



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

**IN THE APPEALS CHAMBER**

**Before:** Judge Carmel Agius, Presiding  
Judge Mehmet Güney  
Judge Liu Daqun  
Judge Arlette Ramaroson  
Judge Andrézia Vaz

**Registrar:** Mr. Adama Dieng

**Judgement of:** 14 December 2011

**Dominique NTAWUKULILYAYO**

v.

**THE PROSECUTOR**

*Case No. ICTR-05-82-A*

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**JUDGEMENT**

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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 seised of an appeal by Dominique Ntawukulilyayo (“Ntawukulilyayo”) against the Judgement rendered on 3 August 2010 by Trial Chamber III of the Tribunal (“Trial Chamber”) in the case of *The Prosecutor v. Dominique Ntawukulilyayo* (“Trial Judgement”).<sup>1</sup>

## I. INTRODUCTION

2. Ntawukulilyayo was born in 1942 in Kibeho, Mubuga commune, Gikongoro prefecture, Rwanda.<sup>2</sup> On 21 September 1990, he was appointed sub-prefect of the Gisagara sub-prefecture within Butare prefecture, a position he maintained until he left Rwanda in July 1994.<sup>3</sup> He was arrested in France on 17 October 2007, and was transferred to the Tribunal’s detention facility in Arusha, Tanzania, on 5 June 2008.<sup>4</sup> He was charged before the Tribunal with three counts of genocide, complicity in genocide, and direct and public incitement to commit genocide.<sup>5</sup>

3. The Trial Chamber convicted Ntawukulilyayo of genocide pursuant to Article 6(1) of the Statute of the Tribunal (“Statute”) for the killing of Tutsis at Kabuye hill in Butare prefecture.<sup>6</sup> It found that Ntawukulilyayo aided and abetted these killings by instructing the refugees who had gathered at Gisagara market to move to Kabuye hill, and by transporting soldiers who participated in the attack at Kabuye hill.<sup>7</sup> The Trial Chamber also found Ntawukulilyayo responsible for ordering the killings at Kabuye hill.<sup>8</sup> The Trial Chamber found Ntawukulilyayo not guilty of

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<sup>1</sup> *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, Judgement and Sentence, delivered in public on 3 August 2010, filed on 6 August 2010.

<sup>2</sup> Trial Judgement, paras. 1, 89.

<sup>3</sup> Trial Judgement, paras. 1, 92.

<sup>4</sup> Trial Judgement, para. 92 and Annex A: Procedural History, para. 2.

<sup>5</sup> On 26 May 2005, the Prosecution filed its original indictment against Ntawukulilyayo, charging him with genocide, complicity in genocide, and direct and public incitement to commit genocide. See *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-2005-82-I, Indictment, confidential, 26 May 2005 (“Original Indictment”). This indictment was amended four times in May 2009. See Trial Judgement, Annex A: Procedural History, paras. 7, 8. The fourth amended indictment, which was filed on 19 May 2009, is the operative indictment in this case. See *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-I, Indictment, 19 May 2009 (“Indictment”).

<sup>6</sup> Trial Judgement, paras. 28, 457, 460, 461.

<sup>7</sup> Trial Judgement, para. 457.

<sup>8</sup> Trial Judgement, para. 457.

complicity in genocide and of direct and public incitement to commit genocide.<sup>9</sup> The Trial Chamber sentenced Ntawukulilyayo to 25 years of imprisonment.<sup>10</sup>

4. Ntawukulilyayo presents six grounds of appeal challenging his conviction and sentence.<sup>11</sup> He alleges that the Trial Chamber erred in finding that he instructed refugees to leave Gisagara market and move to Kabuye hill,<sup>12</sup> and that he brought soldiers to Kabuye hill who then participated in the attacks on the refugees.<sup>13</sup> He also alleges that he lacked notice that he was charged with ordering as a mode of liability, and that the criminal elements thereof, as well as those of aiding and abetting, were not established.<sup>14</sup> He requests that the Appeals Chamber reverse the Trial Judgement, enter an acquittal on the count of genocide, and order his immediate release.<sup>15</sup> In the alternative, he requests that the Appeals Chamber significantly reduce his sentence.<sup>16</sup>

5. The Prosecution responds that Ntawukulilyayo's appeal should be dismissed in its entirety.<sup>17</sup>

6. The Appeals Chamber heard oral submissions regarding this appeal on 26 September 2011.

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<sup>9</sup> Trial Judgement, paras. 28, 458-461.

<sup>10</sup> Trial Judgement, paras. 29, 479.

<sup>11</sup> Notice of Appeal, paras. 4-34; Appeal Brief, paras. 7-267.

<sup>12</sup> Notice of Appeal, paras. 5-12; Appeal Brief, paras. 7-91.

<sup>13</sup> Notice of Appeal, paras. 13-22; Appeal Brief, paras. 92-158.

<sup>14</sup> Notice of Appeal, paras. 23-33; Appeal Brief, paras. 159-253.

<sup>15</sup> Notice of Appeal, p. 10; Appeal Brief, p. 65.

<sup>16</sup> Notice of Appeal, para. 34, p. 10; Appeal Brief, paras. 254-265, p. 65.

<sup>17</sup> Response Brief, para. 217.

## II. STANDARDS OF APPELLATE REVIEW

7. The Appeals Chamber recalls the applicable standards of appellate review pursuant to Article 24 of the Statute. The Appeals Chamber reviews only errors of law which have the potential to invalidate the decision of the Trial Chamber and errors of fact which have occasioned a miscarriage of justice.<sup>18</sup>

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

Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant's arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.<sup>19</sup>

9. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.<sup>20</sup> In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding may be confirmed on appeal.<sup>21</sup>

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

Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.<sup>22</sup>

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

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<sup>18</sup> See, e.g., *Munyakazi* Appeal Judgement, para. 5; *Muvunyi* Appeal Judgement of 1 April 2011, para. 7; *Renzaho* Appeal Judgement, para. 7.

<sup>19</sup> *Ntakirutimana* Appeal Judgement, para. 11 (internal citation omitted). See also, e.g., *Munyakazi* Appeal Judgement, para. 6; *Setako* Appeal Judgement, para. 8; *Muvunyi* Appeal Judgement of 1 April 2011, para. 8.

<sup>20</sup> See, e.g., *Munyakazi* Appeal Judgement, para. 7; *Setako* Appeal Judgement, para. 9; *Muvunyi* Appeal Judgement of 1 April 2011, para. 9.

<sup>21</sup> See, e.g., *Munyakazi* Appeal Judgement, para. 7; *Setako* Appeal Judgement, para. 9; *Muvunyi* Appeal Judgement of 1 April 2011, para. 9.

<sup>22</sup> See, e.g., *Krstić* Appeal Judgement, para. 40 (internal citations omitted). See also *Munyakazi* Appeal Judgement, para. 8; *Setako* Appeal Judgement, para. 10; *Muvunyi* Appeal Judgement of 1 April 2011, para. 10.

the intervention of the Appeals Chamber.<sup>23</sup> Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.<sup>24</sup>

12. In order for the Appeals Chamber to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.<sup>25</sup> Moreover, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.<sup>26</sup> Finally, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and it will dismiss arguments which are evidently unfounded without providing detailed reasoning.<sup>27</sup>

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<sup>23</sup> See, e.g., *Munyakazi* Appeal Judgement, para. 9; *Setako* Appeal Judgement, para. 11; *Muvunyi* Appeal Judgement of 1 April 2011, para. 11.

<sup>24</sup> See, e.g., *Munyakazi* Appeal Judgement, para. 9; *Setako* Appeal Judgement, para. 11; *Muvunyi* Appeal Judgement of 1 April 2011, para. 11.

<sup>25</sup> Practice Direction on Formal Requirements for Appeals from Judgement, 15 June 2007, para. 4(b). See also, e.g., *Munyakazi* Appeal Judgement, para. 10; *Setako* Appeal Judgement, para. 12; *Muvunyi* Appeal Judgement of 1 April 2011, para. 12.

<sup>26</sup> See, e.g., *Munyakazi* Appeal Judgement, para. 10; *Setako* Appeal Judgement, para. 12; *Muvunyi* Appeal Judgement of 1 April 2011, para. 12.

<sup>27</sup> See, e.g., *Munyakazi* Appeal Judgement, para. 10; *Setako* Appeal Judgement, para. 12; *Muvunyi* Appeal Judgement of 1 April 2011, para. 12.

### III. ALLEGED ERRORS RELATING TO ORDERS TO LEAVE GISAGARA MARKET FOR KABUYE HILL (GROUND 1)

13. The Trial Chamber found that, in the early afternoon of Saturday, 23 April 1994, Ntawukulilyayo came to Gisagara market with Callixte Kalimanzira and, together with communal policemen, directed mostly Tutsi refugees to Kabuye hill, promising them food and protection there.<sup>28</sup> It found that the refugees complied with Ntawukulilyayo's instructions and were escorted to Kabuye hill by communal police.<sup>29</sup> The Trial Chamber based these findings on the "consistent and convincing evidence of [Prosecution] Witnesses AYQ and BAU".<sup>30</sup>

14. Ntawukulilyayo submits that the Trial Chamber erred in: (i) finding that Witnesses AYQ and BAU corroborated each other;<sup>31</sup> (ii) its assessment of Witness AYQ's testimony;<sup>32</sup> (iii) its assessment of Witness BAU's testimony;<sup>33</sup> and (iv) its assessment of the Defence evidence.<sup>34</sup> He requests that the Appeals Chamber vacate the Trial Chamber's findings in respect of the transfer of the refugees from Gisagara market to Kabuye hill.<sup>35</sup>

15. The Appeals Chamber notes that, in support of many of his submissions, Ntawukulilyayo refers to the Dissenting Opinion of Judge Akay.<sup>36</sup> The Appeals Chamber recalls that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence, both of which are reasonable.<sup>37</sup> It is only when the evidence relied on by the Trial Chamber could not have been accepted by any reasonable trier of fact, or where the evaluation of the evidence is wholly erroneous, that the Appeals Chamber can substitute its own finding for that of the Trial Chamber.<sup>38</sup>

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<sup>28</sup> Trial Judgement, paras. 12, 263, 424, 453.

<sup>29</sup> Trial Judgement, paras. 12, 263, 424, 453.

<sup>30</sup> Trial Judgement, para. 263. *See also ibid.*, para. 12.

<sup>31</sup> Notice of Appeal, para. 6; Appeal Brief, paras. 8-15. *See also* Reply Brief, paras. 12-14.

<sup>32</sup> Notice of Appeal, paras. 7, 8; Appeal Brief, paras. 16-42. *See also* Reply Brief, paras. 15-25.

<sup>33</sup> Notice of Appeal, para. 9; Appeal Brief, paras. 43-53. *See also* Reply Brief, paras. 26-28.

<sup>34</sup> Notice of Appeal, paras. 10-12; Appeal Brief, paras. 54-90. *See also* Reply Brief, paras. 29-36.

<sup>35</sup> Notice of Appeal, paras. 8, 9, 12; Appeal Brief, para. 91.

<sup>36</sup> Appeal Brief, paras. 24, 30, 34, 49, 83.

<sup>37</sup> *Rutaganda* Appeal Judgement, para. 22; *Bagilishema* Appeal Judgement, para. 11; *Kupre{ki} et al.* Appeal Judgement, para. 30; *Kayishema and Ruzindana* Appeal Judgement, para. 143; *Tadi}* Appeal Judgement, para. 64.

<sup>38</sup> *See Rutaganda* Appeal Judgement, para. 22; *Bagilishema* Appeal Judgement, para. 11; *Kupre{ki} et al.* Appeal Judgement, para. 30; *Aleksovski* Appeal Judgement, para. 63; *Akayesu* Appeal Judgement, para. 232; *Tadi}* Appeal Judgement, para. 64. *See also supra*, para. 10.

### **A. Alleged Lack of Corroboration Between Witnesses AYQ and BAU**

16. The Trial Chamber briefly summarized the Prosecution evidence on Ntawukulilyayo's alleged orders at Gisagara market on 23 April 1994 as follows:

Prosecution Witnesses BAF, BAU and AYQ each provided first-hand accounts of Ntawukulilyayo instructing refugees at Gisagara market to go to Kabuye hill on Saturday 23 April. Witness BAF testified that some time prior to 8.00 a.m., he observed Ntawukulilyayo, in the company of Fidèle Uwizeye, Gaëtan Uwihoreye and Callixte Kalimanzira, at the market. There, the sub-prefect told the displaced Tutsis to go to Kabuye where protection would be provided. Witness BAU said that around 1.30 p.m. he followed instructions from communal police to go to the market where Ntawukulilyayo, in the presence of Callixte Kalimanzira and police officers Vincent and Munyakindi, told refugees to go to Kabuye hill where tents would be erected and their security ensured. Witness AYQ, a refugee who arrived at Gisagara market that day, observed Ntawukulilyayo, using a megaphone, direct police to bring displaced persons to Kabuye hill where they would be fed and protected. Kalimanzira was also present at the market with the sub-prefect.<sup>39</sup>

17. In assessing the Prosecution witnesses' testimonies, the Trial Chamber found that they contained a number of similarities, and were largely consistent:

All identified Kalimanzira as accompanying Ntawukulilyayo at Gisagara market. Witnesses BAU and AYQ suggested that Kalimanzira also spoke while in the company of Ntawukulilyayo at the market. Witness BAF's testimony is less clear on whether Kalimanzira spoke. The evidence consistently indicates that Ntawukulilyayo was the focal point for instructing the refugees to leave. Notably, aside from Witness BAU, neither Witness AYQ nor BAF was asked pointed questions about what Kalimanzira did at the market that day. Varying vantage points could also account for such differences in their testimonies on this point.<sup>40</sup>

Moreover, the fundamental features of what was said to the refugees, [are] largely consistent. Witness AYQ recalled that Ntawukulilyayo promised the refugees that they would be fed and protected. Witness BAU testified that the Accused told them that tents would be erected and assured them that security would be provided on Kabuye hill. Witness BAF also recalled that Ntawukulilyayo promised that the refugees would be protected there. While there are slight discrepancies, these are understandable given the lapse of time and varying vantage points from which they observed these events. While Witness AYQ is the only person who said that Ntawukulilyayo used a megaphone, neither Witness BAU nor BAF were asked whether the Accused used a megaphone.<sup>41</sup>

18. The Trial Chamber also found that the testimonies contained a number of variances, on the basis of which it concluded that Witness BAF referred to a separate event, which was distinct from the incident described by Witnesses AYQ and BAU.<sup>42</sup> The Trial Chamber decided not to accept Witness BAF's testimony unless adequately corroborated.<sup>43</sup> It did, however, find the testimonies of

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<sup>39</sup> Trial Judgement, para. 227 (internal citations omitted).

<sup>40</sup> Trial Judgement, para. 229 (internal citations omitted).

<sup>41</sup> Trial Judgement, para. 230. *See also ibid.*, para. 232 ("The variances among the testimonies reasonably may have resulted from the passage of time, varying vantage points, as well as differing abilities to identify the other individuals who were with the Accused. This reasonably explains the minor differences between the testimonies of Witnesses BAU and AYQ.").

<sup>42</sup> Trial Judgement, paras. 231, 232.

<sup>43</sup> Trial Judgement, para. 235.

Witnesses AYQ and BAU to be “consistent and convincing”, and relied in part upon the events they recounted to convict Ntawukulilyayo for aiding and abetting genocide.<sup>44</sup>

19. Ntawukulilyayo submits that the Trial Chamber erred in finding that Witnesses AYQ and BAU corroborated each other.<sup>45</sup> Specifically, he contends that the Trial Chamber erred in finding that their varying testimonies on whether Ntawukulilyayo used a megaphone merely constituted a “slight discrepancy” that could be explained by the lapse of time and the witnesses’ varying vantage points, particularly in light of the Trial Chamber’s finding that Ntawukulilyayo was the witnesses’ “focal point” at the relevant time.<sup>46</sup> In this respect, Ntawukulilyayo argues that the Trial Chamber did not invoke any evidence as to the witnesses’ vantage points in order to eliminate such a discrepancy,<sup>47</sup> and that the evidence actually reflects that Witnesses AYQ and BAU were both proximate to Ntawukulilyayo at the time that he spoke.<sup>48</sup> He further contends that the Trial Chamber mistakenly reasoned that Witness BAU’s failure to mention a megaphone was due to the fact that the witness was not questioned on the subject, whereas in fact, he was.<sup>49</sup> In Ntawukulilyayo’s view, this discrepancy cannot be explained by the lapse of time alone and was in fact an “irreconcilable contradiction”.<sup>50</sup>

20. The Prosecution responds that the Trial Chamber reasonably concluded that Witnesses AYQ’s and BAU’s accounts of the events at Gisagara market were compatible with each other, and that Ntawukulilyayo’s contentions should be dismissed.<sup>51</sup>

21. The Appeals Chamber recalls that a Trial Chamber has full discretion to assess the appropriate credibility and weight to be accorded to the testimony of a witness;<sup>52</sup> corroboration is one of many potential factors relevant to this assessment.<sup>53</sup> A Trial Chamber retains discretion to

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<sup>44</sup> Trial Judgement, para. 263. *See also ibid.*, paras. 12, 231, 239, 240, 454, 457.

<sup>45</sup> Notice of Appeal, para. 6; Appeal Brief, paras. 8-15.

<sup>46</sup> Notice of Appeal, para. 6; Appeal Brief, paras. 10, 13; Reply Brief, paras. 12-14.

<sup>47</sup> Notice of Appeal, para. 6. Ntawukulilyayo also submits that “[t]he same applies to discrepancies regarding police escort to the hill, that are anything but minor.” *See* Notice of Appeal, para. 6, *referring to* Trial Judgement, para. 239. He does not, however, develop his argument in his Appeal Brief. The Appeals Chamber therefore considers that Ntawukulilyayo has abandoned his argument in this respect and will not consider it.

<sup>48</sup> Appeal Brief, para. 12.

<sup>49</sup> Appeal Brief, para. 11, *referring to* Exhibit D17, p. 12.

<sup>50</sup> Appeal Brief, paras. 10, 13.

<sup>51</sup> Response Brief, paras. 17-25.

<sup>52</sup> *Nchamihigo* Appeal Judgement, para. 47; *Muvunyi* Appeal Judgement of 1 April 2011, para. 56; *Nahimana et al.* Appeal Judgement, para. 194.

<sup>53</sup> *Nchamihigo* Appeal Judgement, para. 47; *Simba* Appeal Judgement, para. 24, *quoting Ntakirutimana* Appeal Judgement, para. 132.

decide, in the circumstances of each case, whether corroboration of evidence is necessary and to rely on uncorroborated, but otherwise credible, witness testimony.<sup>54</sup>

22. The Appeals Chamber notes that Ntawukulilyayo did not allege any discrepancy regarding the use of a megaphone when cross-examining Witness BAU, or in his closing submissions.<sup>55</sup> With respect to this issue, the Trial Chamber merely stated that “[w]hile Witness AYQ is the only person who said that Ntawukulilyayo used a megaphone, neither Witness BAU nor BAF were asked whether the Accused used a megaphone.”<sup>56</sup> The Trial Chamber appears to have thereby implied that no discrepancy could be determined between the testimonies of Witnesses AYQ and BAU as to whether Ntawukulilyayo used a megaphone, since Witness BAU was not questioned on the subject.

23. However, while Witness BAU was not asked in the present trial whether Ntawukulilyayo used a megaphone, the Appeals Chamber notes that a Defence exhibit admitted in this case shows that, in the *Kalimanzira* case, he was specifically asked whether, on the given occasion, Ntawukulilyayo “use[d] his voice or [...] some kind of tool”, to which he answered that Ntawukulilyayo “spoke with his own voice”.<sup>57</sup> In addition, although Witnesses AYQ and BAU may have had varying vantage points during the event, they both testified that they personally witnessed Ntawukulilyayo speak.<sup>58</sup> There was thus a perceptible difference in the recollections of Witnesses AYQ and BAU with respect to whether Ntawukulilyayo used a megaphone when addressing the refugees at Gisagara market on Saturday, 23 April 1994.

24. Nevertheless, the Appeals Chamber recalls that two *prima facie* credible testimonies need not be identical in all aspects or describe the same fact in the same way in order to be corroborative.<sup>59</sup> Every witness presents what he has seen from his own point of view at the time of

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<sup>54</sup> *Karera* Appeal Judgement, para. 45. See also *Renzaho* Appeal Judgement, para. 556; *Nchamihigo* Appeal Judgement, para. 42; *Muvunyi* Appeal Judgement of 29 August 2008, para. 128.

<sup>55</sup> See Witness BAU, T. 13 May 2009 pp. 27-38; *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, Defence Closing Brief, 18 May 2010 (“Defence Closing Brief”), paras. 1145-1159 (Credibility of Witness AYQ), 1177-1199 (Credibility of Witness BAU); Defence Closing Arguments, T. 14 June 2010 pp. 56, 57, 71. The Defence Closing Brief was originally filed in French on 26 March 2010.

<sup>56</sup> Trial Judgement, para. 230. See also *ibid.*, para. 258 (“Accordingly, the testimonies of these [Defence] witnesses do not raise concerns about the reliability of Witness AYQ and BAU’s first-hand accounts that refugees remained in Gisagara market until the early afternoon and were subsequently instructed to leave by Ntawukulilyayo. In so finding, consideration has also been given to the fact that Witness AYQ stated that Ntawukulilyayo used a megaphone and that Witness BAU testified that communal police with whistles gathered persons around the market. Given the market’s size, the number of [f] persons in and around it and ambiguities about the vantage points of the Defence witnesses, it is not clear that such actions would have been noticed by them.”).

<sup>57</sup> Exhibit D17(E) (Transcript Excerpts of Witness BAU’s Testimony of 5 and 12 May 2008 in the *Kalimanzira* Case), p. 12 (transcript pagination).

<sup>58</sup> Witness AYQ, T. 11 May 2009 pp. 9, 10, 28; Witness BAU, T. 13 May 2009 p. 28.

<sup>59</sup> *Munyakazi* Appeal Judgement, para. 103; *Bikindi* Appeal Judgement, para. 81, citing *Nahimana et al.* Appeal Judgement, para. 428.

the events, or according to how he understood the events recounted by others.<sup>60</sup> It follows that corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony.<sup>61</sup>

25. In this case, the Trial Chamber found that the testimonies of Witnesses AYQ and BAU were consistent on the following points: Kalimanzira and communal police were with Ntawukulilyayo;<sup>62</sup> Ntawukulilyayo was the “focal point” in instructing the refugees to leave Gisagara market;<sup>63</sup> this instruction was given in the early afternoon on 23 April 1994;<sup>64</sup> and Ntawukulilyayo promised the refugees aid and protection at Kabuye hill.<sup>65</sup> In the Appeals Chamber’s view, Ntawukulilyayo fails to show how, in light of these similarities, the fact that Witness AYQ recalled Ntawukulilyayo using a megaphone whereas Witness BAU, when testifying in another case, did not, renders their testimonies incompatible.<sup>66</sup> The differing recollections of Witnesses AYQ and BAU as to whether Ntawukulilyayo spoke with a megaphone may also reasonably be attributed to the passage of time, which the Trial Chamber considered to explain other slight discrepancies in their testimonies.<sup>67</sup> Moreover, the Appeals Chamber recalls that Witness BAU was not questioned on the subject in the present trial, and was thereby not given an opportunity to explain or specify his recollection on the matter.

26. The Appeals Chamber therefore finds that Ntawukulilyayo has failed to demonstrate that the Trial Chamber erred in finding that the testimonies of Witnesses AYQ and BAU were consistent with regard to his conduct at Gisagara market on 23 April 1994.

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<sup>60</sup> *Munyakazi* Appeal Judgement, para. 103, citing *Nahimana et al.* Appeal Judgement, para. 428; *Bikindi* Appeal Judgement, para. 81; *Karera* Appeal Judgement, paras. 173, 192.

<sup>61</sup> *Munyakazi* Appeal Judgement, para. 71, citing *Nahimana et al.* Appeal Judgement, para. 428; *Setako* Appeal Judgement, para. 31; *Rukundo* Appeal Judgement, para. 201; *Bikindi* Appeal Judgement, para. 81.

<sup>62</sup> Trial Judgement, paras. 229, 232, 239, 263.

<sup>63</sup> Trial Judgement, para. 229.

<sup>64</sup> Trial Judgement, paras. 231, 250.

<sup>65</sup> Trial Judgement, paras. 230, 263. The Trial Chamber also found that Witnesses AYQ’s and BAU’s testimonies were similar in suggesting that Kalimanzira also spoke while in Ntawukulilyayo’s company at Gisagara market. *See ibid.*, para. 229. However, as discussed below, the Appeals Chamber finds that Witness BAU’s credibility on whether or not Kalimanzira spoke may be questionable and that the Trial Chamber could not reasonably rely upon this aspect of his testimony. *See infra*, paras. 72, 73.

<sup>66</sup> In reaching this conclusion, the Appeals Chamber bears in mind that, as a result of its finding that Witness BAU’s credibility on whether or not Kalimanzira spoke at Gisagara market may be questionable (*see infra*, para. 73; *see also supra*, fn. 65), the testimonies of Witnesses AYQ and BAU may also be inconsistent on this point. However, it considers that even if it were determined that Witness BAU’s testimony that he saw Kalimanzira speak at Gisagara market is not reliable, his credibility and reliability as a whole are not undermined. *See infra*, para. 73.

<sup>67</sup> *See* Trial Judgement, paras. 230, 232.

## **B. Alleged Errors in the Assessment of Witness AYQ's Testimony**

27. The Trial Chamber found Witness AYQ's evidence about Ntawukulilyayo's order to the refugees at Gisagara market to go to Kabuye hill to be "convincing".<sup>68</sup>

28. Ntawukulilyayo submits that the Trial Chamber erred in its assessment of Witness AYQ's testimony.<sup>69</sup> In particular, he contends that the Trial Chamber erred in: (i) discounting a major inconsistency in the witness's ability to identify Ntawukulilyayo at Gisagara market;<sup>70</sup> (ii) minimizing an inconsistency in the time-frame in which she saw Ntawukulilyayo in April 1994;<sup>71</sup> (iii) disregarding contradictions with regard to the time of Ntawukulilyayo's arrival at Gisagara market;<sup>72</sup> (iv) failing to consider a discrepancy in her descriptions of the security agents who accompanied Ntawukulilyayo to Gisagara market and gathered the refugees;<sup>73</sup> (v) ignoring an incoherence in her statement regarding the forced nature of the transfer from Gisagara market to Kabuye hill;<sup>74</sup> and (vi) devaluing the Defence evidence of Witness AYQ's involvement in fabricating evidence.<sup>75</sup> Ntawukulilyayo accordingly submits that no reasonable trier of fact could have accepted or relied on Witness AYQ's testimony to convict him.<sup>76</sup>

29. The Prosecution responds that the Trial Chamber's assessment of Witness AYQ's testimony was reasonable, and that Ntawukulilyayo's allegation that Witness AYQ was part of a scheme to fabricate testimony is spurious and without merit.<sup>77</sup>

### **1. Identification of Ntawukulilyayo**

30. In assessing the merits of Witness AYQ's testimony, the Trial Chamber found that her evidence identifying Ntawukulilyayo at the market was not inconsistent with her prior statement and testimony in the *Kalimanzira* case.<sup>78</sup>

31. Ntawukulilyayo submits that Witness AYQ's testimony that she personally saw him address the refugees at Gisagara market differs significantly from her evidence in the *Kalimanzira* case, where she testified that she was surrounded by a crowd of refugees who were taller than her and

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<sup>68</sup> Trial Judgement, para. 236.

<sup>69</sup> Notice of Appeal, paras. 7, 8; Appeal Brief, paras. 16-42. *See also* AT. 26 September 2011 p. 17.

<sup>70</sup> Notice of Appeal, para. 7; Appeal Brief, paras. 18-24. *See also* Reply Brief, paras. 15-19.

<sup>71</sup> Appeal Brief, paras. 33, 34.

<sup>72</sup> Appeal Brief, paras. 28-30.

<sup>73</sup> Appeal Brief, paras. 25-27. *See also* Reply Brief, paras. 20-22.

<sup>74</sup> Appeal Brief, paras. 31, 32 (French).

<sup>75</sup> Notice of Appeal, para. 8; Appeal Brief, paras. 35-42. *See also* Reply Brief, paras. 23-25.

<sup>76</sup> Notice of Appeal, paras. 7, 8; Appeal Brief, paras. 24, 27, 30, 32, 34, 39, 42.

<sup>77</sup> Response Brief, paras. 26-43.

<sup>78</sup> *See* Trial Judgement, para. 236.

who informed her of the situation.<sup>79</sup> Ntawukulilyayo contends that the witness often narrated using the first person plural rather than relaying a personal account,<sup>80</sup> and that her testimony in the *Kalimanzira* case suggested that, despite purporting to know Callixte Kalimanzira, her identification of him was based on hearsay.<sup>81</sup> Ntawukulilyayo argues that doubt therefore exists as to the reliability of her observations.<sup>82</sup>

32. A review of the evidence shows that Ntawukulilyayo's contentions that Witness AYQ did not relay a personal account and was unable to identify Callixte Kalimanzira without assistance are specious and unfounded. Witness AYQ unambiguously testified both in the present case and in the *Kalimanzira* case that she personally saw Kalimanzira and Ntawukulilyayo at Gisagara market.<sup>83</sup> The Appeals Chamber notes that the Trial Chamber specifically addressed and rejected Ntawukulilyayo's arguments in this respect,<sup>84</sup> which he raised at trial during Witness AYQ's cross-examination, as well as in his Closing Brief.<sup>85</sup> The Appeals Chamber recalls that the purpose of appellate proceedings is not for the Appeals Chamber to reconsider the evidence and arguments submitted before the Trial Chamber.<sup>86</sup> Ntawukulilyayo merely repeats the same arguments on appeal, without demonstrating that the Trial Chamber's rejection thereof constituted an error.

33. The Appeals Chamber accordingly dismisses Ntawukulilyayo's arguments regarding Witness AYQ's identification of him at Gisagara market.

## 2. Date of Sighting of Ntawukulilyayo

34. Ntawukulilyayo contends that Witness AYQ testified that she saw him only once in early April 1994, but later testified that she saw him at Gisagara market and Kabuye hill at the end of April 1994.<sup>87</sup> He submits that the Trial Chamber erred in finding this essential inconsistency to be immaterial, particularly as Witness AYQ unequivocally affirmed that she saw Ntawukulilyayo in early April 1994 in response to a "very specific question."<sup>88</sup>

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<sup>79</sup> Appeal Brief, paras. 19-21, *referring to* Exhibit D8(F), p. 28.

<sup>80</sup> Appeal Brief, para. 22, *referring to* Witness AYQ, T. 11 May 2009 pp. 10, 31, 32 (French); Exhibit D8(F), p. 32; Exhibit D9(F), pp. 27, 29. *See also* Reply Brief, para. 15.

<sup>81</sup> Appeal Brief, para. 23.

<sup>82</sup> Appeal Brief, para. 24.

<sup>83</sup> Witness AYQ, T. 11 May 2009 pp. 7-11, 30, 31; Exhibit D8(E) (Transcript Excerpts of Witness AYQ's Testimony of 9 May 2008 in the *Kalimanzira* Case), pp. 27, 28 (transcript pagination).

<sup>84</sup> Trial Judgement, para. 236.

<sup>85</sup> *See* Witness AYQ, T. 11 May 2009 pp. 27-30; Defence Closing Brief, para. 1146.

<sup>86</sup> *Čelebići* Appeal Judgement, para. 837.

<sup>87</sup> Appeal Brief, para. 33. Ntawukulilyayo does not provide a reference to support the contention that the witness testified to seeing him at the end of April 1994.

<sup>88</sup> Appeal Brief, para. 33.

35. A review of the evidence shows that Witness AYQ testified that from April to June 1994, she saw Ntawukulilyayo “only in April”,<sup>89</sup> “[o]nce”,<sup>90</sup> that it was “during the killings of April”,<sup>91</sup> on “a Saturday”,<sup>92</sup> and that she “believe[d] it was at the beginning of April”,<sup>93</sup> “after the president of the republic died”.<sup>94</sup> Contrary to Ntawukulilyayo’s contention, Witness AYQ’s testimony does not reveal that she “later testified that she saw Ntawukulilyayo [...] at the end of April 1994.”<sup>95</sup>

36. The Trial Chamber specifically addressed an ambiguity in Witness AYQ’s testimony as to when she saw Ntawukulilyayo in April 1994 as follows:

It is noted that Witness AYQ testified that she saw Ntawukulilyayo only once on a Saturday in “early” April 1994. However, she also testified that this was “during the killings of April” and *after* the President’s death. Her descriptions of the situation at Gisagara market [are] consistent with Defence and Prosecution evidence of events around Saturday 23 April. Given the tense circumstances and the significant passage of time, the Majority finds her reference to a Saturday in “early” April 1994 immaterial to the extent it is inconsistent with other evidence.<sup>96</sup>

Ntawukulilyayo merely alleges that the Trial Chamber erred in its conclusion, without demonstrating why. The Appeals Chamber notes that Witness AYQ’s testimony clearly reflects the witness’s uncertainty about the date on which the incident took place.<sup>97</sup> The Appeals Chamber considers that, in light of the totality of the evidence, it was reasonable for the Trial Chamber to find that Witness AYQ’s confusion as to the exact time in April 1994 during which she saw Ntawukulilyayo was immaterial.

37. Ntawukulilyayo’s arguments in this respect are therefore dismissed.

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<sup>89</sup> Witness AYQ, T. 11 May 2009 p. 7.

<sup>90</sup> Witness AYQ, T. 11 May 2009 p. 7.

<sup>91</sup> Witness AYQ, T. 11 May 2009 p. 7.

<sup>92</sup> Witness AYQ, T. 11 May 2009 p. 7.

<sup>93</sup> Witness AYQ, T. 11 May 2009 p. 8.

<sup>94</sup> Witness AYQ, T. 11 May 2009 p. 8.

<sup>95</sup> Appeal Brief, para. 33.

<sup>96</sup> Trial Judgement, fn. 291 (emphasis in original).

<sup>97</sup> Witness AYQ, T. 11 May 2009 pp. 7, 8 (“I saw him during the killings of April. [...] I do not remember the date, but I remember the day. [...] It was a Saturday. [...] I believe it was at the beginning of April, but I do not recall the date. [...] It was after the president of the republic died.”). *See also ibid.*, p. 32 (“Q. [...] Could you confirm, Madam Witness, the day when you actually got to Kabuye. A. It was a Saturday.”).

### 3. Ntawukulilyayo's Arrival at Gisagara Market

38. In assessing Witness AYQ's ability to identify Ntawukulilyayo, the Trial Chamber found that "her March 2003 statement, while taken in relation to Kalimanzira, expressly states that Ntawukulilyayo was at Gisagara market with Kalimanzira. Nothing in it indicates that she was unable to see him."<sup>98</sup> In respect of this finding, the Trial Chamber added in a footnote:

The Chamber, Judge Akay dissenting, finds it immaterial that [Witness AYQ's] March 2003 statement referred to seeing dignitaries arrive while she was at the market, while her testimony in this case was that when she arrived she saw Ntawukulilyayo and Kalimanzira. To the extent there is a discrepancy, the Majority considers that this reasonably could have resulted from a recording error and is also insignificant given the passage of time since the events.<sup>99</sup>

39. Ntawukulilyayo submits that the Trial Chamber erred in dismissing in a footnote the inconsistencies in Witness AYQ's testimony regarding the dignitaries' arrival at Gisagara market.<sup>100</sup> He further argues that the Trial Chamber's speculative reasoning that the discrepancy may have been caused by a recording error or the passage of time is baseless.<sup>101</sup> Ntawukulilyayo contends that the discrepancies in Witness AYQ's observations demonstrate that she was neither credible nor reliable, and that her testimony was therefore incapable of sustaining a conviction.<sup>102</sup>

40. The Appeals Chamber considers that Ntawukulilyayo's cursory allegation that the Trial Chamber gave speculative reasons for considering the alleged discrepancy to be insignificant does not demonstrate an error. Moreover, there is nothing speculative about the amount of time which has passed since the events, and it was not unreasonable for the Trial Chamber to take such a factor into account. It was equally not unreasonable for the Trial Chamber to consider the possibility of a recording error in light of Witness AYQ's express disagreement about ever having said that she saw Ntawukulilyayo arrive at Gisagara market.<sup>103</sup>

41. These arguments are therefore dismissed.

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<sup>98</sup> Trial Judgement, para. 236.

<sup>99</sup> Trial Judgement, fn. 311.

<sup>100</sup> Appeal Brief, para. 28.

<sup>101</sup> Appeal Brief, para. 28.

<sup>102</sup> Appeal Brief, paras. 29, 30.

<sup>103</sup> See Witness AYQ, T. 11 May 2009 pp. 30, 31 ("Q. [I]n your March 2003 statement, you said that you saw [Ntawukulilyayo and other dignitaries] arrive [at Gisagara market], didn't you? [...] A. I said that we saw him when he was in front of us addressing refugees. He asked *communal* policemen to bring us here where he was so that he could speak to us. [...] *I don't believe that I had said that I had seen him when he arrived there* because I did not see him arrive there." (emphasis added)).

#### 4. Identification of Security Agents

42. The Trial Chamber relied on Witness AYQ's testimony that Ntawukulilyayo was at Gisagara market with communal policemen.<sup>104</sup>

43. Ntawukulilyayo submits that the Trial Chamber failed to consider that Witness AYQ's testimony in this case regarding the presence of policemen at Gisagara market differs both from a prior statement, in which she mentioned only the presence of soldiers, and from her evidence in the *Kalimanzira* case, where she testified that both soldiers and policemen were present.<sup>105</sup> He argues that this discrepancy is fundamental since Witness AYQ was able to distinguish between soldiers and policemen.<sup>106</sup> He contends that the determination of the category of security agents who allegedly accompanied him to Gisagara market and gathered the refugees is a material fact, and that the Trial Chamber's lack of a reasoned opinion in this respect is manifest.<sup>107</sup>

44. The Appeals Chamber notes that, in her statement of 27 March 2003, Witness AYQ indicated that Ntawukulilyayo and other dignitaries came to Gisagara market accompanied by "military guards", or "soldiers".<sup>108</sup> During her testimony in the *Kalimanzira* case, Witness AYQ indicated that there were "policemen and soldiers" with Ntawukulilyayo and Kalimanzira at Gisagara market.<sup>109</sup> In the present trial, Witness AYQ testified only to the presence of "policemen" with Ntawukulilyayo at Gisagara market.<sup>110</sup> Witness AYQ's evidence therefore varies with respect to the precise category of security personnel who were with Ntawukulilyayo at Gisagara market.

45. Ntawukulilyayo did not raise this particular variance when cross-examining Witness AYQ, or when challenging her credibility in his Closing Brief.<sup>111</sup> Witness AYQ therefore did not have an opportunity to respond to this allegation, and the Trial Chamber could therefore not determine whether there was merit in Ntawukulilyayo's present contention.<sup>112</sup> In any event, the fact that the Trial Chamber did not mention the variance in its reasoning does not necessarily mean that it did

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<sup>104</sup> Trial Judgement, paras. 227, 239, 263.

<sup>105</sup> Appeal Brief, para. 26, referring to Exhibit D7; Exhibit D8(F), p. 31; Witness AYQ, T. 11 May 2009 pp. 9-11, 32.

<sup>106</sup> Appeal Brief, para. 26. See also Reply Brief, para. 21.

<sup>107</sup> Appeal Brief, paras. 25, 27. See also Reply Brief, paras. 20, 22.

<sup>108</sup> Exhibit D7 (Witness AYQ's Statement of 27 March 2003), p. 3.

<sup>109</sup> Exhibit D8(E) (Transcript Excerpts of Witness AYQ's Testimony of 9 May 2008 in the *Kalimanzira* Case), pp. 27, 28 (transcript pagination); Exhibit D9 (Transcript Excerpts of Witness AYQ's Testimony of 20 May 2008 in the *Kalimanzira* Case), p. 27 (transcript pagination).

<sup>110</sup> Witness AYQ, T. 11 May 2009 pp. 9-11, 32.

<sup>111</sup> See Witness AYQ, T. 11 May 2009 pp. 16-40; Defence Closing Brief, paras. 1145-1159. Ntawukulilyayo does not allege this particular discrepancy anywhere in his closing arguments either. See Defence Closing Arguments, T. 14 June 2010 pp. 43-72.

<sup>112</sup> Cf. *Kajelijeli* Appeal Judgement, para. 26.

not consider it. In this respect, the Appeals Chamber recalls that a Trial Chamber is not required to articulate every step of its reasoning for each finding it makes.<sup>113</sup>

46. Furthermore, the Appeals Chamber is not persuaded that the variance was, as Ntawukulilyayo contends, fundamental. Witness AYQ's ability to remember whether Ntawukulilyayo was accompanied by policemen or soldiers, or both, has no bearing on the Trial Chamber's reliance on her evidence to reach conclusions about his presence and actions at Gisagara market, and about the fact that he was accompanied by security personnel. Recalling that minor inconsistencies commonly occur in witness testimony without rendering the testimony unreliable,<sup>114</sup> the Appeals Chamber considers that it was within the discretion of the Trial Chamber to accept the fundamental features of Witness AYQ's evidence notwithstanding this variance. As such, Ntawukulilyayo fails to show any error.

47. Ntawukulilyayo's arguments in this respect are therefore dismissed.

##### 5. Allegedly Forced Nature of the Transfer to Kabuye Hill

48. Based on the evidence of Witnesses AYQ and BAU, the Trial Chamber found that, after Ntawukulilyayo promised the refugees at Gisagara market that they would be fed and protected at Kabuye hill, the refugees complied with his instructions to move to the hill.<sup>115</sup> The Trial Chamber further found that the refugees were escorted towards Kabuye hill by communal police and arrived there later that same afternoon.<sup>116</sup>

49. Ntawukulilyayo submits that no reasonable trier of fact could have believed Witness AYQ's testimony that the transfer of the refugees to Kabuye hill ordered by Ntawukulilyayo was forced and conducted under duress while, at the same time, believing her testimony that she interpreted Ntawukulilyayo's subsequent arrival at Kabuye hill in the company of soldiers as a sign that the refugees' security would be assured.<sup>117</sup> Ntawukulilyayo contends that such a contradiction rendered implausible Witness AYQ's allegations regarding his order to transfer the refugees.<sup>118</sup>

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<sup>113</sup> See, e.g., *Nchamihigo* Appeal Judgement, para. 165; *Krajišnik* Appeal Judgement, para. 139; *Musema* Appeal Judgement, paras. 18, 20.

<sup>114</sup> *Muvunyi* Appeal Judgement of 1 April 2011, para. 44; *Karera* Appeal Judgement, para. 174.

<sup>115</sup> Trial Judgement, para. 263.

<sup>116</sup> Trial Judgement, para. 263.

<sup>117</sup> Appeal Brief, para. 31.

<sup>118</sup> Appeal Brief, para. 32.

50. The Appeals Chamber considers that even if it could be inferred from Witness AYQ's testimony that, based on the policemen's behaviour during the transfer to Kabuye hill,<sup>119</sup> she no longer believed that they would protect the refugees, this does not render incredible her statement that, when Ntawukulilyayo subsequently came to Kabuye hill in the company of soldiers, she believed that the refugees would be protected.<sup>120</sup>

51. Ntawukulilyayo's arguments in this respect are therefore dismissed.

## 6. Alleged Fabrication of Evidence

52. Ntawukulilyayo submits that the Trial Chamber erred in dismissing as insufficient the Defence evidence regarding Witness AYQ's role in the fabrication of evidence against him. Ntawukulilyayo contends that the Trial Chamber minimized Witness AYQ's active involvement in manufacturing false testimony and merely acknowledged her general membership of *Avega*, a genocide survivors group for widows, and her presence at a meeting held in June 2008.<sup>121</sup> He asserts that Defence Witnesses MAD and MAE, in particular, gave detailed and convincing accounts of Witness AYQ's active role in the fabrication of evidence,<sup>122</sup> and further argues that, regardless of any acts she may have committed personally, Witness AYQ's association with a group actively involved in fabricating evidence is sufficient to raise a reasonable doubt as to her credibility.<sup>123</sup>

53. The Trial Chamber specifically addressed and rejected Ntawukulilyayo's challenges to Witness AYQ's credibility based on evidence of her membership of *Avega* and her presence at the June 2008 meeting,<sup>124</sup> claims which Ntawukulilyayo introduced through the testimonies of Witnesses MAD and MAE, and raised in his Closing Brief.<sup>125</sup> The Trial Chamber considered that Witness AYQ's *Avega* membership did not necessarily render her evidence unreliable.<sup>126</sup> It further reasoned that:

[...] the accounts of Witnesses MAD and MAE are particularly brief and vague as they relate to Witness AYQ's alleged improper conduct. Other than identifying her as being present during a June 2008 meeting where members of *Avega* asked her to testify against Ntawukulilyayo, Witness MAD did not delineate any particular action taken by her. Indeed, the Witness'[s]

<sup>119</sup> Witness AYQ testified that "[w]hen [the policemen] escorted us to the Kabuye hill, they were hitting us, they were asking us to move faster, they were shoving us." See Witness AYQ, T. 11 May 2009 p. 32.

<sup>120</sup> See Witness AYQ, T. 11 May 2009 p. 11.

<sup>121</sup> Notice of Appeal, para. 8; Appeal Brief, paras. 35-41; Reply Brief, para. 24.

<sup>122</sup> Appeal Brief, paras. 38, 40.

<sup>123</sup> Appeal Brief, para. 42; Reply Brief, para. 24.

<sup>124</sup> Trial Judgement, paras. 242-245.

<sup>125</sup> Witness MAD, T. 24 September 2009 pp. 57-66 (closed session); Witness MAE, T. 28 September 2009 pp. 37-44 (closed session); Defence Closing Brief, paras. 1154-1156.

<sup>126</sup> Trial Judgement, para. 242.

testimony is ambiguous about whether Witness AYQ participated in later incidents where she was again requested to testify against Ntawukulilyayo or sign documents. Similarly, while Witness MAE stated that *Avega* as a group sought to obtain testimony against Hutu authorities, the only details he gave with respect to Witness AYQ's role was that she told him that she was a member of *Avega* because she was a widow. Although she was Hutu, she was married to a Tutsi. He added that "it was taken" that whatever she said was true and that "she had seen or experienced what had transpired because she was Hutu".<sup>127</sup>

The Trial Chamber concluded that the record as it relates to Witness AYQ's purported improper conduct is "ambiguous and unsubstantiated" and does not raise doubts about her testimony provided under oath.<sup>128</sup>

54. The Appeals Chamber notes that Witness MAD testified that she fled Rwanda in December 2008 as a result of being persecuted and threatened for refusing to join *Avega* and make false allegations against Ntawukulilyayo.<sup>129</sup> The witness stated that she was approached by certain members of the *Avega* group, including Witness AYQ, in June 2008.<sup>130</sup> After specifically naming eight members of *Avega*, with whom she met on that first occasion, including Witness AYQ,<sup>131</sup> Witness MAD stated:

*Those are the people* who were at the forefront of the group charged with making accusations against people. *They were very active.* [...] *These persons* sought to convince me to accuse Ntawukulilyayo. And when I realised that *these persons* were trying to incite me to accuse Dominique Ntawukulilyayo falsely, I refused to listen to them. [...] *These persons* were telling me that they were ready to make the same false accusations against Ntawukulilyayo. And so they told me, since [...] I was Hutu and that I was educated, certainly, my testimony was certainly going to be easily accepted. [...] It was not important to know whether I was a witness to these events or not.<sup>132</sup>

Witness MAD testified further that, after this initial encounter, she was approached by and met "these persons" a few more times before fleeing Rwanda.<sup>133</sup> She also indicated that she knew "all those persons", including Witness AYQ, before June 2008.<sup>134</sup>

55. Although Witness MAD may not have explicitly delineated any particular action taken by Witness AYQ during the group's alleged attempts to coerce her to join them in accusing Ntawukulilyayo, the Appeals Chamber considers that Witness MAD's consistent reference to "these persons" in describing the actions of those with whom she met clearly includes Witness AYQ. In its view, the Trial Chamber misread Witness MAD's evidence in this regard, and

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<sup>127</sup> Trial Judgement, para. 244 (internal citations omitted).

<sup>128</sup> Trial Judgement, para. 245. *See also ibid.*, para. 295.

<sup>129</sup> *See* Witness MAD, T. 24 September 2009 pp. 57, 59, 60 (closed session). *See also* Trial Judgement, para. 243.

<sup>130</sup> Witness MAD, T. 24 September 2009 p. 57 (closed session).

<sup>131</sup> Witness MAD, T. 24 September 2009 pp. 57-59 (closed session).

<sup>132</sup> Witness MAD, T. 24 September 2009 pp. 59, 60 (closed session) (emphasis added).

<sup>133</sup> Witness MAD, T. 24 September 2009 p. 61 (closed session). *See also ibid.*, pp. 62, 63 (closed session).

<sup>134</sup> Witness MAD, T. 24 September 2009 p. 67 (closed session).

unreasonably limited it to merely identifying Witness AYQ as being present during the June 2008 meeting.

56. Similarly, Witness MAE testified that he fled Rwanda in 2005 “because of a number of things that people were asking [him] to do. But [he] felt that [he] could not do those things that [he] was being asked to do.”<sup>135</sup> When asked to specify who those “people” were, Witness MAE provided the names of four persons, including Witness AYQ’s, and stated that “[t]hose persons contacted me in their own individual capacities [...] [though] [t]hey did not all come to see me together.”<sup>136</sup> Witness MAE described in detail the actions of the first three persons he named in soliciting his testimony against Ntawukulilyayo.<sup>137</sup> He did not, however, provide details about Witness AYQ’s contact with him.<sup>138</sup> Nevertheless, the Appeals Chamber considers that, when reading Witness MAE’s evidence as a whole, it clearly implicates Witness AYQ as being among those who personally approached him to solicit his testimony against Ntawukulilyayo. The Appeals Chamber therefore considers that the Trial Chamber misread Witness MAE’s evidence in this regard, and unreasonably limited it to merely suggesting that Witness AYQ told him she was a member of *Avega* because she was a widow.

57. As such, the Appeals Chamber finds that the Trial Chamber did not properly construe Witnesses MAD’s and MAE’s accounts relating to Witness AYQ’s involvement in the procurement of testimony against Ntawukulilyayo. However, the Appeals Chamber does not consider that their accounts establish that Witness AYQ knowingly participated in an effort to procure *false* testimony against Ntawukulilyayo. In particular, the Appeals Chamber notes that Witnesses MAD and MAE testified that they feigned their willingness to cooperate with *Avega*, and that they hid their lack of awareness of Ntawukulilyayo’s involvement in any crimes.<sup>139</sup> Accordingly, although their evidence

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<sup>135</sup> Witness MAE, T. 28 September 2009 p. 37 (closed session).

<sup>136</sup> Witness MAE, T. 28 September 2009 p. 37 (closed session).

<sup>137</sup> Witness MAE, T. 28 September 2009 pp. 37-42 (closed session).

<sup>138</sup> Witness MAE, T. 28 September 2009 pp. 43, 44 (closed session). The Appeals Chamber notes that when Defence Counsel was nearly finished questioning Witness MAE about the actions of the first three persons he named in soliciting his testimony against Ntawukulilyayo, the Presiding Judge advised Defence Counsel that there was little time left for Witness MAE’s examination. *See ibid.*, p. 42. Witness MAE did, however, describe Witness AYQ as a member of *Avega*, a group comprised of widows who, in his view, “often discussed about how to accuse a number of persons and how to testify against them.” *See ibid.*, p. 43. Witness MAE stated that the members of *Avega* “told us to accuse [...] [Hutu authorities and other personalities] by stating that they had incited members of the population to participate in or to commit killings”, and that Ntawukulilyayo was one of those persons whom they asked him to accuse. *See ibid.*, pp. 43, 44. Witness MAE further described Witness AYQ as being a member of *Avega* “because she was a widow, although she was Hutu. And whatever she said was accepted, given that she was Hutu, and it was taken that whatever she said was true because she was Hutu and had seen or experienced what had transpired because she was Hutu.” *See ibid.*, p. 44.

<sup>139</sup> Witness MAD, T. 24 September 2009 p. 60 (closed session); Witness MAE, T. 28 September 2009 pp. 40, 41 (closed session).

does convey that their testimonies were solicited aggressively,<sup>140</sup> and persistently,<sup>141</sup> it does not necessarily follow that Witness AYQ sought to coerce Witnesses MAD and MAE into fabricating evidence against Ntawukulilyayo. In this respect, the Appeals Chamber notes that, despite the gravity of the accusation, Ntawukulilyayo did not question Witness AYQ about her membership of *Avega*, did not confront her with the accusation of procuring false testimony during her cross-examination,<sup>142</sup> and did not seek to recall her for these purposes. Witness AYQ was therefore deprived of the opportunity to respond to this allegation, and the Trial Chamber was accordingly deprived of the opportunity to properly assess the veracity thereof.

58. Nevertheless, the Appeals Chamber considers that the aggression and persistence with which the testimonies of Witnesses MAD and MAE were allegedly solicited suggests that Witness AYQ may have had a particularly strong personal desire to compel others to testify against Ntawukulilyayo, thereby suggesting that Witness AYQ may have had motives to implicate him. The Appeals Chamber recalls that such evidence is to be treated with caution.<sup>143</sup> A review of the Trial Judgement does not reveal whether the Trial Chamber believed or disbelieved Witnesses MAD and MAE, and the Trial Chamber did not expressly state that it approached Witness AYQ's testimony with the requisite caution. However, since the Trial Chamber only relied on Witness AYQ's evidence to the extent that it was corroborated by other credible and reliable evidence, the Appeals Chamber considers that such caution was *de facto* applied. The Appeals Chamber recalls its finding above that the Trial Chamber did not err in finding that Witnesses AYQ and BAU corroborated one another with respect to the events at Gisagara market. Under these circumstances, the error demonstrated by Ntawukulilyayo regarding the assessment of Witnesses MAE's and MAD's testimonies does not invalidate the Trial Chamber's decision to rely on Witness AYQ's testimony in this respect.<sup>144</sup>

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<sup>140</sup> See Witness MAD, 24 September 2009 p. 57 (closed session); Witness MAE, T. 28 September 2009 pp. 39-41 (closed session).

<sup>141</sup> See Witness MAD, 24 September 2009 p. 61 (closed session); Witness MAE, 28 September 2009 pp. 38, 40 (closed session).

<sup>142</sup> Witness AYQ, T. 11 May 2009 pp. 16-40. The Appeals Chamber notes Ntawukulilyayo's submission that he "indeed questioned [Witness] AYQ on her relationship with two *Avega* members, whom she denied being close to, and who also happen to be Prosecution witnesses. She further denied, rather incredibly, to have spoken with anyone whomsoever about the events of 1994." See Confidential Reply Brief, para. 25 (internal citations omitted). A review of Witness AYQ's testimony reveals that she was questioned about her knowledge of two individuals (whose names were subsequently mentioned by Witnesses MAD and MAE in the context of the fabrication of evidence), and that she admitted to knowing them. See Witness AYQ, T. 11 May 2009 pp. 21, 22 (closed session). Witness AYQ also testified that she did not discuss the events of 1994 "with anyone, apart from Gacaca proceedings". See Witness AYQ, T. 11 May 2009 p. 23. Contrary to Ntawukulilyayo's contention, the Appeals Chamber does not consider such questioning to constitute a "cross-examin[ation] [of Witness] AYQ about her deceit". See Reply Brief, para. 25.

<sup>143</sup> Cf. *Nchamihigo* Appeal Judgement, para. 42, fn. 110.

<sup>144</sup> The Appeals Chamber notes that Ntawukulilyayo also makes allegations of error with respect to the Trial Chamber's finding that Witnesses AZN, AYQ, and BAU corroborated one another on the events at Kabuye hill.

59. Based on the foregoing, the Appeals Chamber dismisses Ntawukulilyayo's arguments regarding Witness AYQ's alleged involvement in the fabrication of evidence against him.

## 7. Conclusion

60. The Appeals Chamber has found no error in the Trial Chamber's assessment of the alleged discrepancies in Witness AYQ's evidence and accordingly rejects Ntawukulilyayo's argument that the cumulative effect of such discrepancies renders her testimony unreliable.<sup>145</sup> While the Appeals Chamber has found error in the Trial Chamber's assessment of the evidence of Defence Witnesses MAD and MAE regarding Witness AYQ's role in procuring testimony against Ntawukulilyayo, it has nevertheless considered that such error does not invalidate the Trial Chamber's decision to rely on Witness AYQ's testimony about the events at Gisagara market.

61. For the foregoing reasons, the Appeals Chamber dismisses Ntawukulilyayo's allegations of error in the Trial Chamber's assessment of Witness AYQ's testimony with regard to Gisagara market.

### C. Alleged Errors in the Assessment of Witness BAU's Testimony

62. In assessing the individual merits of Witness BAU's testimony, the Trial Chamber found that the discrepancies with his prior statement and testimony in the *Kalimanzira* case were minor, and considered his evidence to be compelling.<sup>146</sup>

63. Ntawukulilyayo submits that the Trial Chamber erred in its assessment of Witness BAU's testimony.<sup>147</sup> In particular, he submits that the Trial Chamber erred in: (i) failing to exercise sufficient caution;<sup>148</sup> (ii) disregarding discrepancies regarding Callixte Kalimanzira's role in directing the refugees to Kabuye hill;<sup>149</sup> and (iii) accepting Witness BAU's explanation regarding his presence at the market and at Kabuye hill.<sup>150</sup>

64. The Prosecution responds that the Trial Chamber properly assessed Witness BAU's evidence.<sup>151</sup>

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*See infra*, para. 119. The impact of the Appeals Chamber's finding in this regard will be accordingly considered below in the appropriate section of this Judgement.

<sup>145</sup> *See* Appeal Brief, paras. 30, 34. *See also ibid.*, para. 16.

<sup>146</sup> Trial Judgement, paras. 237, 238.

<sup>147</sup> Notice of Appeal, para. 9; Appeal Brief, paras. 43-53. *See also* Reply Brief, paras. 26-28.

<sup>148</sup> Appeal Brief, para. 44; Reply Brief, para. 26.

<sup>149</sup> Notice of Appeal, para. 9; Appeal Brief, paras. 45-49. *See also* Reply Brief, paras. 27, 28.

<sup>150</sup> Notice of Appeal, para. 9; Appeal Brief, paras. 50-53.

<sup>151</sup> Response Brief, paras. 44-51.

## 1. Caution

65. Ntawukulilyayo submits that the vindictive nature of Witness BAU's escalating incriminations against Ntawukulilyayo, the witness's belligerence in court, and his lack of corroboration on certain points required the Trial Chamber to exercise the "utmost caution" in assessing Witness BAU's testimony.<sup>152</sup>

66. The Appeals Chamber recalls that the assessment of the demeanour of witnesses in considering their credibility is one of the fundamental functions of a Trial Chamber, to which the Appeals Chamber must accord considerable deference.<sup>153</sup> Further, the Appeals Chamber considers that the fact that a witness incriminates an accused person, even if increasingly over time or successive testimonies, does not in itself show malicious intent. In this case, the transcript of Witness BAU's testimony does not support Ntawukulilyayo's characterization of the witness as "vindictive". While the transcript reflects that the witness was at times argumentative during cross-examination, it does not sustain Ntawukulilyayo's contention that Witness BAU was belligerent in court or that he was routinely called to order by the Trial Chamber.<sup>154</sup> Finally, with respect to Ntawukulilyayo's submission that Witness BAU's testimony that Ntawukulilyayo personally persuaded the refugees to go to Kabuye hill with the policemen was uncorroborated, the Appeals Chamber recalls that Witness AYQ also testified to this effect.<sup>155</sup> Accordingly, Ntawukulilyayo fails to demonstrate any basis for requiring the exercise of the "utmost caution" in assessing the testimony of Witness BAU.

67. These arguments are therefore dismissed.

## 2. Kalimanzira's Role

68. The Trial Chamber found that any discrepancies between Witness BAU's testimony in the *Kalimanzira* trial and in the present trial regarding the role played by Callixte Kalimanzira at Gisagara market were insignificant, and reasonably explained by the passage of time and varying circumstances in which the witness gave evidence in both cases:

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<sup>152</sup> Appeal Brief, para. 44, fns. 82, 83. *See also ibid.*, paras. 155, 235; Reply Brief, para. 26; AT. 26 September 2011 pp. 16, 17.

<sup>153</sup> *Muvunyi* Appeal Judgement of 1 April 2011, para. 26. *See also Nchamihigo* Appeal Judgement, para. 47; *Bikindi* Appeal Judgement, para. 114; *Ntagerura et al.* Appeal Judgement, para. 213.

<sup>154</sup> The transcript of Witness BAU's testimony, which lasted several hours, reflects that the Judges instructed him on four occasions to simply answer the questions and refrain from making extraneous comments. *See* Witness BAU, T. 13 May 2009 pp. 12, 16, 26, 42.

<sup>155</sup> Witness AYQ, T. 11 May 2009 pp. 9, 10; Witness BAU, T. 12 May 2009 p. 64 and T. 13 May 2009 pp. 28, 29. As to the remaining points on which Ntawukulilyayo submits Witness BAU was not corroborated, the Appeals Chamber notes that Ntawukulilyayo concedes that the Trial Chamber dismissed the allegations to which those points pertained. *See* Appeal Brief, fns. 82, 83.

The Defence challenged Witness BAU's evidence about Ntawukulilyayo's order to send refugees to Kabuye hill with his statement to Tribunal investigators in March 2003 and his testimony in *Kalimanzira*. In particular, Witness BAU initially testified that only Ntawukulilyayo addressed the refugees at the market. However, his March 2003 statement, taken in relation to Kalimanzira, indicates that both he and Ntawukulilyayo spoke to the attendees. The Witness explained that he was answering the questions asked of him, and then conceded that Kalimanzira spoke after Ntawukulilyayo. Defence counsel subsequently pointed to his testimony in *Kalimanzira*, wherein he said that Kalimanzira had only stood by while the sub-prefect ordered refugees to leave. The Witness responded that Ntawukulilyayo spoke and that Kalimanzira "simply said that [the refugees] should leave."<sup>156</sup>

These discrepancies, however, are minor in light of the significant passage of time and varying circumstances under which Witness BAU provided information to investigators, testimony in *Kalimanzira*, and evidence in this case. His explanations tend to suggest that Ntawukulilyayo took the lead in directing refugees to leave, a position that he has consistently held while testifying under oath in two different proceedings before the Tribunal. The Chamber, Judge Akay dissenting, considers his evidence compelling.<sup>157</sup>

69. Ntawukulilyayo submits that, because the presence of Kalimanzira at Gisagara market is a material fact, the Trial Chamber erred in disregarding the differences in Witness BAU's previous accounts of whether Kalimanzira addressed the refugees at Gisagara market.<sup>158</sup> He argues that the passage of time was insufficient to justify the inconsistency, since only one year separated Witness BAU's testimonies in both trials.<sup>159</sup> He further asserts that the explanation that the witness's responses hinged on "varying circumstances" is particularly unusual and, in any case, incorrect.<sup>160</sup> Ntawukulilyayo contends that a reasonable trier of fact could therefore not have concluded that Witness BAU's declarations regarding Ntawukulilyayo's speech were consistent and sufficient to demonstrate the witness's credibility, while ignoring evidence to the contrary.<sup>161</sup>

70. The Appeals Chamber notes that, in a statement relating to Callixte Kalimanzira given to Tribunal investigators in 2003, Witness BAU stated that both Ntawukulilyayo and Kalimanzira addressed the crowd of refugees at Gisagara market.<sup>162</sup> However, when Witness BAU testified in the *Kalimanzira* trial in 2008, he unequivocally stated that only Ntawukulilyayo addressed the refugees.<sup>163</sup> The witness explained under cross-examination that the discrepancy with his statement from 2003 – the accuracy of which he contested – must have resulted from an erroneous recording thereof by Tribunal investigators.<sup>164</sup> In the present case, Witness BAU similarly testified that only

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<sup>156</sup> Trial Judgement, para. 237 (internal citations omitted).

<sup>157</sup> Trial Judgement, para. 238.

<sup>158</sup> Appeal Brief, paras. 45-48.

<sup>159</sup> Appeal Brief, para. 47. *See also* Reply Brief, para. 27.

<sup>160</sup> Appeal Brief, para. 47.

<sup>161</sup> Appeal Brief, para. 48. *See also* Reply Brief, para. 27.

<sup>162</sup> Exhibit D15(E) (Witness BAU's Statement of 27 March 2003), p. 3.

<sup>163</sup> Exhibit D17(E) (Transcript Excerpts of Witness BAU's Testimony of 5 and 12 May 2008 in the *Kalimanzira* Case), pp. 10, 12, 29 (transcript pagination).

<sup>164</sup> *See* Exhibit D17(E) (Transcript Excerpts of Witness BAU's Testimony of 5 and 12 May 2008 in the *Kalimanzira* Case), pp. 42-46 (transcript pagination).

Ntawukulilyayo addressed the refugees.<sup>165</sup> However, when similarly confronted with his 2003 statement during cross-examination, Witness BAU explained that his prior statement was in fact accurate, that his testimony that Ntawukulilyayo addressed the crowd was confined to the context of the questions posed to him, and that had he been asked about Kalimanzira, he would have answered that Kalimanzira also spoke.<sup>166</sup> When he was then confronted with his 2008 testimony from the *Kalimanzira* trial, in which he stated that Kalimanzira did not say anything, Witness BAU answered: “Well, I have to say this: The *sous-préfet* spoke. Kalimanzira did not address the refugees. He simply said that they should leave.”<sup>167</sup>

71. The Appeals Chamber notes that the Trial Chamber specifically addressed and rejected Ntawukulilyayo’s challenges to Witness BAU’s credibility in this respect.<sup>168</sup> Contrary to both parties’ contentions,<sup>169</sup> the Appeals Chamber considers that the Trial Chamber’s reference to a “significant passage of time”<sup>170</sup> alluded to the time that elapsed between Witness BAU’s 2003 statement and his testimonies in both trials. However, it is unclear how such passage of time could explain this particular discrepancy, which involves contradictory statements about whether Kalimanzira spoke at all. In light of the fact that Witness BAU himself professes no problems in recalling whether Kalimanzira spoke that could be attributed to the passage of time,<sup>171</sup> the Appeals Chamber considers the Trial Chamber’s reliance thereon to have been in error.

72. As to the Trial Chamber’s reference to “varying circumstances under which Witness BAU provided information”, the Appeals Chamber finds nothing unusual in considering that the answer to a question may vary depending on the context in which it is asked. However, while such reasoning can reconcile Witness BAU’s testimony in the present case with his 2003 statement, a review of the record shows that Witness BAU was asked nearly identical questions in the *Kalimanzira* trial and the present trial regarding whether Kalimanzira spoke, and that he gave two different answers.<sup>172</sup> In the Appeals Chamber’s view, the circumstances in which Witness BAU testified in the *Kalimanzira* trial and the present trial were nearly identical for present purposes, and

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<sup>165</sup> Witness BAU, T. 13 May 2009 p. 28.

<sup>166</sup> Witness BAU, T. 13 May 2009 pp. 31, 34.

<sup>167</sup> Witness BAU, T. 13 May 2009 p. 38.

<sup>168</sup> Trial Judgement, paras. 237, 238.

<sup>169</sup> The Prosecution submits that, contrary to Ntawukulilyayo’s argument, the Trial Chamber’s reference to the passage of time was to the time elapsed since the genocide. *See* Response Brief, para. 48.

<sup>170</sup> Trial Judgement, para. 238.

<sup>171</sup> *See* Witness BAU, T. 13 May 2009 pp. 28-38, where Witness BAU provides answers with certitude to questions about whether Kalimanzira spoke, without invoking any memory difficulties in this regard, even when confronted with his previous statement. This is in contrast to, for instance, a professed inability to recall other types of information due to the passage of time. *See* Witness BAU, T. 13 May 2009 p. 24 (“Q. Mr. Witness, can I ask you to make a special effort in memory, and tell the Court how was the new *préfet*, Sylvain, dressed? A. That’s very difficult to do. After 15 years, I cannot remember the type of clothes that someone was wearing at that time.”).

<sup>172</sup> *See* Witness BAU, T. 13 May 2009 pp. 31, 34, 38.

are therefore incapable of explaining or rendering “minor” the inconsistency between the witness’s answers on this point. The Appeals Chamber considers that the Trial Chamber in the present case failed to note the similarity in the questions posed to the witness in both trials.<sup>173</sup> In these circumstances, the discrepancies between Witness BAU’s 2003 statement and his testimonies in the two trials could not reasonably have been attributed to any “varying circumstances” in which he provided information. Accordingly, the Appeals Chamber considers that the Trial Chamber erred in relying on “varying circumstances” to find that the discrepancies in question were minor.

73. Ntawukulilyayo submits that Kalimanzira’s presence at Gisagara market is a material fact, and suggests that whether or not Kalimanzira spoke is therefore of importance.<sup>174</sup> The Appeals Chamber does not agree. Ntawukulilyayo’s conviction is based on the Trial Chamber’s finding that Ntawukulilyayo took the lead in directing the refugees to leave. Kalimanzira’s presence and role at Gisagara market are therefore irrelevant as far as Ntawukulilyayo’s individual criminal responsibility is concerned. Although Witness BAU’s reliability in relation to whether or not Kalimanzira spoke may be questionable, Ntawukulilyayo does not demonstrate that the witness’s credibility and reliability as a whole are consequently undermined.<sup>175</sup> In this respect, the Appeals Chamber recalls that it is within a Trial Chamber’s discretion to assess any inconsistencies in the testimonies of witnesses, and to determine whether, in light of the overall evidence, the witnesses were nonetheless reliable and credible.<sup>176</sup> The presence of inconsistencies in the evidence does not, *per se*, require a reasonable trier of fact to reject it as unreliable.<sup>177</sup> Accordingly, Ntawukulilyayo fails to demonstrate that the Trial Chamber’s reliance on other credible portions of Witness BAU’s testimony was unreasonable.

74. The Appeals Chamber dismisses Ntawukulilyayo’s arguments in this respect.

### 3. Reasons for Witness BAU’s Presence at Gisagara Market and Journey to Kabuye Hill

75. The Trial Chamber found that Witness BAU’s “explanations as to why he went to the market to hear Ntawukulilyayo speak and that he left his family behind when heading to Kabuye are coherent and compelling, particularly in light of the heightened tension at the time.”<sup>178</sup>

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<sup>173</sup> The Appeals Chamber recalls that the relevant passages of Witness BAU’s testimony in the *Kalimanzira* case were admitted into evidence in the present case as Exhibit D17.

<sup>174</sup> Appeal Brief, para. 45.

<sup>175</sup> See Reply Brief, para. 28.

<sup>176</sup> *Muvunyi* Appeal Judgement of 29 August 2008, para. 144; *Bagilishema* Appeal Judgement, para. 78. See also *Setako* Appeal Judgement, para. 31; *Munyakazi* Appeal Judgement, paras. 71, 103; *Gacumbitsi* Appeal Judgement, para. 74; *Kajelijeli* Appeal Judgement, para. 96.

<sup>177</sup> *Kupreškić et al.* Appeal Judgement, para. 31. See also *Muvunyi* Appeal Judgement of 1 April 2011, para. 44; *Karera* Appeal Judgement, para. 174.

<sup>178</sup> Trial Judgement, para. 238.

In particular, the Trial Chamber accepted Witness BAU's testimony that he went to Gisagara market because he and others were directed by communal police to do so, and that he left his family behind because he felt threatened.<sup>179</sup>

76. Ntawukulilyayo submits that the Trial Chamber's finding was unreasonable.<sup>180</sup> He contends that Witness BAU operated a banana wine shop at the trading centre located at Gisagara market, which placed the witness "in a situation which was quite different from that of the refugees" gathered there.<sup>181</sup> He further contends that Witness BAU's testimony that his house was within 40 metres of Gisagara marketplace, and that the policemen only briefly escorted the refugees to Kabuye hill, "leaving them freely to cover the remaining distance of two kilometres", is irreconcilable with his statement that he was compelled by the policemen's instructions, as well as by fear of assailants, to move to Kabuye hill for his own safety without taking his Tutsi wife and children.<sup>182</sup> He argues that a reasonable trier of fact could not dismiss these problems and merely describe Witness BAU as credible in light of the tension prevailing at the time.<sup>183</sup>

77. The Appeals Chamber notes that the Trial Chamber specifically addressed and rejected Ntawukulilyayo's challenges to Witness BAU's credibility in respect of the witness's reasons for being present at Gisagara market and for moving to Kabuye hill.<sup>184</sup> In the Appeals Chamber's view, there is nothing dissonant about Witness BAU, a Tutsi resident of Gisagara,<sup>185</sup> having left Gisagara market upon feeling threatened after seeing "attackers come down there [...] covering themselves with banana leaves",<sup>186</sup> and having subsequently joined the group of mostly Tutsi refugees who had been promised safety and refuge at Kabuye hill. It was therefore reasonable for the Trial Chamber to rely on Witness BAU's testimony that he left his family in Gisagara because he felt threatened,<sup>187</sup> particularly "in light of the heightened tension at the time",<sup>188</sup> and in the context of fear for one's

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<sup>179</sup> Trial Judgement, fn. 317.

<sup>180</sup> Appeal Brief, para. 50.

<sup>181</sup> Appeal Brief, para. 51.

<sup>182</sup> Appeal Brief, para. 51. Ntawukulilyayo also submits that Witness BAU's statement that he thought Ntawukulilyayo later came to Kabuye hill to provide the promised tents and foodstuffs is inconsistent with the witness's testimony on the order to move to Kabuye hill and the alleged fear which "irresistibly drove him to flee, leaving behind his wife, children, business and house." *See ibid.*, para. 52. *See also* AT. 26 September 2011 pp. 18, 19. The Appeals Chamber recalls that it has rejected Ntawukulilyayo's similar arguments of implausibility in respect of Witness AYQ's testimony. *See supra*, para. 50. For similar reasons, the Appeals Chamber rejects them here, and notes in particular that nothing in Witness BAU's testimony suggests that Ntawukulilyayo was the source of the fear which compelled him to move to Kabuye hill.

<sup>183</sup> Appeal Brief, para. 53.

<sup>184</sup> Trial Judgement, para. 238, fn. 317.

<sup>185</sup> Exhibit P7 (Protected Information of Witness BAU).

<sup>186</sup> *See* Witness BAU, T. 13 May 2009 p. 39. *See also* Trial Judgement, fn. 317.

<sup>187</sup> *See* Trial Judgement, fn. 317.

<sup>188</sup> Trial Judgement, para. 238, *referring to* Witness BAU, T. 13 May 2009 pp. 28, 29.

life.<sup>189</sup> The Appeals Chamber recalls that the purpose of appellate proceedings is not for the Appeals Chamber to reconsider the evidence and arguments submitted before the Trial Chamber.<sup>190</sup> Ntawukulilyayo merely repeats the same arguments on appeal, without demonstrating that the Trial Chamber's rejection thereof constituted an error.

78. These arguments are therefore dismissed.

#### 4. Conclusion

79. Based on the foregoing, the Appeals Chamber dismisses Ntawukulilyayo's allegations of error in the Trial Chamber's assessment of Witness BAU's testimony about the events at Gisagara market.

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<sup>189</sup> In this respect, the Appeals Chamber notes that in the *Kalimanzira* trial, Witness BAU specified that at the time he left Gisagara market for Kabuye hill, his children were at their grandmother's house, and he was not allowed to go back home to see his wife. See Exhibit D17(E) (Transcript Excerpts of Witness BAU's Testimony of 5 and 12 May 2008 in the *Kalimanzira* Case), p. 32 (transcript pagination). The Appeals Chamber further notes that in the present trial, Witness BAU was not asked about the whereabouts of his wife and children at the time of his departure for Kabuye hill, and that he was not confronted with his prior testimony in the *Kalimanzira* trial in the context of this line of questioning.

<sup>190</sup> *Celebi/i* Appeal Judgement, para. 837.

#### **D. Alleged Errors in the Assessment of Defence Evidence**

80. The Trial Chamber considered the evidence of Defence Witnesses KAD, MAI, MAE, MAD, Jean-Baptiste Gasana, Emmanuel Niyitegeka, and Gérard Ndamage to be of limited probative value and insufficient to raise doubt with respect to the Prosecution evidence.<sup>191</sup> The Trial Judgement reflects that all of these witnesses denied having seen or heard about Ntawukulilyayo coming to Gisagara market other than on the evening of Wednesday, 20 April 1994.<sup>192</sup> The Trial Chamber also had reservations about the testimonies of Defence Witnesses BAA, Louis Ahorukomeye, Simon Rumashana, as well as Ntawukulilyayo himself, which suggested that Ntawukulilyayo was not at Gisagara market or even in Gisagara town on Saturday, 23 April 1994.<sup>193</sup> It considered that even if their evidence were accepted, such evidence would not be inconsistent with the testimonies of Witnesses AYQ and BAU placing Ntawukulilyayo at Gisagara market in the early afternoon of that day.<sup>194</sup>

81. Ntawukulilyayo submits that the Trial Chamber erred in its assessment of the Defence evidence.<sup>195</sup> In particular, he contends that the Trial Chamber erred in: (i) distorting the evidence of Witnesses MAI, MAE, and Jean-Baptiste Gasana;<sup>196</sup> (ii) reversing the burden of proof;<sup>197</sup> and (iii) concluding that Ntawukulilyayo's alibi evidence was not inconsistent with the Prosecution evidence.<sup>198</sup>

82. The Prosecution responds that the Trial Chamber properly assessed the Defence evidence, and that Ntawukulilyayo merely substitutes his own evaluation of the evidence for that of the Trial Chamber.<sup>199</sup> It submits that there is no indication that the Prosecution evidence was unreasonably accepted, and that the Trial Chamber's assessment of the Defence evidence imposed no burden of proof on Ntawukulilyayo.<sup>200</sup>

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<sup>191</sup> Trial Judgement, paras. 12, 251-261.

<sup>192</sup> Trial Judgement, para. 251. The Appeals Chamber notes that the Trial Chamber erroneously refers to "Wednesday 23 April" in this paragraph (emphasis added).

<sup>193</sup> Trial Judgement, paras. 247-250.

<sup>194</sup> Trial Judgement, para. 250.

<sup>195</sup> Notice of Appeal, paras. 10-12; Appeal Brief, paras. 54-90.

<sup>196</sup> Appeal Brief, paras. 55-73. *See also* Reply Brief, paras. 29-31.

<sup>197</sup> Appeal Brief, paras. 74-83. *See also* Reply Brief, paras. 32-35.

<sup>198</sup> Appeal Brief, paras. 84-90. *See also* Reply Brief, para. 36.

<sup>199</sup> Response Brief, paras. 52-67.

<sup>200</sup> Response Brief, paras. 59, 60.

## 1. Alleged Distortion of Defence Evidence

83. The Trial Chamber found that Witnesses MAI, MAE, and Jean-Baptiste Gasana, all of whom stated that the refugees had left Gisagara market before the afternoon of Saturday, 23 April 1994, were not in a position to observe occurrences at the market at all times, and that their testimonies did not raise concerns about the reliability of Witnesses AYQ's and BAU's first-hand accounts.<sup>201</sup>

84. Ntawukulilyayo submits that Witnesses MAI, MAE, and Gasana “deserve special attention since they are directly relevant with respect to the early afternoon of 23 April 1994” and that, considered together, their evidence raises a reasonable doubt about Ntawukulilyayo's presence at Gisagara market that day.<sup>202</sup> He contends that the Trial Chamber failed to provide sufficient reasons for dismissing and distorting their testimonies, despite their inherent credibility not being called into question.<sup>203</sup>

### (a) Jean-Baptiste Gasana

85. In assessing Jean-Baptiste Gasana's testimony, the Trial Chamber found:

Notably, Gasana testified that he decided to leave his store and go to the market to see what the Accused and the priest had to say, thus suggesting that he would not have been able to see or hear the Accused at the market from his shop. He further conceded that although he worked about 30 metres from the market, he was not constantly in a position to monitor persons going or coming from there.<sup>204</sup>

86. Ntawukulilyayo submits that the evidence on the record clearly shows that, contrary to the Trial Chamber's finding, Gasana was indeed able to see the market from his shop.<sup>205</sup> He contends that, although Gasana admitted that he was not watching the market at all times, he was categorical that Ntawukulilyayo did not come back to hold a meeting after Wednesday.<sup>206</sup> He further submits that “[i]t should be recalled that, according to Witness BAU, the policemen invited ‘everyone’ to go and attend the meeting of 23 April 1994, including ‘normal residents who were close to the marketplace.’”<sup>207</sup> Ntawukulilyayo asserts that Gasana's testimony “raised a reasonable doubt as to

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<sup>201</sup> Trial Judgement, paras. 255-258. *See also ibid.*, para. 12.

<sup>202</sup> Appeal Brief, para. 56.

<sup>203</sup> Appeal Brief, paras. 54-73. *See also* Reply Brief, paras. 29-31.

<sup>204</sup> Trial Judgement, para. 255 (internal citations omitted).

<sup>205</sup> Appeal Brief, para. 64. *See also* Reply Brief, para. 33.

<sup>206</sup> Appeal Brief, para. 65.

<sup>207</sup> Appeal Brief, para. 65.

whether Ntawukulilyayo organized a meeting on 23 April 1994 during which he allegedly issued a transfer order.”<sup>208</sup>

87. The Appeals Chamber notes that Gasana testified that he lived and worked 30 metres from Gisagara market.<sup>209</sup> A diagram sketched by Gasana indicates that his shop was just down the road and across the street from the market.<sup>210</sup> Gasana testified that, on a Wednesday two weeks after the President’s death, refugees began to arrive at the marketplace, starting at around 3.00 p.m.<sup>211</sup> At around 7.30 p.m. that evening, Gasana saw Ntawukulilyayo and “Father Thomas” pass in front of his shop and go “to the location where the refugees were”.<sup>212</sup> Gasana stated that he then followed Ntawukulilyayo and Father Thomas there in order to hear what they would say to the refugees.<sup>213</sup> He further specified: “It did not take much time to go from my shop to the location, so I remained in my shop and continued to watch the *sous-préfet* and Father Thomas as they went towards that location. When I noticed that they had stopped at the location, I then closed my shop and went to that location.”<sup>214</sup>

88. In the Appeals Chamber’s view, Gasana’s testimony clearly indicates that, although he may not have been within hearing distance of Ntawukulilyayo and Father Thomas when they spoke with the refugees, he could nevertheless see them from his shop. Given that Gasana could see, though not necessarily hear, Ntawukulilyayo from his shop, the Trial Chamber misread Gasana’s testimony in concluding that “he decided to leave his store and go to the market to *see* what the Accused and the priest had to say, thus suggesting that he would not have been able to *see* or hear the Accused at the market from his shop.”<sup>215</sup>

89. Nevertheless, the Trial Chamber correctly stated that Gasana “conceded that [...] he was not constantly in a position to monitor persons going or coming from [the market]”.<sup>216</sup> In this respect, the Appeals Chamber notes that, when asked whether the humanitarian aid and protection promised to the refugees in fact arrived, Gasana indicated that he did not see it arrive, and that he did not

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<sup>208</sup> Appeal Brief, para. 66.

<sup>209</sup> Jean-Baptiste Gasana, T. 29 September 2009 p. 42.

<sup>210</sup> Exhibit D51 (Sketch Map Drawing by Gasana).

<sup>211</sup> Jean-Baptiste Gasana, T. 29 September 2009 pp. 55-57.

<sup>212</sup> Jean-Baptiste Gasana, T. 29 September 2009 pp. 58, 59.

<sup>213</sup> Jean-Baptiste Gasana, T. 29 September 2009 pp. 58 (“When he passed in the company of Father Thomas, they passed in front of my shop, and, subsequently, I saw them at the market square, and I felt obliged to go and listen to what they had to tell the refugees.”), 59 (“When I got there, it was with a view to hearing what the two officials had to tell the refugees and what the reaction of the refugees would be.”).

<sup>214</sup> Jean-Baptiste Gasana, T. 29 September 2009 p. 60.

<sup>215</sup> Trial Judgement, para. 255 (emphasis added).

<sup>216</sup> See Trial Judgement, para. 255. See also Jean-Baptiste Gasana, T. 29 September 2009 p. 71.

know whether it did arrive.<sup>217</sup> When further asked whether he would have known if Ntawukulilyayo had returned to the market, Gasana replied: “If he had returned to the market square, although I may not have been watching at all times to see who was going by, I can say that, as far as Dominique is concerned, I did not see him.”<sup>218</sup> In the Appeals Chamber’s view, even if Gasana was categorical about Ntawukulilyayo not having returned to the market after Wednesday, his own testimony nevertheless allows for the possibility that, had Ntawukulilyayo returned, Gasana would not necessarily have seen him.<sup>219</sup>

90. In the circumstances, the Appeals Chamber considers that it was not unreasonable for the Trial Chamber accord relatively limited probative value to Gasana’s assertion that Ntawukulilyayo did not return to Gisagara market, when weighed against credible and reliable eyewitness accounts placing Ntawukulilyayo there on Saturday, 23 April 1994. Ntawukulilyayo therefore shows no error warranting appellate intervention in the Trial Chamber’s assessment of Gasana’s testimony.

(b) Witness MAE

91. With respect to Witness MAE, the Trial Chamber found:

[...] the evidence of Witness MAE, who worked about one minute away from the market, demonstrates that he could not always account for what occurred there while at work. For example, he specified that when refugees arrived, he went to the market to see what was happening, and he saw refugees at the market while travelling between his work and other locations. Indeed, he did not see Ntawukulilyayo come to speak to refugees on Friday afternoon, and it is similarly possible that he did not see him arrive on the Saturday.<sup>220</sup>

92. Ntawukulilyayo submits that the Trial Chamber dismissed Witness MAE’s testimony “[w]ithout any real basis”.<sup>221</sup> He contends that the witness worked next to the market and that he could “clearly see the market square where the refugees were” from his shop, making him a “privileged observer”.<sup>222</sup> He points out that the witness was categorical about the fact that he would have seen any official arrive and that it would have been impossible for people not to know about it.<sup>223</sup> Ntawukulilyayo further contends that the fact that Witness MAE did not see Ntawukulilyayo at Gisagara market on Friday, 22 April 1994 does not constitute a valid basis for excluding his testimony, because “it was not a meeting in the real sense of the word, nor was it a boisterous

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<sup>217</sup> Jean-Baptiste Gasana, T. 29 September 2009 pp. 61, 62, 71.

<sup>218</sup> Jean-Baptiste Gasana, T. 29 September 2009 p. 71.

<sup>219</sup> By the same token, the Appeals Chamber considers that Jean-Baptiste Gasana’s testimony allows for the possibility that the policemen described by Witness BAU did arrive, but without his knowledge.

<sup>220</sup> Trial Judgement, para. 256 (internal citations omitted).

<sup>221</sup> Appeal Brief, para. 67. *See also ibid.*, para. 73.

<sup>222</sup> Appeal Brief, paras. 68 (emphasis omitted), 70.

<sup>223</sup> Appeal Brief, para. 70.

gathering the likes of the alleged one of 23 April [with the use of a megaphone and/or whistles], but a brief stop by the roadside to greet the refugees informally.”<sup>224</sup>

93. The Appeals Chamber notes that Witness MAE testified that he worked in a shop “very close to” Gisagara market.<sup>225</sup> He stated that he also lived near the market, and that he would pass through the market on the two-minute walk between his home and the shop.<sup>226</sup> Witness MAE testified that, on a Wednesday two weeks after the President’s death, refugees began to arrive at the market, starting at around 3.00 p.m.<sup>227</sup> At around 7.30 p.m. that evening, he saw Ntawukulilyayo come to Gisagara market with “Father Thomas”.<sup>228</sup> Witness MAE did not see or hear that Ntawukulilyayo returned to Gisagara market on any other occasion thereafter.<sup>229</sup> Witness MAE testified that, “[f]rom the shop, [he] could clearly see the market square where the refugees were.”<sup>230</sup> He further asserted that he would have known if Ntawukulilyayo had returned.<sup>231</sup>

94. However, Ntawukulilyayo himself testified that he briefly returned to Gisagara market on Friday, 22 April 1994 at around 2.00 p.m., and spent nearly 10 minutes speaking with the refugees.<sup>232</sup> In the Appeals Chamber’s view, it was reasonable for the Trial Chamber to consider that Witness MAE’s failure to see Ntawukulilyayo return on this occasion, despite purporting to have a direct view of the market where the refugees were, “demonstrates that he could not always account for what occurred there while at work.”<sup>233</sup> Moreover, the fact that Witness MAE was never made aware of Ntawukulilyayo’s return on this occasion contradicts his assertion that he would have known if Ntawukulilyayo had returned to Gisagara market after 20 April 1994.

95. Finally, the Appeals Chamber notes that Witness MAE’s evidence does not suggest that he was within hearing distance of the refugees at the market while at his shop, nor does it support Ntawukulilyayo’s contention that his alleged address to the refugees on 22 April 1994 was not in the context of a meeting “in the real sense of the word” or a “boisterous gathering”.<sup>234</sup> Even considering that Ntawukulilyayo’s addresses to the refugees on 22 and 23 April 1994 may have taken different forms and may not have been similarly noticeable, the Appeals Chamber does not find unreasonable the Trial Chamber’s conclusion that since Witness MAE “did not see

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<sup>224</sup> Appeal Brief, para. 71 (internal citations omitted), fn. 151.

<sup>225</sup> Witness MAE, T. 28 September 2009 p. 23. *See also ibid.*, pp. 5, 10 (closed session).

<sup>226</sup> Witness MAE, T. 28 September 2009 pp. 10, 11 (closed session), 24.

<sup>227</sup> Witness MAE, T. 28 September 2009 p. 23.

<sup>228</sup> Witness MAE, T. 28 September 2009 pp. 24, 25.

<sup>229</sup> Witness MAE, T. 28 September 2009 pp. 27-29, 33. *See also ibid.*, pp. 55, 56.

<sup>230</sup> Witness MAE, T. 28 September 2009 p. 28.

<sup>231</sup> Witness MAE, T. 28 September 2009 p. 28.

<sup>232</sup> Ntawukulilyayo, T. 16 December 2009 pp. 12, 13.

<sup>233</sup> Trial Judgement, para. 256.

<sup>234</sup> *See* Appeal Brief, para. 71.

Ntawukulilyayo come to speak to refugees on Friday afternoon, [...] it is similarly possible that he did not see him arrive on the Saturday.”<sup>235</sup> Ntawukulilyayo has therefore shown no error in the Trial Chamber’s assessment of Witness MAE’s testimony.

(c) Witness MAI

96. With respect to Witness MAI, the Trial Chamber found:

Witness MAI also denied that Ntawukulilyayo returned to the market on Saturday 23 April. He testified that from his shop in Gisagara he could see the market and that from Wednesday 20 April to Saturday 23 April, he worked from 6.00 a.m. to 8.00 p.m. Notably the precise location of his store is not known, and he stated that he did not go to the market to mingle with refugees. Moreover, despite his presence that Wednesday 20 April, he did not see Ntawukulilyayo visit refugees there. While he testified that Ntawukulilyayo and Father Thomas Mutabazi had come after he left, the record indicates that he would have been there during the meeting Ntawukulilyayo led. Nor did he see Ntawukulilyayo come to the market on the afternoon of Friday 22 April. This raises questions about his ability to observe what was occurring at the market from his shop, even large events, as well as his testimony about his permanent presence the[re] during 6.00 a.m. and 8.00 p.m. those days, including Saturday.<sup>236</sup>

97. Ntawukulilyayo submits that the Trial Chamber erred in demanding an “excessively high level of proof” from Witness MAI, despite the witness’s “unquestionable consistency”.<sup>237</sup> He contends that the Trial Chamber was intransigent about the fact that Witness MAI did not see Ntawukulilyayo between 7.00 p.m. and 8.00 p.m. on 20 April 1994, despite the witness’s own testimony that he was in his shop until 8.00 p.m., but that it excused, as a consequence of the passage of time, the significant time differences in the testimonies of the Prosecution witnesses.<sup>238</sup> Ntawukulilyayo further contends that the fact that Witness MAI did not also see him on 22 April 1994 is not surprising since his “visit [...] was neither a meeting nor a gathering”, and the Trial Chamber could therefore not “use the unawareness of that micro incident as an excuse to dismiss the whole of Witness MAI’s testimony.”<sup>239</sup>

98. The Appeals Chamber notes that Witness MAI testified that, in 1994, he had a business located in Gisagara market, where he worked from 6.00 a.m. to 8.00 p.m., and had a view of the marketplace.<sup>240</sup> The Trial Chamber accepted this testimony.<sup>241</sup> Although Witness MAI did not specify *exactly* where in Gisagara market his store was located, the Appeals Chamber does not consider that such further precision was required in light of the witness’s testimony that his store was in the market and that he therefore had a view of it. The Trial Chamber’s note that “the precise

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<sup>235</sup> Trial Judgement, para. 256 (internal citation omitted).

<sup>236</sup> Trial Judgement, para. 257 (internal citations omitted).

<sup>237</sup> Appeal Brief, para. 57. *See also ibid.*, paras. 61, 62.

<sup>238</sup> Appeal Brief, para. 58.

<sup>239</sup> Appeal Brief, para. 59.

<sup>240</sup> Witness MAI, T. 24 September 2009 pp. 17, 18, 26, 27.

location of his store is not known”<sup>242</sup> is accordingly irrelevant, and the Prosecution’s assertion that Witness MAI “would not have been able to see Ntawukulilyayo from where he was located”<sup>243</sup> is baseless.

99. With respect to Witness MAI’s failure to see Ntawukulilyayo’s arrival at Gisagara market on 20 April 1994, the Appeals Chamber considers that the record does not indicate, but rather merely suggests, that Witness MAI might have been at his shop at the time of Ntawukulilyayo’s arrival. Even if it were determined that the Trial Chamber erred in finding that “the record *indicates* that he would have been there during the meeting Ntawukulilyayo led”,<sup>244</sup> it does not necessarily follow that Witness MAI would have seen Ntawukulilyayo had he been there at the same time. Indeed, Ntawukulilyayo admitted to having returned to speak with the refugees at Gisagara market on 22 April 1994, at around 2.00 p.m.,<sup>245</sup> which is a time when Witness MAI indicated he would have been at his shop. However, Witness MAI neither saw nor heard about this visit.<sup>246</sup> As such, it was reasonable for the Trial Chamber to consider that Witness MAI might similarly have been unable to observe a subsequent visit by Ntawukulilyayo on the following day. Ntawukulilyayo has therefore demonstrated no error in the Trial Chamber’s assessment of Witness MAI’s testimony.

(d) Conclusion

100. As discussed above, Ntawukulilyayo has not demonstrated any error in the Trial Chamber’s assessment of the testimonies of Witnesses MAI, MAE, or Jean-Baptiste Gasana that would invalidate the Trial Chamber’s findings regarding Ntawukulilyayo’s presence and conduct at Gisagara market on 23 April 1994. Ntawukulilyayo’s arguments in this respect are dismissed.

2. Burden of Proof

101. The Trial Chamber determined that the testimonies of Emmanuel Niyitegeka, who did not return to the market after 20 April 1994, and Gérard Ndamage, who only came to the market on the morning of 23 April 1994 for 30 minutes and otherwise largely stayed at home, were of similarly limited probative value as the testimonies of Witnesses MAI, MAE, and Gasana.<sup>247</sup> The Trial Chamber further found that, because Witness KAD left for Kabuye hill on the morning of 23 April 1994, her evidence was “not necessarily inconsistent” with the evidence of

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<sup>241</sup> Trial Judgement, para. 257.

<sup>242</sup> Trial Judgement, para. 257.

<sup>243</sup> Response Brief, para. 54.

<sup>244</sup> Trial Judgement, para. 257 (emphasis added).

<sup>245</sup> Ntawukulilyayo, T. 16 December 2009 pp. 12, 13.

<sup>246</sup> Witness MAI, T. 24 September 2009 pp. 24, 25.

<sup>247</sup> Trial Judgement, paras. 260, 261. *See also ibid.*, para. 12.

Witnesses AYQ and BAU, who recalled Ntawukulilyayo giving instructions to the refugees in the early afternoon.<sup>248</sup>

102. Ntawukulilyayo submits that, instead of considering whether the version of events of Defence witnesses was likely to raise a reasonable doubt, the Trial Chamber favoured the Prosecution's theory and arbitrarily discounted relevant Defence evidence.<sup>249</sup> He contends that the coherent testimonies of Witnesses MAI, MAE, and Gasana were buttressed by the first-hand accounts of Witnesses KAD, MAD, Niyitegeka, and Ndamage and were not consistent with the Prosecution evidence.<sup>250</sup> He argues that the Trial Chamber's failure to consider their cumulative evidence amounted to reversing the burden of proof.<sup>251</sup>

103. The Appeals Chamber recalls that the Prosecution bears the burden of establishing facts material to the guilt of an accused beyond reasonable doubt, and that suggesting that the Defence should present evidence proving the contrary would be an impermissible shift of such burden.<sup>252</sup> In this case, the Trial Chamber essentially took the view that the Defence evidence on the events at Gisagara market was not inconsistent with the Prosecution evidence. It reasoned that since two credible and reliable Prosecution witnesses saw Ntawukulilyayo at the market, the fact that the Defence witnesses did not see him or hear of his presence at the market did not necessarily suggest that he was not there.<sup>253</sup>

104. The Appeals Chamber finds no error in the Trial Chamber's preference for positive eyewitness testimony, and does not consider that the Trial Chamber's assessment of the Defence evidence in this regard suggests that Ntawukulilyayo was required to present witnesses who were able to negate the Prosecution evidence. The Trial Chamber found that "Witnesses AYQ and BAU provided convincing and consistent accounts of Ntawukulilyayo's order to refugees to go to Kabuye hill."<sup>254</sup> It then considered the evidence that Ntawukulilyayo presented to show that he was not at the market that day.<sup>255</sup> The Trial Chamber also considered Ntawukulilyayo's evidence that the refugees had already left the market before he allegedly instructed them to move.<sup>256</sup> In the Appeals

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<sup>248</sup> Trial Judgement, para. 253.

<sup>249</sup> Appeal Brief, paras. 74-81. *See also* Reply Brief, para. 35.

<sup>250</sup> Appeal Brief, paras. 75-81.

<sup>251</sup> Appeal Brief, para. 82.

<sup>252</sup> *Milošević* Appeal Judgement, para. 231.

<sup>253</sup> *See* Trial Judgement, paras. 253-262. *See also ibid.*, para. 250.

<sup>254</sup> Trial Judgement, para. 240.

<sup>255</sup> Trial Judgement, paras. 247-262. The Appeals Chamber notes that, in analyzing the Defence evidence seeking to discredit Witness AYQ based on her association with *Avega* and alleged procurement of false testimony, the Trial Chamber explicitly bore "in mind that the Defence carries no independent burden when seeking to raise doubt with elements of the Prosecution case." *See ibid.*, para. 245.

<sup>256</sup> Trial Judgement, para. 255. *See also ibid.*, paras. 159, 161, 167, 179.

Chamber's view, the fact that the Trial Chamber considered that such evidence was "of limited probative value"<sup>257</sup> and did "not raise doubt"<sup>258</sup> or "concerns"<sup>259</sup> about the Prosecution evidence does not constitute a reversal of the burden of proof.

105. The Appeals Chamber therefore finds that Ntawukulilyayo has not demonstrated that the Trial Chamber impermissibly reversed the burden of proof.

### 3. Alibi

106. The Trial Chamber also had reservations about the testimonies of Defence Witnesses BAA, Louis Ahorukomeye, Simon Rumashana, as well as Ntawukulilyayo himself, which suggested that Ntawukulilyayo was not at Gisagara market or in Gisagara town on Saturday, 23 April 1994.<sup>260</sup> It considered that, even if the evidence of Ntawukulilyayo's whereabouts were accepted, that evidence was "not inconsistent" with the testimonies of Witnesses AYQ and BAU placing him at Gisagara market in the early afternoon that day.<sup>261</sup>

107. Ntawukulilyayo submits that the Trial Chamber erred in concluding that the evidence indicating that he was accompanying a Tutsi priest, Father Mutabazi, to Doctor Ntabomvura's house where the priest would be safe, was not inconsistent with the Prosecution evidence that Ntawukulilyayo was eight kilometres away at Gisagara market at the same time.<sup>262</sup> He contends that, since Rumashana's credibility and reliability in relation to seeing him and the priest pass the Ntobo roadblock between 2.00 p.m. and 3.00 p.m. were not impeached, his activities in the early afternoon are *prima facie* accounted for. As a result, he argues, it was incumbent upon the Prosecution to eliminate the reasonable possibility that the alibi was true.<sup>263</sup> Ntawukulilyayo further contends that, even if the Prosecution and Defence evidence could be deemed chronologically consistent, his alleged activities involving both saving and forcibly transferring Tutsis were nevertheless incompatible. According to him, this casts additional doubt on the Prosecution evidence.<sup>264</sup>

108. In finding that the Defence evidence on Ntawukulilyayo's whereabouts on the afternoon of Saturday, 23 April 1994 was not inconsistent with the Prosecution evidence, the Trial Chamber

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<sup>257</sup> Trial Judgement, paras. 253, 259, 261. *See also ibid.*, para. 12.

<sup>258</sup> Trial Judgement, para. 250. *See also ibid.*, para. 12.

<sup>259</sup> Trial Judgement, para. 258.

<sup>260</sup> Trial Judgement, paras. 247-250.

<sup>261</sup> Trial Judgement, para. 250.

<sup>262</sup> Appeal Brief, paras. 84-89.

<sup>263</sup> Appeal Brief, paras. 87, 88. Ntawukulilyayo argues that the Prosecution evidence implies that Ntawukulilyayo must have participated in the events at the market well beyond 2.00 p.m. *See ibid.*, paras. 85, 86.

<sup>264</sup> Appeal Brief, para. 90.

reasoned that Ntawukulilyayo “conceded that he returned to Gisagara after leaving the Benedictine Sisters Convent and was there until he departed with Father Mutabazi before 2.00 p.m. Furthermore, while Rumashana observed the sub-prefect drive to the Ntobo roadblock between 2.00 p.m. and 3.00 p.m., it was only eight kilometres from Gisagara town. According to Rumashana, the distance between Gisagara parish and the roadblock could be covered by bicycle in 15 minutes.”<sup>265</sup>

109. Considering the proximity of the Ntobo roadblock to Gisagara market, the Appeals Chamber finds no error in the Trial Chamber’s conclusion that Rumashana’s sighting of Ntawukulilyayo is not incompatible with the testimonies of Witnesses AYQ and BAU. As such, Rumashana’s placement of Ntawukulilyayo at the Ntobo roadblock does not raise reasonable doubt that Ntawukulilyayo was in a position to commit the crime with which he was charged.<sup>266</sup> Accordingly, contrary to Ntawukulilyayo’s contention, the Prosecution was not required to eliminate the possibility that Rumashana’s account was true, since it was not an alibi within the legal meaning of the term.<sup>267</sup> The only evidence that did exclude the possibility that Ntawukulilyayo was at Gisagara market at the relevant time was Ntawukulilyayo’s own testimony, which the Trial Chamber viewed with suspicion because Ntawukulilyayo testified after the benefit of having heard the evidence presented by the other Defence witnesses.<sup>268</sup> The Appeals Chamber finds no error in such an approach.<sup>269</sup>

110. In any event, Ntawukulilyayo conceded that he was in the Gisagara area until 2.00 p.m. on Saturday, 23 April 1994,<sup>270</sup> and Rumashana placed Ntawukulilyayo at the Ntobo roadblock, a mere 15-minute bicycle ride from Gisagara, between 2.00 p.m. and 3.00 p.m. that day.<sup>271</sup> The Trial Chamber found that this evidence “is not inconsistent with the testimonies of Witness[es] AYQ and BAU, which placed Ntawukulilyayo at Gisagara market in the early afternoon that day.”<sup>272</sup> Contrary to Ntawukulilyayo’s suggestion, he was not alleged to have been at Gisagara market “at that same time” as when Rumashana placed him at the Ntobo roadblock (*i.e.* between 2.00 p.m. and 3.00 p.m.),<sup>273</sup> but rather at approximately the same time of day (*i.e.* in the early afternoon). The Appeals Chamber therefore finds no error in the Trial Chamber’s finding that the Defence and Prosecution evidence in this regard was not incompatible.

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<sup>265</sup> Trial Judgement, para. 250 (internal citation omitted).

<sup>266</sup> See *Zigiranyirazo* Appeal Judgement, para. 17.

<sup>267</sup> See *Zigiranyirazo* Appeal Judgement, para. 18. See also *Setako* Appeal Judgement, para. 224.

<sup>268</sup> Trial Judgement, paras. 247, 248. See also *ibid.*, para. 249.

<sup>269</sup> See *Ntakirutimana* Appeal Judgement, paras. 392, 393.

<sup>270</sup> Ntawukulilyayo, T. 16 December 2009 pp. 12, 14, 17, 19-21. See also Trial Judgement, para. 250.

<sup>271</sup> Simon Rumashana, T. 30 September 2009 pp. 10, 36, 37.

111. As to Ntawukulilyayo's contention that the acts of both saving and forcibly transferring Tutsis are incompatible, the Appeals Chamber considers that Ntawukulilyayo's assistance to one particular Tutsi does not in itself contradict the Trial Chamber's finding that he directed other Tutsis to Kabuye hill in the early afternoon of 23 April 1994.

112. Ntawukulilyayo's arguments in this respect are therefore dismissed.

#### 4. Conclusion

113. The Appeals Chamber finds that Ntawukulilyayo has not demonstrated that the Trial Chamber erred in its assessment of the Defence evidence regarding his presence at Gisagara market.

#### E. Conclusion

114. For the foregoing reasons, the Appeals Chamber dismisses Ntawukulilyayo's First Ground of Appeal.

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<sup>272</sup> Trial Judgement, para. 250.

<sup>273</sup> Appeal Brief, para. 84.

#### IV. ALLEGED ERRORS RELATING TO THE ATTACK ON KABUYE HILL (GROUND 2)

115. The Trial Chamber found that, in the late afternoon or early evening of Saturday, 23 April 1994, Ntawukulilyayo arrived in a vehicle at Kabuye hill together with Callixte Kalimanzira and soldiers.<sup>274</sup> He stopped briefly at the hill, allowing the soldiers to alight from the vehicle, and left shortly thereafter.<sup>275</sup> The Trial Chamber found that the soldiers who had accompanied Ntawukulilyayo, along with others, including communal policemen, subsequently attacked the refugees at the hill, resulting in the killing of “hundreds and possibly thousands of civilians, primarily Tutsis”.<sup>276</sup> The Trial Chamber based this finding on the “collective testimonies” of Prosecution Witnesses AZN, AYQ, and BAU.<sup>277</sup>

116. Ntawukulilyayo submits that the Trial Chamber erred in: (i) finding that Witnesses AZN, AYQ, and BAU corroborated each other;<sup>278</sup> (ii) its assessment of Witness AZN’s testimony;<sup>279</sup> (iii) its assessment of Witness AYQ’s testimony;<sup>280</sup> (iv) its assessment of Witness BAU’s testimony;<sup>281</sup> and (v) its assessment of alleged exculpatory evidence.<sup>282</sup> He submits that no reasonable trier of fact could have disregarded the succession of difficulties in, and based a conviction on, the testimonies of Witnesses AYQ, AZN, and BAU.<sup>283</sup> Accordingly, he requests that the Appeals Chamber vacate the Trial Chamber’s findings in respect of the Kabuye hill attack.<sup>284</sup>

117. The Appeals Chamber will examine Ntawukulilyayo’s allegations of error in turn.

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<sup>274</sup> Trial Judgement, paras. 18, 303, 453.

<sup>275</sup> Trial Judgement, paras. 18, 303, 453.

<sup>276</sup> Trial Judgement, paras. 303, 453. *See also ibid.*, para. 18.

<sup>277</sup> Trial Judgement, para. 286. *See also ibid.*, paras. 17, 291.

<sup>278</sup> Notice of Appeal, paras. 14, 15; Appeal Brief, paras. 93-109. *See also* Reply Brief, paras. 37-43.

<sup>279</sup> Notice of Appeal, para. 16; Appeal Brief, paras. 131-143.

<sup>280</sup> Notice of Appeal, para. 17; Appeal Brief, paras. 110-121. *See also* Reply Brief, paras. 44, 45.

<sup>281</sup> Notice of Appeal, para. 18; Appeal Brief, paras. 122-130.

<sup>282</sup> Notice of Appeal, paras. 19-21; Appeal Brief, paras. 144-152. *See also* Reply Brief, para. 46. In his Notice of Appeal, Ntawukulilyayo also submits that the Trial Chamber erred in relying on the circumstantial evidence of his subsequent activities to establish his involvement in the Kabuye hill killings. *See* Notice of Appeal, para. 22 (French). Ntawukulilyayo does not reiterate or develop this submission in his Appeal Brief or Reply Brief. The Appeals Chamber therefore considers that Ntawukulilyayo has abandoned this argument.

<sup>283</sup> Appeal Brief, para. 157.

<sup>284</sup> Notice of Appeal, paras. 15, 21, 22; Appeal Brief, para. 158.

### **A. Alleged Lack of Corroboration of Witnesses AZN, AYQ, and BAU**

118. The Trial Chamber found that the testimonies of Witnesses AZN, AYQ, and BAU regarding Ntawukulilyayo's role in the attack at Kabuye hill were similar on the following points: Ntawukulilyayo arrived on Saturday, 23 April 1994;<sup>285</sup> Ntawukulilyayo was accompanied by security personnel who subsequently attacked the refugees in coordination with communal police;<sup>286</sup> and Ntawukulilyayo's presence at Kabuye hill was "relatively brief".<sup>287</sup> The Trial Chamber noted some variances between the witnesses' testimonies, such as in the time of day that Ntawukulilyayo arrived, and the type of security personnel who accompanied him, but considered these differences to be immaterial.<sup>288</sup> It concluded that their collective evidence established Ntawukulilyayo's arrival in the late afternoon or evening of Saturday, 23 April 1994, with soldiers.<sup>289</sup> The Trial Chamber also noted variances in whether the witnesses saw Kalimanzira arrive with Ntawukulilyayo, as well as the vehicle in which the witnesses saw Ntawukulilyayo arrive at Kabuye hill, but considered these differences to be immaterial and reasonably explained.<sup>290</sup> The Trial Chamber considered the collective testimonies of Witnesses AZN, AYQ, and BAU to be "consistent" and "compelling",<sup>291</sup> and accordingly convicted Ntawukulilyayo for ordering and aiding and abetting genocide based on the events they recounted.<sup>292</sup>

119. Ntawukulilyayo submits that the Trial Chamber erred in finding that Witnesses AZN, AYQ, and BAU corroborated each other.<sup>293</sup> In particular, he contends that no reasonable trier of fact could have disregarded the inexplicable and irreconcilable inconsistencies in their testimonies regarding the time of his alleged arrival at Kabuye hill, the category and number of security personnel who accompanied him, the presence of Kalimanzira, and the vehicle used.<sup>294</sup> Ntawukulilyayo argues that "[t]he only common thread in the testimonies of [Witnesses AZN, AYQ, and BAU] [...] is their having belatedly ascribed a criminal nature to the role of Ntawukulilyayo, simply because of his status as a former official and his inability to protect his people."<sup>295</sup> He further asserts that "there is no knowing what decision [the Trial Chamber] would have made if it had correctly found that the

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<sup>285</sup> Trial Judgement, para. 285.

<sup>286</sup> Trial Judgement, paras. 285, 286.

<sup>287</sup> Trial Judgement, para. 287. *See also ibid.*, para. 291.

<sup>288</sup> Trial Judgement, paras. 285, 286, 288.

<sup>289</sup> Trial Judgement, para. 303. *See also ibid.*, paras. 286, 291.

<sup>290</sup> Trial Judgement, paras. 289, 290.

<sup>291</sup> Trial Judgement, paras. 17, 286, 291.

<sup>292</sup> Trial Judgement, paras. 18, 303, 454, 455, 457.

<sup>293</sup> Notice of Appeal, paras. 14, 15; Appeal Brief, paras. 93-109. *See also* Reply Brief, paras. 37-43.

<sup>294</sup> Appeal Brief, paras. 93-107; Reply Brief, paras. 38-43.

<sup>295</sup> Appeal Brief, para. 153. *See also ibid.*, paras. 154-157.

alleged material facts were inconsistent”, and that, considered separately, each of the witnesses’ accounts was implausible.<sup>296</sup>

120. The Prosecution responds that, because the testimonies of Witnesses AZN, AYQ, and BAU were *prima facie* credible and compatible as a sequence of linked facts, the Trial Chamber reasonably found that corroboration existed.<sup>297</sup> It contends that any variances between their testimonies were minor, and that Ntawukulilyayo fails to show that the Trial Chamber’s assessment was unreasonable.<sup>298</sup>

121. The Appeals Chamber recalls that “two testimonies corroborate one another when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or a sequence of linked facts.”<sup>299</sup> The Trial Chamber’s findings reflect that it considered Witnesses AZN, AYQ, and BAU to have each testified that, on 23 April 1994, Ntawukulilyayo came to Kabuye hill with security personnel who participated in the attack there after he left.<sup>300</sup> Ntawukulilyayo does not contest the Trial Chamber’s determination that the witnesses’ testimonies were compatible in these respects, but rather its assessment of the points on which they diverge. The Appeals Chamber recalls that corroboration may exist even when some details differ between testimonies.<sup>301</sup> The salient issue is whether they differ to such an extent as to render the testimonies of the witnesses incompatible with one another.<sup>302</sup>

#### 1. Time-frame

122. With respect to the time of day when Ntawukulilyayo arrived at Kabuye hill, the Trial Chamber noted that Witness AZN recounted that Ntawukulilyayo arrived in the morning whereas Witnesses AYQ and BAU each referred to him arriving “later in the day”,<sup>303</sup> “on the afternoon of Saturday 23 April.”<sup>304</sup> However, it found that “the difference, in this instance, is immaterial in light

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<sup>296</sup> Appeal Brief, para. 108. *See also* Notice of Appeal, para. 15; Appeal Brief, para. 15.

<sup>297</sup> Response Brief, para. 69.

<sup>298</sup> Response Brief, paras. 70-92. *See also* AT. 26 September 2011 pp. 33-36.

<sup>299</sup> *Bikindi* Appeal Judgement, para. 81, *citing Nahimana et al.* Appeal Judgement, para. 428. *See also Karera* Appeal Judgement, paras. 173, 192.

<sup>300</sup> Trial Judgement, paras. 270, 285-287.

<sup>301</sup> *Munyakazi* Appeal Judgement, para. 71, *citing Nahimana et al.* Appeal Judgement, para. 428. *See also Setako* Appeal Judgement, para. 31; *Rukundo* Appeal Judgement, para. 201; *Bikindi* Appeal Judgement, para. 81.

<sup>302</sup> *Munyakazi* Appeal Judgement, para. 103; *Bikindi* Appeal Judgement, para. 81; *Karera* Appeal Judgement, paras. 173, 192; *Nahimana et al.* Appeal Judgement, para. 428.

<sup>303</sup> Trial Judgement, para. 288.

<sup>304</sup> Trial Judgement, para. 270.

of the traumatic nature of the events, particularly given that Witness AZN had experienced an attack the night before, as well as the passage of time since the attack.”<sup>305</sup>

123. Ntawukulilyayo submits that the discrepancy with regard to the time of arrival is such that no reasonable trier of fact could have characterized it as an “immaterial difference” that could be explained by the passage of time and the traumatic nature of the events.<sup>306</sup> In this context, he points out that: (i) Witness AZN placed the event in the early morning; (ii) Witness AYQ categorically stated that it took place around 4.00 p.m.; and (iii) Witness BAU testified that Ntawukulilyayo arrived at night.<sup>307</sup>

124. The Trial Chamber did not explicitly state that the testimonies of Witnesses AYQ and BAU corroborated one another on this particular point. Nevertheless, the Appeals Chamber considers that such a view is implicit in the Trial Chamber’s language reflecting that Witnesses AZN, AYQ, and BAU testified to the same event,<sup>308</sup> and that Witnesses AYQ and BAU both referred to Ntawukulilyayo arriving at the same time of day.<sup>309</sup> The Trial Chamber’s finding that Ntawukulilyayo arrived at Kabuye hill “[i]n the late afternoon or evening” of Saturday,<sup>310</sup> 23 April 1994 implies that the Trial Chamber considered the evidence of Witnesses AYQ and BAU to be more reliable than Witness AZN’s evidence in this respect. In this regard, the Appeals Chamber considers that Ntawukulilyayo does not demonstrate that it was unreasonable for the Trial Chamber to reject the portion of Witness AZN’s testimony relating to the time of day at which he saw Ntawukulilyayo at Kabuye hill for the reasons provided.<sup>311</sup>

125. With respect to the testimonies of Witnesses AYQ and BAU, however, a review of the trial record shows that they were not as similar in respect of the time of day Ntawukulilyayo came to Kabuye hill as the Trial Chamber’s reasoning suggests. Witness AYQ testified that Ntawukulilyayo arrived at around 4.00 p.m.,<sup>312</sup> whereas Witness BAU saw him come to Kabuye hill on

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<sup>305</sup> Trial Judgement, para. 288.

<sup>306</sup> Appeal Brief, para. 94.

<sup>307</sup> Appeal Brief, para. 94 (French). *See also* Reply Brief, para. 38; AT. 26 September 2011 pp. 17, 18.

<sup>308</sup> Trial Judgement, para. 271 (“In the Chamber’s view, Witness AZV’s account is sufficiently different from the evidence of Witnesses AZN, AYQ and BAU to indicate that she is talking about a separate event.”).

<sup>309</sup> Trial Judgement, paras. 270 (“Witnesses AYQ and BAU each said that Ntawukulilyayo came to Kabuye hill [...] on the afternoon of Saturday 23 April.”), 288 (“It is recalled that Witness AZN recounted that Ntawukulilyayo arrived in the morning, while Witnesses AYQ and BAU referred to him arriving later in the day.”).

<sup>310</sup> Trial Judgement, para. 303. *See also ibid.*, para. 18.

<sup>311</sup> The Appeals Chamber recalls that a Trial Chamber may rely on a part of a witness’s testimony and reject other parts. *See, e.g., Setako* Appeal Judgement, para. 48; *Muvunyi* Appeal Judgement of 1 April 2011, para. 44; *Renzaho* Appeal Judgement, para. 425.

<sup>312</sup> Witness AYQ, T. 11 May 2009 pp. 11 (“[A]t about 4 o’clock in the afternoon, Dominique’s vehicle came [to Kabuye hill].”), 13 (“Q. Now, Witness, what time of day was it when Dominique arrived at Kabuye hill? A. About 4 o’clock in the afternoon.”), 33 (“Q. According to you, you saw Callixte Kalimanzira and the *sous-préfet*, Ntawukulilyayo at the hill, right? A. Yes. Q. [...] Can you remind us at what time did you see them arrive there? A. If I were to make an

two occasions, the first “around 5:30 p.m.”, and the second time “at night” when he brought armed security personnel.<sup>313</sup> The Trial Chamber relied on Witness BAU’s second sighting of Ntawukulilyayo in support of its finding of guilt.<sup>314</sup>

126. Given that the Trial Chamber’s conviction rests in part on its finding that Ntawukulilyayo substantially contributed to the killings at Kabuye hill by bringing soldiers there,<sup>315</sup> the Appeals Chamber considers that the Trial Chamber should have expressly addressed the difference between “around 4.00 p.m.” and “at night” as the time at which Ntawukulilyayo allegedly brought those soldiers.

127. However, the Trial Judgement reveals that the Trial Chamber did not ignore the difference between the timing of the sightings of Witnesses AYQ and BAU. While the Trial Chamber initially misstated the evidence when stating that “Witnesses AYQ and BAU *each* said that Ntawukulilyayo came to Kabuye hill accompanied by Callixte Kalimanzira and security personnel *on the afternoon of Saturday 23 April*”,<sup>316</sup> its conclusion that Ntawukulilyayo arrived on Kabuye hill with Kalimanzira and soldiers “[i]n the late afternoon or evening of Saturday 23 April 1994”<sup>317</sup> reflects that the Trial Chamber was indeed aware of Witnesses AYQ’s and BAU’s differing testimonies with respect to timing. In the Appeals Chamber’s view, this finding implies that the Trial Chamber was convinced beyond reasonable doubt that Witnesses AZN, AYQ, and BAU described the same incident notwithstanding the differences in their evidence as to the time of day when this incident occurred.

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estimate, starting from the time when we got there and taking into account the time they got there, I would say that they got there at around 4 o'clock in the afternoon.”). *See also* Trial Judgement, para. 107.

<sup>313</sup> Witness BAU, T. 12 May 2009 pp. 64 (“Q. When you arrived at Kabuye hill, did you at any time see – or did Dominique Ntawukulilyayo come to that location? A. Yes. At night Dominique came there with Kalimanzira, policemen and soldiers.”), 65 (“Q. What did Dominique do at that point when he arrived? A. It was at night. Dominique asked the soldiers and policemen to get out of the vehicles. And then Dominique and his neighbour left in the same vehicle.”) and T. 13 May 2009 pp. 45, 46 (“Q. Mr. Witness, when you were on the hill [on 23 April 1994], [...] [w]hen did you find yourself in the presence of the *sous-préfet*, Dominique Ntawukulilyayo? A. Actually, Dominique Ntawukulilyayo came to that place twice. [...] On the first occasion, he came there around 5:30 p.m. [...] Q. And on the second occasion? [...] A. They came during the night. That is on the second occasion.”). *See also* Trial Judgement, paras. 113, 280, 281.

<sup>314</sup> Trial Judgement, paras. 280-282, 286. The Trial Chamber found that Witness BAU’s testimony “as it emerged, about how many times Ntawukulilyayo came to Kabuye hill [...] was a little confusing” (*see ibid.*, para. 280), but did not reject his testimony in this regard (*see ibid.*, paras. 280-282, 286).

<sup>315</sup> Trial Judgement, para. 454.

<sup>316</sup> Trial Judgement, para. 270 (emphasis added).

<sup>317</sup> Trial Judgement, para. 303. *See also ibid.*, paras. 18 (“Accordingly, the Majority finds as follows: Ntawukulilyayo arrived at Kabuye hill, with Callixte Kalimanzira and soldiers in the late afternoon or early evening of 23 April. Ntawukulilyayo stopped at the hill, allowing the soldiers to exit.”), 393 (“The Chamber, Judge Akay dissenting, found that in the late afternoon or evening of that day, Ntawukulilyayo arrived on Kabuye hill in a vehicle along with Callixte Kalimanzira and soldiers.”), 424 (“Later that [Saturday, 23 April 1994], Ntawukulilyayo and Kalimanzira arrived on Kabuye hill with soldiers.”), 453 (“Later that [Saturday, 23 April 1994], Ntawukulilyayo and Kalimanzira arrived on Kabuye hill with soldiers.”).

128. The Appeals Chamber notes that, while the witnesses' testimonies differed on timing, the Trial Chamber nevertheless considered that they contained "striking" similarities.<sup>318</sup> The Appeals Chamber finds this assessment to be a reasonable one. All three witnesses suggested that Ntawukulilyayo arrived on Saturday, 23 April 1994, accompanied by security personnel who subsequently attacked the refugees in coordination with communal police, and that Ntawukulilyayo stayed only for a relatively brief period.<sup>319</sup> Witnesses BAU and AYQ also both testified that Ntawukulilyayo was accompanied by Kalimanzira.<sup>320</sup> The Appeals Chamber further observes that Witness AYQ was uncertain about the time in the afternoon when the events occurred, and that her references to seeing Ntawukulilyayo on Kabuye hill at "around" 4.00 p.m. were merely an estimate.<sup>321</sup> In this regard, the Appeals Chamber considers that the witnesses' differing recollections of the time Ntawukulilyayo dropped off soldiers at Kabuye hill on Saturday, 23 April 1994 may also reasonably be attributed to the traumatic nature of the events that day, and to the passage of time, which, according to the Trial Chamber, explained other discrepancies in their testimonies.<sup>322</sup>

129. Accordingly, while the Appeals Chamber finds that the Trial Chamber should have expressly addressed the difference between Witnesses AYQ's and BAU's testimonies in respect of the timing of Ntawukulilyayo's arrival, it considers that, notwithstanding such difference, it was within the Trial Chamber's discretion to accept the fundamental features of the witnesses' evidence.

130. The Appeals Chamber finds that Ntawukulilyayo has failed to demonstrate that the Trial Chamber's assessment of Witnesses AZN's, AYQ's, and BAU's evidence regarding the time of day at which they saw him at Kabuye hill was unreasonable.

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<sup>318</sup> See Trial Judgement, para. 288.

<sup>319</sup> Witness AZN, T. 6 May 2009 pp. 12-14; Witness AYQ, T. 11 May 2009 pp. 11, 33; Witness BAU, T. 12 May 2009 pp. 64, 65 and T. 13 May 2009 pp. 45, 46. See also Trial Judgement, para. 285.

<sup>320</sup> Witness AYQ, T. 11 May 2009 p. 33; Witness BAU, T. 12 May 2009 p. 64 and T. 13 May 2009 p. 46.

<sup>321</sup> Witness AYQ, T. 11 May 2009 pp. 11 ("It is very difficult for me to give you the time it took us to cover [the] distance [between Gisagara market and Kabuye hill]. In fact, I cannot give you an estimate of the time it took us to cover the distance."), 32 ("It is difficult for me to give you the time because at that time we were really afraid. So, it's difficult for me to tell you whether we left Gisagara [for example] at one or two in the afternoon. It's not easy for me to actually give you the time when we left Gisagara. And it's equally difficult for me to give you the time when we arrived in Kabuye because if I attempt to do that then I would be telling a lie. [...] I think that we should not dwell on the issue of time because I was not wearing a watch. [...] [E]ven people who were wearing watches did not have the mind to actually look at their watches."), 33 ("Q. [...] Can you remind us at what time did you see [Ntawukulilyayo and Kalimanzira] arrive [at Kabuye hill]? A. If I were to make an estimate, starting from the time when we got there and taking into account the time they got there, I would say that they got there at around 4 o'clock in the afternoon."). See also Witness AYQ, T. 11 May 2009 p. 35 (French).

<sup>322</sup> See Trial Judgement, paras. 230, 232, 238, 277, 283, 288-290.

## 2. Security Personnel

131. The Trial Chamber noted that Witnesses AZN, AYQ, and BAU each testified that Ntawukulilyayo came to Kabuye hill on 23 April 1994 accompanied by “security personnel”,<sup>323</sup> and found that “[b]ased on the[ir] collective testimonies [...] Ntawukulilyayo transported *soldiers* to Kabuye hill on Saturday 23 April, who subsequently attacked refugees there in coordination with communal police.”<sup>324</sup>

132. Ntawukulilyayo submits that the testimonies of Witnesses AZN, AYQ, and BAU regarding the category and number of security personnel alleged to have accompanied him and participated in the attack differed to such an extent that no reasonable trier of fact could have concluded that the evidence was sufficient and compelling.<sup>325</sup> He contends that the Trial Chamber deliberately ignored the material inconsistencies in the numbers and categories of security personnel attested to by these witnesses.<sup>326</sup>

133. The Appeals Chamber notes that Witness AZN testified that Ntawukulilyayo brought soldiers to Kabuye hill, but did not specify how many,<sup>327</sup> and conceded that he had difficulties distinguishing between soldiers and gendarmes.<sup>328</sup> In his prior statement of 2008, Witness AZN indicated that Ntawukulilyayo came to Kabuye hill “with gendarmes or soldiers. They could be more than ten of them [*sic*].”<sup>329</sup> Witness AYQ also testified that Ntawukulilyayo brought soldiers to Kabuye hill, specifying that four of them alighted from his car and that their military uniforms were distinct from those worn by policemen.<sup>330</sup> In the *Kalimanzira* case, however, she testified that, when Ntawukulilyayo and Kalimanzira came to Kabuye hill, “[t]hey were accompanied by police officers and soldiers.”<sup>331</sup> Witness BAU testified that the second time he saw Ntawukulilyayo come to Kabuye hill, Ntawukulilyayo dropped off policemen and soldiers, but did not specify how

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<sup>323</sup> Trial Judgement, para. 285.

<sup>324</sup> Trial Judgement, para. 286 (emphasis added). *See also ibid.*, paras. 303, 453.

<sup>325</sup> Appeal Brief, para. 97. *See also* Reply Brief, paras. 38, 41; AT. 26 September 2011 p. 18. Ntawukulilyayo argues that: (i) Witness AYQ testified to seeing four soldiers, which she distinguished from communal policemen, thereby making her reference to policemen in a previous testimony “troubling”; (ii) Witness AZN spoke only of soldiers, but explained in his statement of 2008 that there were “probably a little more than ten of them”; and (iii) Witness BAU spoke of both soldiers and policemen and was equally able to identify them as such, which also made his reference only to gendarmes/soldiers in previous statements and testimonies “troubling”, and his testimony in this case suggests that they might have come in large numbers. *See* Appeal Brief, para. 101.

<sup>326</sup> Appeal Brief, paras. 98-102.

<sup>327</sup> Witness AZN, T. 6 May 2009 pp. 12-14. *See also* Trial Judgement, paras. 98, 285.

<sup>328</sup> Witness AZN, T. 6 May 2009 p. 25 and T. 7 May 2009 p. 3. *See also* Trial Judgement, para. 285.

<sup>329</sup> Exhibit D4(E) (Witness AZN’s Statement of 29 October 2008), p. 3.

<sup>330</sup> Witness AYQ, T. 11 May 2009 pp. 11, 12, 34, 37. *See also* Trial Judgement, paras. 107, 285.

<sup>331</sup> Exhibit D8(E) (Transcript Excerpts of Witness AYQ’s Testimony of 9 May 2008 in the *Kalimanzira* Case), p. 29 (transcript pagination).

many.<sup>332</sup> In the *Kalimanzira* case, Witness BAU also testified to soldiers and policemen accompanying Ntawukulilyayo and Kalimanzira to Kabuye hill, and indicated that there were “many” of them.<sup>333</sup> His prior statement of 2003 indicates, however, that the two dignitaries came to Kabuye hill in two separate vehicles “full of gendarmes”.<sup>334</sup>

134. Contrary to Ntawukulilyayo’s contention, the Trial Chamber acknowledged that there was some confusion in the categories of security personnel attested to by Witnesses AZN, AYQ, and BAU.<sup>335</sup> However, it deemed the confusion to be immaterial “[g]iven that they were civilians unaffiliated with the military or civilian security forces”, and “[i]n view of the traumatic circumstances in which the observations were made, the significant passage of time, as well as varying vantage points and abilities to differentiate between armed security agents”.<sup>336</sup> The Appeals Chamber considers that the Trial Chamber’s assessment of the witnesses’ actual abilities to distinguish between the different categories of security personnel was not unreasonable, despite Witnesses AYQ’s and BAU’s evidence that they could distinguish soldiers from policemen. Reiterating also that corroboration may exist even when some details differ between testimonies,<sup>337</sup> the Appeals Chamber finds that Ntawukulilyayo fails to demonstrate any error in the Trial Judgement in this respect.

135. As to the number of security personnel alleged to have accompanied Ntawukulilyayo to Kabuye hill, the Appeals Chamber notes that the Trial Chamber did not explicitly address the differences in the testimonies of Witnesses AZN, AYQ, and BAU on this point.<sup>338</sup> However, there is no indication that the Trial Chamber ignored their evidence in this regard. The Appeals Chamber recalls that a Trial Chamber is not required to articulate every step of its reasoning for each finding it makes.<sup>339</sup> The Trial Chamber was thus not required to explain that the differences in the testimonies of Witnesses AZN, AYQ, and BAU about the security personnel who accompanied Ntawukulilyayo to Kabuye hill were immaterial. The Appeals Chamber considers that the same reasons which explain differences in testimony regarding the category of security personnel – that

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<sup>332</sup> Witness BAU, T. 12 May 2009 pp. 64, 65 and T. 13 May 2009 p. 47. The Appeals Chamber notes that, during Witness BAU’s testimony, the word “gendarmes” was sometimes used interchangeably with “soldiers” in the context of this event. See Witness BAU, T. 13 May 2009 pp. 53, 54 (French). See also Trial Judgement, paras. 280, 281, 285, fn. 421.

<sup>333</sup> Exhibit D17(E) (Transcript Excerpts of Witness BAU’s Testimony of 5 and 12 May 2008 in the *Kalimanzira* Case), p. 13 (transcript pagination).

<sup>334</sup> Exhibit D15(E) (Witness BAU’s Statement of 27 March 2003), p. 3.

<sup>335</sup> Trial Judgement, paras. 285, 286.

<sup>336</sup> Trial Judgement, para. 286. See also *ibid.*, fn. 421.

<sup>337</sup> See *supra*, para. 24, fn. 61.

<sup>338</sup> See Trial Judgement, paras. 98, 107, 113.

<sup>339</sup> See, e.g., *Nchamihigo* Appeal Judgement, para. 165; *Krajišnik* Appeal Judgement, para. 139; *Musema* Appeal Judgement, paras. 18, 20.

is, the traumatic circumstances in which the observations were made, the significant passage of time, and varying vantage points<sup>340</sup> – are also reasonably applicable to differences in the number of security personnel.<sup>341</sup>

136. For these reasons, Ntawukulilyayo has failed to demonstrate that the Trial Chamber was unreasonable in concluding that the collective testimonies of Witnesses AZN, AYQ, and BAU established that Ntawukulilyayo transported soldiers to Kabuye hill on 23 April 1994.

### 3. Presence of Kalimanzira

137. The Trial Chamber noted that Witnesses AYQ and BAU testified to seeing Ntawukulilyayo arrive at Kabuye hill with Kalimanzira, whereas Witness AZN “appears to have seen Ntawukulilyayo accompanied by a different person.”<sup>342</sup> The Trial Chamber observed that Witness AZN was not specifically asked about Kalimanzira’s presence at Kabuye hill and considered that his failure to see Kalimanzira could reasonably be explained by “varying vantage points, the passage of time and the traumatic nature of the events”.<sup>343</sup> The Trial Chamber also found that “any doubt left by the ambiguity about whether Witness AZN saw Kalimanzira” was eliminated by “parallels” in all three witnesses’ testimonies that Ntawukulilyayo was accompanied by soldiers and “the presence of these armed forces was significant in the minds of the refugees who would have wondered what their presence meant.”<sup>344</sup>

138. Ntawukulilyayo submits that the Trial Chamber unreasonably concluded that Witness AZN’s failure to see Kalimanzira was attributable to the witness’s focus on the presence of armed forces, because the witness spontaneously mentioned the presence of another person in Ntawukulilyayo’s vehicle, whom he named and referred to as being “the” person accompanying Ntawukulilyayo.<sup>345</sup> He contends that the contradiction between Witness AZN’s testimony and the testimonies of Witnesses AYQ and BAU was therefore irreconcilable.<sup>346</sup>

139. Contrary to the Trial Chamber’s finding and Ntawukulilyayo’s contention, Witness AZN did not testify that Ntawukulilyayo was accompanied by anyone else when he brought soldiers to

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<sup>340</sup> Trial Judgement, para. 286.

<sup>341</sup> In this respect, the Appeals Chamber notes that Witness AYQ testified to seeing four soldiers *in Ntawukulilyayo’s vehicle*, but was not asked whether she saw any other vehicles come to Kabuye hill with Ntawukulilyayo. See Witness AYQ, T. 11 May 2009 p. 12. *See also infra*, para. 145.

<sup>342</sup> Trial Judgement, para. 289, *referring to* Witness AZN, T. 6 May 2009 pp. 14-16 *and* Exhibit P2 (Names written by Witness AZN).

<sup>343</sup> Trial Judgement, para. 289.

<sup>344</sup> Trial Judgement, para. 289.

<sup>345</sup> Appeal Brief, para. 103.

<sup>346</sup> Appeal Brief, para. 104.

Kabuye hill on 23 April 1994. Rather, it was with respect to a prior sighting at Gisagara market that Witness AZN testified that Ntawukulilyayo was “transporting someone in his car from our area”.<sup>347</sup> The Trial Chamber therefore misconstrued the evidence in this respect.

140. The Trial Chamber correctly observed that Witness AZN was not specifically asked about Kalimanzira’s presence at Kabuye hill.<sup>348</sup> There is therefore no basis for the Trial Chamber’s conclusion that Witness AZN “fail[ed] to see [Kalimanzira]”, or that there was “ambiguity” in his testimony in this regard.<sup>349</sup> Equally, there is no basis for Ntawukulilyayo’s contention that Witness AZN’s testimony contradicts that of Witnesses AYQ and BAU on the matter. In this respect, the Appeals Chamber considers Ntawukulilyayo’s argument that Witness AZN would certainly have mentioned Kalimanzira’s presence, if indeed he had seen him at Kabuye hill, to be speculative and unsubstantiated.<sup>350</sup> In the absence of a demonstrable contradiction between the testimony of Witness AZN and that of Witnesses AYQ and BAU regarding the presence of Kalimanzira at Kabuye hill, Ntawukulilyayo fails to demonstrate that the Trial Chamber was unreasonable in concluding that the collective testimonies of Witnesses AZN, AYQ, and BAU were consistent.

141. Ntawukulilyayo’s arguments in this respect are therefore dismissed.

#### 4. Vehicles Used

142. With respect to the vehicle in which Ntawukulilyayo arrived at Kabuye hill, the Trial Chamber found:

Differences also emerge with respect to the vehicles described by the witnesses. Witness AYQ recalled that the sub-prefect and Kalimanzira arrived in a white vehicle, possibly a “berline ... saloon”. Witness BAU, however, testified that the two came in “double-cabin pickup trucks and they had a carrier behind them”. Witness AZN did not specify the make of the vehicle that he observed. These differences are also not material. Indeed, Witness AYQ conceded in cross-

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<sup>347</sup> Witness AZN, T. 6 May 2006 p. 15 (“Q. At the Gisagara market centre, how far away were you from Dominique? A. I think that between where Dominique was and where I was, the distance was about 10 metres. Q. And are you absolutely sure it was the same man you saw two or three times before as your *sous-préfet* that you saw at that location? A. I saw him. I recognised him, and amongst the people from our locality – or rather, I’d say that he was transporting someone in his car from our area, and if you wish, I can even give you the name of the person who was in the car of the Accused.”). See also Witness AZN, T. 6 May 2009 pp. 26, 27 (French). The witness wrote the name of the person in question on a piece of paper in the courtroom, which was then tendered as Exhibit P2. The name indicated was not that of Kalimanzira.

<sup>348</sup> See Trial Judgement, para. 289. The witness was not asked any questions about whether Ntawukulilyayo was accompanied by any persons other than soldiers at Kabuye hill, or about Kalimanzira during his testimony.

<sup>349</sup> Trial Judgement, para. 289.

<sup>350</sup> See Reply Brief, para. 42. Cf. *Munyakazi* Appeal Judgement, para. 85, citing *Kajelijeli* Appeal Judgement, para. 176 (“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.”).

examination that she could not tell the vehicle's make. Again, varying vantage points, the passage of time and the traumatic nature of the events reasonably explain these differences.<sup>351</sup>

143. Ntawukulilyayo submits that the Trial Chamber erred in downplaying the contradictions regarding the vehicle or vehicles used, particularly concerning the number of vehicles described, and that these disparities prove either that the witnesses did not observe the same scene or that they are lying.<sup>352</sup> He contends that no reasonable trier of fact would have found their testimonies to be corroborative.<sup>353</sup>

144. The Appeals Chamber notes that Witness AZN did not specify the make of the vehicle in which he observed Ntawukulilyayo arrive at Kabuye hill and only testified about one vehicle.<sup>354</sup> Witness AYQ also only testified about one white vehicle, the make of which she said she was unable to specify.<sup>355</sup> Witness BAU, however, testified that Ntawukulilyayo returned with Kalimanzira, as well as policemen and soldiers, in two double-cabin pick-up trucks with "a carrier behind them".<sup>356</sup>

145. The Appeals Chamber considers that the Trial Chamber was not unreasonable in considering these differences to be immaterial. The only discrepancy which may exist is in the number of vehicles seen, namely that Witnesses AZN and AYQ only testified about one vehicle, whereas Witness BAU specified that he saw two. In this respect, the Appeals Chamber notes that Witnesses AYQ and AZN only testified about the vehicle in which they saw Ntawukulilyayo arrive; they were not specifically asked whether they saw any other vehicles come to Kabuye hill.<sup>357</sup>

146. Ntawukulilyayo has not demonstrated any error in this respect and his arguments are therefore dismissed.

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<sup>351</sup> Trial Judgement, para. 290 (internal citations omitted).

<sup>352</sup> Appeal Brief, paras. 105-107.

<sup>353</sup> Appeal Brief, para. 107. *See also* Reply Brief, para. 43.

<sup>354</sup> Witness AZN, T. 6 May 2009 p. 12.

<sup>355</sup> Witness AYQ, T. 11 May 2009 pp. 11-13, 34.

<sup>356</sup> Witness BAU, T. 12 May 2009 pp. 64, 65 *and* T. 13 May 2009 pp. 45, 46. *See also* Trial Judgement, paras. 113, 290. Contrary to the Trial Chamber's statement, Witness BAU never specified the colour of the double-cabin pick-up truck which accompanied Ntawukulilyayo to Kabuye hill. *See* Trial Judgement, para. 113. Witness BAU testified that on the first occasion he saw Ntawukulilyayo on 23 April 1994 at Kabuye hill, Ntawukulilyayo arrived with policemen at around 5.30 p.m. in a double-cabin pick-up truck, followed by a khaki-coloured minibus. *See* Witness BAU, T. 13 May 2009 p. 45. Given that Witness BAU's second sighting of Ntawukulilyayo at Kabuye hill is the one that forms the basis of Ntawukulilyayo's conviction, only the portion of Witness BAU's testimony relating to seeing two double-cabin pick-up trucks with a carrier behind them is relevant here. *See supra*, para. 125.

<sup>357</sup> Witness AYQ, T. 11 May 2009 pp. 11-13; Witness AZN, T. 6 May 2009 p. 12.

## 5. Conclusion

147. The Appeals Chamber has not found any error in the Trial Chamber's determination that Witnesses AZN, AYQ, and BAU corroborated one another on the category and number of security personnel who accompanied Ntawukulilyayo, Kalimanzira's presence at Kabuye hill, and the vehicles used. The Appeals Chamber has, however, found that the Trial Chamber should have expressly addressed the difference between Witnesses AYQ's and BAU's testimonies regarding the time of Ntawukulilyayo's arrival at Kabuye hill. Nevertheless, the Appeals Chamber considers that it was within the Trial Chamber's discretion to accept the fundamental features of the witnesses' evidence, notwithstanding this discrepancy. The Appeals Chamber therefore finds no error in the Trial Chamber's conclusion that Witnesses AZN, AYQ, and BAU corroborated one another in relation to Ntawukulilyayo's role in the killings at Kabuye hill.

### **B. Alleged Errors in the Assessment of Witness AZN's Testimony**

148. The Trial Chamber noted that Witness AZN's testimony was ambiguous about whether he arrived at Kabuye hill on Thursday, 21 or Friday, 22 April 1994, but found that the ambiguity was insignificant and inferred that he arrived on 22 April 1994.<sup>358</sup> The Trial Chamber further noted that while Witness AZN's prior statements of June 1995, November 1995, and October 2008 discussed his observations at Kabuye hill, only his October 2008 statement referred to Ntawukulilyayo's presence there.<sup>359</sup> The Trial Chamber found that Witness AZN's failure to mention Ntawukulilyayo's role in his June and November 1995 statements was reasonable because Ntawukulilyayo was not the primary subject of those interviews conducted by Tribunal investigators.<sup>360</sup> The Trial Chamber considered that Witness AZN's evidence was "internally consistent and compelling".<sup>361</sup>

149. Ntawukulilyayo submits that the Trial Chamber erred in its assessment of Witness AZN's testimony.<sup>362</sup> He contends that the Trial Chamber failed to find that Witness AZN gave three divergent accounts of his transfer to Kabuye hill which were increasingly incriminating against Ntawukulilyayo.<sup>363</sup> Accordingly, he argues, the Trial Chamber ought to have doubted Witness AZN's sincerity about Ntawukulilyayo's role in the Kabuye hill killings on 23 April 1994, particularly since it doubted his sincerity about Ntawukulilyayo ordering refugees to go to Kabuye

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<sup>358</sup> Trial Judgement, para. 274.

<sup>359</sup> Trial Judgement, para. 275.

<sup>360</sup> Trial Judgement, paras. 275, 276.

<sup>361</sup> Trial Judgement, para. 276.

<sup>362</sup> Notice of Appeal, para. 16; Appeal Brief, paras. 131-143. *See also* AT. 26 September 2011 p. 17.

<sup>363</sup> Appeal Brief, paras. 132-136.

hill on 21 April 1994.<sup>364</sup> In addition, Ntawukulilyayo claims that the Trial Chamber erred in overlooking Witness AZN's omissions in his previous two statements regarding Ntawukulilyayo's conduct and presence at Kabuye hill.<sup>365</sup> He further contends that the Trial Chamber failed to address a major contradiction regarding the date of Ntawukulilyayo's arrival at Kabuye hill. In this context, he notes the disparity between Witness AZN's October 2008 statement, in which the witness stated that Ntawukulilyayo only came to Kabuye hill on "Friday", and his *viva voce* testimony given just six months later, in which he stated that Ntawukulilyayo came on "Saturday".<sup>366</sup> Ntawukulilyayo submits that such successive difficulties would have precluded a reasonable trier of fact from relying on Witness AZN's testimony.<sup>367</sup>

150. The Prosecution responds that the Trial Chamber did not err in its assessment of Witness AZN.<sup>368</sup>

151. The Appeals Chamber notes that the Trial Chamber specifically addressed and rejected Ntawukulilyayo's arguments relating to Witness AZN's belated incriminating allegations against Ntawukulilyayo.<sup>369</sup> Ntawukulilyayo merely repeats the same arguments on appeal, without demonstrating that the Trial Chamber's rejection thereof constituted an error.<sup>370</sup>

152. As to the alleged contradiction regarding the date of Ntawukulilyayo's arrival at Kabuye hill, the Appeals Chamber notes that Ntawukulilyayo did not raise this particular discrepancy when cross-examining Witness AZN,<sup>371</sup> but did so only in his Closing Brief.<sup>372</sup> Witness AZN therefore did not have an opportunity to respond to this allegation. Moreover, the fact that the Trial Chamber did not address or mention the alleged discrepancy does not necessarily mean that it did not consider it. In this respect, the Appeals Chamber reiterates that a Trial Chamber is not required to

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<sup>364</sup> Appeal Brief, paras. 132-136.

<sup>365</sup> Appeal Brief, paras. 138-140.

<sup>366</sup> Appeal Brief, para. 142.

<sup>367</sup> Appeal Brief, para. 143.

<sup>368</sup> Response Brief, paras. 72-75.

<sup>369</sup> Trial Judgement, paras. 275, 276.

<sup>370</sup> For instance, Ntawukulilyayo submits that the Trial Chamber "erroneously explained away [Witness AZN's] omission regarding the presence of Ntawukulilyayo in Kabuye by finding that, while [Witness AZN's] statement of November 1995 clearly mentioned Ntawukulilyayo, he was only named while he was in the company of Ndayambaje. Yet, in his incriminating and tardy statement of 2008, AZN clearly mentions the appearance of Ntawukulilyayo at Kabuye hill with Elie Ndayambaje, never mentioned hitherto. This inexplicable omission cast further doubt on the credibility of AZN." See Appeal Brief, para. 140 (internal citations omitted). However, the Trial Chamber specifically addressed the omission by noting that "Ndayambaje was not seen to have arrived on Kabuye hill with Ntawukulilyayo". See Trial Judgement, para. 276. The Trial Chamber also specifically addressed the reference to Ntawukulilyayo's appearance at Kabuye hill with Elie Ndayambaje by noting that "[a]lthough Witness AZN was confronted with his statement of 29 October 2008, which states that he saw 'Dominique and Elie at the hill', he explained that they came one after the other." See Trial Judgement, fn. 378, referring to Witness AZN, T. 7 May 2009 pp. 26, 27.

<sup>371</sup> Witness AZN, T. 6 May 2009 pp. 17-30 and T. 7 May 2009 pp. 2-34.

<sup>372</sup> Defence Closing Brief, para. 1139.

articulate every step of its reasoning for each finding it makes,<sup>373</sup> which in this case was that Witness AZN “appears to have testified that the sub-prefect arrived [...] on Saturday morning.”<sup>374</sup> The Appeals Chamber notes that Witness AZN’s recollection of the date of Ntawukulilyayo’s arrival at Kabuye hill derived from his recollection of the date of his own arrival at the hill,<sup>375</sup> which the Trial Chamber explicitly noted “lack[ed] clarity”.<sup>376</sup> A review of Witness AZN’s October 2008 statement also shows that he was confused about dates,<sup>377</sup> and the Trial Chamber noted as much.<sup>378</sup> The Trial Chamber considered that the ambiguity in the witness’s account about his own arrival at Kabuye hill was reasonably explained by “the traumatic nature of the events he would have experienced, as well as the significant passage of time between them and his evidence before this Tribunal”.<sup>379</sup> Ntawukulilyayo demonstrates no error in the Trial Chamber’s findings in this respect, and the Appeals Chamber considers that the same factors would also reasonably explain any problems in Witness AZN’s recollection of the date of Ntawukulilyayo’s arrival at Kabuye hill.

153. The Appeals Chamber now turns to Ntawukulilyayo’s submission that the Trial Chamber should have doubted Witness AZN’s credibility with respect to the events of 23 April 1994, as it had questioned his credibility with respect to the events of 21 April 1994. The Trial Chamber expressed its doubt about Witness AZN’s testimony that Ntawukulilyayo ordered refugees at the Gisagara market to go to Kabuye hill on Thursday, 21 April 1994 as follows:

Witness AZN’s October 2008 statement to Tribunal investigators also makes no reference to an order to send refugees to Kabuye hill. The Witness was not confronted with this specific omission. However, given that the statement concerned the Accused and the significance of the order to go to Kabuye hill, the omission raises questions regarding the Witness’ testimony that Ntawukulilyayo ordered the removal of the refugees that day. While it is possible that the Witness did not realise the importance of the order to go to Kabuye hill when providing his statement, *the omission nonetheless creates doubt about his testimony that Ntawukulilyayo gave one*. Thus, in this instance, the Chamber considers his evidence is insufficient to support a finding beyond reasonable doubt that Ntawukulilyayo directed refugees to Kabuye hill on the morning of Thursday 21 April.<sup>380</sup>

154. Having regard to the Trial Chamber’s reasoning as a whole, the Appeals Chamber considers that the Trial Chamber did not cast doubt upon the totality of the witness’s testimony, but rather found this particular uncorroborated aspect of his testimony to be insufficiently credible to be relied

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<sup>373</sup> See, e.g., *Nchamihigo* Appeal Judgement, para. 165; *Krajišnik* Appeal Judgement, para. 139; *Musema* Appeal Judgement, paras. 18, 20.

<sup>374</sup> Trial Judgement, para. 270.

<sup>375</sup> See Witness AZN, T. 6 May 2009 p. 12. See also Exhibit D4(E) (Witness AZN’s Statement of 29 October 2008), p. 3 (“We were at Kabuye on the Thursday, surrounded by soldiers and gendarmes. On Friday, I saw Dominique and Elie at the hill. On that same day Dominique returned to the hill.”).

<sup>376</sup> Trial Judgement, para. 274.

<sup>377</sup> Exhibit D4(E) (Witness AZN’s Statement of 29 October 2008), p. 3 (“I think the 19 April was a Wednesday. We were at Kabuye on the Thursday”). The Appeals Chamber notes that in 1994, 19 April was a Tuesday.

<sup>378</sup> Trial Judgement, fn. 372.

<sup>379</sup> Trial Judgement, para. 274.

upon for a finding beyond reasonable doubt. The Appeals Chamber notes that the Trial Chamber found Witness AZN's evidence with respect to Ntawukulilyayo's conduct and presence at Kabuye hill on 23 April 1994 to be "internally consistent and compelling".<sup>381</sup> A review of the Trial Judgement also shows that the Trial Chamber approached Witness AZN's evidence on Ntawukulilyayo's presence and role in the attack at Kabuye hill with caution,<sup>382</sup> only relying on it insofar as it was corroborated by the testimonies of Witnesses AYQ and BAU.<sup>383</sup>

155. Recalling that it is not unreasonable for a Trial Chamber to accept some parts of a witness's testimony while rejecting others,<sup>384</sup> the Appeals Chamber finds that Ntawukulilyayo has failed to demonstrate that the Trial Chamber erred in assessing Witness AZN's credibility.

### **C. Alleged Errors in the Assessment of Witness AYQ's Testimony**

156. The Trial Chamber noted a discrepancy between Witness AYQ's prior statement of March 2003 indicating that she saw Ntawukulilyayo come to Kabuye hill with Kalimanzira on Sunday around 2.00 p.m., and her testimony in this case that she saw him arrive on Saturday around 4.00 p.m.<sup>385</sup> However, it found the variation to be "slight", "immaterial", and "insufficient to raise doubt about her evidence."<sup>386</sup> The Trial Chamber also noted that, under cross-examination in the *Kalimanzira* trial, Witness AYQ testified that the soldiers and policemen who accompanied Ntawukulilyayo and Kalimanzira to Kabuye hill also left with them, while during her evidence-in-chief in that case, as well as her testimony in the present case, she stated that the soldiers stayed behind and participated in the attacks on the refugees.<sup>387</sup> The Trial Chamber nevertheless found that Witness AYQ's testimony under cross-examination in the *Kalimanzira* trial was "insufficient to cast doubt on her compelling evidence in these proceedings."<sup>388</sup>

157. Ntawukulilyayo submits that the Trial Chamber unreasonably minimized the contradiction regarding the date of Ntawukulilyayo's arrival at Kabuye hill.<sup>389</sup> In his view, the shift from Sunday to Saturday suggests an attempt by Witness AYQ to match the Indictment and the testimonies of

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<sup>380</sup> Trial Judgement, para. 213 (emphasis added).

<sup>381</sup> Trial Judgement, para. 276.

<sup>382</sup> Trial Judgement, paras. 274-276.

<sup>383</sup> Trial Judgement, paras. 271, 276, 285-291 303.

<sup>384</sup> See, e.g., *Setako* Appeal Judgement, para. 48; *Muvunyi* Appeal Judgement of 1 April 2011, para. 44; *Renzaho* Appeal Judgement, para. 425.

<sup>385</sup> Trial Judgement, para. 277.

<sup>386</sup> Trial Judgement, para. 277.

<sup>387</sup> Trial Judgement, para. 279.

<sup>388</sup> Trial Judgement, para. 279. The Trial Chamber also found that Witness AYQ consistently stated that Ntawukulilyayo and Kalimanzira left the hill prior to the attack. See *ibid.*, para. 278.

<sup>389</sup> Notice of Appeal, para. 17; Appeal Brief, paras. 111-114.

other Prosecution witnesses.<sup>390</sup> Ntawukulilyayo similarly argues that the Trial Chamber unreasonably minimized Witness AYQ's contradiction as to the time of Ntawukulilyayo's departure from Kabuye hill and that of the soldiers, particularly since her testimony in the *Kalimanzira* trial that the soldiers and Ntawukulilyayo left at the same time tended to exonerate Ntawukulilyayo, thereby creating a doubt from which he should have benefited.<sup>391</sup> Ntawukulilyayo further contends that the Trial Chamber erred in failing to consider a material contradiction between Witness AYQ's testimony in the *Kalimanzira* trial that Ntawukulilyayo went to Kabuye hill with policemen and soldiers, and her testimony in the present trial that he only went with soldiers.<sup>392</sup> He asserts that "[a] reasonable trier of fact could not have lent credence to [Witness AYQ's] testimony on the speculative ground of a recording error or even the passage of time."<sup>393</sup>

158. The Prosecution responds that the Trial Chamber did not err in its assessment of Witness AYQ's evidence regarding the Kabuye hill events.<sup>394</sup>

159. The Appeals Chamber notes that the Trial Chamber specifically addressed and rejected Ntawukulilyayo's arguments relating to the contradictions as to the date and time of Ntawukulilyayo's arrival at Kabuye hill, and in the role of security personnel accompanying Ntawukulilyayo,<sup>395</sup> which he raised at trial during Witness AYQ's cross-examination,<sup>396</sup> as well as in his Closing Brief.<sup>397</sup> Ntawukulilyayo largely repeats the evidence on the record and makes the same arguments on appeal, without demonstrating that the Trial Chamber's rejection thereof constituted an error. His submission that the Trial Chamber speculated in attributing the discrepancy to a recording error and the passage of time is unsubstantiated.<sup>398</sup>

160. Turning to the alleged discrepancy in the category of security personnel who accompanied Ntawukulilyayo, the Appeals Chamber notes that Witness AYQ testified in the present case that Ntawukulilyayo brought soldiers to Kabuye hill, specifying that she could recognize their military uniforms as distinct from those worn by policemen,<sup>399</sup> whereas in the *Kalimanzira* case, she

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<sup>390</sup> Appeal Brief, para. 111.

<sup>391</sup> Appeal Brief, paras. 115-119.

<sup>392</sup> Appeal Brief, paras. 120, 121.

<sup>393</sup> Appeal Brief, para. 113, *referring to* Trial Judgement, para. 277.

<sup>394</sup> Response Brief, paras. 76, 85, 87, 88.

<sup>395</sup> Trial Judgement, paras. 277, 279.

<sup>396</sup> Witness AYQ, T. 11 May 2009 pp. 33-38.

<sup>397</sup> Defence Closing Brief, paras. 1147-1150.

<sup>398</sup> The Appeals Chamber also sees no merit in Ntawukulilyayo's argument that this contradiction could not have been justified as an error in good faith given the witness's reaction when the discrepancy was put to her in this case. *See* Appeal Brief, para. 113.

<sup>399</sup> Trial Judgement, paras. 107, 285; Witness AYQ, T. 11 May 2009 p. 12. *See also supra*, para. 133, 134, fn. 330.

testified that Ntawukulilyayo brought both soldiers and policemen.<sup>400</sup> Ntawukulilyayo did not raise this particular discrepancy when cross-examining Witness AYQ, or when challenging her credibility in his Closing Brief.<sup>401</sup> Witness AYQ therefore did not have an opportunity to respond to this allegation, and the Trial Chamber could not determine whether there was merit in Ntawukulilyayo's present contention.<sup>402</sup> Given Witness AYQ's stated ability to distinguish soldiers from policemen, the Appeals Chamber considers that a discrepancy indeed exists between her testimony in the present case that Ntawukulilyayo brought soldiers, and her testimony in the *Kalimanzira* case that he brought both soldiers and policemen.

161. Nevertheless, the fact that the Trial Chamber did not mention this discrepancy in its reasoning does not necessarily mean that it did not consider it.<sup>403</sup> The Trial Chamber acknowledged that there was some confusion in the categories of security personnel attested to by Witnesses AZN, AYQ, and BAU, but deemed the confusion to be immaterial “[g]iven that they were civilians unaffiliated with the military or civilian security forces”, and “[i]n view of the traumatic circumstances in which the observations were made, the significant passage of time, as well as varying vantage points and abilities to differentiate between armed security agents”.<sup>404</sup> In this respect, the Appeals Chamber recalls its finding above that, despite Witnesses AYQ's and BAU's purported abilities to distinguish soldiers from policemen, the Trial Chamber's assessment and conclusion about their actual abilities to do so were reasonable.<sup>405</sup> Accordingly, the Appeals Chamber does not consider the discrepancy in Witness AYQ's testimony regarding the category of security personnel to be significant.

162. As such, Ntawukulilyayo has failed to show that the Trial Chamber erred in its assessment of the reliability of Witness AYQ's testimony with regard to Ntawukulilyayo's role and presence at Kabuye hill.<sup>406</sup>

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<sup>400</sup> Exhibit D8(E) (Transcript Excerpt of Witness AYQ's Testimony of 9 May 2008 in the *Kalimanzira* Case), p. 29 (transcript pagination).

<sup>401</sup> Witness AYQ, T. 11 May 2009 pp. 26-40; Defence Closing Brief, paras. 1145-1159. Ntawukulilyayo did not allege this particular discrepancy in his closing arguments either. *See* Defence Closing Arguments, T. 14 June 2010 pp. 43-72.

<sup>402</sup> *Cf. Kajelijeli* Appeal Judgement, para. 26.

<sup>403</sup> In this respect, the Appeals Chamber recalls that a Trial Chamber is not required to articulate every step of its reasoning for each finding it makes. *See supra*, para. 135, fn. 339.

<sup>404</sup> Trial Judgement, para. 286.

<sup>405</sup> *See supra*, para. 134.

<sup>406</sup> The Appeals Chamber recalls its finding above that Witness AYQ's testimony should have been treated with caution, and that since the Trial Chamber only relied on Witness AYQ's evidence to the extent that it was corroborated by other credible and reliable evidence, the Appeals Chamber considers that such caution was *de facto* applied. *See supra*, para. 58. The Appeals Chamber further recalls its finding that Ntawukulilyayo has failed to demonstrate that the Trial Chamber was unreasonable in concluding that the collective testimonies of Witnesses AZN, AYQ, and BAU established that Ntawukulilyayo transported soldiers to Kabuye hill on 23 April 1994. *See supra*, para. 147. As such, the Appeals Chamber considers that the Trial Chamber properly relied on Witness AYQ's testimony that she saw

#### **D. Alleged Errors in the Assessment of Witness BAU's Testimony**

163. The Trial Chamber noted that Witness BAU's testimony "about how many times Ntawukulilyayo came to Kabuye hill as well as who accompanied him was a little confusing."<sup>407</sup> The Trial Chamber nonetheless considered the variations in the witness's testimony in these respects to be "minor", "not significant", or "immaterial",<sup>408</sup> and accepted Witness BAU's mention of a second appearance by Ntawukulilyayo at Kabuye hill during which he dropped off armed security personnel who subsequently attacked refugees.<sup>409</sup> The Trial Chamber further noted a discrepancy between Witness BAU's *viva voce* testimony and March 2003 statement with respect to whether Ntawukulilyayo addressed the refugees at Kabuye hill, but found that the discrepancy "does not raise doubt about his consistent evidence that Ntawukulilyayo arrived on the hill with armed security personnel."<sup>410</sup>

164. Ntawukulilyayo submits that the Trial Chamber erroneously minimized Witness BAU's belated mention of a second appearance by Ntawukulilyayo at Kabuye hill, and unreasonably accepted the second appearance as being of primary importance.<sup>411</sup> He further submits that the Trial Chamber erred in disregarding the fact that Witness BAU evoked the presence of both soldiers and policemen with Ntawukulilyayo in his testimony in this case, whereas he had only mentioned "gendarmes/soldiers" in his prior statements and testimonies.<sup>412</sup> In addition, Ntawukulilyayo contends that the Trial Chamber failed to find that the witness's March 2003 statement contradicted his in-court testimony with regard to the role Ntawukulilyayo played and utterances he made.<sup>413</sup>

165. The Prosecution responds that the Trial Chamber's assessment of Witness BAU's evidence regarding Kabuye hill was reasonable.<sup>414</sup>

166. As recalled above, Witness BAU testified that he saw Ntawukulilyayo come to Kabuye hill twice on 23 April 1994, the first time at "around 5:30 p.m.", and the second time "at night".<sup>415</sup> In assessing the internal consistency of Witness BAU's evidence, the Trial Chamber accepted Witness BAU's sighting of Ntawukulilyayo "around 5:30 p.m.", which the witness mentioned for

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Ntawukulilyayo arrive with soldiers, as this aspect of her testimony was corroborated. Her testimony was also corroborated as to the date of Ntawukulilyayo's arrival at Kabuye hill, and the time of his departure therefrom.

<sup>407</sup> Trial Judgement, para. 280. *See also ibid.*, para. 281.

<sup>408</sup> Trial Judgement, paras. 282, 283.

<sup>409</sup> Trial Judgement, paras. 282, 284.

<sup>410</sup> Trial Judgement, para. 284, *referring to* Exhibit D15(E) (Witness BAU's Statement of 27 March 2003).

<sup>411</sup> Appeal Brief, paras. 123-125. Ntawukulilyayo points out that the witness testified to a second visit for the first time during cross-examination. *See ibid.*, para. 124.

<sup>412</sup> Appeal Brief, paras. 126, 127.

<sup>413</sup> Appeal Brief, paras. 128-130.

<sup>414</sup> Response Brief, paras. 78, 79, 83.

<sup>415</sup> *See supra*, para. 125, fn. 313.

the first time during his cross-examination in the present trial.<sup>416</sup> During cross-examination, Witness BAU was asked whether he had ever previously mentioned a second appearance by Ntawukulilyayo.<sup>417</sup> Witness BAU's credibility was also challenged on this basis in the Defence Closing Brief.<sup>418</sup> The Trial Chamber addressed all of Ntawukulilyayo's submissions before deciding that the discrepancy was minor and accepting the witness's attestation to Ntawukulilyayo's second appearance as being of primary importance.<sup>419</sup> Thus, contrary to Ntawukulilyayo's contention, the Trial Chamber did not "brush aside such a new fact emerging from [Witness BAU's] testimony".<sup>420</sup> Ntawukulilyayo's discontent with the Trial Chamber's decision fails to show any error therein.

167. With respect to the category of security personnel, Ntawukulilyayo claims that Witness BAU's *viva voce* testimony in the present trial that Ntawukulilyayo was accompanied by "soldiers and police officers" significantly contradicts his prior statements and testimony in the *Kalimanzira* case, wherein he "only mentioned gendarmes/soldiers".<sup>421</sup> The Appeals Chamber notes that Ntawukulilyayo alleges this discrepancy for the first time on appeal. Witness BAU therefore did not have an opportunity to respond to this allegation, and the Trial Chamber could therefore not determine whether there was merit in Ntawukulilyayo's present contention.<sup>422</sup> In any event, the Prosecution correctly points out that Witness BAU used the terms "soldiers", "policemen", and "gendarmes" interchangeably.<sup>423</sup> Accordingly, the Appeals Chamber finds no contradiction between "soldiers and police officers" and "gendarmes/soldiers". The Appeals Chamber further recalls its finding above that, despite Witnesses AYQ's and BAU's purported abilities to distinguish soldiers from policemen, the Trial Chamber's assessment of their actual abilities to do so was reasonable.<sup>424</sup> Accordingly, the Appeals Chamber finds no error in the Trial Chamber's assessment of Witness BAU's testimony regarding the type of security personnel accompanying Ntawukulilyayo to Kabuye hill.

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<sup>416</sup> See Trial Judgement, paras. 280-282.

<sup>417</sup> Witness BAU, T. 13 May 2009 p. 46 ("Q. Witness, did you mention anywhere in your various statements – I am referring to the one made on 27th of March, or the one 30th of October, 20th November, or during your appearance in the *Kalimanzira* case. Did you make any reference to this? A. I said that I refused to comment on a statement made [...] in the *Kalimanzira* case; whereas I made a statement for this Chamber."). The witness therefore had an opportunity to react to the alleged discrepancy. The Defence did not, however, pursue this line of questioning after Witness BAU refused to answer its question.

<sup>418</sup> Defence Closing Brief, paras. 1186-1189.

<sup>419</sup> Trial Judgement, paras. 280-282.

<sup>420</sup> Appeal Brief, para. 125.

<sup>421</sup> Appeal Brief, para. 126 (emphasis in original).

<sup>422</sup> Cf. *Kajelijeli* Appeal Judgement, para. 26.

<sup>423</sup> Witness BAU, T. 12 May 2009 pp. 64, 65 and T. 13 May 2009 pp. 46, 47. See also Trial Judgement, fn. 421. The Appeals Chamber notes that Witness BAU also expressed some difficulty in remembering "the type of clothes that someone was wearing at that time." See Witness BAU, T. 13 May 2009 p. 24.

<sup>424</sup> See *supra*, para. 134.

168. As to whether Ntawukulilyayo spoke to the refugees at Kabuye hill, the Appeals Chamber notes that the Trial Chamber specifically addressed the alleged discrepancy in Witness BAU's evidence in this respect and found that it did not raise doubt about the witness's "consistent evidence that Ntawukulilyayo arrived on the hill with armed security personnel."<sup>425</sup> Ntawukulilyayo's cursory assertion that the Trial Chamber erred in failing to find the alleged discrepancy to be a major contradiction falls short of demonstrating an error on the part of the Trial Chamber.

169. Accordingly, the Appeals Chamber finds that Ntawukulilyayo has failed to demonstrate that the Trial Chamber's assessment of Witness BAU's evidence on Kabuye hill was unreasonable.

#### **E. Alleged Errors in the Assessment of Alleged Exculpatory Evidence**

170. The Trial Chamber found that the evidence of Prosecution Witnesses AZI and AXY, who testified that they did not see Ntawukulilyayo on Kabuye hill, was "not necessarily inconsistent" with the accounts of Witnesses AZN, AYQ, and BAU because "given the tense circumstances at the time, it is possible that they would not have been in a position to see his arrival on the hill."<sup>426</sup> The Trial Chamber further found that the evidence of Defence Witness KAD, who also testified that she did not see Ntawukulilyayo there, was "of limited probative value given the chaotic circumstances that surrounded her departure from Gisagara and arrival at Kabuye hill, the size of the location and her position on the top of the hill when the attacks commenced."<sup>427</sup> Likewise, the Trial Chamber found that the evidence of Defence Witness Innocent Nziyomaze, a Gisagara *Gacaca* judge from October 2002 to March 2007 who testified that he never heard any direct evidence implicating Ntawukulilyayo in the Kabuye hill killings, was "of limited probative value."<sup>428</sup>

171. Ntawukulilyayo submits that the Trial Chamber erred in lending little or no credence to the evidence of Witnesses AZI, AXY, and KAD, all of whom survived the killings at Kabuye hill.<sup>429</sup> With respect to Witness KAD, Ntawukulilyayo submits that the Trial Chamber failed to provide adequate reasoning in disregarding her evidence, which included that she never heard that Ntawukulilyayo played a part in the killings at Kabuye hill,<sup>430</sup> and which was indirectly

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<sup>425</sup> Trial Judgement, para. 284.

<sup>426</sup> Trial Judgement, para. 292. *See also ibid.*, paras. 105, 119.

<sup>427</sup> Trial Judgement, para. 299. *See also ibid.*, para. 155.

<sup>428</sup> Trial Judgement, para. 301. *See also ibid.*, para. 190.

<sup>429</sup> Appeal Brief, para. 144.

<sup>430</sup> Appeal Brief, para. 145.

corroborated by Innocent Nziyomaze.<sup>431</sup> Ntawukulilyayo further submits that the Trial Chamber failed to analyze Witness KAD's testimony that there was no road leading to Kabuye hill in April 1994,<sup>432</sup> and that it distorted her evidence by incorrectly stating that she testified that some assailants came to Kabuye hill in vehicles.<sup>433</sup> Ntawukulilyayo contends that the Trial Chamber's failure to acknowledge that the testimonies of these witnesses raised a reasonable doubt in his favour amounts to reversing the burden of proof.<sup>434</sup>

172. The Prosecution responds that Ntawukulilyayo fails to show any error in the Trial Chamber's assessment of the evidence of Witnesses AZI, AXY, KAD, and Nziyomaze.<sup>435</sup> It contends that there was no shifting of the burden of proof onto the Defence.<sup>436</sup>

173. The Appeals Chamber summarily dismisses Ntawukulilyayo's cursory and unsubstantiated assertions of error in the Trial Chamber's assessment of Witnesses AZI's and AXY's testimonies. With respect to Witness KAD, the Appeals Chamber notes that Ntawukulilyayo's contention that the Trial Chamber "overlook[ed] the fact that she never heard about his presence during the three days she spent on the hill"<sup>437</sup> is incorrect, as the Trial Chamber clearly stated that "[a]t no point, while on the hill, did she see Ntawukulilyayo or hear that he had come."<sup>438</sup> As to Ntawukulilyayo's contention that the Trial Chamber distorted her evidence about the arrival of soldiers at Kabuye hill, the Appeals Chamber observes that the Trial Chamber stated that "Defence Witness KAD testified that soldiers and other assailants, some of whom arrived *on Kabuye hill* in vehicles, attacked and shot at the refugees that Saturday evening."<sup>439</sup> Although such language could suggest that Witness KAD was considered to have testified that the soldiers drove directly onto the hill, the Appeals Chamber observes that the Trial Chamber accurately noted that Witness KAD testified that some "soldiers and other attackers [...] arrived in vehicles *that stopped a short distance from Kabuye hill* while others came by foot [...] [and] mounted the hill on foot."<sup>440</sup> Thus, although the Trial Chamber could have used clearer language to reflect Witness KAD's testimony, the Appeals Chamber is not persuaded by Ntawukulilyayo's contention that the Trial Chamber misconstrued her evidence.

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<sup>431</sup> Appeal Brief, paras. 146-149.

<sup>432</sup> Appeal Brief, para. 151.

<sup>433</sup> Appeal Brief, para. 152.

<sup>434</sup> Appeal Brief, para. 150. *See also* Reply Brief, para. 46.

<sup>435</sup> Response Brief, paras. 93-98.

<sup>436</sup> Response Brief, para. 98.

<sup>437</sup> Appeal Brief, para. 145 (emphasis omitted).

<sup>438</sup> Trial Judgement, para. 155 (emphasis added).

<sup>439</sup> Trial Judgement, para. 292 (emphasis added).

<sup>440</sup> Trial Judgement, para. 154 (emphasis added).

174. Turning to Ntawukulilyayo's argument that the Trial Chamber failed to analyze Witness KAD's testimony that there was no road leading to Kabuye hill in April 1994, the Appeals Chamber notes that Witness KAD testified that, from her position at the summit of Kabuye hill,<sup>441</sup> she was able to observe that some of the assailants had come in vehicles "which they parked a little far off" before all of them climbed the hill on foot.<sup>442</sup> In the Appeals Chamber's view, her evidence clearly shows that vehicles were able to approach the hill and that they were within her sight from the hill's summit. Ntawukulilyayo therefore fails to show any error in the Trial Chamber's treatment of Witness KAD's evidence.

175. As to the contentions regarding Innocent Nziyomaze, Ntawukulilyayo largely repeats the evidence on the record,<sup>443</sup> without demonstrating that the Trial Chamber erred in considering that the witness's evidence was relatively general, unsupported, and of limited probative value.<sup>444</sup>

176. Based on the foregoing, the Appeals Chamber concludes that Ntawukulilyayo has not demonstrated that the Trial Chamber's assessment of Witnesses AZI, AXY, KAD, and Nziyomaze was unreasonable.

#### **F. Conclusion**

177. The Appeals Chamber has found no error in the Trial Chamber's conclusion that Witnesses AZN, AYQ, and BAU corroborated one another in relation to Ntawukulilyayo's role in the killings at Kabuye hill. The Appeals Chamber has also found no error in the Trial Chamber's assessment of the individual merit of the testimonies of Witnesses AZN, AYQ, and BAU, or in its assessment of Witnesses AZI, AXY, KAD, and Nziyomaze.

178. For the foregoing reasons, the Appeals Chamber dismisses Ntawukulilyayo's Second Ground of Appeal.

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<sup>441</sup> Witness KAD, T. 19 November 2009 p. 31.

<sup>442</sup> Witness KAD, T. 19 November 2009 p. 22.

<sup>443</sup> See Appeal Brief, paras. 146-149.

<sup>444</sup> See Trial Judgement, para. 301.

## V. ALLEGED ERRORS RELATING TO ORDERING (GROUNDS 3, IN PART, AND 4)

179. The Trial Chamber convicted Ntawukulilyayo of genocide pursuant to Article 6(1) of the Statute for ordering, as well as aiding and abetting, the killing of Tutsis at Kabuye hill.<sup>445</sup>

180. With respect to his conviction for ordering these killings, Ntawukulilyayo submits that the Trial Chamber erred in finding: (i) that he was provided with adequate notice that ordering was a mode of liability pursued by the Prosecution for the killings at Kabuye hill; (ii) that the *actus reus* for ordering genocide had been established; and (iii) that the only reasonable conclusion was that he had genocidal intent.<sup>446</sup> Ntawukulilyayo accordingly requests that the Appeals Chamber overturn his conviction for ordering genocide.<sup>447</sup>

181. The Prosecution responds that the Trial Chamber properly convicted Ntawukulilyayo of ordering genocide.<sup>448</sup>

182. The Appeals Chamber will turn first to Ntawukulilyayo's submissions regarding notice.

183. Ntawukulilyayo's conviction for ordering the killings at Kabuye hill was based on paragraphs 5, 7, and 8 of the Indictment,<sup>449</sup> which read as follows:

5. Pursuant to Section 6(1) of the Statute, the accused, **Dominique NTAWUKULILYAYO**, is individually responsible for the crimes of genocide or complicity in genocide because he instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of these crimes. With respect to the commission of those crimes, **Dominique NTAWUKULILYAYO** ordered those over whom he had effective control as a result of his position and authority described in paragraph 2, and he instigated and aided and abetted those over whom he did not have effective control. The particulars that give rise to his individual criminal responsibility are set forth in paragraphs 6 through 22.

7. On or about 23 April 1994, in the afternoon, **Dominique NTAWUKULILYAYO** ordered Tutsi who were gathered at [the] Gisagara market place that they were to move to Kabuye hill where they would be protected and fed. Those that were unwilling to go were chased to Kabuye hill. Upon arrival in the late afternoon or early evening, **Dominique NTAWUKULILYAYO** arrived with Callixte Kalimanzira at Kabuye hill in vehicles full of gendarmes. **Dominique NTAWUKULILYAYO** told the refugees that they would be protected by armed soldiers.

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<sup>445</sup> Trial Judgement, paras. 28, 457, 460, 461.

<sup>446</sup> Notice of Appeal, paras. 23-29, 31-33; Appeal Brief, paras. 159-202, 218-244; AT. 26 September 2011 pp. 7-15.

<sup>447</sup> Notice of Appeal, para. 33; Appeal Brief, paras. 217, 228, 244.

<sup>448</sup> Response Brief, paras. 5-7, 101-191.

<sup>449</sup> See Trial Judgement, paras. 206, 269, 400-409, fns. 252, 365, *referring also to, inter alia*, Indictment, para. 13 (“As a result of his actions, [Ntawukulilyayo] was responsible for the death of as many as 25000 Tutsi refugees who were killed at Kabuye hill during the period of 21 to 25 April 1994.”). In summarising the charges against Ntawukulilyayo relating to the Kabuye hill massacre, the Trial Chamber also referred to paragraphs 10 and 11 of the Indictment. These paragraphs relate to allegations that are different to those for which Ntawukulilyayo was ultimately convicted, and to paragraphs 19 through 22, which expressly relate to Ntawukulilyayo's superior responsibility under Article 6(3) of the Statute. See Trial Judgement, paras. 206, 269, 406, fns. 252, 365.

By ordering the Tutsi to go to Kabuye hill, **Dominique NTAWUKULILYAYO** aided and abetted in the killing of those Tutsi.

8. Within a short time of their arrival at Kabuye hill, on or about 23 April 1994, gendarmes and communal policemen had surrounded the hill and started shooting at the refugees. Many Tutsi were killed. By bringing the gendarmes to Kabuye hill, who, along with others took part in the killing of those Tutsi, **Dominique NTAWUKULILYAYO** committed and aided and abetted in the killing of those Tutsi.

184. The Trial Chamber found that, although “ordering” was not expressly pleaded in the Indictment’s individual paragraphs of particulars, Ntawukulilyayo was nevertheless put on notice by the Indictment that he was charged with ordering the killings at Kabuye hill.<sup>450</sup> The Trial Chamber also found that the material facts supporting “ordering” were sufficiently pleaded in the Indictment.<sup>451</sup>

185. Ntawukulilyayo submits that the Trial Chamber erred in expanding the modes of liability explicitly stated in paragraphs 7 and 8 of the Indictment to include ordering.<sup>452</sup> Relying on the *Rukundo* Appeal Judgement, he argues that the general reference to “ordering” in *chapeau* paragraph 5 did not put him on sufficient notice that this mode of liability would apply to paragraphs 7 and 8, since other specific modes of liability were expressly pleaded therein.<sup>453</sup> He contends that this lack of notice was never cured since the Prosecution alleged for the first time during closing arguments that an order was given to soldiers at the hill.<sup>454</sup> Ntawukulilyayo adds that the material facts of which he had notice did not support the characterization of ordering.<sup>455</sup> He asserts that the prejudice caused to him is irreparable as he was unable to cross-examine Witnesses AZN, AYQ, and BAU on the existence of orders.<sup>456</sup>

186. The Prosecution responds that ordering was properly pleaded in the Indictment, and that Ntawukulilyayo’s conviction thereof is based on a consideration of the Indictment as a whole, in line with the jurisprudence of the Appeals Chamber.<sup>457</sup> It argues that introductory paragraphs 2 and 5 identify ordering as a mode of liability in the case and Ntawukulilyayo’s position of authority over the Kabuye hill assailants, while paragraphs 7 through 11, which relate to the Kabuye hill

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<sup>450</sup> Trial Judgement, paras. 400-409.

<sup>451</sup> Trial Judgement, paras. 403-407.

<sup>452</sup> Appeal Brief, paras. 218-222.

<sup>453</sup> Appeal Brief, paras. 220-222, *referring to Rukundo* Appeal Judgement, paras. 33, 35, 37, 38. *See also* AT. 26 September 2011 pp. 13, 14.

<sup>454</sup> Appeal Brief, para. 223; AT. 26 September 2011 p. 14.

<sup>455</sup> Appeal Brief, paras. 225, 226.

<sup>456</sup> Appeal Brief, para. 227. *See also* AT. 26 September 2011 p. 14.

<sup>457</sup> Response Brief, paras. 135-143, 146-150, 164. *See also* AT. 26 September 2011 pp. 24-26, 31.

massacre, indicate the particular conduct of ordering.<sup>458</sup> According to the Prosecution, this pleading is similar to the pleading that was upheld by the Appeals Chamber in the *Gacumbitsi* case.<sup>459</sup> The Prosecution also contends that, even if the Indictment was defective in its pleading of ordering, the defect was cured through a series of post-Indictment communications.<sup>460</sup> In addition, it argues that by raising the issue for the first time in his Closing Brief, Ntawukulilyayo failed to object to the alleged defect in a specific and timely manner, and therefore bears the burden of showing that he was prejudiced by the alleged lack of notice.<sup>461</sup> It asserts that Ntawukulilyayo understood the case against him, cross-examined relevant Prosecution witnesses on this charge, and suffered no prejudice.<sup>462</sup>

187. In reply, Ntawukulilyayo submits that he has never denied that ordering was generally pleaded but reiterates that the Trial Chamber erred in unduly expanding the charge relating to the Kabuye hill killings.<sup>463</sup> He also argues that he did not object to the pleading of ordering in introductory paragraph 5 since other paragraphs in the Indictment outlined material facts that may have characterized ordering,<sup>464</sup> and since no evidence of an order given to the Kabuye hill attackers had been adduced at trial.<sup>465</sup>

188. The Appeals Chamber recalls that the charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused.<sup>466</sup> The practice of the Tribunal also requires the Prosecution to plead the specific forms of individual criminal responsibility for which the accused is being charged.<sup>467</sup>

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<sup>458</sup> Response Brief, paras. 136-144. The Prosecution argues that, in these paragraphs, Ntawukulilyayo was accused of having played a dominant role during the events, organizing, leading and directing attacks and of having been in a position of authority *vis-à-vis* various categories of attackers, which are indicia of the pleading of ordering. *See idem*.

<sup>459</sup> AT. 26 September 2011 p. 25, *referring to Gacumbitsi Appeal Judgement*, paras. 122-124.

<sup>460</sup> Response Brief, paras. 148, 151-156, *referring to The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, Decision on Defence Motion Alleging Non Compliance of the Amended Indictment with the Chamber's Decision of 28 April 2009, 18 May 2009 ("Decision on Non Compliance of the Amended Indictment"); *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-I, Prosecution's Compliance with Orders in the Decision on Defence Preliminary Motion Alleging Defects in the Indictment, 1 May 2009 ("Prosecution's Compliance of 1 May 2009"), para. 6; *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-I, The Prosecutor's Pre-Trial Brief, 20 February 2009 ("Prosecution Pre-Trial Brief"), paras. 18, 19, 39-40, 43-44; *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-I, *Corrigendum* to Annex[] A of the Prosecutor's Pre-Trial Brief, 23 February 2009 ("Annex A to Prosecution Pre-Trial Brief"), Witnesses AYQ, BAV, AXV, BAO, BAU, AXY, BAW, BAF, BAZ, AZN, BAP; Opening Statement, T. 6 May 2009 p. 2. *See also* Response Brief, paras. 162, 163; AT. 26 September 2011 pp. 26, 27.

<sup>461</sup> Response Brief, paras. 131-134. *See also ibid.*, paras. 144, 145, 161; AT. 26 September 2011 p. 27.

<sup>462</sup> Response Brief, paras. 157-161; AT. 26 September 2011 pp. 27, 28, 31.

<sup>463</sup> Reply Brief, paras. 72, 73, 75.

<sup>464</sup> Reply Brief, para. 79, *citing* Indictment, paras. 6, 9.

<sup>465</sup> Reply Brief, para. 80.

<sup>466</sup> *See, e.g., Munyakazi Appeal Judgement*, para. 36; *Muvunyi Appeal Judgement* of 1 April 2011, para. 19; *Rukundo Appeal Judgement*, para. 29.

<sup>467</sup> *See, e.g., Rukundo Appeal Judgement*, para. 30; *Simi* Appeal Judgement, para. 21; *Semanza Appeal Judgement*, para. 357. The Prosecution has repeatedly been discouraged from simply restating Article 6(1) of the Statute, unless it

Where it is alleged that the accused planned, instigated, ordered, or aided and abetted the planning, preparation, or execution of the alleged crimes, the Prosecution is required to identify the particular acts or the particular course of conduct on the part of the accused which forms the basis for the charges in question.<sup>468</sup>

189. An indictment which fails to duly set forth the specific material facts underpinning the charges against the accused is defective.<sup>469</sup> The defect may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charge.<sup>470</sup> However, a clear distinction has to be drawn between vagueness in an indictment and an indictment omitting certain charges altogether.<sup>471</sup> While it is possible to remedy the vagueness of an indictment, omitted charges can be incorporated into the indictment only by a formal amendment pursuant to Rule 50 of the Rules of Procedure and Evidence of the Tribunal (“Rules”).<sup>472</sup> In reaching its judgement, a Trial Chamber can only convict the accused of crimes that are charged in the indictment.<sup>473</sup>

190. In the present case, paragraph 5 of the Indictment, which appears at the head of the section entitled “Concise Statement of Facts for Counts I and II”,<sup>474</sup> pleads that Ntawukulilyayo is “individually responsible for the crimes of genocide or complicity in genocide because he instigated, *ordered*, committed or otherwise aided and abetted in the planning, preparation or execution of these crimes.”<sup>475</sup> It further states that “[w]ith respect to the commission of those crimes”, Ntawukulilyayo “*ordered those over whom he had effective control as a result of his position and authority [...]*, and he instigated and aided and abetted those over whom he did not

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intends to rely on all of the forms of individual criminal responsibility contained therein, because of the ambiguity that this causes. *See Rukundo* Appeal Judgement, para. 30; *Semanza* Appeal Judgement, para. 357; *Ntakirutimana* Appeal Judgement, para. 473; *Aleksovski* Appeal Judgement, para. 171, fn. 319.

<sup>468</sup> *See, e.g., Renzaho* Appeal Judgement, para. 53; *Ntagerura et al.* Appeal Judgement, para. 25; *Blaškić* Appeal Judgement, para. 213.

<sup>469</sup> *See, e.g., Renzaho* Appeal Judgement, para. 55; *Ntagerura et al.* Appeal Judgement, para. 22; *Kupreškić et al.* Appeal Judgement, para. 114.

<sup>470</sup> *See, e.g., Munyakazi* Appeal Judgement, para. 36; *Renzaho* Appeal Judgement, para. 55; *Ntagerura et al.* Appeal Judgement, para. 28.

<sup>471</sup> *See, e.g., Renzaho* Appeal Judgement, para. 55; *Rukundo* Appeal Judgement, para. 29; *Ntagerura et al.* Appeal Judgement, para. 32.

<sup>472</sup> *See, e.g., Renzaho* Appeal Judgement, para. 55; *Rukundo* Appeal Judgement, para. 29; *Ntagerura et al.* Appeal Judgement, para. 32.

<sup>473</sup> *See, e.g., Munyakazi* Appeal Judgement, para. 36; *Rukundo* Appeal Judgement, para. 29; *Ntagerura et al.* Appeal Judgement, para. 28; *Kvočka et al.* Appeal Judgement, para. 33.

<sup>474</sup> Indictment, p. 3.

<sup>475</sup> Indictment, para. 5 (emphasis added).

have effective control.”<sup>476</sup> The paragraph ends with a sentence specifying that “[t]he particulars that give rise to his individual criminal responsibility are set forth in paragraphs 6 through 22.”<sup>477</sup>

191. The specific paragraphs relating to Ntawukulilyayo’s responsibility under Article 6(1) of the Statute, however, expressly refer only to Ntawukulilyayo instigating,<sup>478</sup> committing,<sup>479</sup> and/or aiding and abetting<sup>480</sup> the killing of Tutsis.<sup>481</sup> Paragraphs 7 and 8, which set forth the particulars of Ntawukulilyayo’s participation in the killings at Kabuye hill, expressly characterize Ntawukulilyayo’s acts as committing and aiding and abetting the killings.

192. The Trial Chamber was nevertheless satisfied that “the Indictment provided Ntawukulilyayo with timely, clear and consistent notice that ‘ordering’ was a mode of liability pursuant to Article 6 (1) of the Statute pursued by the Prosecution with respect to the killings at Kabuye hill.”<sup>482</sup> In reaching this conclusion, the Trial Chamber recalled that it had previously ordered the Prosecution to remove “planning” from paragraph 5 of the Indictment, and considered that, because it did not give similar instructions to remove “ordering”, and because this mode of liability remained in the Indictment, “the Indictment provided a clear indication that ‘ordering’ was still being pursued by the Prosecution.”<sup>483</sup> It added that its “decisions implicitly acknowledged that the material facts supporting this form of liability were sufficiently pleaded in the Indictment.”<sup>484</sup>

193. The Appeals Chamber notes that paragraph 5 of the Indictment originally included all five modes of liability specified in Article 6(1) of the Statute and expressly pleaded joint criminal enterprise as a mode of commission. On 28 April 2009, the Trial Chamber ordered the Prosecution to remove any modes of liability from the Original Indictment for which no material facts were pleaded.<sup>485</sup> As a result, the Prosecution removed “joint criminal enterprise” from paragraph 5.<sup>486</sup> Subsequently, on 18 May 2009, the Trial Chamber *proprio motu* ordered the Prosecution to remove

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<sup>476</sup> Indictment, para. 5 (emphasis added).

<sup>477</sup> Indictment, para. 5.

<sup>478</sup> Indictment, para. 9.

<sup>479</sup> Indictment, paras. 8, 10, 11, 16.

<sup>480</sup> Indictment, paras. 6-11, 14, 16.

<sup>481</sup> Paragraphs 17 through 23 of the Indictment expressly relate to Ntawukulilyayo’s criminal responsibility as a superior. *See* Indictment, pp. 6-8.

<sup>482</sup> Trial Judgement, para. 409.

<sup>483</sup> Trial Judgement, para. 403.

<sup>484</sup> Trial Judgement, para. 403.

<sup>485</sup> *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-PT, Decision on Defence Preliminary Motion Alleging Defects in the Indictment, 28 April 2009, para. 29, p. 13. *See also* Trial Judgement, para. 402.

<sup>486</sup> On 1, 4, and 5 May 2009, the Prosecution filed three consecutive indictments, each of which retained all five forms of responsibility under Article 6(1) of the Statute at paragraph 5, but removed joint criminal enterprise as a mode of commission. *See The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-I, Indictment, 1 May 2009, para. 5; *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-I, Indictment, 4 May 2009, para. 5; *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-I, Amended Indictment, 5 May 2009, para. 5.

“planning” from paragraph 5, finding that the supporting paragraphs did not plead material facts in support of this mode of liability.<sup>487</sup> Accordingly, the operative Indictment filed on 18 May 2009 retained instigating, ordering, committing, and aiding and abetting. Against this background, the Appeals Chamber agrees with the Trial Chamber that it was clear that “ordering” as a mode of liability was still being pursued by the Prosecution in this case,<sup>488</sup> a fact that Ntawukulilyayo does not appear to dispute.<sup>489</sup>

194. However, in the Appeals Chamber’s view, a distinction must be drawn between general and specific pleadings. Although some or all modes of liability may be generally pleaded in a *chapeau* paragraph, it does not necessarily follow that all generally pleaded modes of liability apply to every particularized event in an indictment, especially where each event specifies a limited number of applicable modes of liability. The Appeals Chamber therefore does not agree with the Trial Chamber’s conclusion that, because “[o]rdering” was only pleaded generally in the preamble (paragraph 5) and not in the following paragraphs alleging the particulars [...] [i]t was therefore clear that this form of liability was intended to apply to all those paragraphs.”<sup>490</sup>

195. Thus, although Ntawukulilyayo was on notice that he was generally charged with ordering genocide, the questions for the Appeals Chamber are whether he was specifically charged with ordering the killing of Tutsis at Kabuye hill on or about 23 April 1994, and whether he had notice of this charge.

196. Most of the Indictment paragraphs that appear under the heading “The massacre at Kabuye hill” contain a detailed synopsis of the particular charge relevant to the events described therein. In particular, paragraph 7 of the Indictment, which relates to the moving of Tutsi refugees from the Gisagara market on or about 23 April 1994, pleads that “[b]y ordering the Tutsi to go to Kabuye

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On 1 May 2009, the Prosecution indicated that it had complied with the Trial Chamber’s instruction to delete the modes of liability for which it pleaded no material facts. *See* Prosecution’s Compliance of 1 May 2009, para. 6.

<sup>487</sup> *See* Decision on Non Compliance of the Amended Indictment, para. 19, p. 8. *See also* Trial Judgement, para. 403.

<sup>488</sup> In this regard, the Appeals Chamber considers that the procedural history of the Indictment and the wording of paragraph 5 distinguish this case from the *Rukundo* case, where the Appeals Chamber found that the *verbatim* reproduction of Article 6(1) of the Statute in the *chapeau* paragraphs of the indictment was simply an introduction and did not constitute appropriate notice that Emmanuel Rukundo was charged with committing the crimes pleaded in his indictment. *See Rukundo* Appeal Judgement, paras. 33-37. The Appeals Chamber therefore finds that Ntawukulilyayo’s comparison with the *Rukundo* case is without merit.

<sup>489</sup> *See* Reply Brief, para. 72.

<sup>490</sup> Trial Judgement, para. 411. *See also ibid.*, fn. 579, where the Trial Chamber explained that “the Prosecution expressly indicated the appropriate mode of liability, either by pleading it generally with no subsequent reference in the paragraphs pleading the particular acts (‘ordering’), or pleading generally and then specifying the particular facts to which the mode applied (‘instigating’, ‘committing’ and ‘aiding and abetting’).” In the Appeals Chamber’s view, the Prosecution’s inconsistent way of pleading “ordering”, as opposed to “instigating”, “committing” and “aiding and abetting”, renders the application of the general pleading more ambiguous. *See also infra*, para. 197.

hill, [Ntawukulilyayo] *aided and abetted* in the killing of those Tutsi.”<sup>491</sup> Similarly, paragraph 8 of the Indictment, which relates to the killings at Kabuye hill on or about 23 April 1994, pleads that “[b]y bringing the gendarmes to Kabuye hill, who, along with others took part in the killing of those Tutsi, [Ntawukulilyayo] *committed and aided and abetted* in the killing of those Tutsi.”<sup>492</sup>

197. As such, paragraphs 7 and 8 of the Indictment provide a very clear and precise indication that, with respect to the killings at Kabuye hill on or about 23 April 1994, both committing and aiding and abetting were being pursued. If the Prosecution had intended to charge Ntawukulilyayo with ordering the killings at Kabuye hill in addition to committing and aiding and abetting them, it should have provided an equally clear and precise indication to this effect. To the extent that ordering did form part of the Prosecution’s case, the Appeals Chamber considers that the specification of certain modes of liability in individual paragraphs created more ambiguity with respect to the pleading of ordering than if the Prosecution had failed to specify any modes of liability within the particular paragraphs at all.

198. In addition, the Appeals Chamber notes that certain paragraphs in the Indictment allege conduct which may be characterized as “ordering”,<sup>493</sup> such as orders to search for Tutsis between about 21 and 25 April 1994 to send them to Kabuye hill or orders to prevent Tutsis from leaving Gisagara marketplace between 20 and 21 April 1994.<sup>494</sup> However, the particulars set forth in paragraphs 7 and 8 do not identify the course of conduct on the part of Ntawukulilyayo which would have formed the basis for a charge of ordering the killings at Kabuye hill. This, in the Appeals Chamber’s opinion, distinguishes the present case from the *Gacumbitsi* case, where the Appeals Chamber made it clear that it was satisfied that Sylvestre Gacumbitsi was on notice that he was charged with aiding and abetting the murders of Marie and Beatrice based on “the reference to

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<sup>491</sup> Emphasis added.

<sup>492</sup> Emphasis added.

<sup>493</sup> The Appeals Chamber recalls that criminal responsibility is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, and if that crime is effectively committed subsequently by the person who received the order. See *Renzaho* Appeal Judgement, para. 315; *Semanza* Appeal Judgement, para. 361; *Kordi} and Čerkez* Appeal Judgement, para. 28.

<sup>494</sup> Indictment, paras. 6, 9. As such, the Appeals Chamber considers that the Trial Chamber’s implicit acknowledgement in prior decisions that “the material facts supporting [ordering] were sufficiently pleaded in the Indictment” did not necessarily relate to the allegations for which Ntawukulilyayo was ultimately convicted. See Trial Judgement, para. 403. Since other paragraphs in the Indictment do allege conduct which may have been characterized as “ordering”, the Appeals Chamber considers that the fact that the Defence did not object to “ordering” in its third motion alleging defects in the Indictment could not meaningfully be taken into account by the Trial Chamber. See Trial Judgement, fn. 567.

aiding and abetting in the preamble to Count 4, *taken in combination with the allegations of material facts sufficient to support a conviction under that mode of liability*".<sup>495</sup>

199. The Appeals Chamber recalls that, in determining whether an accused was adequately put on notice of the nature and cause of the charges against him, the indictment must be considered as a whole.<sup>496</sup> To this end, the Trial Chamber considered that "[g]iven that the Indictment alleges [Ntawukulilyayo's] central role in the attacks, as well as his immediate proximity to the attackers and his superior status *vis-à-vis* the assailants, it also provided clear notice that 'ordering' was being pursued by the Prosecution for the killings at Kabuye hill."<sup>497</sup> In particular, the Trial Chamber found:

Like *Semanza*, the Indictment only generally pleads "ordering". Nonetheless, the material facts pleaded generally with respect to Ntawukulilyayo's role in the attack on Kabuye hill reflect his prominent role in it. For example, paragraphs 7 and 8 indicate that he "arrived in vehicles full of gendarmes" and that they, along with others surrounded the hill and started shooting at refugees there. Paragraph 9 alleges that he gave orders to search Tutsi houses for the purposes of gathering them on Kabuye hill. Paragraphs 10 and 11 refer to him having "collected" and "transport[ed]" soldiers to Kabuye hill, who then participated in killings there. Moreover, the Indictment alleges that Ntawukulilyayo was the superior of these categories of assailants and exercised effective control over them.<sup>498</sup>

200. The Appeals Chamber does not consider that these factors reasonably lead to the conclusion that Ntawukulilyayo was charged with ordering the killings at Kabuye hill. Although the Indictment indeed refers to Ntawukulilyayo giving certain orders,<sup>499</sup> none of these involves Ntawukulilyayo ordering anyone to kill members of the Tutsi group at Kabuye hill, or otherwise ordering an act or omission with the awareness of the substantial likelihood that Tutsis would be killed at Kabuye hill in the execution of that order by the persons who received it. The Indictment indeed alleged that Ntawukulilyayo ordered Tutsis from Gisagara marketplace to move to Kabuye hill, telling them that they would be protected by soldiers there,<sup>500</sup> and that he subsequently arrived at the hill with

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<sup>495</sup> *Gacumbitsi* Appeal Judgement, para. 123 (emphasis added).

<sup>496</sup> *Simba* Appeal Judgement, fn. 158; *Gacumbitsi* Appeal Judgement, para. 123.

<sup>497</sup> Trial Judgement, para. 407.

<sup>498</sup> Trial Judgement, para. 406 (internal citations omitted). The Trial Chamber relied on the *Semanza* and *Gacumbitsi* cases, where the Appeals Chamber found that the accused were put on adequate notice although the relevant indictment paragraphs did not expressly allege the modes of liability on the basis of which they were convicted. See Trial Judgement, paras. 404-406, *referring to Semanza* Appeal Judgement, paras. 355-358 and *Gacumbitsi* Appeal Judgement, paras. 122-124.

<sup>499</sup> See, e.g., Indictment, paras. 6 ("Many of these refugees attempted to leave to travel towards the Burundi border but were prevented from doing so by soldiers and communal policemen on the orders of [Ntawukulilyayo] and Elie Ndayambaje."), 7 ("On or about 23 April 1994, in the afternoon, [Ntawukulilyayo] ordered Tutsi who were gathered at Gisagara market place that they were to move to Kabuye hill where they would be protected and fed. [...] By ordering the Tutsi to go to Kabuye hill, [Ntawukulilyayo] aided and abetted in the killing of those Tutsi."), 9 ("Between about 21 and 25 April 1994, [Ntawukulilyayo] ordered civilians to search the houses of Tutsis so that they could be assembled at Kabuye hill. [...] By ordering civilians to search houses for Tutsis to be sent to Kabuye hill where they were killed, [Ntawukulilyayo] instigated and aided and abetted in the killing of the Tutsi.").

<sup>500</sup> Indictment, para. 7. See also *ibid.*, para. 19.

gendarmes who, with others, attacked the refugees.<sup>501</sup> The Indictment also alleged that Ntawukulilyayo had effective control over assailants.<sup>502</sup> Nevertheless, these factors, alone or in combination, do not necessarily lead to the conclusion that he was charged with ordering the Kabuye hill killings. Even if all of these factors consistently show that Ntawukulilyayo's alleged actions were aimed at the killing of Tutsis or that he was aware of the risk that Tutsis would be killed, they did not constitute a sufficient basis for Ntawukulilyayo to understand that he was charged with "ordering" such killings since the Indictment only expressly pleaded that he was responsible for "committing" and "aiding and abetting" them.<sup>503</sup>

201. The Prosecution relies on its Pre-Trial Brief and Opening Statement to argue that Ntawukulilyayo was put on notice that "ordering" was a mode of liability applicable to the Kabuye hill killings.<sup>504</sup> Even if the failure to plead "ordering" with respect to this event could be cured, a review of the Prosecution's Pre-Trial Brief and Opening Statement does not indicate that Ntawukulilyayo was alleged to have ordered the killings at Kabuye hill. The Prosecution Pre-Trial Brief only alleges that Ntawukulilyayo issued orders or instructions: (i) in the context of meetings convened to plan the killing of Tutsis; (ii) to stop refugees from fleeing to Burundi; (iii) to search for Tutsis and chase them out of their homes; (iv) to relocate refugees from Gisagara market to Kabuye hill; and (v) in relation to killings at roadblocks throughout Gisagara sector.<sup>505</sup> With respect to the attacks at Kabuye hill in particular, the Prosecution Pre-Trial Brief does not refer to Ntawukulilyayo giving instructions or orders, but to his participation in the killings and discussing the need to visit Kabuye hill to check on the progress of the killings.<sup>506</sup> Likewise, none of the summaries of the Prosecution witnesses' anticipated evidence annexed to the Prosecution Pre-Trial

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<sup>501</sup> Indictment, para. 8. *See also ibid.*, para. 19.

<sup>502</sup> *See* Indictment, paras. 2(A)(ii), 5.

<sup>503</sup> *Cf. Renzaho Appeal Judgement*, para. 319.

<sup>504</sup> Response Brief, paras. 151, 153-156.

<sup>505</sup> Prosecution Pre-Trial Brief, paras. 34-37, 41. Ordering is also mentioned in relation to the count of direct and public incitement to commit genocide. *See ibid.*, paras. 61, 63. The Appeals Chamber also notes that the Trial Chamber specifically found that the Prosecution Pre-Trial Brief referred to the Original Indictment of 13 June 2005 since it was filed before the amendment process. *See Trial Judgement*, para. 35. For this reason, the Trial Chamber expressed reservations about whether the Prosecution Pre-Trial Brief and its annexed witness summaries could sufficiently cure defects in the operative Indictment filed subsequent thereto. *See Trial Judgement*, para. 47 ("The Chamber has reservations about whether, as a matter of law, the annexed witness summary can cure the defect in the Indictment in this proceeding. As noted above, the Pre-Trial Brief and annex were filed almost three months prior to the operative Indictment of 19 May 2009. Notably, in the *Karera* case, the Appeals Chamber held that defects in the indictment could not be cured by a Pre-Trial Brief, which was filed prior to the amended indictment and which referred to a prior indictment or the draft amended indictment annexed to a motion to amend. The Chamber is also mindful that where the Appeals Chamber has conducted a curing analysis with respect to defects in an indictment, it has tended to look to *post*-indictment submissions. Under the circumstances, the Chamber has doubts that a Pre-Trial Brief and its annexed witness summaries, which were filed almost three months prior to the Indictment and refers to a prior indictment, could provide clear or consistent notice sufficient to cure defects in the operative Indictment.") (emphasis in original, internal citations omitted). The Appeals Chamber will not entertain this issue as it finds in any event that the Prosecution Pre-Trial Brief and its annexed witness summaries did not provide the necessary information.

<sup>506</sup> Prosecution Pre-Trial Brief, paras. 43, 44.

Brief refers to Ntawukulilyayo instructing or ordering killings at Kabuye hill.<sup>507</sup> As for its Opening Statement, the Prosecution generally alleged that Ntawukulilyayo “planned with others, ordered, instigated, aided and abetted, failed to prevent, and failed to punish genocide in [Ndora, Muyaga, Kibayi, Muganza, and Nyaruhengeri] *communes*”, and that, *after* the massacres, he ordered the survivors to be hunted down and killed.<sup>508</sup> However, it did not allege that Ntawukulilyayo issued any orders or instructions in respect of the Kabuye hill killings themselves. Rather, the Prosecution merely alleged in its Opening Statement that Ntawukulilyayo “planned, organised, and supervised” the Kabuye hill killings.<sup>509</sup>

202. In additional support of its finding that Ntawukulilyayo knew that he was charged with ordering the killings at Kabuye hill on 23 April 1994, the Trial Chamber recalled that the Prosecution’s Closing Brief and Closing Arguments provided him with further notice that ordering was pleaded.<sup>510</sup> In this regard, the Appeals Chamber emphasizes that the Prosecution is expected to know its case before proceeding to trial.<sup>511</sup> Considering that the basic purpose of informing an accused clearly of the charges against him is so that he may prepare his defence,<sup>512</sup> the Appeals Chamber finds that notification in closing submissions cannot constitute proper notice.

203. The Trial Chamber also referred to Ntawukulilyayo’s Pre-Defence Brief, noting that he “denied the charge of ‘ordering’ and did not object to its pleading.”<sup>513</sup> A review of

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<sup>507</sup> Reference is made to Ntawukulilyayo being “amongst several local authorities who were responsible for the attack on Kabuye hill.” (Annex A to Prosecution Pre-Trial Brief, Witness AZI); coming to the hill during the attacks and participating in the killing of Tutsi refugees on Kabuye hill (Annex A to Prosecution Pre-Trial Brief, Witness AYQ); conveying ammunition and/or attackers to Kabuye hill (Annex A to Prosecution Pre-Trial Brief, Witnesses BAV, AXV, BAU, BAP); being with soldiers and gendarmes at the hill (Annex A to Prosecution Pre-Trial Brief, Witness AZN); instructing refugees to go to Kabuye hill (Annex A to Prosecution Pre-Trial Brief, Witnesses AYQ, AYK, BAO, BAU, BAF, AZV, AZR). As regards the summaries of Witnesses BAZ and BAW on which the Prosecution relies in particular, the Appeals Chamber notes that the summary of Witness BAW’s anticipated evidence which refers to Ntawukulilyayo as being “busy monitoring the massacres” was indicated to be relevant to paragraphs 24 and 27 of the Indictment pertaining to the charge of direct and public incitement to commit genocide. *See* Annex A to Prosecution Pre-Trial Brief, Witness BAW. The summary of Witness BAZ refers to Ntawukulilyayo addressing attackers at “Ndathemwa” [*sic*] saying that “they should not immediately launch an attack on Kibuye [*sic*] hill” (Annex A to Prosecution Pre-Trial Brief, Witness BAZ). The Appeals Chamber notes that Witness BAZ’s evidence was not indicated to be relevant to paragraphs 7 and 8 of the Indictment and, in any event, considers that saying that an attack should not be launched immediately is not indicative of an order to attack. The summary of Witness AXV’s anticipated evidence also relied upon by the Prosecution does not refer to Ntawukulilyayo but only to “dignitaries” planning and sending the killers to Kabuye hill. *See* Annex A to Prosecution Pre-Trial Brief, Witness AXV.

<sup>508</sup> Opening Statement, T. 6 May 2009 pp. 2, 3.

<sup>509</sup> Opening Statement, T. 6 May 2009 p. 2.

<sup>510</sup> Trial Judgement, para. 408.

<sup>511</sup> *See, e.g., Setako* Appeal Judgement, para. 296; *Muvunyi* Appeal Judgement of 29 August 2008, para. 18; *Ntagerura et al.* Appeal Judgement, para. 27; *Kupreškić et al.* Appeal Judgement, para. 92.

<sup>512</sup> *Cf. Nahimana et al.* Appeal Judgement, para. 322; *Simi* Appeal Judgement, para. 20; *Ntagerura et al.* Appeal Judgement, para. 22; *Kupreškić et al.* Appeal Judgement, para. 88.

<sup>513</sup> Trial Judgement, para. 407, *referring to The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, Pre-Defence Brief Pursuant to Rule 73 *ter* of the Rules of Procedure and Evidence, 16 September 2009 (“Pre-Defence Brief”), para. 11. The Pre-Defence Brief was originally filed in French on 7 August 2009.

Ntawukulilyayo's Pre-Defence Brief, however, reveals that he denied the charge of "ordering" in the most general terms:

9. Dominique Ntawukulilyayo categorically denies any individual responsibility for the crimes charged in the counts of genocide (Article 2(3)(a) of the ICTR Statute [...]) and of complicity in genocide (Article 2(3)(e) of the Statute), pursuant to Article 6(1) of the Statute.

10. Dominique Ntawukulilyayo categorically denies having committed the crime charged in the count of direct and public incitement to commit genocide (Article 2(3)(c) of the Statute), pursuant to Article 6(1) of the Statute.

11. He denies that he instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of the said crime.<sup>514</sup>

In the Appeals Chamber's view, such a general statement cannot, of itself, demonstrate that Ntawukulilyayo was aware that "ordering" was being pursued by the Prosecution as a mode of criminal responsibility for the killings at Kabuye hill, and that he did not object to it.<sup>515</sup> It was therefore unreasonable for the Trial Chamber to rely on the Pre-Defence Brief in this respect to support its conclusion that Ntawukulilyayo was on notice of the allegation that he ordered the killings at Kabuye hill.

204. Likewise, the Prosecution's reliance on Ntawukulilyayo's Closing Brief in support of its contention that "Ntawukulilyayo himself acknowledged [...] that ordering had been pleaded as a mode of liability in this case" is without merit.<sup>516</sup> The Appeals Chamber notes that, as in his Pre-Defence Brief, Ntawukulilyayo denied the charge of "ordering" in his Closing Brief in the most general terms:

As stated above, instigation, ordering, committing and aiding and abetting the commission are, in the instant case, the only modes of participation alleged by the Prosecutor against Dominique Ntawukulilyayo, pursuant to Article 6(1) of the Statute, with the exception of planning.<sup>517</sup>

The Appeals Chamber considers that such a general statement cannot, of itself, imply that Ntawukulilyayo acknowledged that he was charged with ordering the killings at Kabuye hill.

205. Furthermore, a review of the relevant transcripts reveals that, contrary to the Prosecution's submission, Ntawukulilyayo did not cross-examine Prosecution witnesses on the specific charge of ordering the Kabuye hill killings. Ntawukulilyayo's Lead Counsel merely suggested to

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<sup>514</sup> Pre-Defence Brief, paras. 9-11 (emphasis omitted). Ntawukulilyayo also denied more specific allegations of ordering, including that he ordered soldiers and others to stop refugees from fleeing to the Burundian border; that he ordered Tutsi refugees gathered at Gisagara market to relocate to Kabuye hill; and that he ordered civilians to search for Tutsis in their homes so that they could be taken to Kabuye hill. *See ibid.*, paras. 47, 51, 57. However, the Appeals Chamber notes that there is no reference in the Pre-Defence Brief to any allegation of ordering in respect of killings at Kabuye hill.

<sup>515</sup> *See* Trial Judgement, para. 407. The Appeals Chamber recalls that certain paragraphs in the Indictment do allege certain conduct which may have been characterized as "ordering". *See supra*, para. 200.

<sup>516</sup> Response Brief, para. 158. *See also ibid.*, para. 149, fns. 347, 376.

<sup>517</sup> Defence Closing Brief, para. 52 (internal citation omitted).

Witness BAU at one point of his cross-examination, in very broad terms and without referring to Kabuye hill in particular, that “Ntawukulilyayo never issued any orders to these soldiers, policemen or gendarmes to kill anyone.”<sup>518</sup> The Prosecution also submits that Ntawukulilyayo’s answer to a question posed by his Counsel demonstrated that he understood that ordering was part of the Prosecution’s case.<sup>519</sup> The Appeals Chamber, however, notes that the original French version of the relevant transcript shows that Ntawukulilyayo was not asked whether he ordered anyone “to seek out the Tutsi on [...] Kabuye hill” as reflected in the English version,<sup>520</sup> but rather whether he ordered anyone to search for Tutsis in order to send them to Kabuye hill, as alleged at paragraph 9 of the Indictment.<sup>521</sup>

206. Based on the foregoing, the Appeals Chamber concludes that the Trial Chamber erred in finding that Ntawukulilyayo was charged with ordering the 23 April 1994 killings at Kabuye hill, and in subsequently convicting him for those killings on the basis of this mode of criminal responsibility.

207. Accordingly, the Appeals Chamber grants Ntawukulilyayo’s Fourth Ground of Appeal and finds that the Trial Chamber erred in holding him responsible for ordering the Kabuye hill killings. The impact, if any, of this finding on Ntawukulilyayo’s sentence will be considered in the appropriate section of this Judgement. In light of its conclusion, the Appeals Chamber does not need to consider Ntawukulilyayo’s remaining allegations of error under his Third and Fourth Grounds of Appeal, relating to ordering and to the Trial Chamber’s finding that he shared the assailants’ genocidal intent.

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<sup>518</sup> Witness BAU, T. 13 May 2009 p. 53.

<sup>519</sup> Response Brief, paras. 160, 161, *referring to* Ntawukulilyayo, T. 16 December 2009 pp.41, 44; AT. 26 September 2011 p. 28. The Prosecution contends that “Defence Counsel specifically asked Ntawukulilyayo whether he ordered anyone to seek out the Tutsi on Kabuye hill, which he denied”, and that “Ntawukulilyayo’s counsel explained the purpose behind putting the question on ‘ordering’ to [Ntawukulilyayo] by stating that ‘it [was] important in the course of his testimony to state his position on these various allegations.’” *See* Response Brief, para. 160.

<sup>520</sup> Ntawukulilyayo, T. 16 December 2009 p. 44.

<sup>521</sup> Ntawukulilyayo, T. 16 December 2009 pp. 51, 52 (French) (“*Q. Au paragraphe 9 de l’Acte d’accusation, il vous est reproché certaines allégations. Monsieur Ntawukulilyayo, avez-vous jamais ordonné à qui que ce soit de rechercher des Tutsis pour qu’ils soient envoyés sur la colline de Kabuye ? R. Non. Je ne l’ai jamais fait.*”).

## VI. ALLEGED ERRORS RELATING TO AIDING AND ABETTING (GROUNDS 3, IN PART, AND 5)

208. The Trial Chamber convicted Ntawukulilyayo of genocide for aiding and abetting the killing of Tutsis at Kabuye hill.<sup>522</sup>

209. Ntawukulilyayo submits that the Trial Chamber erred in finding that the *actus reus* and *mens rea* for aiding and abetting the crime of genocide had been established.<sup>523</sup>

### A. Alleged Errors Relating to the Actus Reus

210. In holding Ntawukulilyayo guilty of aiding and abetting genocide, the Trial Chamber found:

By instructing the mostly Tutsi refugees at Gisagara market to go to Kabuye hill, Ntawukulilyayo substantially contributed to their subsequent killings. His encouraging words to the displaced persons that they would be accommodated for at Kabuye hill facilitated their movement from the populated centre of Gisagara market to the relatively isolated Kabuye hill. This provided a tactical advantage to the attackers, who subsequently surrounded the refugees, and it removed the assault from the public eye. He provided further sanction and material support to the killings that followed at Kabuye hill by bringing soldiers there. Both his status as the highest administrative official in the sub-prefecture and his act of transporting soldiers to Kabuye hill clearly would, at a minimum, have lent encouragement and moral support to the principal perpetrators he transported there, even though his stay was brief.<sup>524</sup>

211. Ntawukulilyayo submits that the Trial Chamber erred in finding that the *actus reus* for aiding and abetting genocide was established beyond reasonable doubt.<sup>525</sup> He contends that no reasonable trier of fact could determine with certainty the number and category of security personnel brought to the hill, and their effective participation in the crime.<sup>526</sup> He asserts that “the substantial link” between his acts and the crime could therefore not be sufficiently established to support a conviction for genocide.<sup>527</sup> Ntawukulilyayo further submits that the Trial Chamber’s reliance on the moral support and encouragement he allegedly lent by virtue of his authority and brief presence at the crime scene is contradicted by its own findings that he had no authority over the attackers and that the soldiers were not stationed in the sub-prefecture.<sup>528</sup> He also contends that

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<sup>522</sup> Trial Judgement, paras. 28, 457, 460, 461.

<sup>523</sup> Notice of Appeal, paras. 23, 27-30; Appeal Brief, paras. 160, 203-217, 247-253.

<sup>524</sup> Trial Judgement, para. 454.

<sup>525</sup> Notice of Appeal, para. 30; Appeal Brief, paras. 245-253.

<sup>526</sup> Appeal Brief, para. 249; Reply Brief, para. 101. Ntawukulilyayo points out in particular that “one of the three testimonies accepted asserted that the soldiers allegedly brought by [Ntawukulilyayo] did not stay at the location and therefore did not participate in the attack.” See Appeal Brief, para. 249. Ntawukulilyayo further reiterates other challenges to the Trial Chamber’s factual findings developed under his First and Second Grounds of Appeal, which have been addressed and rejected above. See Appeal Brief, para. 247. See also *supra*, Sections III, IV.

<sup>527</sup> Appeal Brief, para. 249. See also Reply Brief, paras. 100, 101.

<sup>528</sup> Appeal Brief, paras. 250, 251, referring to Trial Judgement, paras. 423-447, 456. See also Reply Brief, para. 102. Ntawukulilyayo also argues that there is no evidence that the soldiers would have known that he was a sub-prefect. See Appeal Brief, para. 251.

his prior good conduct is inconsistent with any possible moral support or encouragement, and that his presence at Kabuye hill would therefore have been of no consequence to the assailants.<sup>529</sup>

212. The Prosecution responds that the elements of aiding and abetting were clearly established beyond reasonable doubt, and that prior good conduct is not a relevant factor.<sup>530</sup>

213. In reply, Ntawukulilyayo contends that, contrary to the Trial Chamber's finding, Kabuye hill was not an isolated area, and that its conclusion that the transfer of refugees provided a "tactical advantage" was therefore purely speculative.<sup>531</sup>

214. The Appeals Chamber recalls that the *actus reus* of aiding and abetting is constituted by acts or omissions specifically aimed at assisting, encouraging, or lending moral support to the perpetration of a specific crime, and which have a substantial effect upon the perpetration of the crime.<sup>532</sup> Whether a particular contribution qualifies as "substantial" is a "fact-based inquiry", and need not "serve as condition precedent for the commission of the crime."<sup>533</sup>

215. The Trial Chamber found beyond reasonable doubt that, in the early afternoon of Saturday, 23 April 1994, Ntawukulilyayo directed mostly Tutsi refugees at Gisagara market to go to Kabuye hill, promising them food and protection there, and that the refugees complied with his instructions.<sup>534</sup> The Trial Chamber further found that Ntawukulilyayo arrived at Kabuye hill later that day, and left shortly after dropping off soldiers who, along with others, subsequently attacked the civilian refugees at the hill.<sup>535</sup> As discussed above, the Appeals Chamber has found no error in the Trial Chamber's factual findings regarding Ntawukulilyayo's instructions to refugees at Gisagara market, and his arrival at Kabuye hill with soldiers.<sup>536</sup> Ntawukulilyayo has also failed to demonstrate error in the Trial Chamber's conclusion that the soldiers who accompanied him, along with others, attacked the refugees.<sup>537</sup> As regards the number of soldiers, the Appeals Chamber observes that the Trial Chamber did not rely on the specific number of soldiers who accompanied Ntawukulilyayo but on Ntawukulilyayo's contribution to the killings by bringing armed reinforcements.<sup>538</sup> Ntawukulilyayo's arguments that no reasonable trier of fact could determine with

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<sup>529</sup> Appeal Brief, para. 252, *referring to ibid.*, paras. 190-202; Reply Brief, para. 103.

<sup>530</sup> Response Brief, paras. 192-206.

<sup>531</sup> Reply Brief, para. 100.

<sup>532</sup> *See, e.g., Karera* Appeal Judgement, para. 321; *Nahimana et al.* Appeal Judgement, para. 482.

<sup>533</sup> *Kalimanzira* Appeal Judgement, para. 86; *Rukundo* Appeal Judgement, para. 52; *Blagojević and Jokić* Appeal Judgement, para. 134.

<sup>534</sup> Trial Judgement, paras. 12, 263, 424, 453.

<sup>535</sup> Trial Judgement, paras. 18, 303, 453.

<sup>536</sup> *See supra*, Sections III, IV.

<sup>537</sup> *See supra*, para. 159.

<sup>538</sup> *See* Trial Judgement, para. 454.

certainty the number and category of security personnel brought to the hill, and their effective participation in the crimes, are therefore rejected.

216. The Appeals Chamber considers that it was reasonable for the Trial Chamber to conclude that Ntawukulilyayo substantially contributed to the Kabuye hill killings by encouraging Tutsis to seek refuge there and then providing reinforcements to those attempting to kill them. These acts alone suffice to constitute the *actus reus* of aiding and abetting. The Appeals Chamber is of the opinion that it is therefore unnecessary to assess whether the Trial Chamber erred in concluding that Kabuye hill was an isolated area and that the transfer of refugees thereby provided a “tactical advantage”, or in concluding that his status and position lent moral support to the perpetrators. Ntawukulilyayo’s prior good conduct is equally inconsequential to the Trial Chamber’s finding that the *actus reus* of aiding and abetting had been fulfilled.

217. The Appeals Chamber concludes that Ntawukulilyayo has failed to demonstrate that the Trial Chamber erred in finding that the *actus reus* of aiding and abetting genocide was established.

#### **B. Alleged Errors Relating to the *Mens Rea***

218. The Trial Chamber found that Ntawukulilyayo had knowledge both of the assailants’ genocidal intent and that his acts would assist the killings, reasoning as follows:

Given the systemic and extensive nature of the attack, the Majority has no doubt that its purpose was to eliminate the primarily Tutsi refugees gathered on Kabuye hill and that the assailants possessed genocidal intent. Furthermore, the range of assailants, including soldiers and communal police, who participated in the assault just hours after Ntawukulilyayo sent refugees to Kabuye hill evinces considerable coordination. Indeed, Ntawukulilyayo’s arrival on Kabuye hill with soldiers would no doubt have required planning, given that they were not normally stationed within the sub-prefecture. Under the circumstances, there is no doubt that Ntawukulilyayo instructed refugees to go to Kabuye hill and transported soldiers there with the knowledge of the genocidal intent of the assailants and that his acts would assist the killings. The evidence firmly establishes that Ntawukulilyayo shared that genocidal intent.<sup>539</sup>

219. Ntawukulilyayo submits that the Trial Chamber erred in inferring that the only reasonable conclusion was that he intended to aid and abet genocide on Kabuye hill, as there were other reasonable inferences available from the evidence.<sup>540</sup> Specifically, he argues that it would have been reasonable to conclude that he acted in good faith in sending the refugees to Kabuye hill with the

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<sup>539</sup> Trial Judgement, para. 456 (internal citation omitted).

<sup>540</sup> Appeal Brief, paras. 203, 210. Under his Third Ground of Appeal, Ntawukulilyayo also submits that the Trial Chamber erred in finding that he shared the perpetrators’ genocidal intent. *See* Notice of Appeal, paras. 24-29; Appeal Brief, paras. 160-167. The Appeals Chamber will not entertain this allegation of error as it has found that the Trial Chamber erred in finding Ntawukulilyayo guilty pursuant to Article 6(1) of the Statute for ordering the Kabuye hill killings, and as genocidal intent is not a requisite element of aiding and abetting genocide. *See supra*, para. 206 and *infra*, para. 222. Any error on the part of the Trial Chamber in regard of Ntawukulilyayo’s genocidal intent would therefore have no impact on his conviction for aiding and abetting genocide.

aim of ameliorating the situation at the marketplace and the belief that the protection promised would be given to the refugees.<sup>541</sup> Ntawukulilyayo further argues that it would also have been reasonable to find that he naively believed that the security staff he allegedly transported to the hill would protect the refugees.<sup>542</sup> In support of his contentions, Ntawukulilyayo argues that the tragic turn of events on Kabuye hill was not necessarily predictable as, until 23 April 1994, Gisagara was considered one of the last safe areas, and the warning signs and isolated incidents of which he was aware at the time did not involve soldiers, policemen, or gendarmes.<sup>543</sup>

220. Ntawukulilyayo further submits that the Trial Chamber's findings in relation to his personality and positive actions at the relevant time run counter to the idea that he could knowingly have aided and abetted the killing of Tutsis on Kabuye hill.<sup>544</sup> He also contends that the Trial Chamber's reliance on the planning of the attack is contradicted by its own finding that the record did not reflect that he participated in the planning of the attack.<sup>545</sup> Ntawukulilyayo argues that there is a complete lack of evidence that the attack was planned, and that the mere fact that he was accompanied by soldiers is insufficient to prove that he had knowledge of any planning, since nothing is known about how he met the soldiers or where they had come from.<sup>546</sup>

221. The Prosecution responds that the elements of aiding and abetting were clearly established beyond reasonable doubt.<sup>547</sup> It argues that Ntawukulilyayo's claim that he was unable to anticipate the tragic turn of events is unconvincing and that his conduct in saving Tutsis was properly assessed.<sup>548</sup>

222. The Appeals Chamber recalls that the *mens rea* for aiding and abetting is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal perpetrator.<sup>549</sup> Specific intent crimes such as genocide do not require that the aider and abettor share

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<sup>541</sup> Appeal Brief, para. 215; AT. 26 September 2011 pp. 7-9.

<sup>542</sup> Appeal Brief, para. 215; AT. 26 September 2011 pp. 9-13.

<sup>543</sup> Appeal Brief, paras. 176, 177, 211-213, referring to the *Ntagerura et al. and Blagojević and Jokić* cases. See also AT. 26 September 2011 pp. 9-11.

<sup>544</sup> Appeal Brief, para. 214. See also *ibid.*, paras. 187, 190-202, 215, 216; Reply Brief, paras. 68, 69; AT. 26 September 2011 pp. 12, 13, 41.

<sup>545</sup> Appeal Brief, para. 206. Ntawukulilyayo also submits that he was not charged with planning and that, consequently, no evidence was adduced in this respect. See *ibid.*, para. 205; Reply Brief, paras. 70, 71.

<sup>546</sup> Appeal Brief, paras. 207-210.

<sup>547</sup> Response Brief, para. 192.

<sup>548</sup> Response Brief, paras. 118, 124-126. See also AT. 26 September 2011 p. 24.

<sup>549</sup> See, e.g., *Kalimanzira* Appeal Judgement, para. 86; *Rukundo* Appeal Judgement, para. 53; *Nahimana et al.* Appeal Judgement, para. 482.

the *mens rea* of the principal perpetrator; it suffices to prove that he knew of the principal perpetrator's specific intent.<sup>550</sup>

223. The Appeals Chamber notes that the Trial Chamber's finding that the assailants at Kabuye hill acted with genocidal intent is not in dispute. The question before the Appeals Chamber is therefore whether the Trial Chamber reasonably found that Ntawukulilyayo had knowledge that his acts would assist the assailants in killing the refugees at Kabuye hill, and that he had knowledge of the assailants' genocidal intent.

224. The Appeals Chamber does not agree with Ntawukulilyayo's contention that the Trial Judgement contains contradictory findings with respect to planning. The Trial Chamber clearly found that, although the scale and nature of the attacks on Kabuye hill would have required planning and organization by various civilian and military officials, it was not clear that Ntawukulilyayo himself participated in the planning of the operation.<sup>551</sup> In the Appeals Chamber's view, this is not contradicted by the statement that "Ntawukulilyayo's arrival on Kabuye hill with soldiers would no doubt have required planning",<sup>552</sup> which merely implies that the Trial Chamber considered that Ntawukulilyayo could not reasonably have ignored that the transport of soldiers to the hill was part of a broader, premeditated scheme. The Appeals Chamber sees no error in this finding.

225. The Appeals Chamber also sees no error in the Trial Chamber's finding that the range of assailants and their participation in the assault just hours after Ntawukulilyayo sent refugees to Kabuye hill evinces considerable coordination.<sup>553</sup> In the Appeals Chamber's view, in the context of determining Ntawukulilyayo's *mens rea* it was not necessary for the Trial Chamber to consider how he met the soldiers whom he brought to Kabuye hill, or from where they came.<sup>554</sup>

226. The Appeals Chamber notes that Ntawukulilyayo personally observed the situation at Kabuye hill shortly before the killings took place there on such a large scale.<sup>555</sup> The Appeals Chamber further observes that Ntawukulilyayo issued his instructions to refugees at Gisagara market to move to Kabuye hill just hours before the attack took place, and only two days after President Sindikubwabo's public speech in Gisagara referring to the 1959 revolution, during which

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<sup>550</sup> See *Kalimanzira* Appeal Judgement, para. 86; *Rukundo* Appeal Judgement, para. 53; *Haradinaj et al.* Appeal Judgement, para. 58; *Blagojević and Jokić* Appeal Judgement, para. 127.

<sup>551</sup> Trial Judgement, para. 470.

<sup>552</sup> Trial Judgement, para. 456.

<sup>553</sup> See Trial Judgement, para. 456.

<sup>554</sup> See Appeal Brief, para. 208.

<sup>555</sup> Trial Judgement, paras. 303, 393, 453, 454, 456.

ethnic violence erupted between Tutsis and Hutus.<sup>556</sup> The Appeals Chamber also notes that the Trial Chamber found that Ntawukulilyayo's activities after the Kabuye hill attacks, namely his participation in security meetings and his instructions to local Gisagara officials to organize civilian security efforts, offered circumstantial corroboration of his involvement in facilitating the attacks on Tutsis at Kabuye hill.<sup>557</sup>

227. In these circumstances, the Appeals Chamber considers that it was reasonable for the Trial Chamber to conclude that Ntawukulilyayo knew that, by instructing the refugees to move to Kabuye hill and subsequently bringing soldiers there, he was assisting the assailants in killing the refugees, and that he knew of their genocidal intent. Ntawukulilyayo correctly points out that the Trial Chamber found that he had good character and provided assistance to Tutsis before, during, and after the genocide.<sup>558</sup> Such evidence was indeed relevant to the assessment of Ntawukulilyayo's *mens rea* and it might have been opportune for the Trial Chamber to have discussed such evidence in the relevant section of its legal findings. Nevertheless, the Appeals Chamber considers that, based on the totality of the evidence in this case, such evidence of Ntawukulilyayo's good character and assistance to other Tutsis did not preclude a reasonable trier of fact from concluding that the only reasonable inference was that Ntawukulilyayo knew that the Tutsi refugees would not in fact be protected at Kabuye hill, but rather killed.<sup>559</sup>

228. For these reasons, the Appeals Chamber finds no error in the Trial Chamber's conclusion that Ntawukulilyayo had the requisite *mens rea* for aiding and abetting genocide, and dismisses Ntawukulilyayo's arguments in this respect.

### C. Conclusion

229. Based on the foregoing, the Appeals Chamber finds that Ntawukulilyayo has not demonstrated that the Trial Chamber erred in finding him responsible for aiding and abetting

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<sup>556</sup> See Trial Judgement, para. 194.

<sup>557</sup> See Trial Judgement, paras. 293, 294. The Trial Chamber specified that "[w]hile the purpose of some of these meetings is disputed and their outcomes unproven, it is not disputed that Ntawukulilyayo had a role in them." See *ibid.*, para. 293.

<sup>558</sup> Trial Judgement, paras. 474, 475. See also *infra*, para. 240.

<sup>559</sup> In this respect, the Appeals Chamber notes, for example, the Trial Chamber's reliance on Exhibit P30 as circumstantial corroboration of Ntawukulilyayo's involvement in facilitating the attacks on Tutsis at Kabuye hill. See Trial Judgement, para. 293. The Trial Chamber accurately described Exhibit P30 as "a letter [dated 28 May 1994] confirming that [Ntawukulilyayo] visited the five communes [of Gisagara sub-prefecture] and addressed 'the people' concerning security as well as the need to assist the Rwandan army; he requested the assistance of soldiers to aid members of the population 'in finding out whether there are no enemies amongst [] refugees' that had gathered in Gisagara". See *ibid.*, fn. 412 (emphasis added). See also *ibid.*, fn. 411 (emphasis added). Although this statement postdates the Kabuye hill killings, it offers circumstantial evidence of Ntawukulilyayo's state of mind during the genocide and, in the Appeals Chamber's view, goes against his suggestion that the Trial Chamber could also reasonably have found that his primary consideration in requesting military assistance was to protect incoming refugees.

genocide. Accordingly, the Appeals Chamber dismisses Ntawukulilyayo's Fifth Ground of Appeal and the relevant part of his Third Ground of Appeal.

## VII. ALLEGED ERRORS RELATING TO SENTENCING (GROUND 6)

230. The Trial Chamber sentenced Ntawukulilyayo to 25 years of imprisonment.<sup>560</sup> In the alternative to his other grounds of appeal, Ntawukulilyayo submits that the Trial Chamber erred in imposing a sentence which is clearly excessive considering the limited nature of his participation in the crimes, and the mitigating circumstances in his case.<sup>561</sup> Ntawukulilyayo requests that the Appeals Chamber significantly reduce his sentence.<sup>562</sup>

231. The Prosecution responds that the Trial Chamber properly exercised its sentencing discretion, taking all the relevant factors into account.<sup>563</sup>

232. In addressing this ground of appeal, the Appeals Chamber bears in mind that Trial Chambers are vested with broad discretion in determining an appropriate sentence due to their obligation to individualize penalties to fit the circumstances of the convicted person and the gravity of the crime.<sup>564</sup> As a rule, the Appeals Chamber will not substitute its own sentence for that imposed by the Trial Chamber unless it has been shown that the latter committed a discernible error in exercising its discretion, or failed to follow the applicable law.<sup>565</sup>

### A. Alleged Error in Assessing the Gravity of the Offence

233. Ntawukulilyayo does not call into question the gravity of the crime and the scale of the massacre, but submits that the nature of his alleged participation, limited to a single afternoon, should have been considered in his favour in the determination of his sentence.<sup>566</sup>

234. The Prosecution responds that Ntawukulilyayo's attempt to categorize his participation as limited is without merit.<sup>567</sup>

235. As pointed out by Ntawukulilyayo,<sup>568</sup> the Trial Chamber expressly took into account that the evidence did not show that he was a main architect of the crimes committed in Gisagara sub-prefecture or that he physically participated in the attack, and that it was not clear that he planned

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<sup>560</sup> Trial Judgement, para. 479.

<sup>561</sup> Notice of Appeal, para. 34; Appeal Brief, paras. 254-265. *See also* Reply Brief, para. 104.

<sup>562</sup> Appeal Brief, p. 65.

<sup>563</sup> Response Brief, paras. 207-216.

<sup>564</sup> *See, e.g., Setako* Appeal Judgement, para. 277; *Munyakazi* Appeal Judgement, para. 166; *Renzaho* Appeal Judgement, para. 606.

<sup>565</sup> *Renzaho* Appeal Judgement, para. 606. *See also, e.g., Setako* Appeal Judgement, para. 277; *Munyakazi* Appeal Judgement, para. 166.

<sup>566</sup> Appeal Brief, paras. 255, 263, 264.

<sup>567</sup> Response Brief, para. 216. *See also ibid.*, para. 210.

<sup>568</sup> Appeal Brief, para. 263.

the operation.<sup>569</sup> However, the Trial Chamber also recalled that it “ha[d] found Ntawukulilyayo guilty of genocide through ordering and aiding and abetting in the killing of hundreds and possibly thousands of Tutsi civilians who had sought refuge on Kabuye hill”, stating that “[i]t [was] difficult to overemphasise the gravity of this offence, which led to a significant loss of human life and immense suffering.”<sup>570</sup>

236. The Appeals Chamber considers that Ntawukulilyayo’s participation in the Kabuye hill massacre constituted his culpable conduct and the fact that he was not found guilty of other crimes or that his criminal conduct was limited in time did not reduce that culpability. In light of the gravity of the crime, as emphasized by the Trial Chamber, the Appeals Chamber is not persuaded that the sentence imposed on Ntawukulilyayo was disproportionate to the nature and degree of his participation in the crimes as found by the Trial Chamber. Ntawukulilyayo’s arguments in this respect are therefore dismissed.

237. However, the Appeals Chamber recalls that it has found that the Trial Chamber erred in holding Ntawukulilyayo responsible for ordering the killings perpetrated at Kabuye hill. The Appeals Chamber will therefore examine in a section below whether the reversal of the Trial Chamber’s finding reduces the gravity of Ntawukulilyayo’s offence and calls for a revision of the sentence.

### **B. Alleged Errors Relating to Mitigating Circumstances**

238. Ntawukulilyayo submits that, while the Trial Chamber acknowledged that, due to his age and the fact that he suffers from diabetes and “blood pressure”, his life expectancy in his current conditions of detention is seriously compromised, it failed to draw the necessary conclusions from these factors in order to individualize his sentence.<sup>571</sup> In support of his contention, Ntawukulilyayo refers to the practice of the Tribunal and other jurisdictions to take into account age and ill health in the determination of the sentence.<sup>572</sup> He contends that it was unreasonable to sentence him to 25 years of imprisonment, which, for a sick 69-year-old man, effectively amounts to life imprisonment.<sup>573</sup> In addition, Ntawukulilyayo submits that the Trial Chamber erred by not expressly considering in mitigation his substantial assistance to Tutsis during and after the

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<sup>569</sup> Trial Judgement, para. 470.

<sup>570</sup> Trial Judgement, para. 468.

<sup>571</sup> Appeal Brief, para. 257.

<sup>572</sup> Appeal Brief, paras. 258, 259, *referring to, inter alia*, Swedish Penal Code, Chapter 29, section 5.6; Penal Code of Brazil, Article 65; Ecuadorian Penal Code, Article 29; *Papon v. France*, European Court of Human Rights, Application No. 64666/01, 7 June 2001; *Plavsi*} Trial Judgement, paras. 95, 104-106; *Ntakirutimana* Trial Judgement, para. 898; *Bisengimana* Trial Judgement, para. 173; *Krnojelac* Trial Judgement, para. 533.

<sup>573</sup> Appeal Brief, paras. 254, 260.

genocide.<sup>574</sup> He argues that these factors, considered together with the other factors acknowledged by the Trial Chamber, show that the sentence imposed on him is disproportionate.<sup>575</sup>

239. In response, the Prosecution submits that the Trial Chamber reasonably determined that the consideration of Ntawukulilyayo's advanced age and sickness was dwarfed by the overwhelming gravity of his crimes.<sup>576</sup> It further contends that the Trial Chamber took Ntawukulilyayo's assistance to Tutsis into account in mitigation and that Ntawukulilyayo does not demonstrate that the Trial Chamber attached insufficient weight to this factor in imposing the sentence.<sup>577</sup>

240. The Trial Chamber expressly considered Ntawukulilyayo's age and health condition as factors in mitigation of his sentence.<sup>578</sup> While the Trial Chamber did not expressly state that Ntawukulilyayo's assistance to Tutsis had been considered in mitigation, it is clear from the Trial Chamber's detailed discussion of the evidence of such assistance in the section on mitigating circumstances that the Trial Chamber took it into consideration in determining the sentence.<sup>579</sup>

241. To the extent that Ntawukulilyayo argues that the Trial Chamber failed to sufficiently weigh these factors in his favour, the Appeals Chamber recalls that Trial Chambers enjoy a considerable degree of discretion in determining the weight to be accorded to mitigating circumstances.<sup>580</sup> The Appeals Chamber considers that the sentence of 25 years' imprisonment imposed on Ntawukulilyayo based on the Trial Chamber's findings was not so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.<sup>581</sup> It therefore finds that Ntawukulilyayo has failed to demonstrate that the Trial Chamber committed a discernible error in the weight it afforded to his mitigating circumstances. Ntawukulilyayo's arguments in this respect are accordingly dismissed.

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<sup>574</sup> Appeal Brief, para. 261.

<sup>575</sup> Appeal Brief, paras. 262, 265.

<sup>576</sup> Response Brief, para. 212.

<sup>577</sup> Response Brief, para. 214.

<sup>578</sup> Trial Judgement, paras. 476, 477.

<sup>579</sup> See Trial Judgement, paras. 474-477.

<sup>580</sup> See, e.g., *Munyakazi* Appeal Judgement, para. 174; *Bikindi* Appeal Judgement, para. 158; *Nchamihigo* Appeal Judgement, para. 387; *Milošević* Appeal Judgement, para. 316.

<sup>581</sup> See, e.g., *Renzaho* Appeal Judgement, para. 606; *Bikindi* Appeal Judgement, para. 141; *Milošević* Appeal Judgement, para. 297. The Appeals Chamber recalls in this respect that it has held on several occasions that even where mitigating circumstances exist, a Trial Chamber is not precluded from imposing a life sentence where the gravity of the offence so requires. See *Renzaho* Appeal Judgement, para. 612; *Karera* Appeal Judgement, para. 390; *Niyitegeka* Appeal Judgement, para. 267. As regards Ntawukulilyayo's comparison with other cases, the Appeals Chamber considers that the differences between the cases cited and this case are such that the comparison is of very limited assistance.

### **C. Conclusion**

242. In light of the foregoing, the Appeals Chamber finds that Ntawukulilyayo has not demonstrated that the Trial Chamber erred in the determination of his sentence. Accordingly, the Appeals Chamber dismisses Ntawukulilyayo's Sixth Ground of Appeal.

## VIII. IMPACT OF THE APPEALS CHAMBER'S FINDINGS ON THE SENTENCE

243. The Appeals Chamber recalls that it has found that the Trial Chamber erred in convicting Ntawukulilyayo of ordering genocide for the killings perpetrated at Kabuye hill. It has nonetheless found no error in the Trial Chamber's finding that Ntawukulilyayo aided and abetted genocide by instructing the refugees who had gathered at Gisagara market to move to Kabuye hill, and by transporting soldiers to the hill who participated in the attack there.

244. The reversal of Ntawukulilyayo's conviction for ordering genocide removes the only direct form of responsibility by which he was found to have participated in the Kabuye hill killings. The Appeals Chamber notes that aiding and abetting is a mode of responsibility which has generally warranted lower sentences than forms of direct participation such as committing or ordering.<sup>582</sup> The Appeals Chamber therefore considers that the reversal of Ntawukulilyayo's conviction for ordering genocide calls for a reduction of his sentence. It notes, nonetheless, that Ntawukulilyayo remains convicted of an extremely serious crime.

245. Taking into account the particular circumstances of this case, the mitigating and aggravating circumstances as found by the Trial Chamber, as well as the form and degree of Ntawukulilyayo's participation in the crime, the Appeals Chamber reduces Ntawukulilyayo's sentence of 25 years of imprisonment to 20 years of imprisonment.

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<sup>582</sup> See *Blagojević and Jokić* Appeal Judgement, para. 334; *Simić* Appeal Judgement, para. 265; *Gacumbitsi* Appeal Judgement, para. 201 ("The Trial Chamber properly stated the legal principles on which the Prosecution relies. After noting that the crimes committed were very serious, it stated that 'the penalty should, first and foremost, be commensurate with the gravity of the offence' and that '[s]econdary or indirect forms of participation are generally punished with a less severe sentence.'" (internal citations omitted)); *Semanza* Appeal Judgement, para. 388 ("The Appeals Chamber recently held in *Krstić* that 'aiding and abetting is a form of responsibility which generally warrants lower sentences than responsibility as a co-perpetrator.' The Appeals Chamber endorses this reasoning to the extent that a higher sentence is likely to be imposed on a principal perpetrator vis-à-vis an accomplice in genocide and on one who orders rather than merely aids and abets exterminations."); *Krstić* Appeal Judgement, para. 268; *Vasiljević* Appeal Judgement, para. 102 ("[a]iding and abetting the commission of a crime is usually considered to incur a lesser degree of individual criminal responsibility than committing a crime.").

## IX. DISPOSITION

246. For the foregoing reasons, **THE APPEALS CHAMBER,**

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

**NOTING** the written submissions of the parties and their oral arguments presented at the appeal hearing on 26 September 2011;

**SITTING** in open session;

**GRANTS** Dominique Ntawukulilyayo's Fourth Ground of Appeal and **REVERSES** his conviction for ordering genocide in relation to the killing of Tutsis at Kabuye hill;

**DISMISSES** Dominique Ntawukulilyayo's appeal in all other respects;

**AFFIRMS** Dominique Ntawukulilyayo's conviction for aiding and abetting genocide in relation to the killing of Tutsis at Kabuye hill;

**SETS ASIDE** Dominique Ntawukulilyayo's sentence of 25 years of imprisonment and **IMPOSES** a sentence of 20 years of imprisonment, subject to credit being given under Rules 101(C) and 107 of the Rules for the period he has already spent in detention since his arrest on 17 October 2007;

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

**ORDERS** that, in accordance with Rules 103(B) and 107 of the Rules, Dominique Ntawukulilyayo is to remain in the custody of the Tribunal pending the finalization of arrangements for his transfer to the State where his sentence will be served.

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

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Carmel Agius  
Presiding Judge

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Mehmet Güney  
Judge

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Liu Daqun  
Judge

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Arlette Ramaroson  
Judge

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Andrésia Vaz  
Judge

Done this fourteenth day of December 2011 at Arusha, Tanzania.

**[Seal of the Tribunal]**

## X. ANNEX A: PROCEDURAL HISTORY

1. The main aspects of the appeal proceedings are summarised below.

### A. Notice of Appeal and Briefs

2. Trial Chamber III of the Tribunal rendered the judgement in this case on 3 August 2010 and issued its written Trial Judgement in English on 6 August 2010.

3. On 24 August 2010, the Pre-Appeal Judge denied a request by Ntawukulilyayo for an extension of time to file his notice of appeal, but granted him leave to file his appeal brief no later than 45 days from the date on which the French translation of the Trial Judgement was served on him and his Counsel.<sup>1</sup>

4. Ntawukulilyayo filed his initial notice of appeal on 6 September 2010.<sup>2</sup> On 14 January 2011, the Appeals Chamber granted a motion by Ntawukulilyayo to amend his initial notice of appeal based, in part, on his review of the French translation of the Trial Judgement.<sup>3</sup> Ntawukulilyayo filed his confidential appeal brief on 17 January 2011<sup>4</sup> and his amended notice of appeal on 18 January 2011.<sup>5</sup> The Prosecution filed its response brief on 28 February 2011.<sup>6</sup> Ntawukulilyayo filed his confidential reply brief on 22 March 2011.<sup>7</sup>

### B. Assignment of Judges

5. On 23 August 2010, the Presiding Judge of the Appeals Chamber assigned the following Judges to the appeal: Judge Patrick Robinson (Presiding), Judge Mehmet Güney, Judge Andréia Vaz, Judge Theodor Meron, and Judge Carmel Agius.<sup>8</sup> On 24 August 2010, the Presiding Judge designated himself as the Pre-Appeal Judge in this case.<sup>9</sup>

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<sup>1</sup> Decision on Dominique Ntawukulilyayo's Motion for Extensions of Time for Filing Appeal Submissions, 24 August 2010.

<sup>2</sup> Notice of Appeal, originally filed in French on 6 September 2010, English translation filed on 30 November 2010.

<sup>3</sup> Decision on Dominique Ntawukulilyayo's Motion for Leave to Amend his Notice of Appeal, 14 January 2011. *See Jugement portant cofn/damnation*, 3 December 2010.

<sup>4</sup> Appellant's Brief, confidential, originally filed in French on 17 January 2011, English translation filed on 10 March 2011. A public redacted version of this brief was filed in French on 20 April 2011, and its English translation was filed on 27 May 2011. *See* Decision on Prosecution's Request for Public Filings, 15 April 2011.

<sup>5</sup> Amended Notice of Appeal, originally filed in French on 18 January 2011, English translation filed on 24 January 2011.

<sup>6</sup> Prosecutor's Respondent Brief, 28 February 2011.

<sup>7</sup> Brief in Reply, confidential, originally filed in French on 22 March 2011, English translation filed on 27 May 2011. A public redacted version of this brief was filed in French on 20 April 2011, and its English translation was filed on 27 May 2011. *See* Decision on Dominique Ntawukulilyayo's Motion for Extension of Time for Filing Brief in Reply, 7 March 2011.

<sup>8</sup> Order Assigning Judges to a Case Before the Appeals Chamber, 23 August 2010.

<sup>9</sup> Order Assigning a Pre-Appeal Judge, 24 August 2010.

6. On 16 June 2011, the Presiding Judge replaced Judge Theodor Meron with Judge Liu Daqun.<sup>10</sup>

7. On 15 September 2011, the Presiding Judge replaced himself with Judge Arlette Ramarosan, effective 22 September 2011.<sup>11</sup> Judge Agius was subsequently elected Presiding Judge.

### C. Appeal Hearing

8. On 26 September 2011, the parties presented their oral arguments at a hearing held in Arusha, Tanzania, in accordance with the Scheduling Order of 25 August 2011.

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<sup>10</sup> Order Replacing a Judge in a Case Before the Appeals Chamber, 16 June 2011.

<sup>11</sup> Order Replacing a Judge in a Case Before the Appeals Chamber, 15 September 2011.

## XI. ANNEX B: CITED MATERIALS AND DEFINED TERMS

### A. Jurisprudence

#### 1. ICTR

##### **AKAYESU Jean-Paul**

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

##### **BAGILISHEMA Ignace**

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

##### **BIKINDI Simon**

*Simon Bikindi v. The Prosecutor*, Case No. ICTR-01-72-A, Judgement, 18 March 2010 (“*Bikindi* Appeal Judgement”).

##### **BISENGIMANA Paul**

*The Prosecutor v. Paul Bisengimana*, Case No. ICTR-00-60-T, Judgement and Sentence, 13 April 2006 (“*Bisengimana* Trial Judgement”).

##### **GACUMBITSI Sylvestre**

*Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, Judgement, 7 July 2006 (“*Gacumbitsi* Appeal Judgement”).

##### **KAJELIJELI Juvénal**

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

##### **KALIMANZIRA Callixte**

*Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Judgement, 20 October 2010 (“*Kalimanzira* Appeal Judgement”).

##### **KARERA François**

*François Karera v. The Prosecutor*, Case No. ICTR-01-74-A, Judgement, 2 February 2009 (“*Karera* Appeal Judgement”).

##### **KAYISHEMA Clément and RUZINDANA Obed**

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

##### **MUNYAKAZI Yussuf**

*The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36A-A, Judgement, 28 September 2011

(“*Munyakazi Appeal Judgement*”).

**MUSEMA Alfred**

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

**MUVUNYI Tharcisse**

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### **B. Defined Terms and Abbreviations**

<b>AT.</b>	Transcript from the appeal hearing held on 26 September 2011 in the present case. All references are to the official English transcript, unless otherwise indicated.
<b><i>Kalimanzira Case</i></b>	<i>The Prosecutor v. Callixte Kalimanzira</i> , Case No. ICTR-05-88
<b>Prosecution</b>	Office of the Prosecutor
<b>Rules</b>	Rules of Procedure and Evidence of the Tribunal
<b>Statute</b>	Statute of the Tribunal established by Security Council Resolution 955 (1994)
<b>T.</b>	Transcript from hearings at trial in the present case. All references are to the official English transcript, unless otherwise indicated.
<b>Trial Chamber</b>	Trial Chamber III of the Tribunal
<b>Tribunal or ICTR</b>	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

### **C. Cited Materials in the Ntawukulilyayo Case**

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