arrived at the residence of the Accused. The witness confirmed that she was not a friend of the Accused's wife before seeking refuge but became her friend after the ordeal. The Accused's wife immediately took the witness to a room where a Tutsi husband and wife, were hiding. However, in her written statement, the Witness only mentioned finding the Tutsi husband at the Accused's house on 7 April 1994. The Witness explained the discrepancy as a mistake of the person who took down the statement. The Witness testified that for the rest of the day, the refugees prayed, and did not see the Accused.[625]

307. Finally, the Appeals Chamber notes the testimony of Witness SMR2 as summarized in the Trial Judgement on this particular incident in the Mukingo home:

> **Defence Witness SMR2**, a close relative of the Accused, testified that the Accused's second wife learned of the death of the President on the night of 7 April 1994 [*sic*] when two Tutsis, Defence Witness RHU21 and his wife, arrived at the home of the Accused's second wife in Mukingo *commune* at approximately 2:00am seeking refuge. The witness was acquainted with the man and woman and identified them in her testimony. These refugees lived in Ruhinigiro *secteur* which is nearby to the home of the Accused's second wife in Rwnizovu *secteur*. The witness testified that RHU-21 was panic-stricken because he heard people talking about the death of President Habyarimana. She also testified that RHU21 had previously been in prison because he was regarded as an accomplice of the *Inkotanyi* and that the Accused, when he was *bourgmestre*, had been responsible for his release. RHU21 had come to the house of the Accused because he was confident that the Accused would help him. […] The Witness testified that between 8:30am and 9:00am, a Tutsi woman, Defence Witness RHU26, and her child arrived at the home of the Accused's second wife seeking refuge. The Witness identified the woman in her testimony, and testified that the woman and the Accused's second wife had a friendly relationship.[626]

308. At the Appeals hearing, the Appellant argued that the Trial Chamber mischaracterized these witnesses' testimonies, ignoring Witnesses RHU21 and RHU26's statements that they fled to the Mukingo house because they felt they could trust the Appellant to protect them and they knew he was a good man.[627] Furthermore, the Appellant contested the Trial Chamber's failure to recognize that Witness SMR2's testimony indicates that the decision to provide refuge in the Mukingo home was a collective one made between the Appellant and his second wife.[628]

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[624] Trial Judgement, para. 106, referring to T. 10 December 2002 pp. 40, 41, 44, 46-48, 60-61 (emphasis added).
[625] Trial Judgement, para. 107, referring to T. 30 September 2002 pp. 11, 12, 18-21, 37, 38 (internal citations omitted and emphasis added).
[626] Trial Judgement, para. 105, referring to T. 19 September 2002 pp. 76, 77, 79, 81, 82; T. 23 September 2002 pp. 9, 10, 12.
[627] Appeal Hearing, T. 7 March 2005 p. 20.
[628] Appeal Hearing, T. 7 March 2005 p. 60.

309. The Appeals Chamber agrees with the Appellant that the Trial Chamber erred in failing to give him some credit for the sheltering of four Tutsis in the Mukingo home, regardless of who actually owned the home, the Appellant or his second wife.[629] Further examination of the testimony of Witnesses SMR2, RHU21, and RHU26 reveals that the Appellant visited the Mukingo home approximately one day and a half after Witness RHU21 and his wife and Witness RHU26 and her small child had arrived in order to fetch his wife and the children and take them to safety. The Appellant only stayed there for about 30-40 minutes. During that time, his wife showed the Appellant the four Tutsis hiding in the home and told him that if he evacuated the children, then the persons who sought refuge in the home would be unsafe. The Appellant greeted and assured the Tutsis. Afterwards, he decided not to evacuate his wife and the children because he would also need to move the Tutsis with them and this would endanger the lives of his family as well as the Tutsis. After the Appellant left, his wife and children stayed behind with the Tutsis.[630]

310. On the basis of this evidence considered by the Trial Chamber, the Appeals Chamber finds that the Trial Chamber committed an error of fact because no reasonable trier of fact could have come to the conclusion that the Appellant did not deserve *any* credit for the refuge given to the four Tutsis in the Mukingo home where his second wife and children were staying. Consequently, the Appeals Chamber also finds that the Trial Chamber erred as a matter of law in failing to take into account, as a mitigating circumstance, that the Appellant offered words of comfort to the Tutsis hiding in the Mukingo home and made a decision not to evacuate his wife and children partly on account of these Tutsis.

311. Nevertheless, the Appeals Chamber finds that the Trial Chamber did not abuse its discretion in finding that, in any event, even if this evidence were taken into account as a mitigating circumstance, it carries little weight. This evidence can in no way, even when taken together with the testimony of other witnesses as to the Appellant's alleged good conduct towards Tutsis before and during 1994, diminish the weight of the evidence going to the Appellant's culpability for intent to commit genocide and acts of genocide against Tutsis such that a reduction in the Trial Chamber's

[629] The Appeals Chamber notes that the evidence on the trial record is not clear on this point. Witnesses RHU21 and RHU26, both testified that the Mukingo home belonged to the Appellant. However, Witness SMR2 was much more closely related to the Appellant and was aware of the property distribution between the Appellant and his wives. In any event, the Appeals Chamber finds that this is a non-issue. The Trial Chamber did not primarily rely upon its finding that the home belonged to the second wife in concluding that no credit was due to the Appellant for hiding the Tutsis in the Mukingo home. Rather, the key findings were that it was the wife who took the Tutsis in and who eventually stayed with them.

[630] T. 19 September 2002 pp. 85-88; T. 30 September 2002 pp. 21, 22; T. 10 December 2002 pp. 47, 48.

sentence should result.[631] The Appeals Chamber notes that Witnesses RHU21 and RHU26 both testified to having known the Appellant since he was a baby or small boy. Such selective assistance to Tutsis who are known by the Appellant and had previously been assisted by the Appellant as in the case of Witness RHU21, is not decisive.[632] Furthermore, it was the Appellant's wife who made the initial decisions to hide the Tutsis when they came to the Mukingo home. It was also the Appellant's wife who first pointed out that evacuation of her and the children would put the Tutsis in jeopardy. Finally, she and the children were the ones who actually stayed behind with the Tutsis for over a month and a half while the Appellant left after staying for little more than half an hour.[633]

312. In conclusion, the Appeals Chamber agrees with the Trial Chamber with regard to the testimony of these three witnesses pertaining to the events at the Mukingo home, finding that it is not "so exceptional" that due weight ought to have been accorded to this evidence in mitigation by the Trial Chamber.[634]

3. Alleged Failure to Give Sufficient Weight to Witness JK312's Testimony

313. Finally, the Appeals Chamber assesses the Appellant's allegation that the Trial Chamber erred in finding that evidence of the Appellant's assistance to one Tutsi family in evacuating them, while credible, was insufficient to mitigate the Appellant's sentence. The Appeals Chamber notes that no arguments, no analysis of the testimony of Witness JK312 on which the Trial Chamber relied for this finding, and no case law are offered by the Appellant. Accordingly, the Appeals Chamber dismisses this submission without further reasoning.

4. Conclusion

314. The Appeals Chamber agrees with the Trial Chamber in that the Appellant's aforementioned conduct vis-à-vis "a handful of Tutsi civilians"[635] clearly does not outweigh the gravity of the crimes for which the Appellant has been charged and convicted and, consequently, dismisses the Appellant's Ground of Appeal 25.

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[631] *See* Trial Judgement, para. 115.
[632] *Cf. Kvočka et al.* Appeal Judgement, para. 693.
[633] *See generally* T. 19 September 2002; T. 23 September 2002; T. 30 September 2002; T. 10 December 2002.
[634] *Cf. Niyitegeka* Appeal Judgement, paras. 264-266.
[635] Trial Judgement, para. 950.

B. Implications of Other Findings of the Appeals Chamber

315. The Appeals Chamber now turns to consider its other findings in this Judgement that are relevant in its review of the Appellant's sentence as handed down by the Trial Chamber.

1. Vacating of Convictions Based on Superior Responsibility under Article 6(3) of the Statute

316. The Appeals Chamber recalls that it vacated the Trial Chamber's convictions against the Appellant under Count 2 for genocide and Count 6 for extermination, a crime against humanity, in so far as they were based upon a finding of his superior responsibility under Article 6(3) of the Tribunal's Statute. The Appeals Chamber found that because the Trial Chamber held the Appellant directly responsible for these crimes pursuant to Article 6(1) of the Statute on the basis of the same set of facts, it committed an error of law and only one conviction under each count should be entered against the Appellant pursuant to Article 6(1).[636]

317. The Appeals Chamber further recalls that it held that, nevertheless, the Trial Chamber was required to take the Appellant's superior position over the *Interahamwe* into account as an aggravating factor at sentencing if it found beyond reasonable doubt that the Appellant held such a superior position.[637] The Appeals Chamber found under Grounds of Appeal 10 and 21 that the Trial Chamber did find beyond reasonable doubt that the Appellant exercised a superior position over the *Interahamwe*.[638]

318. The Appeals Chamber notes that the Trial Chamber explicitly stated that it took into account the following aggravating factors in determining the Appellant's sentence:

> The Chamber had considered the submissions of the Parties and finds the following aggravating factors when considering the culpability of Kajelijeli for the crimes for which he has been found guilty. The Chamber finds that Kajelijeli used his considerable influence to bring together people in order to commit the massacres. He acted as a bridge between the military and civilian spheres in an effort to attack and massacre the civilian Tutsi population; and he ordered, incited and led a large group of people to that enterprise. He saw to it that weapons were provided to the killers so that the attacks would be more devastating. He directed and participated in the killings that went on in various locations around Ruhengeri Prefecture. And even when requested to stop the killings because it was the time to bury the dead, he was unwavering in his genocidal resolve, insisting that it was necessary to continue . . . .[639]

[636] *See supra* Chapter VIII.
[637] *See supra* Chapter VIII.
[638] *See supra* Chapter VIII.
[639] Trial Judgement, paras. 961-962.

The Appeals Chamber further notes that the Trial Chamber expressly considered the Prosecution's submissions on aggravating factors relating to the Appellant's position as a superior.[640] The Appeals Chamber also considers that he was sentenced to life imprisonment twice under both Counts 2 and 6 for genocide and extermination. In this context, although the Trial Chamber only clearly considered the severity of the Appellant's *direct* participation in these crimes as an aggravating factor in the text of its Judgement, the Appeals Chamber is satisfied that the Trial Chamber fully recognized, as an aggravating factor, that the Appellant also held a superior position over others committing the crimes charged under Counts 2 and 6 as is reflected in the resulting sentence imposed.[641]

319. On the basis of the foregoing, the Appeals Chamber concludes that its vacating of the Trial Chamber's convictions of the Appellant as a superior pursuant to Article 6(3) of the Statute under Counts 2 and 6 has no resulting impact on the Appellant's sentence.

2. Finding of Violations to the Appellant's Rights during his Arrest and Detention

320. The Appeals Chamber recalls that it concluded that the Appellant's fundamental rights were violated during his arrest and detention prior to his initial appearance and consequently, that he is entitled to a remedy.[642] The Appeals Chamber therefore finds it appropriate to reduce the Appellant's sentences as imposed by the Trial Chamber for his convictions at trial, which have been affirmed in this appeal.[643]

321. Before doing so, Appeals Chamber notes that the Appellant had two life imprisonment sentences imposed against him for his convictions under Counts 2 and 6 for genocide and extermination respectively, and a third sentence of fifteen years for his conviction for direct and public incitement to commit genocide under Count 4. The Trial Chamber also gave the Appellant credit for time served pursuant to Rule 101(D) of the Rules consisting of five years, five months and twenty-five days, which it deducted from his fifteen-year sentence. The Trial Chamber held that all three sentences are to run concurrently.[644]

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[640] Trial Judgement, paras. 958, 959.
[641] *Cf. Čelebići Case* Appeal Judgement, para. 746.
[642] *See supra* paras. 251-255.
[643] *See Semanza*, Decision, 31 May 2000, para. 129; *Barayagwiza*, Decision (Prosecutor's Request for Review or Reconsideration), para. 75.
[644] Trial Judgement paras. 965-970.

322. The Appeals Chamber notes that the Trial Chamber granted credit[645] to the Appellant pursuant to Rule 101(D) for time served pending surrender and trial as foreseen mandatorily under all circumstances and in each case. Therefore this credit was not a remedy for the suspect or accused's rights having been violated during the period of his prolonged detention pending transfer and trial. Where a suspect or an accused's rights have been violated during the period of his unlawful detention pending transfer and trial, Article 2(3)(a) of the ICCPR stipulates that "[a]ny person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."

323. In reducing the Appellant's sentences, the Appeals Chamber recalls that it found that the Appellant was impermissibly detained for a total of 306[646] days in Benin and the UNDF because 1) he was not promptly informed of the reasons for his arrest or of the provisional charges against him, and 2) he was not promptly granted an initial appearance before a Judge or an official acting in a judicial capacity without undue delay. [647]

324. The Appeals Chamber finds that under the circumstances of this case, in view of the serious violations of the Appellant's fundamental rights during his arrest and detention in Benin and the UNDF from 5 June 1998 to 6 April 1999, and considering the Appellant's entitlement to an effective remedy for those violations under the Tribunal's law and jurisprudence and Article 2(3)(a) of the ICCPR, the Appellant's two life sentences and fifteen years' sentence as imposed by the Trial Chamber shall be set aside and converted into a single sentence consisting of a fixed term of imprisonment of 45 years. Pursuant to Rule 101(D) of the Rules, the Appellant shall receive credit for time already served in detention as of 5 June 1998.

[645] Trial Judgement, paras. 966, 967, 970.
[646] This figure of 306 days is composed of the following: 95 days in the custody of the Republic of Benin from the arrest on 5 June 1998 to the Appellant's transfer to the Tribunal on 7 September 1998 plus 211 days in the custody of the Tribunal from 8 September 1998 to 6 April 1999. *See supra* Chapter XIX.
[647] The Appellant was impermissibly detained for 85 days before being informed of the reasons for his arrest or of the provisional charges against him and for a further 221 days before his initial appearance before a Judge. *See supra* Chapter XIX.

XXIV. DISPOSITION

325. For the foregoing reasons, **THE APPEALS CHAMBER**, unanimously

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

NOTING the written submissions of the parties and their oral arguments presented at the hearing on 7 March 2005;

SITTING in open session;

VACATES the Appellant's convictions under Counts 2 and 6 for genocide and extermination as a crime against humanity insofar as they are based on a finding of the Appellant's superior responsibility under Article 6(3) of the Statute;

DISMISSES the appeal in all other respects;

FINDS, *proprio motu*, that the Appellant's fundamental rights were seriously violated during his arrest and detention and, therefore:

SETS ASIDE the sentences imposed by the Trial Chamber and **CONVERTS** them into a single sentence of 45 years of imprisonment, subject to credit being given under Rule 101(D) of the Rules for the period already spent in detention from 5 June 1998;

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

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

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

Fausto Pocar	Mohamed Shahabuddeen	Florence Ndepele Mwachande Mumba
Presiding Judge	Judge	Judge

Wolfgang Schomburg	Inés Mónica Weinberg de Roca
Judge	Judge

Signed on the twelfth day of May 2005 at The Hague, The Netherlands,

and issued this twenty-third day of May 2005 at Arusha, Tanzania.

[**SEAL OF THE TRIBUNAL]**

XXV. ANNEX A – PROCEDURAL BACKGROUND

326. The main aspects of the appeal proceedings are summarized below.

A. Notice of Appeal and Briefs

327. The Trial Judgement was delivered in English on 1 December 2003. On 8 December 2003 the Appellant filed a motion seeking an extension of time for filing his Notice of Appeal and Brief on the ground that the French text of the Trial Judgement was not yet available.[648] On 17 December 2003 the Pre-Appeal Judge granted the requested extension and ordered the Appellant to file his Notice of Appeal no later than 31 December 2003 and his Brief no later than 29 March 2004.[649] The Appellant filed his Notice of Appeal on 31 December 2003. Because of the continued unavailability of the French text of the Trial Judgement and due to other translation issues, the Pre-Appeal Judge extended the deadline for the filing of the Appellant's Brief to no later than 22 April 2004.[650] On 21 April 2004, upon receiving the French text of the Trial Judgement, the Appellant moved for leave to vary the grounds of appeal.[651] On 22 April 2004, the Pre-Appeal Judge granted leave to file the Amended Notice of Appeal and Brief on the same date.[652] The Appellant filed his Brief on 22 April 2004 and the Amended Notice of Appeal on 28 April 2004. The Prosecution filed its Respondent's Brief on 1 June 2004 and the Appellant filed his Brief in Reply on 30 July 2004.

328. On 16 December 2003, the Prosecution filed a motion seeking an extension of time to file its Notice of Appeal on the ground that the Dissenting Opinion of Judge Ramaroson was not yet available in English.[653] The Pre-Appeal Judge denied this request on 17 December 2003 and ordered the Prosecution to file its Notice of Appeal by 31 December 2003.[654] On 5 January 2004 the Prosecution moved for an acceptance of the filing of its Notice of Appeal out of time.[655] The Appeals Chamber unanimously denied this motion on 23 January 2004 because the Prosecution failed to show good cause for not filing its Notice of Appeal within the prescribed time limit.[656]

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[648] Notice of Motion for an Extension of Time to File Appellant's Notice of Appeal and Brief Pursuant to Rules 108, 111 & 116 of RPE, 8 December 2003.
[649] Decision on Motion for an Extension of Time to File Appellant's Notice of Appeal and Brief, 17 December 2003.
[650] Order on Motion for Extension of Time, 5 April 2004. *See also* Order Granting an Extension of Time for Filing of Translation of Trial Judgement and Appellant's Brief, 23 February 2004; Order Granting an Extension of Time for Filing of Translation of Trial Judgement and Appellant's Brief, 13 February 2004.
[651] Notice of Extremely Urgent Motion for Leave to Vary Grounds of Appeal, 21 April 2004.
[652] Order on Extremely Urgent Motion for Leave to Vary Grounds of Appeal, 22 April 2004.
[653] Prosecution Urgent Motion for an Extension of Time to File Notice of Appeal, 16 December 2003.
[654] Decision on Prosecution Urgent Motion for an Extension of Time to File Notice of Appeal, 17 December 2003.
[655] Prosecution Urgent Motion for Acceptance of Prosecution Notice of Appeal Out of Time, 5 January 2004.
[656] Decision on Prosecution Urgent Motion for Acceptance of Prosecution Notice of Appeal Out of Time, 23 January 2004.

B. Assignment of Judges

329. On 10 December 2003 the Presiding Judge of the Appeals Chamber assigned the following Judges to hear the appeal: Judge Theodor Meron, Judge Mohamed Shahabuddeen, Judge Florence Mumba, Judge Fausto Pocar, and Judge Inés Mónica Weinberg de Roca.[657] Judge Mumba was designated the Pre-Appeal Judge.[658] On 31 August 2004, Judge Wolfgang Schomburg was assigned to replace Judge Meron.[659]

C. Additional Evidence

330. On 16 February 2004, the Appellant filed a motion for the admission of additional evidence.[660] Finding that the motion constituted an incomplete and deficient filing, the Pre-Appeal Judge ordered the Appellant to file an addendum to the motion.[661] The Appellant filed an addendum to the motion on 8 March 2004.[662] Finding that the Appellant's submissions were not sufficiently detailed as to the availability of the additional evidence during trial, the Pre-Appeal Judge ordered the Appellant to file a detailed explanation of how and when the Defence obtained the evidence sought for admission under Rule 115, and whether such evidence could have been discovered at trial through the exercise of due diligence.[663] Finally, on 13 May 2004 the Appellant confidentially filed a detailed explanation on the availability of additional evidence.[664] However, the Appeals Chamber dismissed the request for admission of additional evidence on 28 October 2004.[665]

331. On 15 February 2005, the Appellant filed a second motion for the admission of additional evidence.[666] Finding that this motion was filed out of time without a showing of good cause for the late filing; that, in any event, the proposed evidence was available at trial; and that the Appellant

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[657] Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 10 December 2003.
[658] Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 10 December 2003.
[659] Order of the Presiding Judge Replacing a Judge in a Case Before the Appeals Chamber, 31 August 2004.
[660] Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 16 February 2004.
[661] Order for the Defence to File Additional Evidence in Support of Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 27 February 2004.
[662] Addendum to Defence Motion for Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence and Reply to Prosecutor's Response, 8 March 2004.
[663] Order for the Defence to File a Detailed Explanation on the Availability of the Additional Evidence Sought for Admission Pursuant to Rule 115 of the Rules of Procedure and Evidence, 4 May 2004.
[664] Defence's Detailed Explanation on the Availability of the Additional Evidence Sought for Admission Pursuant to Rule 115 of the Rules of Procedure and Evidence, 13 May 2004. *See also* Decision on Notice of Leave to File Extremely Urgent Motion for Permission to Supplement Defence's Detailed Explanation Filed on May 24 2004, 15 June 2004.
[665] Decision on Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 28 October 2004.
[666] Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 15 February 2005.

had failed to demonstrate that had the evidence been admitted at trial it would have affected the verdict, the Appeals Chamber dismissed it.[667]

D. Hearing of the Appeal

332. On 16 November 2004, the Appeals Chamber ordered that the hearing of the appeal take place on 10 December 2004.[668] Because of a medical emergency concerning the Lead Counsel's spouse and in the absence of a co-counsel, the Appeals Chamber had to postpone the hearing.[669] Pursuant to a Scheduling Order of 17 December 2004,[670] and an Order Concerning the Hearing of the Appeal dated 18 February 2005,[671] the Appeals Chamber heard the parties' oral arguments on 7 March 2005 in Arusha, Tanzania. At the close of the hearing, the Accused made use of the opportunity to address the Chamber himself with some remarks.

[667] Decision on Second Defence Motion for the Admission of Additional Evidence Pursuant to Rule 155 of the Rules of Procedure and Evidence, 7 March 2005.
[668] Scheduling Order, 16 November 2004.
[669] Order Postponing the Hearing of the Appeal, 7 December 2004.
[670] Scheduling Order, 17 December 2004.
[671] Order Concerning the Hearing of the Appeal, 18 February 2005.

XXVI. ANNEX B – CITED MATERIALS/DEFINED TERMS

A. Jurisprudence

1. ICTR

AKAYESU

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

BAGILISHEMA

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

KAJELIJELI

The Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-I, Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing, 8 May 2000 ("Decision of 8 May 2000")

Juvénal Kajelijeli v. The Prosecutor, Case No. ICTR-98-44-AR72, Scheduling Order, 26 July 2000

Juvénal Kajelijeli v. The Prosecutor, Case No. ICTR-98-44-AR72, Order, 10 August 2000

Juvénal Kajelijeli v. The Prosecutor, Case No. ICTR-98-44-AR72, Order (On Motion to Grant Relief from Dismissal of Appeal), 12 December 2000

The Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-T, Decision on the Defence Motion Objecting to the Jurisdiction of the Tribunal, 13 March 2001 ("Decision of 13 March 2001")

The Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-T, Decision on Kajelijeli's Urgent Motion and Certification with Appendices in Support of Urgent Motion for Disclosure of Materials Pursuant to Rule 66(B) and Rule 68 of the Rules of Procedure and Evidence of the Tribunal, 5 July 2001

The Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-T, Decision on Juvénal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO, 2 November 2001

Juvénal Kajelijeli v. The Prosecutor, Case No. ICTR-98-44A-T, Arret (Appel de la Decision du 13 Mars 2001 Rejetant la "Defence Motion Objecting to the Jurisdiction of the Tribunal"), 16 November 2001 ("Decision of 16 November 2001")

The Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-T, Decision on Kajelijeli's Motion to Exclude Statements and Testimonies of Detained Witnesses, 14 June 2002

The Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-T, Decision on Kajelijeli's Request to Admit into Evidence the Statements of GAO, 1 July 2003

The Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-T, Decision on Kajelijeli's Motion to Admit into Evidence Affidavits Pursuant to Rule 92*bis*(B), 1 July 2003

The Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-T, Judgement and Sentence, 1 December 2003

KAMBANDA

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

KAYISHEMA AND RUZINDANA

The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001 ("*Kayishema and Ruzindana* Appeal Judgement ")

"MEDIA CASE"/ NAHIMANA ET AL./BARAYAGWIZA

Jean-Bosco Barayagwiza v. The Prosecutor, Case No. ICTR-97-19-AR72, Decision, 3 November 1999

Jean-Bosco Barayagwiza v. The Prosecutor, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review of Reconsideration), 31 March 2000

Hassan Ngeze and Ferdinand Nahimana v. The Prosecutor, Case No. ICTR-96-11-AR72, Decision on the Interlocutory Appeals, 5 September 2000

Ferdinand Nahimana et al. v. The Prosecutor, Case No. ICTR-99-52-A, Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005

MUSEMA

The Prosecutor v. Alfred Musema, Case No. ICTR-96-13-T, Judgement and Sentence, 27 January 2000 ("*Musema* Trial Judgement")

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

NIYITEGEKA

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

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

NTAKIRUTIMANA

The Prosecutor v. Elizaphan and Gérard Ntakirutimana, Case No. ICTR-96-10 & ICTR-96-17-T, Judgement and Sentence, 21 February 2003 ("*Ntakirutimana* Trial Judgement")

RUTAGANDA

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

SEMANZA

Laurent Semanza v. The Prosecutor, Case No. ICTR-97-20-A, Decision, 31 May 2000

SERUSHAGO

Omar Serushago v. The Prosecutor, Case No. ICTR-98-39-A, Judgement (Appeal Against Sentence), 14 February 2000 ("*Serushago* Sentencing Appeal Judgement")

SIMBA

Aloys Simba v. The Prosecutor, Case No. ICTR-01-76-AR72.2, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, 29 July 2004

2. ICTY

ALEKSOVSKI

The Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement")

BLA[KI]

The Prosecutor v. Tihomir Blaški}, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaški}* Appeal Judgement")

"ČELEBICI CASE"/DELALI] ET AL./MUCIĆ ET AL.

The Prosecutor v. Zejnil Delalić, et al., Case No. IT-96-21-T, Judgement, 16 November 1998 ("*Čelebići Case* Trial Judgement")

The Prosecutor v. Zejnil Delalić, et al., Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići Case* Appeal Judgement" or "*Delalić et al.* Appeal Judgement")

The Prosecutor v. Zdravko Muci}, et al., Case No. IT-96-21-A*bis*, Judgement on Sentence Appeal, 8 April 2003 ("*Čelebići Case* Sentencing Appeal Judgement")

ERDEMOVIĆ

The Prosecutor v. Dražen Erdemovi}, Case No. IT-96-22-A, Judgement, 7 October 1997 ("*Erdemovi}* Appeal Judgement")

FURUNDŽIJA

The Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement")

KOLUNDZIJA

The Prosecutor v. Kolundzija, Case No. IT-95-8-PT, Order on Non-Party Motion for Discovery, 29 September 1999

KORDIĆ AND ČERKEZ

The Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement")

KRSTIĆ

The Prosecutor v. *Radislav Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krsti}* Appeal Judgement")

KUNARAC ET AL.

The Prosecutor v. Dragoljub Kunarac, et al., Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement")

KUPREŠKIĆ ET AL.

The Prosecutor v. Zoran Kupreškić, et al., Case No. IT-95-16-T, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, 17 February 1999

The Prosecutor v. Zoran Kupreškić, et al., Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement")

KVO^KA ET AL.

The Prosecutor v. Miroslav Kvočka, et al., Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement")

LIMAJ ET AL.

The Prosecutor v. Limaj et al., Case No. IT-03-66-I, Order to Withdraw the Indictment against Agim Murtezi and Order for His Immediate Release, 28 February 2003

NIKOLIĆ, DRAGAN

The Prosecutor v. Dragan Nikoli}, Case No. IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002

The Prosecutor v. Dragan Nikoli}, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003

The Prosecutor v. Dragan Nikoli}, Case No. IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005 ("*Dragan Nikoli}* Sentencing Appeal Judgement")

SIKIRICA ET AL.

The Prosecutor v. Sikirica et al., Case No. IT-95-8-I, None [*sic*] Parties Milan and Miroslav Vuckovic's Motion for an Order Compelling Discovery, 2 September 1999

TADIĆ

The Prosecutor v. Duško Tadić, Case No. IT-94-1-A and 94-1-A*bis*, Judgement in Sentencing Appeals, 26 January 2000 ("*Tadić* Sentencing Appeal Judgement")

VASILJEVIĆ

The Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement")

3. Other Jurisdictions

(i) Benin, Constitutional Court

Juvénal Kajelijeli, Decision DCC 00-064, 24 October 2000

(ii) European Court of Human Rights

Terence Brogan and Others v. The United Kingdom, 10/1987/133/184-187, 29 November 1988

Arminas Graužinis v. Lithuania, 37975/97, 10 October 2000

Abdullah Öcalan v. Turkey, 46221/99, 12 March 2003

Talat Tepe v. Turkey, 31247/96, 21 December 2004

(iii) Inter-American Court of Human Rights

Suárez Rosero Case, 12 November 1997, [1997] IACHR 8

(iv) U.N. Human Rights Committee

Barrington Campbell v. Jamaica, CCPR/C/63/D/750/1997, 3 August 1998

Leopoldo Buffo Carballal v. Uruguay, CCPR/C/OP/1/33/1978, 27 March 1981

Ricardo Ernesto Gomez Casafranca v. Peru, CCPR/C/78/D/981/2001, 19 September 2003

Moriana Hernandez Valentini de Bazzano v. Uruguay, CCPR/C/OP/1/5/1997, 15 August 1979

Youssef El-Megreisi v. Libyan Arab Jamahiriya, CCPR/C/50/D/440/1990, 23 March 1994

Michael Freemantle v. Jamaica, CCPR/C/68/D/625/1995, 28 April 2000

Tony Jones v. Jamaica, CCPR/C/62/D/585/1994, 29 May 1998

Dennis Lobban v. Jamaica, CCPR/C/80/D/797/1998, 13 May 2004

Albert Womah Mukong v. Cameroon, CCPR/C/50/D/440/1990, 21 July 1994

B. Defined Terms

ACHPR

African Charter on Human and People's Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986

ACHR

American Convention on Human Rights, 1144 U.N.T.S. 123, entered into force 18 July 1978

Amended Indictment

The Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-I, Amended Indictment Pursuant to the Tribunal Order Dated 25 January 2001, 25 January 2001

Amended Notice of Appeal

Amended Notice of Appeal, filed 28 April 2004

Appeal Hearing

Hearing of the Appeal held on 7 March 2005

Appellant

Juvénal Kajelijeli

Appellant's Brief

Grounds of Appeal Against Conviction and Sentence and Appellant's Brief on Appeal, filed 22 April 2004

Appellant's Brief in Reply

Appellant's Brief-in-Reply, filed 2 August 2004

Directive on the Assignment of Defence Counsel

Directive on the Assignment of Defence Counsel, ICTR, 9 January 1996, as amended 6 June 1997, 8 June 1998, 1 July 1999, 27 May 2003, and 24 April 2004

ECHR

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force 3 September 1953, amended by Protocols 3, 5, 8, and 11

German Constitution

Grundgesetz – Basic Law of the Federal Republic of Germany, 23 May 1949, as amended

ICCPR

International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), p. 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976

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

ICTY

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia since 1991

Inter-American Commission on Human Rights, Annual Report of the Inter-American Commission, 1982-1983

Inter-American Commission on Human Rights, Annual Report of the Inter-American Commission, 1982-1983, OEA/Ser.L/V/II/61, Doc.22, rev. 1

Practice Direction on Formal Requirements for Appeals from Judgement

Practice Direction on Formal Requirements for Appeals from Judgement, ICTR, 16 September 2002

Respondent

The Prosecutor

Respondent's Brief

Respondent's Brief, filed 1 June 2004

Rules

Rules of Procedure and Evidence of the Tribunal

Standard Minimum Rules for the Treatment of Prisoners

Standard Minimum Rules for the Treatment of Prisoners, approved by ECOSOC Res. 663(C) (XXIV) of 31 July 1957 and Res. 2076 (LXII) of 13 May 1997 (UN Doc. E/5988 (1977))

Statute

Statute of the Tribunal

T.

Transcript. All references to the transcript are to the official, English transcript, unless otherwise indicated.

Trial Judgement

The Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-T, Judgement and Sentence, 1 December 2003

Tribunal

International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994

U.N.

United Nations

U.N. Commission on Human Rights, Report of the Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punishment

U.N. Commission on Human Rights, Report of the Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. E/CN.4/1995/434

UNDF

United Nations Detention Facility

UNHCR

United Nations High Commissioner for Refugees

U.N. Human Rights Committee, General Comment No. 8

U.N. Human Rights Committee, General Comment No. 8: Right to Liberty and Security of Persons (Art. 9):30/06/82

U.N. Security Council Resolution 955

S/RES/955 (1994)

Vienna Convention on Consular Relations

Vienna Convention on Consular Relations, 596 U.N.T.S. 261, entered into force 19 March 1967